Application for Nomination to the Fifth District Court of Appeal

ROBERT E. BONNER
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Tab 1 - Application for Nomination to the Fifth District Court of Appeal

APPLICATION FOR NOMINATION TO THE COURT

(Please attach additional pages as needed to respond fully to questions.)

DATE: 08/23/2019 Florida Bar No.: 327875

GENERAL: Social Security No.: [REDACTED]

1. Name Robert E. Bonner E-mail: reb@fltrialteam.com

   Date Admitted to Practice in Florida: 01/29/1981

   Date Admitted to Practice in other States: n/a

2. State current employer and title, including professional position and any public or judicial office.

   Meier, Bonner, Muszynski, O'Dell & Harvey, PA; managing shareholder

3. Business address: [REDACTED]

   City Longwood County Seminole State FL ZIP [REDACTED]

   Telephone (407) 872-7774 FAX (407) 872-7997

4. Residential address: 441 Wild Oak Circle

   City Longwood County Seminole State FL ZIP 32779

   Since 12/04/2007 Telephone ( ) -[REDACTED]

5. Place of birth: Columbus, Ohio

   Date of birth: [REDACTED] Age: 65

6a. Length of residence in State of Florida: 41 years

6b. Are you a registered voter? ☒ Yes ☐ No

   If so, in what county are you registered? Seminole

7. Marital status: Married

   If married: Spouse's name [REDACTED]

   Date of marriage 11/10/2007

   Spouse's occupation RN

   If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

   Divorced from Barbara Brandorff Bonner, now known as Barbara Brandorff. Current address for Barbara Brandorff is 2048 Wembley Place, Oviedo, FL 32765. Petition filed by Barbara Brandorff Bonner in the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida, Case # 2004DR004498. Final Judgment of Dissolution of Marriage December 14, 2004.

8. Children

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
[REDACTED]	31	Art Professor	122 Greengate Lane, Spartanburg, SC 29307
[REDACTED]	29	Post Doctoral Fellow	512 I Street, Apt #1 Davis, CA 95616
[REDACTED]	25	Marketing	1 Nashua St., Apt. 1908, Boston, MA 02114
[REDACTED]	21	student	441 Wild Oak Circle, Longwood, FL 32779

9. Military Service (including Reserves)

Service *Branch* *Highest Rank* *Dates*

None

Rank at time of discharge _____ Type of discharge _____

Awards or citations _____

Service *Branch* *Highest Rank* *Dates*

Rank at time of discharge _____ Type of discharge _____

Awards or citations _____

HEALTH:

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No.

11a. 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?

Yes ☐ No ☒

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.

11b. 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 2 or 3 nights
- Experiencing periods of hyperactivity
- Spending money profusely with extremely poor judgment
- Suffered 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

Yes ☐ No ☒

If yes, please explain.

12a. 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?

Yes ☐ No ☒

12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental health impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes ☐ No ☐

Describe such problem and any treatment or program of monitoring or counseling.

13. 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, give full details as to court, date and circumstances.

No.

14. 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 law provisions.)

No.

15. 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 use of 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.

16. 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.

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

No.

EDUCATION:

18a. Secondary schools, colleges and law schools attended.

Schools	*Class Standing*	*Dates of Attendance*	*Degree*
Whetstone High School, Columbus, Ohio	top 10%	1969-1972	Diploma
The Ohio State University	top 10%	1972-1976	BA
The University of Florida	Top 25% - 40th in a class of 157	1978-1981	JD, with Honors

18b. List and describe academic scholarships earned, honor societies or other awards.

University of Florida Appellate Advocacy Board of Editors

NON-LEGAL EMPLOYMENT:

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

Date	*Position*	*Employer*	*Address*
1977-1978; Summer 1979 and 1980	Claims Examiner; review of unemployment compensation claims for overpayment and/or fraud	Ohio Bureau of Employment Services	P.O. Box 182212, Columbus, OH 43218-2212

PROFESSIONAL ADMISSIONS:

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

The Florida Bar, October 29, 1981;

The United States District Court for the Middle District of Florida, 1981;

Eleventh Circuit Court of Appeals, 1982;

U.S. Supreme Court, 1989;

The United States District Court for the Southern District of Florida, 2008; and

The United States District Court for the Northern District of Florida, 2016.

There have been no suspensions, resignations or lapses in memberships.

LAW PRACTICE: (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

Position	*Name of Firm*	*Address*	*Dates*
Attorney	Eubanks, Hilyard, Rumbley, Meier & Lengauer, PA	105 E Robinson St Ste 201 Orlando, FL 32801-1622	9/14/1981 - 7/15/1997

Shareholder	Meier, Bonner, Muszynski, O'Dell & Harvey, PA	260 WEkiva Springs Road, Suite 2000, Longwood, FL 32779	07/16/1997 to present

22. 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.

n 1981, I began the practice of law as an associate attorney with the Orlando, Florida law firm of Pitts, Eubanks & Ross, P.A. I became a participant of the firm in 1986. Over the years, the name of the firm changed from Pitts, Eubanks & Ross, P.A. to Pitts, Eubanks, Hannah, Hilyard & Marsee, P.A. and eventually changed to Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A. During the entire time that I practiced at that firm, the firm was involved in a general insurance defense practice.

I initially began my career at the firm handling auto accident and premises liability cases. As I gained experience, I also became involved in more complicated cases involving defective products, electrical utility accidents, governmental liability claims and insurance coverage disputes.

In the early 1990s I became more involved in federal court litigation representing and defending governmental clients. To a large extent, these cases involved the defense of claims asserted under 42 USC 1983.

In July 1997, I resigned from Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A. and became a founding member of Meier, Lengauer, Bonner, Muszynski & Doyle, P.A. The firm is now known as Meier, Bonner, Muszynski, O’Dell & Harvey, P.A. This is also a firm which handles a general insurance defense practice.

During the early years of Meier, Bonner, Muszynski, O’Dell & Harvey, I handled a broad variety of cases including auto accident, theme park premises liability cases involving defective products and insurance coverage disputes. A very small percentage of my practice at that time was devoted to defense of federal litigation against governmental entities. However, with the passage of time I began to increase my representation of governmental clients and reduce my involvement in non-governmental tort cases.

From 2003 to 2016, approximately 80% of my caseload involved the representation and defense of governmental entities and employees in the United States District Court. The majority of these cases involved claims asserted under 42 USC 1983 for excessive force

and illegal search and seizure. A smaller percentage of those cases involved employment related claims against governmental entities and employees. Since 2016, my practice has changed to the extent that approximately 30% of my current caseload involves the representation of parties in the United States District Court and 70% of my current caseload involves the representation of parties in state court.

I have been Board Certified as a Civil Trial Lawyer by the Florida Bar since 1989. I am also Board Certified as a Civil Trial Advocate by the National Board of Trial Advocacy (NBTA).

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

Court			Area of Practice		
Federal Appellate	2	%	Civil	100	%
Federal Trial	48	%	Criminal		%
Federal Other		%	Family		%
State Appellate	2	%	Probate		%
State Trial	48	%	Other		%
State Administrative		%			
State Other		%			
		%			
TOTAL	100	%	TOTAL	100	%

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury? 80 Non-jury? 5

Arbitration? 1 Administrative Bodies? 0

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

No.

26. 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 in full.

No.

(Questions 27 through 30 are optional for sitting judges who have served 5 years

or more.)

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

Landsman v. McClellan, case # 2:13-cv-14375-DLG, in the United States District Court for the Southern District of Florida, Ft. Pierce Division.

The case was tried from November 6 to November 13, 2015. The trial judge was the Hon. Donald L. Graham.

Plaintiff's counsel were Guy Bennett Rubin, Esq., Rubin & Rubin, PO Box 395, Stuart, FL 34995, (772) 283-2004, grubin@rubinandrubin.com and Daniel D. Ambrose, Esq., Ambrose Law Group, 1980 Greenfield Road, Berkley, MI 48072, (248) 624-5500, Daniel@ambroselawgroup.com.

Thompson v. Mostert, etc., et al.; case # 6:10-CV-979-ORL-36-GJK, in the United States District Court for the Middle District of Florida, Orlando Division.

The case was tried from September 3 to September 5, 2013. The trial judge was the Hon. Charlene Honeywell.

Plaintiff's counsel was Thomas B Luka, Esq., 390 North Orange Ave., Suite 1630, Orlando, FL 32801; (407) 895-8887

Ana Maria Hazleton v. The City of Orlando, Fernando Trinidad, Frank Sikos, Brandon Loverde and Edward Albino; case # 6:10-CV-00342-ORL-36DAB, in the United States District Court for the Middle District of Florida, Orlando Division.

The case was tried from April 21, 2013 through April 24, 2013. The trial judge was the Hon. Charlene Honeywell.

Plaintiff's counsel were Michael H. Lafay, Esq., 189 South Orange Avenue, Suite 1800, Orlando, Florida 32801, (407) 245-1232; and Frank T. Allen, Esq., 605 E. Robinson Street, Suite 130, Orlando, Florida 32801, (407) 481-8103.

WILLIAM SMITH V. CITY OF OAK HILL, FLORIDA; CHIEF GUY GRASSO, As Chief of the Oak Hill, Florida Police Department, OFFICER SHANE CHANDLER, in his Official Capacity and Individual Capacity; case # 6:11-CV-1332-ORL-31KRS, in the United States District Court for the Middle District of Florida, Orlando Division. (Retrial)

The case was tried from March 12, 2013 through March 13, 2013. The trial judge was the Hon. Gregory Presnell.

Plaintiff's counsel were Carlus L. Haynes, Esq. and Bradley N. Laurent, Esq., Haynes & Laurent, P.A., 5401 South Kirkman Road, Suite 620, Orlando, FL 32819, (407) 246-0077.

WILLIAM SMITH V. CITY OF OAK HILL, FLORIDA; CHIEF GUY GRASSO, As Chief of the Oak Hill, Florida Police Department, OFFICER SHANE CHANDLER, in his Official Capacity and Individual Capacity; case # 6:11-CV-1332-ORL-31KRS, in the United States District Court for the Middle District of Florida, Orlando Division.

The case was tried from February 5, 2013 through February 7, 2013. The trial judge was the Hon. Gregory Presnell. The case resulted in a directed verdict as to the defendant, Michael Ihnken, and a hung jury as to the defendant, Shane Chandler.

Plaintiff's counsel were Carlus L. Haynes, Esq. and Bradley N. Laurent, Esq., Haynes & Laurent, P.A., 5401 South Kirkman Road, Suite 620, Orlando, FL 32819, (407) 246-0077.

27b. For your last 6 cases, which were 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).

Heather Talley v. City of Melbourne and Pete Mercaldo, Case #: 18-cv-00085-PGB-KRS, in the United States District Court for the Middle District of Florida, Orlando Division.

I represented Pete Mercaldo

Plaintiff's counsel was Brandon J. Gibson, Esq., Saenz & Anderson, PLLC, 20900 NE. 30th Ave., Suite 800, Aventura, FL 33180, (305) 503-5131.

Counsel for the City of Melbourne was Douglas T. Noah, Esq., Dean, Ringers, Morgan & Lawton, PA, PO Box 2928, Orlando, FL 32802-2928, (407) 422-4310.

Cleo H. Smith, as personal representative of the estate of DeMarcus Semer, deceased v. City of Fort Pierce, Ralph Holmes and Brian MacNaught, Case #: 2:18-cv-14147, in the United States District Court for the Southern District of Florida, Fort Pierce Division.

I represented Ralph Holmes and Brian MacNaught.

Plaintiff's counsel was Lorenzo Williams, Esq., Law Offices of Gary, Williams, Parenti, Watson and Gary, 221 SE. Osceola St., Stuart, FL 34994, (772) 283-8260.

The City of Fort Pierce was represented by Joshua Walker, Esq., Dean, Ringers, Morgan & Lawton, PA, PO Box 2928, Orlando, FL 32802-2928, (407) 422-4310.

Yarline Torres v. Seminole County School Board (pre-suit settlement)

I represented the Seminole County School Board.

Plaintiff's counsel was Armando R. Payas, Esq., Payas & Payas, PA, 1018 E. Robinson St., Orlando, FL 32801-2024, (407) 425-7223.

Marie Aponte v. T Old Town, LLC, Case #: 2017-CA-002720, in the Circuit Court of the Ninth Judicial Circuit, in and for Osceola County, Florida.

I Represented T Old Town, LLC.

Plaintiff's Counsel was Stephen Kronick, Esq., Kronick Law Firm, 13506 Summerport Village Pkwy., Suite 411, Windermere, FL 34786, (407) 614-1776.

Susan Rial v. Emerson International, Inc.,Case #: 2018-CA-000674, in the Circuit Court of the 18th Judicial Circuit, in and for Seminole County, Florida.

I represented Emerson International, Inc.

Plaintiff's counsel was Gregory S. Stark, Esq., of the law offices of Todd K. Miner, PA, 915 Outer Rd., Orlando, FL 32814, (407) 894-1480.

Celeste Rivera and Luz Rivera v. Lake County, Case #: 2016-CA-1078, in the circuit Court of The Fifth Judicial Circuit, in and for Lake County, Florida.

I represented Lake County.

Plaintiffs' counsel was Luis R. Gracia, Esq., Rue & Ziffra, P.A., 632 Dunlawton Avenue, Port Orange, Florida 32127, (386) 788-7700.

27c. During the last five years, how frequently have you appeared at administrative hearings?
0 average times per month

27d. During the last five years, how frequently have you appeared in Court?
2 average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? 1% Defendants? 99%

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

N/A

30. List and describe the six most significant cases which you personally litigated giving case style, number 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. Give the name of the court and judge, the date tried and names of other attorneys involved.

Messer v. Schold Machine Co., Case # 1995-CA-006076-O, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida. Product liability action arising out of incident in which the plaintiff was scalped while attempting to clean an industrial mixer. I represented the defendant, Schold Machine Co. I was responsible for all pleadings and discovery and was lead counsel for the defense at trial. I tried the case with George A. Meier, III, co-counsel for the defendant. Mr. Meier is retired and resides at 1184 Orange Ave., Winter Springs, FL 32708-2812. His telephone number is (407) 327-4100.

The case was tried from April 27, 1998 to May 7, 1998. The trial judge was the Hon. Alice Blackwell.

Opposing counsel were Gregg A. Page, Esq., Page, Eichenblatt & Bennett, PA, 214 East Lucerne Cir., Orlando, FL 32801-3714, (407) 386-1900 gpage@floridalawonline.com, and the Hon. Roy B. Dalton, Jr., George C. Young US Courthouse, 401 West Central Blvd., Suite 4750, Orlando, FL 32801-0401, (407) 835-2590.

The case resulted in a defense verdict and in a final judgment for the defendant. The case was significant as the defendant had experienced difficulty in securing reasonably priced products liability insurance due to a series of accidents resulting in substantial settlements and jury verdicts. As a result of the successful defense, the company was again able to secure reasonably priced products liability insurance and is still in business to this date.

Needra McCullen v. RDR, LLC. d/b/a Beef O'Brady's, Case # 5:06-CV-202-OC-10, in the United States District Court for the Middle District of Florida, Ocala Division. Civil action arising under the Pregnancy Discrimination Act (PDA). The Plaintiff claimed that she was harassed and discriminated against based upon her gender and/or pregnancy. Specifically, the plaintiff claimed that following her pregnancy her hours were reduced and she was subjected to verbal harassment by the defendant. I was counsel for the defendant, RDR, LLC. d/b/a Beef O'Brady's. I was responsible for all pleadings and discovery and was sole counsel for the defense at trial.

The case was tried from August 20, 2007 to August 22, 2007. The trial judge was the Hon. W. Terrell Hodges.

Opposing counsel was Michael O. Massey, Esq., Massey & Duffy, PLCC, 855 East University Avenue, Gainesville, FL 32601, (352) 505-8900, massey@352law.com.

Following a three-day jury trial, the jury returned a verdict in favor of the defendant. The court then entered judgment in favor of the defendant. The plaintiff filed a motion for new trial. The plaintiff withdrew her motion for new trial in exchange for the defendant's agreement to waive claims for attorney's fees and costs. The case was a significant victory for the defendant, a small business without resources to pay a substantial judgment.

Landsman v. McClellan, case # 2:13-cv-14375-DLG, In the United States District Court for the Southern District of Florida, Ft. Pierce division. 621 Fed.Appx. 559

This was a civil rights lawsuit involving allegations of excessive force. I was counsel for Fletcher McClellan. I was responsible for all pleadings and discovery and was lead counsel for Fletcher McClellan at trial.

The case was tried from November 6 to November 13, 2015. The trial judge was the Hon. Donald L. Graham.

Plaintiff's counsel were Guy Bennett Rubin, Esq., Rubin & Rubin, PO Box 395, Stuart, FL 34995, (772) 283-2004, grubin@rubinandrubin.com and Daniel D. Ambrose, Esq., Ambrose Law Group, 1980 Greenfield Road, Berkley, MI 48072, (248) 624-5500, Daniel@ambroselawgroup.com.

The plaintiff sought damages from Officer McClellan in his individual capacity, including punitive damages. During closing argument, plaintiff's counsel requested compensatory damages in excess of $15.5 million, plus punitive damages.

Following a week of trial, the jury returned a verdict in favor of Fletcher McClellan. The court entered final judgment in favor of Fletcher McClellan.

This case was a significant victory for Fletcher McClellan, as Fla. Stat. § 111.071 would have precluded the use of public funds to pay any judgment against Fletcher McClellan if the jury determined that he caused the harm intentionally.

Thomas Luka v. City of Orlando and Anthony Miller, Case # 07-00841-CV-ORL-22-GJK in the United States District Court for the Middle District of Florida, Orlando Division. 382 Fed.Appx. 840, 2010 WL 2331433.

Civil rights action under 42 USC 1983 for excessive force arising out of arrest of the plaintiff. I represented all of the defendants in this matter.

The case was tried in July 2009. The trial judge was the Hon. Anne C. Conway.

Opposing counsel was Howard Marks, Esq., Burr Forman LLP, 200 South Orange Ave., Suite 800, Orlando, FL 32801-3410, (407) 540-6600, Howard.marks@Burr.com. Mr. Luka, also an attorney, represented himself on appeal. His contact information is Thomas B. Luka, Esq., 390 North Orange Ave., Suite 1840, Orlando, FL 32801-1665, (407) 895-8887, tluka@lukalaw.com.

Plaintiff claimed that he was arrested without probable cause and beaten while in police custody. The defendants admitted that the plaintiff was arrested, but denied that any force was used to effectuate the arrest and asserted that there was probable cause for the arrest.

Prior to trial, the court entered summary judgment in favor of the City of Orlando. Following three days of trial, the jury returned a verdict in favor of Anthony Miller after approximately 30 minutes of deliberations.

Mr. Luka then took a pro se appeal to the Eleventh Circuit. On appeal, the Eleventh Circuit affirmed the final judgment in favor of Officer Miller.

After the unsuccessful appeal, the trial court considered the defendants' motions for attorney's fees and costs. In granting the defendants' motions for attorney's fees and costs, the court found that Luka filed frivolous claims, misrepresented the facts, and testified untruthfully before the court. The court then awarded attorney's fees and costs in the total amount of $119,038.58.

This case was a significant victory for Officer Anthony Miller, as Fla. Stat. § 111.071 would have precluded the use of public funds to pay any judgment against Officer Miller if the jury determined that he caused the harm intentionally.

Robert Harmon v. City of Orlando, etc., et al., Case # 6:89-cv-00424-PCF, in the United

States District Court for the Middle District of Florida, Orlando Division. Civil rights action under 42 USC 1983 arising out of law enforcement action against property owner whose rooming house was the focal point for crack cocaine sales in the City of Orlando. I represented all of the defendants in this matter.

I tried the case with Ernest H. Eubanks, Esq. (deceased).

The case was tried in February 1991. The trial judge was the Hon. Walter Hoffman (deceased).

Opposing counsel was H. Gabriel Kaimowitz, Esq., PO Box 140119, Gainesville, FL 32614-0119, (352) 375-2670, gabrielhillel@gmail.com.

In the mid-1980s, crack cocaine made its appearance in the City of Orlando. Harmon's Cove, and unlicensed rooming house owned by Robert Harmon, was the primary location for the sale and distribution of crack cocaine. After learning that the majority of the crack cocaine transactions took place on the premises of Harmon's Cove, the City of Orlando began a concerted enforcement effort against the illegal activities on the premises. Those enforcement efforts involved joint action by the City of Orlando Police Department, Nuisance Abatement Board and Code Enforcement Board. Mr. Harmon filed an action against the City of Orlando, its mayor, the chief of police, the Nuisance Abatement Board, the Code Enforcement Board and the individual members of the Nuisance Abatement Board and the Code Enforcement Board. Mr. Harmon claimed that the defendants were discriminating against him based upon his race. The defendants denied that they were discriminating against Mr. Harmon and asserted that they were merely taking lawful action based upon the proliferation of illegal drug transactions on his property.

The case was assigned to the Hon. Walter Hoffman of the United States District Court for the Eastern District of Virginia for trial. I served as lead trial counsel for the defendants, handling all activities at trial except for the direct examination of Mayor Frederick. Following a nine (9) day trial, the jury returned a verdict in favor of the defendants on all counts. The court then entered final judgment in favor of the defendants and against Mr. Harmon. This was a significant victory for the City of Orlando as they were able to resume their law enforcement efforts directed toward the sale and distribution of crack cocaine.

Brevard County, Florida v. District School Board of Brevard County, Case # 05-2013-CA-033202, in the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida. Through a variety of factors, including a decline in property tax assessments, a decline in taxable value of real estate and a reduction in state funding, capital funding for the District School Board of Brevard County was reduced from a sum in excess of $125 million in the 2006-2007 school year to a sum of less than $50 million

in the 2012-2013 school year. As part of cost-saving measures adopted by the School Board in anticipation of a significant budget shortfall, it was decided that the School Board would close South Lake Elementary School, Gardendale Elementary Magnet School and Clearlake Middle School. Brevard County then filed an action for injunctive relief to prevent the closing of those schools.

After the action was filed, I was retained by the School Board to defend the litigation. I drafted a motion to dismiss in a memo of law in opposition to the motion for injunctive relief. I also represented the School Board a hearing on the motion for injunctive relief. As a result of these efforts, the School Board prevailed and the request for injunctive relief was denied.

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

See attached writing samples at tabs 3 - 6. I was 100% responsible for preparing each of these.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

No.

32b. List any prior quasi-judicial service:

Dates *Name of Agency* *Position Held*

Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.

(ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

(iii) List citations of any opinions which have been published.

(iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

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

(vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

(vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

BUSINESS INVOLVEMENT:

33a. 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 the President and founding shareholder of Meier, Bonner, Muszynski, O'Dell & Harvey, PA. The nature of the business is the practice of law. The nature of my duties include the practice of law and supervision of the day-to-day business affairs of the firm. I would resign from the position immediately after an appointment to judicial office.

33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

No.

33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

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.

None.

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes _____ No ___X___ If "Yes" what charges? _____

Where convicted? _____ Date of Conviction: _____

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

No.

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No.

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No.

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No.

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No.

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

I believe that I was once sued by a pro-se prisoner filing in forma pauperis. While I believe that the action was filed in Orange County Circuit Court, I do not know the case style or the date of the case. It is my understanding that the suit was dismissed instanter by the court and that no summons was issued.

39. 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, give the particulars.

No.

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

No.

41. 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.

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

No.

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes ☒ No ☐ If no, please explain. _____

43b. Have you ever paid a tax penalty?

Yes ☐ No ☐ If yes, please explain what and why. I was involved in a tax dispute with the IRS with respect to disallowed alimony

deductions for tax year 2011. No tax lien or collection procedure was instituted. I filed suit against the IRS to resolve the matter after an adverse audit ruling. That matter was resolved with a payment of $1,775 in back taxes and penalties.

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No.

HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

President's Message, Trial Advocate Quarterly, Summer 2017

President's Message, Trial Advocate Quarterly, Spring 2017

President's Message, Trial Advocate Quarterly, Winter 2017

President's Message, Trial Advocate Quarterly, Fall 2016

President's Column, FDLA deFENSE Post, Summer 2017

President's Column, FDLA deFENSE Post, Spring 2017

President's Column, FDLA deFENSE Post, Fall/Winter 2016

"Defense of Law Enforcement Agencies and Officers-An Ethical Nightmare," Trial Advocate Quarterly, October 2012.

"Protecting Work Product from Discovery," Trial Advocate Quarterly, April 1989.

45. List any honors, prizes or awards you have received. Give dates.

AV® Preeminent rated by Martindale-Hubbell

Florida Super Lawyers selection 2017, 2018, 2019

Florida Trend Legal Elite selection 2012

Florida Defense Lawyers Association Joseph P. Metzger Outstanding Achievement Award 2016

Florida Defense Lawyers Association Continuing Legal Education Award 2014

Florida Defense Lawyers Association President's Award 2011

Board Certified Civil Trial Lawyer, Florida Bar Board of Legal Specialization and Education, 1989 – present

Board Certified Civil Trial Advocate, National Board of Trial Advocacy, 2017 - present

Advocate, American Board of Trial Advocates 2015 – present

46. List and describe any speeches or lectures you have given.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2019.

Use of Reptile Strategy as a Defense Tactic in Police Misconduct Cases. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2018.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Webinar Presentation for the the Florida Defense Lawyers Association. April 6, 2017.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Defense Lawyers Winter Meeting. Big Sky Resort, Montana. January 2017.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2016.

Surviving and Thriving in Federal Court. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky Resort, Montana. January 2016.

Embracing the Reptile: Using Reptile Tactics for a Successful Defense. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2015.

Excluding Expert Opinion Testimony under Daubert. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2015.

Effective Use of Daubert Motions to Exclude Expert Testimony. Webinar Presentation for the the Florida Defense Lawyers Association. June 18, 2015.

Social Media in Civil Litigation: A Practical Perspective. Presentation for the Claims & Litigation Management Alliance. Orlando, Florida. March 2015.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2014.

Strategic Use of Motions in Limine. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2014.

Joint Representation of Law Enforcement Agencies and Officers: An Ethical Nightmare. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2014.

Joint Representation of Law Enforcement Agencies and Officers: An Ethical Nightmare. Presentation at the Florida Association of Police Attorneys Winter Meeting. Orlando, Florida. January 2014.

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Strategic Use of Motions in Limine. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2013.

Initial Case Workup – Doing Your Homework. Presentation at the Florida Defense Lawyers Association Young Lawyers Boot Camp. Longwood, Florida. March 2012.

Recent Legal Developments and Best Strategies for Removal to Federal Court. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2011.

Initial Case Workup – Doing Your Homework. Presentation at the Florida Defense Lawyers Association Young Lawyers Boot Camp. Longwood, Florida. November 2010.

Exclusion of Experts in the 11th Circuit. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2010.

Motions in Limine and Trial Objections. Presentation at the Florida Defense Lawyers Association Winter Meeting. Park City, Utah. January 2006.

Ethical Considerations Regarding Multiple Representation. Presentation at Police Misconduct in Florida. Orlando, Florida December 2005.

Shocking Developments: Excessive Force Claims Arising Out of the Use of Tasers. Presentation at the Florida Defense Lawyers Association Winter Meeting. Steamboat Springs, Colorado. January 2005.

Defense and Prevention of Law Enforcement Claims. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2004.

Defending Police Liability Claims: The Law, Practical Considerations and Sovereign Immunity. Presentation at the Florida Defense Lawyers Association Winter Meeting. Steamboat Springs, Colorado. January 2004.

Premises Liability for Criminal Acts. Presentation at the Florida Defense Lawyers Association Winter Meeting. Snowmass, Colorado. January 2000.

Successful Defense of Wrongful Death Actions. Presentation at the Florida Defense

Lawyers Association Winter Meeting. Snowmass, Colorado. January 1999.

Defense Planning for the Wrongful Death Case. Presentation at Trying the Wrongful Death Case in Florida: Strategies in Preparation and Valuation. Orlando, Florida. March 1997.

UM Claims: A Practical Perspective. Presentation at Recent Developments in Insurance Law. Orlando, Florida. March 1994.

47. Do you have a Martindale-Hubbell rating? Yes ☒ If so, what is it?___No ☐

AV Preeminent.

PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

The Florida Bar - Trial Lawyers Section; ABOTA; Florida Defense Lawyers Association (Immediate past President 2017-2018; President 2016-2017; President–Elect 2015-2016; Secretary-Treasurer 2014-2015; Board of Directors 2008-2012); Defense Research Institute (DRI); Claims and Litigation Management Alliance; Florida Municipal Attorneys Association; Florida Association of Police Attorneys; Seminole County Bar Association

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

Orange County Bar Association, 1981 - 1997; American Bar Association, dates unknown

48c. List your hobbies or other vocational interests.

Cycling; Physical Fitness; Reading; College Football.

48d. Do you now or have you ever belonged to any 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, national origin or sex? If so, detail 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.

48e. Describe any pro bono legal work you have done. Give dates.

For the first twenty (20) years of my practice I participated in the legal aid program of the Orange County Bar Association. As a participant in the program, I represented qualifying individuals in matters pertaining to landlord-tenant disputes and consumer transactions. Additionally, a great deal of my time is participant in that program was devoted to serving as a guardian ad litem for abused and neglected children. More recently, I have contributed to legal aid endeavors through monetary donations to the Seminole County

Bar Association legal aid program.

SUPPLEMENTAL INFORMATION:

49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

See attached CLE history at Tab 2.

49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

I have recently accepted a position as an Adjunct Professor at the Barry University Dwayne O. Andreas School of Law. I will be teaching Motions and Depositions (Fall 2019) and Florida Civil Practice (Spring 2020). I have also made the following CLE presentations:

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2019.

Use of Reptile Strategy as a Defense Tactic in Police Misconduct Cases. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2018.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Webinar Presentation for the the Florida Defense Lawyers Association. April 6, 2017.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Defense Lawyers Winter Meeting. Big Sky Resort, Montana. January 2017.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2016.

Surviving and Thriving in Federal Court. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky Resort, Montana. January 2016.

Embracing the Reptile: Using Reptile Tactics for a Successful Defense. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2015.

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Effective Use of Daubert Motions to Exclude Expert Testimony. Webinar Presentation for the the Florida Defense Lawyers Association. June 18, 2015.

Social Media in Civil Litigation: A Practical Perspective. Presentation for the Claims & Litigation Management Alliance. Orlando, Florida. March 2015.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2014.

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Effective Use of Daubert Motions and Motions in Limine. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. November 2013.

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Defending Police Liability Claims: The Law, Practical Considerations and Sovereign Immunity. Presentation at the Florida Defense Lawyers Association Winter Meeting. Steamboat Springs, Colorado. January 2004.

Premises Liability for Criminal Acts. Presentation at the Florida Defense Lawyers Association Winter Meeting. Snowmass, Colorado. January 2000.

Successful Defense of Wrongful Death Actions. Presentation at the Florida Defense Lawyers Association Winter Meeting. Snowmass, Colorado. January 1999.

Defense Planning for the Wrongful Death Case. Presentation at Trying the Wrongful Death Case in Florida: Strategies in Preparation and Valuation. Orlando, Florida. March 1997.

UM Claims: A Practical Perspective. Presentation at Recent Developments in Insurance Law. Orlando, Florida. March 1994.

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

51. Explain the particular potential contribution you believe your selection would bring to this position.

My career as a trial lawyer has provided me with the opportunity to represent thousands of clients in litigation at both the trial court level and on appeal. In nearly 37 years of practice, I have tried over 80 cases to jury verdict. Additionally, I have handled over 100 appeals. My experiences as both a trial lawyer and an appellate lawyer have resulted in a deep and abiding admiration, love and respect for the judicial system.

Lawyers should give back to the legal community. An excellent way to give back to the community is to serve as a member of the judiciary. Throughout my legal career, I have demonstrated qualities that are essential for becoming a jurist. Those qualities include respect for the law; integrity; impartiality; industriousness; intelligence and the appropriate temperament necessary to serve as a judge.

Respect for every aspect of the judicial and legal system is essential for any jurist. If you respect the law, you will respect the office of the judiciary; you will respect the parties; you will respect the attorneys and respect the public.

Integrity and impartiality require abiding by the oath to faithfully follow the rule of law embodied in the Constitution, statutes, and binding precedent and to administer justice without bias or prejudice.

Industriousness requires diligence and preparation, which includes thoroughly reviewing pleadings and familiarity with pending motions. Industriousness also includes the use of available electronic case-management tools, periodic reviews of the dockets and deadlines of each case to make sure that the imposed deadlines are prompt but reasonable, and ensuring that the deadlines are made clear to all parties.

Proper judicial temperament requires patience, courtesy, dignity and respect for the attorneys, the litigants and the legal process. Judicial temperament requires that judges be calm, dispassionate, and in control of the courtroom. Judges should also require the lawyers and the litigants to show respect both to each other and toward the court.

My career as a trial lawyer reflects the qualities outlined above. Combining these qualities with a thorough knowledge regarding both trials and appeals makes me uniquely qualified to serve as a member of the Fifth District Court of Appeal.

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

Applicant for United States District Judge for the Middle District of Florida 2015.

Applicant for United States District Judge for the Northern District of Florida 2017.

Applicant for United States District Judge for the Middle District of Florida 2017.

Applicant for United States District Judge for the Southern District of Florida 2017.

Applicant for United States Magistrate Judge for the Middle District of Florida 2018.

Applicant for United States Magistrate Judge for the Northern District of Florida 2018.

Applicant for the Fifth District Court of Appeal May 2018.

Applicant for United States Magistrate Judge for the Middle District of Florida 2018.

Applicant for the Fifth District Court of Appeal December 2018.

Applicant for United States Magistrate Judge for the Middle District of Florida 2019.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

The position of an appellate judge requires both knowledge of the law and knowledge, based on experience, regarding how the legal process works. I sincerely believe that my career as a trial lawyer reflects both of these qualities. As a student of the law, I strive to keep abreast of the latest legal developments. This includes reading the Eleventh Circuit, Florida Supreme Court, and Florida District Court of Appeals opinions on a regular basis. Moreover, I believe that I have developed a proficient knowledge regarding how litigation works. I have shared this knowledge with other attorneys by presenting seminars on various areas of legal practice and procedure as reflected in my curriculum vitae. This knowledge and experience would benefit me and the legal community immensely if I was fortunate enough to be selected to serve as a member of the Fifth District Court of Appeal.

REFERENCES:

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

Bill McCollum
Dentons US LLP
1900 K St NW
Washington, DC 20006-1110
(202) 408-9145
bill.mccollum@dentons.com

Hon. Donald L. Graham
United States District Judge
United States District Court
Southern District of Florida
400 N Miami Ave Rm 13-4
Miami, FL 33128-1812
(305) 523-5130
d_l_graham@flsd.uscourts.gov

Alfredo Garcia, Esq.
Professor
St. Thomas University School of Law
16401 NW 37th Avenue
Opa Locka, FL 33054-6313
(305) 623-2392
agarcia@stu.edu

Donna Marie Canina Doyle, Esq.
Mediate First
200 E Robinson Street
Suite 700
Orlando, FL 32801-1903
(407) 649-9495

Mayanne Downs, Esq.

GrayRobinson PA
301 E Pine Street
Suite 1400
Orlando, FL 32801-2741
(407) 244-5647
mayanne.downs@gray-robinson.com

W. L. Kirk, Jr., Esq.
Rumberger Kirk and Caldwell
PO Box 1873
Orlando, FL 32802-1873
(407) 872-7300
bkirk@rumberger.com

Vincent Michael D'Assaro, Esq.
Morgan & Morgan
20 N Orange Ave Ste 1600
Orlando, FL 32801-4624
(407) 420-1414
vdassaro@forthepeople.com

Clayton Simmons, Esq.
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1220 Commerce Park Dr
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Melvin B. Wright, Esq.
Colling Gilbert Wright & Carter
801 N. Orange Avenue
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mwright@thefloridafirm.com

Michael J. Roper, Esq.
Bell & Roper, P.A.
2707 E Jefferson St
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(407) 897-5150
mroper@bellroperlaw.com

Jeffrey E. Bigman, Esq.
Smith Bigman Brock
444 Seabreeze Blvd Ste 900
Daytona Beach, FL 32118-3953
(386) 254-6875
jbigman@daytonalaw.com

CERTIFICATE

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

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

Dated this 23 day of August, 2019.

ROBERT E. BONNET

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	$145,094.64		
List Last 3 years	$176,339.33	$129,474.16	$189,558.73

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	$145,094.64		
List Last 3 years	$176,339.33	$129,474.16	$189,558.73

3. State the gross amount of income or loses 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	N/A		
List Last 3 years	N/A	N/A	N/A

4. 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	N/A		
List Last 3 years	N/A	N/A	N/A

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 August 1, 2019 was $665,095.72.

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 $ 1,099,230.86

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Residence at 441 Wild Oak Circle, Longwood, FL 32779	$435,769.00
Charles Schwab IRA Account	$410,404.43
Fairwinds Checking Account	$23,057.43
Value of Shares in Meier, Bonner, et. al	$120,000.00
Cars, Household Goods and Personal Effects	$110,000.00

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Fairwinds Credit Union Auto Loan,3087 N. Alafaya Trail, Orlando, FL 32826	$5,557.16
Wells Fargo Home Mortgage PO Box 105647, Atlanta, GA 30348-5647	$294,889.13
Mohela PO Box 1022, Chesterfield, MO 63006-1022	$15,992.00
Navient Solutions, LLC	$17,864.46

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Mohela PO Box 1022, Chesterfield, MO 63006-1022	$39,717.08
Mohela PO Box 1022, Chesterfield, MO 63006-1022	$60,115.31

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

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 BUSIENSS' 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 ENTTITY	Meier, Bonner, Muszynski, O'Dell & Harvey, P.A.		
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

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

OATH

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

SIGNATURE

STATE OF FLORIDA

COUNTY OF Seminole

Sworn to (or affirmed) and subscribed before me this 23 day of **August,** 2019 by ROBERT E. BONNER

Patricia A. Langanke

(Signature of Notary Public—State of Florida)

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

Personally Known X *OR* Produced Identification _____

Type of Identification Produced _____

Notary Public State of Florida
Patricia A. Langanke
My Commission GG 213781
Expires 08/01/2022

Rev. 062414-OGC

INSTRUCTIONS FOR COMPLETING FORM 6:

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

PART A – NET WORTH

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

To total the value of your assets, add:

(1) The aggregate value of household goods and personal effects, as reported in Part B of this form;
(2) The value of all assets worth over $1,000, as reported in Part B; and
(3) The total value of any assets worth less than $1,000 that were not reported or included in the category of "household goods and personal effects."

To total the amount of your liabilities, add:

(1) The total amount of each liability you reported in Part C of this form, except for any amounts listed in the "joint and several liabilities not reported above" portion; and,
(2) The total amount of unreported liabilities (including those under $1,000, credit card and retail installment accounts, and taxes owed).

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

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

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

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

How to Identify or Describe the Asset:

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

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

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

How to Value Assets:

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

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

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

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

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

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

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

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

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

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

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

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

How to Determine the Amount of a Liability:

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

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

— If you are jointly and severally liable with another person or entity, which often is the case where more than one person is liable on a promissory note, you should report here only the portion of the liability that corresponds to your percentage of liability. *However*, if you are jointly and severally liable for a debt relating to property you own with one or more others as tenants by the entirely or jointly, with right of survivorship, report 100% of the total amount owed.

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

Examples:

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

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

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

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

PART D – INCOME

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

PRIMARY SOURCES OF INCOME:

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

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

Examples:

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

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

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

— If more than $1,000 of income was gained from the sale of property, then you should list as a source of income the name of the purchaser, the purchaser's address, and the amount of gain from the sale. If the purchaser's identity is unknown, such as where securities listed on an exchange are sold through a brokerage firm, the source of income should be listed simply as "sale of (name of company) stock," for example.

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

SECONDARY SOURCE OF INCOME:

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

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

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

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

Examples:

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

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

PART E – INTERESTS IN SPECIFIED BUSINESS

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

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

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

JUDICIAL APPLICATION DATA RECORD

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

(Please Type or Print)

Date: _____

JNC Submitting To: 5th DCA JNC

Name (please print): Robert E. Bonner

Current Occupation: Attorney

Telephone Number: (407) 872-7774 Attorney No.: 327875

Gender (check one): ☒ Male ☐ Female

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

County of Residence: Seminole

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

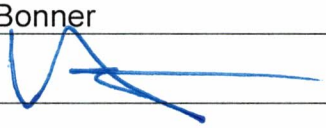
DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

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.

Printed Name of Applicant: Robert E. Bonner

Signature of Applicant: 

Date: 08/23/2019

Tab 2 - CLE History

Continuing Legal Education

Status and Credit History

for Robert E Bonner (Bar #327875) as of 08/23/2019

CLER Cycle

	Gen Credits	PR Credits	Tech Credits
Compliant	77.5 of 30.0	8.0 of 5.0	9.0 of 0.0
	Cycle Start	**Completed**	**Cycle End**
	01/01/2017	10/01/2017	12/31/2019

Basic Skills

Phase 1 Compliant	**End**	**Completed**
	--	09/30/1988
Phase 2 Compliant	**End**	**Completed**
	--	10/01/1988

Credit Date	Reference	Title	Item	Gen Cred	PR Cred	Tech Cred	Cycle	Date Posted
06/07/2019	**1903089N**	2019 Florida Liability Claims Conference	Live	14.5	0.0	3.5	12/31/2019	06/09/2019
07/14/2018	**1804348N**	37th Annual Seminar FL Municipal Attorneys Assn	Live	14.0	2.0	2.0	12/31/2019	07/16/2018
06/08/2018	**1802945N**	2018 Florida Liability Claims Conference	Live	14.5	0.0	0.0	12/31/2019	06/09/2018
10/01/2017	**1706554N**	2017 FDLA Annual Meeting	Live	7.5	2.5	0.0	12/31/2019	10/13/2017
06/15/2017	**1702193N**	Diversity for Success	Live	8.0	0.0	0.0	12/31/2019	06/19/2017
06/09/2017	**1703536N**	2017 FL Liability Claims Conference	Live	13.0	2.5	2.5	12/31/2019	06/12/2017
01/14/2017	**1608414N**	2017 Winter Seminar	Live	6.0	1.0	1.0	12/31/2019	01/24/2017

10/14/2016	**1607013N**	2015 Advanced Litigation Boot Camp	Live	7.5	2.5	0.0	12/31/2016	10/17/2016
09/23/2016	**1606233N**	2016 FDLA Annual Meeting	Live	8.0	1.0	0.0	12/31/2016	09/25/2016
07/30/2016	**1604416N**	35th Annual Seminar FL Municipal Attorneys Assoc.	Live	14.0	2.0	0.0	12/31/2016	07/31/2016
07/14/2016	**1604135N**	2016 CLM Boston Conference	Live	6.0	0.0	0.0	12/31/2016	07/18/2016
06/10/2016	**1602753N**	2016 Florida Liability Claims Conference	Live	14.5	2.5	0.0	12/31/2016	06/11/2016
01/29/2016	**1601436N**	Debunking the Reptile Theory	Webinar	2.0	0.0	0.0	12/31/2016	02/29/2016
01/16/2016	**1508751N**	2016 Winter Seminar	Live	6.0	1.0	0.0	12/31/2016	01/19/2016
10/30/2015	**1507262N**	2015 Advanced Litigation Boot Camp	Live	10.5	2.5	0.0	12/31/2016	10/31/2015
06/18/2015	**1504046N**	Effective Use of Daubert Motions to Exclude Expert	Webinar	1.5	0.0	0.0	12/31/2016	06/18/2015
06/05/2015	**1502172N**	2015 Florida Liability Claims Conference	Live	17.0	2.5	0.0	12/31/2016	06/06/2015
03/10/2015	**1309512N**	Managing the Risk of Legal Malpractice	Live	2.0	1.0	0.0	12/31/2016	03/11/2015
03/04/2015	**1500715N**	2015 CLM Central FL Chapter March 4th Event	Live	1.0	0.0	0.0	12/31/2016	03/09/2015
01/17/2015	**1407623N**	2015 Winter Seminar	Live	6.0	1.0	0.0	12/31/2016	01/20/2015
10/10/2014	**1407333N**	2014 Advanced Litigation Boot Camp	Live	10.5	3.0	0.0	12/31/2016	10/13/2014
07/26/2014	**1403953N**	33rd Annual Seminar FL Municipal Attorneys Assoc.	Live	14.0	2.0	0.0	12/31/2016	07/28/2014
06/06/2014	**1403150N**	2014 FL Liability Claims Conference - 18th Annual	Live	17.0	2.5	0.0	12/31/2016	06/08/2014
11/08/2013	**1307064N**	2013 Advanced Litigation "Boot Camp"	Live	8.0	2.0	0.0	12/31/2013	11/18/2013
06/07/2013	**1303169N**	2013 Florida Liability Claims Conf 17th Annual	Live	16.0	2.5	0.0	12/31/2013	06/11/2013
01/19/2013	**1201101N**	2013 FDLA Winter Seminar	Live	6.0	1.0	0.0	12/31/2013	02/13/2013
08/11/2012	**2239-3**	2012 FDLA ANNL MEETING		7.0	1.0	0.0	12/31/2013	08/13/2012
07/21/2012	**9445-2**	31ST ANNUAL SEMINAR		14.0	2.0	0.0	12/31/2013	07/23/2012
01/14/2012	**4370-2**	2012 WINTER SEMINAR		6.0	1.0	0.0	12/31/2013	02/13/2012
08/06/2011	**9019-1**	2011 ANNUAL MEETING		6.0	2.5	0.0	12/31/2013	08/08/2011
01/15/2011	**2918-1**	2011 WINTER SEMINAR		7.0	1.5	0.0	12/31/2013	01/28/2011
11/18/2010	**1410-1**	2010 YOUNG LAWYER BOOT CA		7.0	1.0	0.0	--	12/13/2010

08/07/2010	**7647-0**	2010 ANNUAL MEETING	Live	7.0	1.0	0.0	--	08/08/2010
07/31/2010	**6914-0**	FLORIDA MUNICIPAL ATTORNY	Live	14.0	2.0	0.0	--	08/01/2010
06/11/2010	**3527-0**	2010 FLORIDA LIABILITY	Live	19.0	1.0	0.0	--	06/14/2010
01/16/2010	**1971-0**	WINTER SEMINAR 2010	Live	7.0	2.0	0.0	--	03/03/2010
08/08/2009	**5806-9**	09 ANNUAL MEETING	Live	8.0	1.0	0.0	--	08/09/2009
05/29/2009	**3649-9**	09 FL DEF LIABILITY CLAIM	Live	15.5	0.0	0.0	--	06/15/2009
05/26/2009	**4203-8**	ADV EXPERT WITNESS DEPOSI	Live	7.0	1.0	0.0	--	05/26/2009
05/15/2009	**8630-8**	LEGAL ETHICS: SOLUTIONS	Live	4.0	4.0	0.0	--	05/20/2009
07/19/2008	**5817-8**	FLORIDA MUNICIPAL ATTORNE	Live	14.0	2.0	0.0	--	07/22/2008
03/07/2008	**9119-7**	CIVIL COURT JUDGES WANT	Live	4.0	0.0	0.0	--	07/22/2008
01/21/2008	**9735-7**	2008 WINTER SEMINAR	Live	7.0	0.0	0.0	--	07/22/2008

Tab 3 - Writing Sample – Rivera v. Lake County Motion to Dismiss for Fraud on the Court

Filing # 79848993 E-Filed 10/25/2018 10:30:31 AM

IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

CASE NO. 2016-CA-1078

CELESTE RIVERA and LUZ RIVERA,

Plaintiffs,

v.

LAKE COUNTY,

Defendant.

_____/

MOTION TO DISMISS FOR FRAUD ON THE COURT

The Defendant, LAKE COUNTY, by and through its undersigned attorneys, files and serves its Motion to Dismiss for Fraud on the Court and shows the Court as follows:

Statement of the Case and Facts

1. This is a civil action for negligence. The Plaintiffs' claims arise out of a collision between a motor vehicle operated by the Plaintiff, CELESTE RIVERA, and occupied by the Plaintiff, LUZ RIVERA, on the one hand, and a tree that fell onto the Plaintiff's vehicle from right-of-way allegedly owned by the Defendant, LAKE COUNTY.

2. The Plaintiff, CELESTE RIVERA, is claiming a variety of soft tissue injuries as a result of the aforementioned incident, including, but not limited to head contusions; bilateral leg contusions; bilateral arm contusions; lumbar

strain; cervical strain; thoracic strain; and chest pain. (Answers of Plaintiff, CELESTE RIVERA, to Interrogatories)

3. As part of discovery in this case, the deposition of the Plaintiff, CELESTE RIVERA, was taken on March 27, 2018. During the deposition of CELESTE RIVERA, the Plaintiff testified that she sustained injuries to her head, neck, and back as a result of the August 29, 2014, incident that is the subject of this lawsuit. (Deposition of CELESTE RIVERA, p. 7, lines 23-25; p. 8, lines 1-4, Excerpts has been filed as Exhibit "A" to this Motion and is part of the record in this cause.

4. During the deposition of CELESTE RIVERA, the Plaintiff also testified that she had previously been involved in another motor vehicle collision in July 2013. (Deposition of CELESTE RIVERA, p. 8, lines 5-17)

5. CELESTE RIVERA also testified that she sustained back injuries as a result of the July 2013 motor vehicle collision. (Deposition of CELESTE RIVERA, p. 10, lines 19-24)

6. CELESTE RIVERA also testified under oath that she had never received any medical or chiropractic treatment for headaches before the July 2013 collision. (Deposition of CELESTE RIVERA, p. 17, lines 17-25)

7. CELESTE RIVERA also testified under oath that she had never received any emergency room treatment for headaches before the July 2013 collision. (Deposition of CELESTE RIVERA, p. 18, lines 1-4)

8. CELESTE RIVERA also testified under oath that she had never received any medical or chiropractic treatment for neck pain before the July 2013 collision. (Deposition of Celeste Rivera, p. 18, lines 5-8)

9. Celeste Rivera testified under oath that she did not sustain any injury or experience any pain in her neck as a result of the July 2013 collision. (Deposition of Celeste Rivera, p. 20, line 21 – p. 21, line 1)

10. The aforementioned sworn testimony of CELESTE RIVERA is false. To the contrary, CELESTE RIVERA had a lengthy history of headaches, neck pain, radicular pain in her upper extremities, and numbness in her upper extremities long before July 2013.

11. CELESTE RIVERA was seen by Dr. Jeffrey Corack on June 7, 2010; September 27, 2010, and December 14, 2010, with complaints of neck pain. Among the other diagnostic impressions rendered by Dr. Corack was the diagnosis that CELESTE RIVERA was suffering from a sprained neck. Dr. Corack further indicated that CELESTE RIVERA had a "long history of neck and back pain." A copy of Dr. Jeffrey Corack's records has been filed as Exhibit "B" to this Motion and is part of the record in this cause.

12. Records of Northeast Florida Health Services reflect that CELESTE RIVERA was seen at Fish Memorial hospital on March 31, 2010, with a history of pain in her neck and low back. The records of Northeast Florida Health Services also show that CELESTE RIVERA was seen by that facility on March 10, 2011 and March 22, 2011, with complaints of neck pain. Those records also reflect that

CELESTE RIVERA was diagnosed with chronic neck pain on May 25, 2011. A copy of Northeast Florida Health Services' records has been filed as Exhibit "C" to this Motion and is part of the record in this cause.

13. Records of Florida Orthopedic Associates reflect that CELESTE RIVERA was seen at that facility on August 23, 2006; September 4, 2008; and September 18, 2008, with complaints of neck pain. Those records further reflect that CELESTE RIVERA was diagnosed as suffering from "cervicalgia" and cervical radiculopathy. A copy of Florida Orthopedic Associates' records has been filed as Exhibit "D" to this Motion and is part of the record in this cause.

14. Records of Jorge Davila Vélez, M.D., reflect that CELESTE RIVERA was seen by that physician in Puerto Rico on September 11, 2012, with complaints, inter alia, of neck pain. Those records further reflect that CELESTE RIVERA was diagnosed, inter alia, as suffering from "syndrome myofascial cervico lumbar." Those records further reflect that CELESTE RIVERA had limited range of motion in her cervical spine at the time of the examination. A copy Dr. Jorge Davila Vélez's records has been filed as Exhibit "E" to this Motion and is part of the record in this cause.

15. Records of René Capulong, M.D., reflect that CELESTE RIVERA was seen by that physician on March 17, 2010, with complaints of chronic back and neck problems. A copy Dr. René Capulong's records has been filed as Exhibit "F" to this Motion and is part of the record in this cause.

16. Records of Centro Medico Wilma N. Vazquez in Puerto Rico reflect that CELESTE RIVERA was seen as an emergency room patient at that facility on July 19, 2012, with complaints of neck and back pain. A copy of Centro Medico Wilman N. Vazquez's records has been filed as Exhibit "G" to this Motion and is part of the record in this cause.

17. Records of Lester Carrero, DC, reflect that CELESTE RIVERA was seen by that chiropractic physician from August 1, 2013 to March 2014, with persistent complaints of neck pain. A copy of Dr. Lester Carrero's records has been filed as Exhibit "H" to this Motion and is part of the record in this cause.

18. Records of Halifax Community Health Systems reflect that CELESTE RIVERA was issued a prescription for medication for migraine headaches on October 14, 2006. Records of Halifax Community Health Systems further reflect that CELESTE RIVERA was seen at that facility on January 3, 2007, with complaints of headaches, neck pain, shoulder pain, and upper back pain. A copy of Halifax Community Health systems' records has been filed as Exhibit "I" to this Motion and is part of the record in this cause.

19. The aforementioned sworn testimony goes to the heart of the Plaintiff's claim for damages in this action and is grounds for dismissal for fraud on the Court.

Memorandum of Law

As part of discovery in this action, the Defendant issued numerous subpoenas to obtain copies of CELESTE RIVERA's medical records. The records

obtained pursuant to subpoenas reflect that the Plaintiff's testimony that she never received treatment for headaches or neck pain prior to the August 2014 incident that is the subject of this lawsuit is false and fraudulent.

"The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when the plaintiff has perpetrated a fraud on the court ...." *Cox v. Burke*, 706 So.2d 43, 46 (Fla. 5th DCA 1998) (citing *Kornblum v. Schneider*, 609 So.2d 138, 139 (Fla. 4th DCA 1992)).

The scope of a trial court's authority to dismiss a cause of action as a sanction for a plaintiff's misconduct was outlined by the Fifth District Court of Appeals in *Cox:*

> The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). When reviewing a case for fraud, the court should "consider the proper mix of factors" and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. *Id*. at 1117-18. Because "dismissal sounds the 'death knell of the lawsuit,' courts must reserve such strong medicine for instances where the defaulting party's misconduct is correspondingly egregious." *Id*. at 1118.

706 So.2d at 46.

The *Cox* court concluded "where a party lies about matters pertinent to his own claim, or a portion of it, and perpetrates a fraud that permeates the entire proceeding, dismissal of the whole case is proper." *Id*. at 47 (citing *Savino v. Fla.*

Drive In Theatre Mgmt., Inc., 697 So.2d 1011 (Fla. 4th DCA 1997)). Indeed, dismissal is proper in such circumstances because "[t]he integrity of the civil litigation process depends on truthful disclosure of facts." *Id*.

Here, CELESTE RIVERA has asserted claims for a variety of soft tissue injuries, including headaches and neck pain. She denied any history of headaches or neck pain prior to the August 2014 incident that is the subject of this lawsuit. Based upon the ample record in this case, dismissal of the personal injury claims of CELESTE RIVERA would be an appropriate sanction. *See Bob Montgomery Real Estate v. Djokic*, 858 So.2d 371, 374 (Fla. 4th DCA 2003) (holding that the dismissal of a plaintiff's action for fraud on the court is reviewed under an abuse of discretion standard and the trial court's findings will not be disturbed upon a clear showing of fraud, pretense, collusion, or similar wrongdoing); *Metro. Dade v. Martinsen*, 736 So.2d 794, 796 (Fla. 3d DCA 1999) (Sorondo, J., concurring) (stating that "few crimes ... strike more viciously against the integrity of our system of justice than the crime of perjury," and that based upon Martinsen's misrepresentations and omissions regarding her medical history during the course of discovery, she had forfeited her right to proceed); *Mendez v. Blanco*, 665 So.2d 1149, 1150 (Fla. 3d DCA 1996) (affirming trial court's dismissal of the plaintiff's complaint where the plaintiff committed serious misconduct by repeatedly lying under oath); *see also Romero v. Harbin*, 876 So.2d 1, 1 (Fla. 3d DCA 2004); *Long v. Swofford*, 805 So.2d 882, 884 (Fla. 3d DCA 2001); *Rosenthal v. Rodriguez*, 750 So.2d 703, 704 (Fla. 3d DCA 2000).

WHEREFORE, for the foregoing reasons, Defendant, LAKE COUNTY, respectfully request this Court enter an Order dismissing the claims of CELESTE RIVERA for fraud on the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court by using Florida Statewide E-Portal filing system that will forward an electronic copy of same to the attached Service List.

*/s/ Robert E. Bonner*_____
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Tab 4 - Writing Sample – Iraheta v. LSREF Motion for Summary Judgment

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2013-CA-006650-O

PEDRO ANTONIO IRAHETA, legal guardian, on behalf of CARLOS IRAHETA, an individual, and BENILDE FATIMA GONCALVES, natural mother, on behalf of KEILA IRAHETA and CARLOS ANTONIO IRAHETA, natural children of CARLOS IRAHETA,

Plaintiffs,

vs.

LSREF ORANGE OPS (ORLANDO) LLC, a Foreign Corporation, d/b/a INTERNATIONAL PALMS RESORT AND CONFERENCE CENTER, FELCOR HOTEL ASSET CO., LLC, a Foreign Corporation, d/b/a HOLIDAY INN ORLANDO I-DRIVE, and INNER CIRCLE MANAGEMENT, LLC,

Defendants.
_____/

LSREF ORANGE OPS (ORLANDO) LLC, a Foreign Corporation, d/b/a INTERNATIONAL PALMS RESORT AND CONFERENCE CENTER,

Cross-Plaintiffs,

vs.

INNER CIRCLE MANAGEMENT, LLC,

Cross-Defendant.
_____/

RENEWED MOTION FOR SUMMARY JUDGMENT OF DEFENDANT, INNER CIRCLE MANAGEMENT, LLC

Pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, the Defendant, INNER CIRCLE MANAGEMENT, LLC, files and serves its Renewed Motion for Summary Judgment in its favor and against the Plaintiffs, PEDRO ANTONIO IRAHETA, legal guardian, on behalf of CARLOS IRAHETA, an individual, and BENILDE FATIMA GONCALVES, natural mother, on behalf of KEILA IRAHETA and CARLOS ANTONIO IRAHETA, natural children of CARLOS IRAHETA. In support thereof, the Defendant states that the pleadings, depositions and other documents filed in this action show there is no genuine issue as to any material fact. Consequently, the Defendant is entitled to summary judgment as a matter of law. Specifically, the Defendant states:

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. This is a civil action arising from a June 9, 2011 incident in which Carlos Iraheta sustained injuries while in the course and scope of his employment with Laiton Incorporated. *See* Second Amended Complaint, ¶¶ 2, 12, 13, 27, 28, 48, 49, 63, 64, 81, 82, 98, 99.

2. On June 9, 2011, LSREF ORANGE OPS (ORLANDO) LLC (hereinafter "LSREF") was the owner of the International Palms Resort & Conference Center (hereinafter "THE PALMS"), located at 6515 International Drive, Orlando, Florida. *See* Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

3. LSREF entered into a contract with INNER CIRCLE to manage and operate THE PALMS on behalf of LSREF. *See* Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

4. Pursuant to that agreement, INNER CIRCLE was responsible for directing, supervising, managing, operating, and maintaining the hotel. LSREF did not maintain any employees on site at THE PALMS, but instead relied upon INNER CIRCLE for the day-to-day operation of the hotel. *See* Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

5. On June 9, 2011, THE PALMS was undergoing remodeling and renovations. In order to effectuate those renovations, hotel furniture was being removed from the various hotel rooms and relocated to storage containers located on the hotel premises. *See* Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

6. INNER CIRCLE requested temporary labor to assist with the relocation of the hotel furniture as stated above. *See*, Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

7. LSREF had a contract with Laiton, Inc. (hereinafter "Laiton") to provide workers on an as-needed basis. This contract will hereinafter be referred to as the "temporary labor contract." Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J"; Deposition of Miguel Laiton, pages 11-12 and 27, attached hereto as Exhibit "K"; Deposition of Maricarmen Laiton, Pages 24-25, 34, attached hereto as Exhibit "L".

8. Pursuant to the temporary labor contract, Laiton provided worker's compensation insurance to cover the workers sent to LSREF. Deposition of Miguel Laiton, Pages 11-12, and 27.

9. Laiton Incorporated was in the business of providing temporary laborers to other entities, to include LSREF, on an as needed basis. Deposition of Miguel Laiton, Pages 14-15.

10. Laiton's business model for providing temporary laborers was to charge the receiving entity to whom the temporary labor was sent an hourly rate for each hour the temporary labor worked for the receiving entity. This hourly rate exceeded the hourly rate of pay that Laiton paid to the temporary laborer, in order to cover administrative costs, profit, and worker's compensation insurance. Deposition of Miguel Laiton, Pages 14-15.

11. Laiton workers supplied to LSREF were paid by Laiton at an hourly rate for the labor supplied and Laiton would in turn pay the individual workers an hourly compensation for the activities performed by each respective laborer. Deposition of Miguel Laiton, Pages 14-15.

12. In furtherance of its agreement with LSREF, Laiton purchased Worker's Compensation and Employers Liability Policy, Policy No.: GWBR333000040-110, for the policy period from 02/23/2011 to 02/23/2012. Deposition of Miguel Laiton, Pages 11-12, 27.

13. On June 9, 2011, Carlos Iraheta was a temporary worker covered by the Worker's Compensation and Employers Liability Policy, Policy No.: GWBR333000040-110, for the policy period from 02/23/2011 to 02/23/2012 obtained by Laiton.

14. On or about June of 2011, INNER CIRCLE contacted Laiton on behalf of LSREF and asked for a certain number of workers to be sent to THE PALMS over the course of several days to assist with the relocation of the hotel furniture. Laiton sent workers each day to perform this work, including CARLOS IRAHETA and Yaroslav Dayutov. Deposition of Miguel Laiton, Page 27.

15. Each day CARLOS IRAHETA and Yaroslav Dayutov reported to Gregory Grunder. Deposition of Jerry Merta, Pages 17, 27 and 45, attached hereto as Exhibit "M".

16. Gregory Grunder was the Chief Engineer at THE PALMS, who was an employee of INNER CIRCLE. Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

17. The activities of the Laiton workers, including CARLOS IRAHETA and Yaroslav Dayutov, were at the complete discretion and direction of INNER CIRCLE since, pursuant to Laiton's contract with LSREF, its workers were provided to accomplish whatever INNER CIRCLE deemed necessary on any particular date. Affidavit of Stephen L. Nalley, attached hereto as Exhibit "J".

18. On June 9, 2011, Mr. Grunder instructed CARLOS IRAHETA, Yaroslav Dayutov and the other Laiton workers to relocate furniture from THE PALMS hotel

rooms to temporary storage trailers located on the property. Deposition of Jerry Merta, Page 27.

19. The Laiton workers loaded the furniture from various rooms of THE PALMS hotel onto the bed of a pick-up truck so that the furniture could be transported to one of the storage trailers located in the parking lot of THE PALMS. Deposition of Jerry Merta, Pages 32, 45-47.

20. Yaroslav Dayutov operated the pick-up truck. CARLOS IRAHETA and two other Laiton workers were situated in the bed of the pick-up truck along with the furniture. Deposition of Jerry Merta, Pages 60, 83 and 88.

21. Yaroslav Dayutov drove the pick-up truck around a corner in the parking lot. At that time, CARLOS IRAHETA was standing in the bed at the rear passenger side of the pick-up truck. Deposition of Jerry Merta, Page 103.

22. CARLOS IRAHETA lost his hold on the pick-up truck as it made the turn, causing him to fall from the vehicle and sustain injuries. Deposition of Jerry Merta, Page 103.

23. Following the incident which is the subject of this litigation, Carlos Iraheta, or his representative, asserted a worker's compensation claim against Laiton Incorporated and its workers compensation carrier. Petition for Benefits dated September 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "A"; Petition for Benefits dated September 30,

2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "B"; Petition for Benefits dated December 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "C"; Petition for Benefits dated April 10, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "D"; Petition for Benefits dated May 21, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "E"; Petition for Benefits dated July 9, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "F". In each and every one of the Petitions for Benefits, it was alleged that Carlos Iraheta was an employee of Laiton Incorporated. See Exhibits B, C, D, E and F.

24. During the prosecution of the claims for workers compensation benefits, the claimant, Carlos Iraheta, on the one hand, and the employer/carrier, Laiton Incorporated and Guarantee Insurance Company, on the other hand, entered into a number of Pretrial Stipulations which were adopted as Pretrial Orders by the Judge of Compensation Claims. Uniform Statewide Pretrial Stipulation and Order dated January 30, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "G"; Uniform Statewide Pretrial Stipulation and Order dated September 14, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "H"; Uniform Statewide Pretrial Stipulation and Order dated October 23, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "I". In each and every one of those Pretrial Stipulations and Orders, it was stipulated and agreed that there was an employer/employee relationship between Carlos Iraheta, on the one hand, and Laiton Incorporated, on the other hand, at the time of the June 9, 2011 incident in which Carlos Iraheta sustained his injuries. It was further stipulated and agreed by Carlos Iraheta, on

the one hand, and Laiton Incorporated, on the other hand, that there was workers compensation insurance available at the time of the accident and that the accident and resulting injuries were compensable. *See* Exhibits G, H and I.

25. As a result of the incident which is the subject of this litigation, Carlos Iraheta obtained worker's compensation benefits from the carrier who provided the worker's compensation insurance to Laiton Incorporated for the injuries that Carlos Iraheta sustained as a result of the incident which is the subject of this litigation. Second Amended Complaint, ¶¶ 13, 28, 49, 64, 82, 99.

26. On November 20, 2014, Plaintiffs filed their Second Amended Complaint. The Second Amended Complaint seeks damages from the Defendants, including INNER CIRCLE MANAGEMENT, LLC, under a variety of tort theories.

LEGAL ARGUMENT

I. Iraheta's Claims Against Inner Circle are Barred by the Exclusive Remedy Provisions of Florida Statutes § 440.11.

Pursuant to the exclusive remedy provisions of Florida Statutes § 440.11, INNER CIRCLE is immune from liability in tort with respect to the claims asserted on behalf of Carlos Iraheta. This case arises out of an incident that took place on June 9, 2011. On that date, the rights and liabilities of the respective parties were governed by the provisions of Florida Statutes § 440.11 (2010). In that regard, the statute stated, in pertinent part, as follows:

40.11 Exclusiveness of liability.—

(1) The liability of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:

*****

(2) The immunity from liability described in subsection (1) shall extend to an employer and to each employee of the employer which utilizes the services of the employees of a help supply services company, as set forth in Standard Industry Code Industry Number 7363, when such employees, whether management or staff, are acting in furtherance of the employer's business. An employee so engaged by the employer shall be considered a borrowed employee of the employer, and, for the purposes of this section, shall be treated as any other employee of the employer. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company.

A. Florida Courts Extend Workers Compensation Tort Immunity to Businesses using a "Help Supply Services Company."

Florida Statutes § 440.11 (2010) clearly extends statutory immunity from liability in tort to employers who use employees of temporary staffing or employment agencies if the employee is acting in furtherance of the employer's business. *See Booher v. Pepperidge Farm, Inc*., 468 So.2d 985 (Fla. 1985) (special employee was barred from recovering tort damages for compensable on-the-job injury from special employer where general employer in business of providing temporary help provided workers' compensation coverage); *B.E.T. Plant Services, Inc. v. Dyer,* 678 So.2d 841 (Fla. 3rd

DCA 1996); *Parker v. State Dep't of Health and Rehabilitative Services,* 649 So.2d 361 (Fla. 1st DCA 1995).

Florida courts have consistently held that employees of a temporary employment agency are barred from bringing tort actions against the employer (called "special employer" by the courts) when the employee is a borrowed servant. *See Fossett v. Southeast Toyota Dist., LLC,* 60 So.3d 1155 (Fla. 1st DCA 2011); *Fleming v. Moreira*, 690 So. 2d 1367 (Fla. 3rd DCA 1997); *Rumsey v. Eastern Distribution, Inc.*, 445 So.2d 1085 (Fla. 1st DCA 1984).

In *Rumsey v. Eastern Distribution, Inc.*, 445 So.2d 1085 (Fla. 1st DCA 1984), the court affirmed the entry of summary judgment in favor of the special employer, finding that the plaintiff was a borrowed servant. *Id*. In *Rumsey*, as in this case, the plaintiff was a labor pool employee who was hired by Right Hand Man of Florida. Right Hand Man then sent the plaintiff to Eastern Distribution for one day, cleaning the interior of a warehouse. *Id*. at 1086. While cleaning the warehouse, Rumsey was under the direction of Eastern's supervisors. *Id*. Additionally, all necessary equipment was supplied by Eastern and Rumsey's work was controlled by Eastern during the hours that Rumsey worked at Eastern's warehouse. *Id*. Rumsey was injured while working for Eastern at their warehouse. Rumsey then filed a claim for workers compensation benefits against Right Hand Man and collected those benefits from its workers compensation carrier. *Id*. Rumsey also filed a tort action against Eastern. *Id*.

Eastern moved for summary judgment, claiming that Ramses tort claim was barred by the exclusive remedy provisions of Florida Statute § 440.11. The trial court agreed and

granted summary judgment in favor of Eastern. In doing so, the trial court held that Rumsey was Eastern's "borrowed servant", and such status precluded a tort action against Eastern. Rumsey then appealed.

On appeal, the First District Court of Appeal rejected Rumsey's argument and affirmed the summary judgment in favor of Eastern. In doing so, the appellate court noted Rumsey's argument ignored the large body of factually indistinguishable cases involving labor pools in which the employee has been invariably found to be a borrowed servant and thus precluded from maintaining a tort action against the special employer. *Id*. at 1086-1087.

The issue of the applicability of workers compensation tort immunity to a claim asserted by an injured worker from the temporary agency was later addressed by the Third District Court of Appeal in Fleming Co., Inc. v. Moreira, 697 So.2d 1367 (Fla. 3rd DCA 1997). In that action, the plaintiff, Moreira, was hired by Regency Staffing, a temporary labor supply company. Regency staffing then assigned Moreira to work for Fleming. Fleming was charged a fee by Regency for the use of its temporary employees. Regency also contractually surrendered all control regarding the details of the temporary worker's employment to Fleming.

Moreira was injured by a forklift while working at Fleming's plant. He filed a claim for workers' compensation benefits and collected workers' compensation benefits from Regency before filing a complaint seeking damages from Fleming under tort theories.

Fleming asserted that the workers' compensation statute barred the action and both parties moved for summary judgment on the issue of immunity. In denying both motions, the trial court found Fleming was not entitled to civil suit immunity, because there remained genuine issues of material fact pertaining to the borrowed servant/workers' compensation defense.

Following the denial of its motion for summary judgment on the workers compensation immunity issue, Fleming took an appeal. On appeal, the Third District Court of Appeals reversed. *Id*.

In reversing the denial of Fleming's motion for summary judgment on the workers compensation tort immunity issue, the court noted that Florida workers' compensation law extends an employer's immunity from tort liability to the work related injuries of employees obtained through a "help supply services company." *Id*. at 1368. The court further noted that Florida courts have consistently interpreted this statute to apply to companies hiring workers through temporary employment agencies. *See B.E.T. Plant Services, Inc. v. Dyer,* 678 So.2d 841 (Fla. 3rd DCA 1996); *Parker v. State Dep't of Health and Rehabilitative Services,* 649 So.2d 361 (Fla. 1st DCA 1995). *Id*.

Because Regency was in the business of supplying temporary help and provided workers' compensation coverage, the court held that Regency clearly fell under the terminology of Section 440.11(2). Moreover, Moreira consented to Fleming's control by using Fleming's equipment, asking Fleming's permission for overtime authorization, and accepting Fleming's orders over how and where to work. Moreover, the court noted that Moreira worked in furtherance of Fleming's business, and exclusively for Fleming after

being assigned there. Finally, the court noted that Regency relinquished all control over Moreira's work while he was at Fleming.

Since no one had the power to control Moreira except Fleming, and since Moreira worked exclusively for Fleming and consented to its control, Moreira was for all intents and purposes a Fleming employee, and should have been treated as such under the statute. Accordingly, the court held that as a temporary employee covered by his general employer's workers' compensation, but acting under the special employer's exclusive authority and control, Moreira was a borrowed servant of Fleming and thereby precluded by the Workers' Compensation Act from maintaining a tort action against Fleming. *Id.* at 1369.

Despite the clear precedent insulating employers to use the services of help supply services companies from liability in tort, the courts have continued to address this issue on a regular basis. In *Fossett v. Southeast Toyota Distributors, LLC*, 60 So.3d 1155 (Fla. 1st DCA 2011), a Florida appellate court was once again called upon to address the issue of the exclusive remedy provisions of Florida Statutes § 440.11 vis-à-vis a temporary employment agency. In *Fossett*, the plaintiff was a temporary laborer assigned to Southeast Toyota Distributors by Adecco, a help supply services company. As an Adecco employee assigned to Southeast Toyota Distributors, Fossett was assigned to stand near the exit of an automated car wash on Southeast Toyota Distributors' property, where she was to get into cars after they had been washed and drive them to an adjacent lot. While doing so, she was run over by a car, resulting in serious injury.

Following her injury, Fossett claimed workers' compensation benefits from Adecco. Fossett eventually settled her claim for workers' compensation benefits. After settling her workers compensation claim, Fossett sued Southeast Toyota Distributors. In her lawsuit, Fossett claimed that the negligence of Southeast Toyota Distributors was the cause of her injury. Southeast Toyota Distributors asserted the affirmative defense of workers compensation exclusive remedy and moved for summary judgment. The trial court agreed and entered summary judgment in favor of Southeast Toyota Distributors.

On appeal, Fossett urged that the exclusive remedy provisions of Florida Statutes § 440.11 did not apply, and she was under the supervision of another Adecco employee at the time of the accident. The court rejected this argument.

In rejecting Fossett's argument, the court noted that the tort liability of Southeast Toyota Distributors was governed by the clear provisions of Florida Statutes § 440.11. *Id*. at 1156-1158. In that regard the court noted that Section 440.11 provided, in relevant part:

> (1) The liability [for workers' compensation benefits] of an employer prescribed in s. 440.10 shall be exclusive and in place of all other liability, including vicarious liability, of such employer to any third-party tortfeasor and to the employee, the legal representative thereof... and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except as follows:
>
> (a) If an employer fails to secure payment of compensation as required by this chapter....
>
> (b) When an employer commits an intentional tort that causes the injury or death of the employee....
>
> ....

> (2) The *immunity from liability* described in subsection (1) *shall extend to an employer* and to each employee of the employer *which utilizes the services of the employees of a help supply services company,* as set forth in Standard Industry Code Industry Number 7363, when such employees, whether management or staff, are acting *in furtherance of the employer's business*. An employee so engaged by the employer shall be considered *a borrowed employee of the employer,* and, for the purposes of this section, *shall be treated as any other employee of the employer*. The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company.

Id. at 1156-1157. The court further noted that OSHA Standard Industry Code Industry Number 7363 defined a "help supply services company" as an entity "primarily engaged in supplying temporary or continuing help on a contract or fee basis." *St. Lucie Falls Prop. Owners Ass'n v. Morelli,* 956 So.2d 1283, 1285 (Fla. 4th DCA 2007) (citing *Sagarino v. Marriott Corp.,* 644 So.2d 162, 165 (Fla. 4th DCA 1994)).

After discussing the relevant Florida statute and OSHA Standard Industry Code classification, the court further noted that the OSHA standard in effect on the date the statute was controlling. *Id*. at 1157. *See also State v. Camil,* 279 So.2d 832, 834 (Fla.1973) (holding that a statute cannot prospectively incorporate by reference subsequently enacted federal law or subsequently adopted federal administrative rules). The court then noted that on the date section 440.11(2) took effect—October 1, 1989, *see* ch. 89–289, § 8, at 1749–50, 1786, Laws of Fla.—OSHA Standard Industry Code Industry Number 7363 listed employee leasing services, help supply services, temporary help services, and labor pools as examples of help supply services companies. *See* Office of Mgmt. & Budget, Exec. Office of the President, *Standard Industry Classification Manual* (1987), available at http://osha.gov/pls/imis/sic_dmanual.html. "The help

supplied is always on the payroll of the supplying establishments, but is under the direct or general supervision of the business to whom the help is furnished." *Id*. at 1157, citing *Owners Ass'n v. Morelli,* 956 So.2d 1283, 1285 (Fla. 4th DCA 2007) and *Sagarino v. Marriott Corp.,* 644 So.2d 162, 165 (Fla. 4th DCA 1994).

The court then indicated that what the exclusive remedy provisions of Florida Statutes § 440.11 contemplates, in incorporating OSHA Standard Industry Code Industry Number 7363, is the legal power to direct the details of the work of the help supply services company employee. Consequently, the issue was not whether or not a Southeast Toyota Distributors manager actually provided direct supervision to Fossett at the time of her injury, but whether Southeast Toyota Distributors or its designee had the legal right or power to control the details of her work.

Addressing the issue of control, the court noted that the contract between Southeast Toyota Distributors and Adecco plainly stated that "services to be performed by employees provided by [Adecco] will be performed under the direction, supervision and control of [SET]." As such, the contract unequivocally gave Southeast Toyota Distributors the right to control Fossett's work. Even though Fossett testified on deposition that she was paid by Adecco, that she never received instruction from SET on how to do her job, and that her personal supervisor was an Adecco employee, the legal right of control the contract conferred on Southeast Toyota Distributors was dispositive. Consequently, Southeast Toyota Distributors was entitled to immunity.

The issue of the applicability of the exclusive remedy provisions of Florida Statutes § 440.11 to a business utilizing the services of workers provided by a help supply

services company was most recently addressed by the Third District Court of Appeals in *Baker v. Airguide Mfg., LLC*, 151 So.3d 38 (Fla. 3rd DCA 2014). In *Baker*, the plaintiff was hired by a temporary agency, Pacesetter, in January 2008. For the first six months of her employment with Pacesetter, Baker was placed with various Carmax locations. Subsequently, Pacesetter placed Baker and several other Pacesetter employees with Airguide, an air conditioning duct manufacturer. After working at Airguide for approximately 2 years, Baker sustained an on-the-job injury to her right index finger.

Baker successfully filed a workers' compensation claim with Pacesetter after her accident, and she was reimbursed for her injury based on the statutorily prescribed reimbursement amount. Baker then filed a tort lawsuit against Airguide.

During the course of the litigation, Airguide asserted that it was entitled to immunity pursuant to the exclusive remedy provisions of Florida Statutes § 440.11(2). Airguide eventually moved for summary judgment on that issue and the court agreed that Airguide was entitled to statutory immunity. Baker then appealed.

On appeal, Baker urged that there were genuine issues of material fact which precluded summary judgment on any common law theory of "borrowed servant." The court noted that although too late-filed documents which contradicted Baker's deposition testimony may have potentially created a dispute as to whether Airguide sufficiently established that it was entitled to immunity under the common law "borrowed servant" doctrine, the late filed documents nonetheless were of no impact as to whether Airguide is entitled to immunity as a "help supply services company" under section 440.11(2) of the Florida Statutes.

With respect to the exclusive remedy provisions of Florida Statutes § 440.11, the court noted that situations in which the immunity is based upon a common law borrowed servant theory, the issue of immunity requires a detailed, three-prong inquiry, including proof of either an express or implied contract between the special employer and the claimant and details regarding the relative control the general employer and special employer exercised over the employee. *Suarez v. Transmontaigne Servs., Inc.,* 127 So.3d 845, 847–48 (Fla. 4th DCA 2013). However, in cases in which the immunity is based upon the use of a help supply service company, the special employer is only required to demonstrate that the employee was acquired from a help supply service company. *Id*. at 42; *Hazealeferiou v. Labor Ready,* 947 So.2d 599, 603 (Fla. 1st DCA 2007). Therefore, because Baker was provided to Airguide by a help supply services company, the court did not need to engage in a common law borrowed servant analysis and Airguide was entitled to immunity from suit. Rather, by engaging the services of a help supply services company which had secured the payment of workers compensation benefits to Baker, Airguide was entitled to statutory immunity by virtue of the provisions of Florida Statute § 440.11 (2). *Id*.

Federal courts applying Florida law have reached similar results with respect to extending workers compensation tort immunity to businesses utilizing workers supplied by a "help supply services" company. *Toucet v. Future Foam Carpet Cushion Co.,* 2012 WL 3143845, (M.D. Fla 2012); *Young v. Cargill Juice North America, Inc*., 2008 WL 5235133(M.D. Fla 2008).

The legal arguments raised by the plaintiff in *Toucet v. Future Foam Carpet Cushion Co.,* 2012 WL 3143845, (M.D. Fla 2012) are strikingly similar to the legal arguments raised by Iraheta in this action. In *Toucet,* United States District Court for the Middle District of Florida granted summary judgment in favor of a business utilizing the services of temporary labor provided by a help supply services company. Toucet, like Mr. Iraheta, was an unskilled laborer employed by Spartan Staffing, LLC. Toucet was assigned by Spartan Staffing to work at the Orlando factory of Future Foam Carpet Cushion Co. While working at a foam peeling machine at Future Foam's plant, the machine's blade cut Toucet, causing him significant injuries.

After Toucet was injured, Spartan Staffing provided him with workers' compensation payments and benefits. Nonetheless, Toucet pursued a third-party tort claim against Future Foam. Future Foam asserted that it was immune from liability in tort by virtue of the exclusive remedy provisions of Florida Statutes § 440.11(2). Accordingly, Future Foam moved for summary judgment on Toucet's claims.

In consideration of Future Foam's motion for summary judgment, the court noted that Florida's Workers' Compensation Law is the exclusive remedy available to an employee who suffers a workplace injury. As such, the court noted that an employer that secures workers' compensation payments for an injured employee is immune from suit based on the injury. The court further noted that statutory immunity also applies to employers that use the services of help supply services such as employee leasing services, temporary help services, and labor pools. Relying upon *St. Lucie Falls Prop. Owners Ass'n v. Morelli,* 956 So.2d 1283, 1285 (Fla. 4th DCA 2007) the court noted that a "help

supply services companies" is defined by Occupational Safety and Health Administration Standard Industry Code Industry Number 7363 as:

> Establishments primarily engaged in supplying temporary or continuing help on a contract or fee basis. The help supplied is always on the payroll of the supplying establishments, but is under the direct or general supervision of the business to whom the help is furnished.

The court then stated that employers qualify for statutory immunity if: (1) they utilize the services of a help supply services company employee; (2) the employee was injured while "acting in furtherance of the employer's business"; and (3) either the borrowing employer or the help supply services company secured payment of compensation for the injured employee.

Toucet argued that Future Foam failed to establish statutory immunity because Spartan Staffing was not a licensed employee leasing company and could not guarantee that it will be able to continue providing compensation to Toucet in the future. Toucet also argued that Future Foam failed to establish immunity under Florida's common law borrowed servant doctrine, the elements of which are that (1) there was a contract for hire between the special employer and the employee; (2) the employee was performing work for the special employer at the time of the injury; and (3) the special employer had the power to control the details of the employee's work. Finally, Toucet argued that Spartan Staffing was not entitled to tort immunity because it was not insured for purposes of workers' compensation.

The court rejected the plaintiff's arguments, as the clear language of Florida Statutes § 440.11(2) does not require a help supply services company to be specially

licensed as such. Likewise, the statute does not require a company that pays workers' compensation to prove its ability to continue providing compensation in the future. The court also rejected the plaintiff's reliance upon common law borrowed servant, as workers' compensation immunity can be established pursuant to statute or Florida's common law borrowed servant doctrine; it is not necessary to prove immunity under both. Because, Future Foam had argued only statutory immunity, and the court did not deem it necessary to undertake its own inquiry into whether the elements of the borrowed servant doctrine are satisfied. Finally, the court noted that Section 440.11(2) does not require a company that pays workers' compensation to prove that it is insured for the purposes of workers' compensation. Instead, the court noted that the only requirements for statutory immunity are the elements given in Fla. Stat. § 440.11(2). The undisputed facts established each of these elements. First, it was undisputed that Spartan Staffing was a help supply company; that Toucet was Spartan Staffing's employee; and that Future Foam utilized Toucet's services. Second, it was undisputed that Toucet was injured while acting in furtherance of Future Foam's business. Finally, it was undisputed that Spartan Staffing secured payment of compensation for Toucet after his injury. Accordingly, the court granted Future Foam's motion for summary judgment

B. Laiton Incorporated was a "Help Supply Services" Company.

The undisputed facts in this case clearly establish that Laiton Incorporated was a "help supply services" company. At the time of this incident, Florida Statutes § 440.11(2) relied on OSHA Standard Industry Code Number 7363, titled "Help Supply Services," to

determine what is and what is not a help supply services company. Standard Industry Code Number 7363 provided the following description:

> Establishments primarily engaged in supplying temporary or continuing help on a contract or fee basis. The help supplied is always on the payroll of the supplying establishments, but is under the direct or general supervision of the business to whom the help is furnished. Establishments which provide both management and staff to operate a business are classified according to the type of activity of the business. Establishments primarily engaged in furnishing personnel to perform a range of services in support of the operation of other establishments are classified in Industry 8744, and those supplying farm labor are classified in Agriculture, Industry 0761.
>
> - Employee leasing service;
> - Fashion show model supply service;
> - Help supply service;
> - Labor pools;
> - Manpower pools;
> - Modeling service;
> - Office help supply service;
> - Temporary help service; and
> - Usher service

The plain language and grammatical structure of this code are key. The first sentence in the paragraph provides that help supply services companies are "[e]stablishments primarily engaged in supplying temporary or continuing help on a contract or fee basis." The undisputed record evidence clearly demonstrates that Laiton was a company "primarily engaged in supplying temporary or continuing help on a

contract or fee basis" as contemplated by OSHA Standard Industry Code Number 7363. Laiton Incorporated was in the business of "staffing." (Maricarmen Laiton deposition, p. 6, lines 13-22; Miguel Laiton deposition, p. 8, lines 1-9) Much of the staffing services provided by Laiton Incorporated involved providing workers for hotels. (Maricarmen Laiton deposition, p. 6, lines 13-22; Miguel Laiton deposition, p. 8, lines 1-9) Hotel managers would call Laiton Incorporated requesting staff and Laiton Incorporated would find the person or persons meeting the hotel's requirements and send personnel to the hotel. (Maricarmen Laiton deposition, p. 8, lines 6-14; Miguel Laiton deposition, p. 8, line 14 - page 9, line 11) Those workers were provided on a temporary basis. (Miguel Laiton deposition, p. 9, lines 8-23)

The business requesting the temporary staffing personnel would keep track of the hours worked by the temporary laborers and would pay Laiton Incorporated for the hours worked. (Miguel Laiton deposition, p. 14, line 16 - page 15, line 5) Laiton would then pay the temporary workers. (Miguel Laiton deposition, p. 14, line 16 - page 15, line 5)

This is also supported by the Agreement between LSREF and Laiton for temporary labor. That agreement provided that LSREF would pay Laiton an hourly rate for labor, and that Laiton would then pay the individual workers hourly compensation. The contract also provided that the labor is provided to accomplish the work deemed necessary by Inner Circle. Therefore, it is undisputed that Laiton Incorporated was a "help supply services" company.

C. There is no Requirement that Laiton Incorporated be Licensed in Order to Qualify as a "Help Supply Services" Company.

The Plaintiff has asserted that Laiton Incorporated cannot be a "help supply services" company because it was never licensed as such. This argument is disingenuous, as there is absolutely no requirement that a business be licensed as a "help supply services" company in order to qualify as such. In fact, this very argument was rejected by the United States District Court for the Middle District of Florida in *Toucet v. Future Foam Carpet Cushion Co.,* 2012 WL 3143845, (M.D. Fla 2012), in which the court held that the clear language of Florida Statutes § 440.11(2) does not require a help supply services company to be specially licensed as such. Therefore, the existence or nonexistence of a license to operate as a "help supply services" company is a nonfactor.

D. Carlos Iraheta was an Employee of Laiton Incorporated at the Time of the Incident That Is the Subject of This Lawsuit.

Plaintiff has attempted to avoid the exclusive remedy provisions of Florida Statutes § 440.11(2) by claiming that Carlos Iraheta was an independent contractor and not an employee of Laiton Incorporated. This is ridiculous. Florida Statutes § 440.02(15) defines "employee" as follows:

> (a) "Employee" means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors.
>
> ******
>
> (d) "Employee" does not include:
>
> 1. An independent contractor who is not engaged in the construction industry.

a. In order to meet the definition of independent contractor, at least four of the following criteria must be met:

(I) The independent contractor maintains a separate business with his or her own work facility, truck, equipment, materials, or similar accommodations;

(II) The independent contractor holds or has applied for a federal employer identification number, unless the independent contractor is a sole proprietor who is not required to obtain a federal employer identification number under state or federal regulations;

(III) The independent contractor receives compensation for services rendered or work performed and such compensation is paid to a business rather than to an individual;

(IV) The independent contractor holds one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation;

(V) The independent contractor performs work or is able to perform work for any entity in addition to or besides the employer at his or her own election without the necessity of completing an employment application or process; or

(VI) The independent contractor receives compensation for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement, unless such contractual agreement expressly states that an employment relationship exists.

b. If four of the criteria listed in sub-subparagraph a. do not exist, an individual may still be presumed to be an independent contractor and not an employee based on full consideration of the nature of the individual situation with regard to satisfying any of the following conditions:

(I) The independent contractor performs or agrees to perform specific services or work for a specific amount of money and controls the means of performing the services or work.

(II) The independent contractor incurs the principal expenses related to the service or work that he or she performs or agrees to perform.

(III) The independent contractor is responsible for the satisfactory completion of the work or services that he or she performs or agrees to perform.

(IV) The independent contractor receives compensation for work or services performed for a commission or on a per-job basis and not on any other basis.

(V) The independent contractor may realize a profit or suffer a loss in connection with performing work or services.

(VI) The independent contractor has continuing or recurring business liabilities or obligations.

(VII) The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

Carlos Iraheta did not meet any of the criteria listed in Florida Statutes § 440.02(15) to qualify as an independent contractor. He did not maintain a separate business with his own work facility, truck, equipment, materials, or similar accommodations. He did not maintain or apply for a federal employer identification number. The compensation paid by Laiton Incorporated was paid directly to Carlos Iraheta as an individual and not to a business. Carlos Iraheta did not hold one or more bank accounts in the name of the business entity for purposes of paying business expenses or other expenses related to services rendered or work performed for compensation. Carlos Iraheta did not work or show any ability to perform work for any entity in addition to or besides Laiton Incorporated at his own election without the necessity of completing an employment application or process. Finally, Carlos Iraheta

compensation from Laiton Incorporated for work or services rendered on a competitive-bid basis or completion of a task or a set of tasks as defined by a contractual agreement. Instead, he was compensated solely based upon the number of hours that he worked on his assignment for Inner Circle.

E. Carlos Iraheta was on the Payroll of Laiton Incorporated at the Time of the Incident That Is the Subject of This Lawsuit.

Plaintiff next suggests that Inner Circle is not entitled to workers compensation tort immunity because Iraheta was not on the "payroll" of Laiton Incorporated. In this regard, Plaintiff claims that Carlos Iraheta was not on the "payroll" of Laiton Incorporated because payments to him were documented by means of an IRS Form 1099 rather than a W-2. This argument also lacks merit. Florida Administrative Code Rule 69L-6.035 defines "payroll" as follows:

> (1) For purposes of determining payroll for calculating a penalty pursuant to Section 440.107(7)(d) 1., F.S., the Department shall when applicable include any one or more of the following as remuneration to employees based upon evidence received in its investigation:
>
> *******
>
> (j) Income listed in "Form 1099 Miscellaneous Income" issued to a person, excluding the cost of materials as evidenced by business records from the person to whom the Form 1099 Miscellaneous Income was issued. In the event such records are not provided to the Department to determine the cost of such materials, the entire amount of the income listed on the "Form 1099 Miscellaneous Income" shall be included in the employer's payroll.

Here, there is no dispute that Laiton Incorporated issued an IRS Form 1099 two Carlos Iraheta to document the payments made to him. Nonetheless, based upon the clear definition of payroll in the Florida Administrative Code, this does not disqualify Carlos

Iraheta from being on the payroll of Laiton Incorporated. To the contrary, income listed in an IRS Form 1099 is clearly included on an employer's payroll.

F. The Plaintiff Is Estopped to Deny That Carlos Iraheta Was an Employee of Laiton Incorporated at the Time of the Incident That Is the Subject of This Lawsuit.

Following the incident in question, Carlos Iraheta applied for workers compensation benefits for the injuries and damages he sustained in the on-the-job accident. (Second Amended Complaint, ¶¶ 2, 12, 13, 27, 28, 48, 49, 63, 64, 81, 82, 98, 99; Petition for Benefits dated September 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "A"; Petition for Benefits dated September 30, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "B"; Petition for Benefits dated December 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "C"; Petition for Benefits dated April 10, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company,*

Employer/Carrier, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "D"; Petition for Benefits dated May 21, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "E"; Petition for Benefits dated July 9, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "F"; Uniform Statewide Pretrial Stipulation and Order dated January 30, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "G"; Uniform Statewide Pretrial Stipulation and Order dated September 14, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "H"; Uniform Statewide Pretrial Stipulation and Order dated October 23, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings,

Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "I"). In each and every one of the Petitions for Benefits filed on behalf of Carlos Iraheta, Iraheta and his counsel asserted that Iraheta was an employee of Laiton Incorporated. Similarly, in each and every one of the Uniform Statewide Pretrial Stipulations and Orders in the workers compensation claim, counsel for both Iraheta and Laiton Incorporated stipulated and agreed that there was an employer/employee relationship between Laiton Incorporated, on the one hand, and Carlos Iraheta, on the other hand. Those stipulations were adopted as a Pretrial Order by the Judge of Compensation Claims.

Because Iraheta has previously taken a position in a contested legal proceeding that he was an employee of Laiton Incorporated, he is now estopped from maintaining a position in his civil action which is inconsistent with the position he successfully maintained in his workers' compensation proceeding. See, *Pearson v. Harris*, 449 So.2d 339 (Fla. 1st DCA 1984); *Grauer v. Occidental Life Insurance Company of California,* 363 So.2d 583 (Fla. 1st DCA 1978), *cert. den.* 372 So.2d 468 (Fla.1979); *Federated Mutual Implement and Hardware Insurance Company v. Griffin,* 237 So.2d 38 (Fla. 1st DCA 1970). Consequently, Iraheta cannot deny that he was an employee of Laiton Incorporated after having successfully claimed that he was an employee of Laiton in the workers compensation proceeding.

G. Laiton Incorporated Secured the Payment of Workers Compensation Benefits to Carlos Iraheta as a Result of the Incident That Is the Subject of This Lawsuit.

There is also no doubt that Laiton Incorporated secured the payment of workers compensation benefits to and on behalf of Carlos Iraheta. Second Amended Complaint, ¶¶ 2, 12, 13, 27, 28, 48, 49, 63, 64, 81, 82, 98, 99; Petition for Benefits dated September 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "A"; Petition for Benefits dated September 30, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "B"; Petition for Benefits dated December 15, 2011, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "C"; Petition for Benefits dated April 10, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "D"; Petition for Benefits dated

May 21, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "E"; Petition for Benefits dated July 9, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "F"; Uniform Statewide Pretrial Stipulation and Order dated January 30, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "G"; Uniform Statewide Pretrial Stipulation and Order dated September 14, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "H"; Uniform Statewide Pretrial Stipulation and Order dated October 23, 2012, in the matter of *Carlos Iraheta, Claimant, v. Laiton Incorporated and Guarantee Insurance Company, Employer/Carrier*, State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District, Case No.: 11-021134NPP, attached hereto as Exhibit "I").

H. Inner Circle Management, LLC is Entitled to Workers Compensation Tort Immunity with Respect to Any Claims Asserted by or on Behalf of Carlos Iraheta as a Result of the Incident That Is the Subject of This Lawsuit.

Because Laiton Incorporated was a help supply services company, and because Laiton Incorporated secured the payment of workers compensation benefits to Carlos Iraheta, the Defendant, INNER CIRCLE MANAGEMENT, LLC, is entitled to immunity from the tort claims asserted on behalf of Carlos Iraheta. *Baker v. Airguide Mfg., LLC*, 151 So.3d 38 (Fla. 3rd DCA 2014); Florida Statutes § 440.11(2). Moreover, because Laiton Incorporated was a help supply services company, this court does not need to conduct the three-prong analysis into whether or not Carlos Iraheta was a common-law borrowed servant of INNER CIRCLE MANAGEMENT, LLC. *Baker v. Airguide Mfg., LLC,* 151 So.3d 38, 42 (Fla. 3rd DCA 2014); *Hazealeferiou v. Labor Ready,* 947 So.2d 599, 603 (Fla. 1st DCA 2007). Instead, because Carlos Iraheta was provided to INNER CIRCLE MANAGEMENT, LLC by a help supply services company, it is entitled to immunity from suit based upon the exclusive remedy provisions of Florida worker's compensation law.

CONCLUSION

The pleadings, depositions and other documents filed in this action show that Carlos Iraheta was an employee of Laiton Incorporated at the time of the June 9, 2011 incident that is the subject of this lawsuit. The pleadings, depositions and other documents filed in this action further show that Laiton Incorporated was a help supply services company as contemplated by Florida Statutes § 440.11(2) and OSHA Standard

Industry Code Industry Number 7363. Finally, the pleadings, depositions and other documents filed in this action further show that Laiton Incorporated secured the payment of workers compensation benefits to and on behalf of Carlos Iraheta. WHEREFORE, the Defendant, INNER CIRCLE MANAGEMENT, LLC, respectfully requests that this Court to grant its Motion for Summary Judgment and enter judgment in its favor and against the Plaintiffs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the **7th day of March, 2016**, I electronically filed the foregoing with the Clerk of the Court using Florida Courts E-Portal filing system which will generate a notice of filing to all counsel on the attached Service List.

s/ Robert E. Bonner
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Tab 5 - Writing Sample – Kane v. Canaveral Port Authority Motion for Summary Judgment

Filing # 87184427 E-Filed 03/29/2019 01:13:06 PM

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 05-2016-CA-035130-XXXX-XX

CINDY KANE,

Plaintiff,

v.

CANAVERAL PORT AUTHORITY,

Defendant.
_____/

MOTION OF DEFENDANT, CANAVERAL PORT AUTHORITY, FOR SUMMARY JUDGMENT

Pursuant to Rule 1.510(b) of the Florida Rules of Civil Procedure, the Defendant, CANAVERAL PORT AUTHORITY, files and serves its Motion for Summary Judgment in its favor and against the Plaintiff, CINDY KANE. In support thereof, the Defendant states that the pleadings, depositions and other documents filed in this action show there is no genuine issue as to any material fact. Consequently, the Defendant is entitled to summary judgment as a matter of law. Specifically, the Defendant states:

Statement of the Case

1. This case is a civil action for money damages and injunctive relief arising out of the termination of Plaintiff's employment with the Canaveral Port Authority.

2. This case is now on the Amended Complaint. The Amended Complaint purports to set forth two separate and distinct theories of liability arising out of the termination of the Plaintiff's employment.

3. Count I of the Amended Complaint asserts that the Plaintiff was terminated in violation of The Florida Civil Rights Act, Florida Statutes §§760.01-760.11.

4. Count II of the Amended Complaint asserts that the Plaintiff was terminated in violation of The Florida Public Whistleblower's Act, Florida Statutes §§112.3187-112.31895.

5. With respect to Count I of the Amended Complaint, the Plaintiff claims that she was discriminated against and suffered adverse employment action because of her gender. Amended Complaint, ¶¶ 11-18; ¶¶ 27-34) The Plaintiff further claims that the Canaveral Port Authority Chief Financial Officer, Rodger Rees, was the person responsible for the discriminatory conduct and adverse employment action. (Amended Complaint, ¶¶ 11-18; Amended Complaint, Exhibit A)

6. With respect to Count II of the Amended Complaint, the Plaintiff claims that she suffered adverse employment action and retaliation for a January 19, 2016 written complaint regarding Rodger Rees in which she complained of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by Rodger Rees in violation of the Florida Public Whistleblower's Act, Florida Statutes §§112.3187-112.31895. (Amended Complaint, ¶¶ 19-26; ¶¶ 35-39; Amended Complaint, Exhibit B)

7. Despite these allegations, the pleadings, depositions, answers to interrogatories and other documents filed in this action show there is no genuine issue as to any material fact. Consequently, the Defendant is entitled to summary judgment as a matter of law.

Undisputed Facts

8. The Defendant, the Canaveral Port Authority, is a political subdivision of the State of Florida, created by Laws of Florida Special Acts of 1953, as amended by the 2014 regular session of the Florida Legislature, Chapter 2014 - 241.

9. In October 2013, Cindy Kane was hired by the Canaveral Port Authority as a part time "Human Resources Temp." (Amended Complaint, ¶ 7)

10. On or about May 22, 2014, Cindy Kane was hired by the Canaveral Port Authority as a full-time "Human Resources Senior Manager." (Amended Complaint, ¶ 8)

11. On December 22, 2014, Cindy Kane was promoted to the position of "Senior Director Human Resources." (Amended Complaint, ¶ 9)

12. John Walsh was employed by the Canaveral Port Authority until late January 2016. (Deposition of John Walsh, Page 7, Line 15 - Page 8, Line 6) During his last three years of employment, John Walsh was the CEO of the Canaveral Port Authority. (Deposition of John Walsh, Page 7, Line 15 - Page 8, Line 6)

13. Peggy Gooch was John Walsh's executive assistant.

14. Beginning with the July 3, 2015 pay period, Peggy Gooch was placed in the status of "admin leave with pay" as a result of a serious illness affecting her husband. This was changed to a status of "general leave with pay" beginning with the July 17, 2015 pay period. At that time, the HR/PY sheets submitted by human resources to payroll reflected

that Ms. Gooch would be in a status of "general leave with pay" and would be required to "exhaust vacation and sick time first then admin leave with pay kicks in."

15. The Canaveral Port Authority Commissioners became aware of the Peggy Gooch payments in early January 2016. (Deposition of John Walsh, Page 146, Lines 16-19)

16. Commissioner Weinberg told CEO John Walsh that the payments should not have been made without clearance from the commissioners. (Deposition of John Walsh, (Page 146, Lines 20-25)

17. On January 4, 2016, Canaveral Port Authority Chief Financial Officer Rodger Rees issued a memorandum to the Canaveral Port Authority Commission Chairman Jerry Allender and Board Members regarding payments made to Peggy Gooch while she was on leave with pay. (Deposition of Rodger Rees, Exhibit 3) That memorandum reflected that Peggy Gooch received in excess of $44,000 in salary and benefits while on "general leave with pay." (Deposition of Rodger Rees, Exhibit 3)

18. The memorandum authored by Rodger Rees pertaining to salary and benefits paid to Peggy Gooch was written in response to an inquiry from Commissioner Tom Weinberg after Commissioner Weinberg had learned that former Canaveral Port Authority employee Tim Macy had received severance pay from the Canaveral Port Authority. (Deposition of Rodger Rees, Page 73, Line 17 - Page 75, Line 24) When Commissioner Weinberg learned about the severance pay to Tim Macy, he wanted to know what other employees had been given accommodations. (Deposition of Rodger Rees, Page 74, Lines 10-17)

19. Commissioner Weinberg was extremely upset when he learned that Peggy Gooch had been paid for not coming to work. (Deposition of Rodger Rees, Page 75, Lines 4-24)

20. On the morning of January 19, 2016, Cindy Kane had conversations with Canaveral Port Authority CEO John Walsh and Canaveral Port Authority employee Alberto Cabrera in which she was advised that the commissioners wanted to fire her as a result of her involvement in the Peggy Gooch payments.

21. Cabrera told Cindy Kane that he (Cabrera) had a conversation with Rodger Rees in which Rees indicated that the commissioners wanted to fire Ms. Kane because of her involvement in the Peggy Gooch payments.

22. Later that morning, in a staff meeting, Canaveral Port Authority CEO John Walsh told Ms. Kane that Commissioner Justice and Commissioner Evans wanted to terminate Kane because of her involvement in the Peggy Gooch payments. (Deposition of Cindy Kane, Page 80, Line 24 - Page 81, Line 5)

23. During the staff meeting, Walsh said "this is my last week and now they are after Cindy." (Deposition of John Walsh, Page 77, Lines 10-17)

24. Walsh stated that the commissioners were after Ms. Kane because of the payments to Gooch. (Deposition of John Walsh, Page 78, Line 10 - Page 79, Line 9)

25. Mr. Cabrera's comments of January 19 caused Kane concern that she would be terminated. (Deposition of Cindy Kane, Page 79, Line 23 - Page 80, Line 6)

26. On the afternoon of January 19, 2016, Cindy Kane prepared a draft of a "whistleblower letter" that she sent to attorney Michael Kahn via e-mail.

27. The e-mail to Michael Kahn was sent at 4:06 p.m. on Ms. Kane's Canaveral Port Authority e-mail account, using her Canaveral Port Authority computer and the Canaveral Port Authority's e-mail servers. (Deposition of Cindy Kane, Exhibit 4)

28. Ms. Kane understood that there were policies at Canaveral Port Authority regarding use of Canaveral Port Authority e-mail for personal business. (Deposition of Cindy Kane, Page 67, Line 23 - Page 68, Line 1)

29. Ms. Kane understood that the Canaveral Port Authority is a governmental entity and all e-mails are public records. (Deposition of Cindy Kane, Page 68, Lines 9-16)

30. Ms. Kane understood that all e-mails to be retained on the Canaveral Port Authority servers would become public records. (Deposition of Cindy Kane, Page 68, Lines 17-21)

31. Mr. Kahn responded to Ms. Kane's e-mail at 4:40 p.m. on January 19, 2016. (Deposition of Cindy Kane, Page 66, Line 5-6; Deposition of Cindy Kane, Exhibit 4)

32. In his e-mail response sent at 4:40 p.m. on January 19, 2016, Mr. Kahn stated: "Cindy, I have attached a slightly edited version of the document. See how you like the minor revisions. If you like them, and you are certain you are going to be fired (as certain as one can be), then send it and realize that if you are wrong, the letter and its reply may themselves get you terminated." (Deposition of Cindy Kane, Page 66, Line 5-6; Deposition of Cindy Kane, Exhibit 4)

33. Ms. Kane then sent a letter to Canaveral Port Authority CEO John Walsh by e-mail at 5:50 p.m. on January 19, 2016. (Deposition of Cindy Kane, Page 70, Lines 17-22; Page 71, Lines 2-9)

34. The whistleblower letter sent to Canaveral Port Authority CEO John Walsh at 5:50 p.m. on January 19, 2016 included the following statement "… at this point from the information I garnered this morning from you and your conversations with Commissioner Justice and from Alberto Cabrera's conversation January 8, 2016, with Rodger Rees, I am preparing to be unjustly terminated …." (Deposition of Cindy Kane, Page 72, Lines 6-19; Deposition of Cindy Kane, Exhibit 3)

35. The whistleblower letter sent to Canaveral Port Authority CEO John Walsh at 5:50 p.m. on January 19, 2016 contained a variety of allegations of "misconduct" against Canaveral Port Authority Chief Financial Officer Rodger Rees. (Deposition of Cindy Kane, Exhibit 3)

36. Ms. Kane had not made any written complaints regarding Rodger Rees prior to the whistleblower letter sent to Canaveral Port Authority CEO John Walsh at 5:50 p.m. on January 19, 2016. (Deposition of John Walsh, Page 129, Line 17 - Page 130, Line 17)

37. Following Ms. Kane's whistleblower letter of January 19, 2016, attorney Harold Bistline, on behalf of the Canaveral Port Authority commissioners, retained attorney Robert Bonner to conduct an investigation.

38. Pursuant to a telephone conversation with Mr. Bistline on January 21, 2016, Mr. Bonner was asked to expand the investigation to include an investigation into the allegations concerning Ms. Kane's involvement with respect to the payments made to Peggy Gooch. (Deposition of Robert Bonner, Page 103, Lines 5-18; Page 106, Lines 13-17)

39. Ms. Kane was then placed on administrative leave with pay pending the investigation.

40. As part of his investigation, Mr. Bonner interviewed Canaveral Port Authority Deputy Executive Director & Chief Financial Officer Rodger Rees; Canaveral Port Authority Assistant Director, Risk Management Gary Raia; Pat Poston; Julie Michel; Kimberly Cupaiole; Dawn Hare; Marina Davis; and Donna Greenslade. Additionally, Mr. Bonner reviewed numerous Canaveral Port Authority policies; the Peggy Gooch personnel file; the Peggy Gooch Payroll History May 15, 2015 to December 31, 2015; Canaveral Port Authority HR/PY Sheets for Peggy Gooch from 7/3/2015 to 12/31/2015; E-mail Correspondence from Cindy Kane regarding Peggy Gooch; E-mail Correspondence to Cindy Kane regarding Peggy Gooch; Canaveral Port Authority Classification Description, Director of Human Resources; and Cindy Kane's Personnel File.

41. Capt. John Murray became the CEO of the Canaveral Port Authority on February 15, 2016. (Deposition of Capt. John Murray, Page 6, Line 20 - Page 7, Line 4)

42. Capt. Murray first became aware of the situation leading to termination of Cindy Kane on or about February 17, 2016. (Deposition of Capt. John Murray, Page 32, Lines 11-24)

43. Capt. Murray became aware of the Cindy Kane situation through a request for documents from Ms. Kane's attorney, Michael Kahn. (Deposition of Capt. John Murray, Page 32, Lines 11-24)

44. Capt. Murray immediately called Canaveral Port Authority attorney Harold Bistline to ask him about the Cindy Kane situation. (Deposition of Capt. John Murray, Page 33, Lines 10-20)

45. Mr. Bistline represents the Canaveral Port Authority Board of Commissioners. (Deposition of Capt. John Murray, Page 39, Lines 9-15)

46. During their telephone conversation, Mr. Bistline told Capt. Murray that Ms. Kane was on administrative leave. (Deposition of Capt. John Murray, Page 42, Lines 10-16)

47. Capt. Murray asked that the investigation be completed as soon as possible so that he could move forward. (Deposition of Capt. John Murray, Page 44, Lines 4-14)

48. Capt. Murray was concerned that he was operating without a senior HR person and needed to have a senior HR leader, regardless of whether it was Ms. Kane or someone else. (Deposition of Capt. John Murray, Page 44, Lines 10-17)

49. Capt. Murray received Mr. Bonner's report on February 29, 2016. (Deposition of Capt. John Murray, Page 53, Lines 4-18)

50. Capt. Murray did not call Canaveral Port Authority in-house attorney Craig Langley to ask questions about the Cindy Kane situation or payments to Peggy Gooch. (Deposition of Capt. John Murray, Page 57, Line 24 - Page 58, Line 2)

51. Capt. Murray never spoke with Rodger Rees regarding Ms. Kane either before or after Ms. Kane's termination. (Deposition of Capt. John Murray, Page 86, Lines 18-25)

52. Rodger Rees never spoke with Capt. Murray regarding Ms. Kane either before or after Ms. Kane's termination. (Deposition of Capt. John Murray, Page 86, Lines 18-25)

53. Capt. Murray did not call Mr. Bonner to ask questions regarding the report prior to making the decision to terminate Ms. Kane. (Deposition of Capt. John Murray, Page 57, Lines 15-18)

54. Capt. Murray could not recall discussing Mr. Bonner's report with anyone prior to making his decision to terminate Ms. Kane. (Deposition of Capt. John Murray, Page 54, Lines 4-8)

55. After reviewing Mr. Bonner's report, Capt. Murray made the decision to terminate Ms. Kane's employment. (Deposition of Capt. John Murray, Page 54, Lines 4-12)

56. Capt. Murray then called Mr. Bistline and requested that he prepare a letter terminating Ms. Kane's employment. (Deposition of Capt. John Murray, Page 54, Lines 13-23; Page 55, Lines 9-13)

57. Peggy Gooch had received six months of pay without coming to work. Under Capt. Murray's reading of the applicable policies, this should have never been allowed. Based on Capt. Murray's experience of 37 years in the private industry, this simply cannot be done. It also cannot be done in the public sector. (Deposition of Capt. John Murray, Page 87, Line 6 - Page 88, Line 18)

58. Moreover, based upon Capt. Murray's reading of the applicable policies, there was absolutely no reason to pay Ms. Gooch for not coming to work for over six months. (Deposition of Capt. John Murray, Page 90, Line 1 - Page 91, Line 6)

59. Mr. Bistline then asked Mr. Bonner to prepare a letter terminating Ms. Kane's employment. (Deposition of Harold Bistline, Page 133, Lines 12-17)

60. Capt. Murray then signed the letter terminating Ms. Kane's employment. (Deposition of Capt. John Murray, Page 84, Lines 15-23)

61. Following the termination of Ms. Kane, the Canaveral Port Authority hired Amanda Brailsford-Urbina as Vice President of HR. Ms. Brailsford-Urbina is the person who

replaced Cindy Kane. Amanda Brailsford-Urbina is a female. (Deposition of Capt. John Murray, Page 29, Lines 17-23)

62. Ms. Brailsford-Urbina was interviewed by Rodger Rees, Jim Dubea, and Rosalyn Harvey. (Deposition of Capt. John Murray, Page 29, Lines 17-23)

63. The ultimate decision to hire Ms. Brailsford-Urbina was made by Capt. Murray. (Deposition of Capt. John Murray, Page 51, Lines 4-7)

Legal Argument

I. Legal Standard for Summary Judgment

"A party against whom a claim ... is asserted ... may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." Florida Rule of Civil Procedure 1.510(b). Summary judgment is warranted where the plaintiff is unable to present requisite proof of the claims alleged in the complaint. *Hall v. Talcott*, 191 So.2d 40 (Fla. 1966). Florida Courts have long held that summary judgment may be granted when there are no genuine issues as to material fact and the moving party is entitled to a judgment as a matter of law. *Moore v. Morris*, 475 So.2d 666(Fla. 1985); *Hall v. Talcott*, 191 So.2d 40 (Fla. 1966).

In order to avoid the granting of summary judgment against it, the opposing party must demonstrate both the existence of a material fact and a genuine issue as to that material fact. A fact is material if it constitutes a legal defense to an action or is essential to the resolution of legal questions raised in the case. *Wells v. Wilkinson*, 391 So.2d 266 (Fla. 4th DCA 1980). It is not enough for the opposing party to merely assert that an issue exists. *Landers v. Milton*, 370 So.2d 368 (Fla. 1979), citing *Harvey Building, Inc. v. Haley*,

175 So.2d 780 (Fla. 1965); *4444 Corp v. City of Orlando*, 598 So.2d 287 (Fla. 5th DCA 1992). If there are no genuine issues as to any material facts, summary judgment is appropriate as it avoids needless and costly litigation and promotes judicial efficiency.

II. Ms. Kane Has Failed to Establish a Prima Facie Case of Gender Discrimination under the Florida Civil Rights Act

Because Florida's Civil Rights Act is patterned after Title VII of the Federal Civil Rights Act of 1964, claims of gender discrimination under the Florida Civil Rights Act are evaluated using both Florida and federal decisions. *See Valenzuela v. GlobeGround N. Am. LLC*, 18 So.3d 17, 21 (Fla. 3d DCA 2009). A claim for gender discrimination can be proved by direct or circumstantial evidence. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

A. Ms. Kane Has Failed to Produce Direct Evidence of Gender Discrimination

Direct evidence is "evidence, which, if believed, proves the existence of a fact in issue without inference or presumption." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11th Cir. 1997) (citing, *Mize v. Jefferson City Bd. Of Ed.*, 93 F.3d 739, 742 (11th Cir. 1996). Evidence which only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence. *Merritt*, 120 F.3d at 1189. Instead, direct evidence requires a proffer of actions or statements which reflect a discriminatory attitude correlating to the discrimination complained of by the employee. *See*, *Id.* (quoting, *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990) "[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate" are direct evidence of

discrimination. *Damon v. Flemming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999) (same).

With respect to direct evidence, Ms. Kane claims that Canaveral Port Authority CFO Rodger Rees was "unhappy with the fact that the Plaintiff, a female, had been placed in an executive role." (Amended Complaint ¶ 12) Kane further claims that Mr. Rees stated that she had been "anointed to the job" and that she was "unqualified to do the work." (Amended Complaint¶ 12) According to Ms. Kane's deposition, those comments were made by Rodger Rees on November 13, 2014. (Deposition of Cindy Kane, Page 51, Line 14 - Page 58, Line 4; Amended Complaint, Exhibit B)

Although Rodger Rees, in his role as acting CEO, placed Ms. Kane on paid administrative leave in January 2016, he was not the ultimate decision maker who terminated Ms. Kane. Instead, Ms. Kane was terminated by Canaveral Port Authority CEO Capt. John Murray on February 29, 2016.

It is well-settled that "[R]emarks by non-decisionmakers or remarks unrelated to the decision-making process itself are not direct evidence of discrimination." *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998). Moreover, in order to constitute direct evidence, the evidence must directly relate in time and subject to the adverse employment action at issue. *Id*. ("[R]emarks ... unrelated to the decision-making process itself are not direct evidence of discrimination."); see also *Scott v. Suncoast Beverage Sales, Ltd*, 295 F.3d 1223, 1227-8 (11th Cir. 2002) (concluding, in a Title VII race discrimination suit, that the statement "[w]e'll burn his black ass" was not direct evidence of discrimination where it was made two and a half years prior to plaintiff's termination);

Williams v. Central Processing Corp., 2014 WL 982764 (M.D. Fla. 2014) (comments that "no black would be working inside, only whites," and that "black people work best outside and should not work inside; only whites should work inside" were not direct evidence of discrimination when made two to three years before adverse employment action).

Here, as in *Suncoast* and *Williams*, Rees allegedly made statements reflecting a discriminatory animus over two years before the alleged adverse employment action. Therefore, they are not direct evidence of discrimination.

Moreover, even if Rees' statements were made in temporal proximity to the time of the decision to terminate Ms. Kane, they were not made by the decision-maker and could not qualify as direct evidence. It is undisputed that Capt. John Murray was the ultimate and lone decision-maker with respect to the decision to terminate Ms. Kane, and there is no evidence that Capt. Murray ever made any discriminatory or inflammatory statements regarding gender. Discriminatory remarks do not constitute direct evidence of discrimination if they are not made by the decision maker. *Standard*, 161 F.3d at 1330. *See also Ritchie v. Industrial Steel, Inc*., 426 F. App'x. 867, 872 (11th Cir. 2011) ("The other discriminatory remarks identified [by the plaintiff] do not constitute direct evidence because they were not made by the decision makers."). Therefore, any statements made by Rodger Rees are not direct evidence of gender discrimination in this case.

B. Ms. Kane Has Failed to Produce Circumstantial Evidence of Gender Discrimination

Where a Florida Civil Rights Act claim is based upon circumstantial evidence, the claim is evaluated under the burden shifting framework of *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The first step of the *McDonnell Douglas* analysis requires the plaintiff to establish a prima facie case of discrimination by showing that (1) she is a member of a protected class; (2) is qualified to perform the job at issue; (3) has suffered some adverse employment action; and (4) was treated differently from someone outside of her protected class. *See Holland v. Gee*, 677 F.3d 1047, 1055 (11th Cir. 2012). If the defendant provides a legitimate, non-discriminatory reason for its action, the plaintiff must then show that the reason provided by the defendant was pretextual. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004).

Here, the Canaveral Port Authority concedes that Ms. Kane is a member of a protected class. Likewise, the Canaveral Port Authority concedes that Ms. Kane is qualified to perform the job and that she has suffered an adverse employment action. As such, there is no doubt that she has satisfied the first three elements of a prima facie case of discrimination under the Florida Civil Rights Act. Nonetheless, Ms. Kane's Florida Civil Rights Act claim nonetheless fails, as she has produced absolutely no evidence showing that she was treated differently from someone outside of her protected class.

The second step of the *McDonnell Douglas* analysis shifts the burden of proof to the Canaveral Port Authority to offer legitimate, non-discriminatory reasons for Ms. Kane's termination. The Canaveral Port Authority has stated that its decision to terminate Ms. Kane was based on legitimate, non-discriminatory reasons and was not motivated by discriminatory intent. In that regard, the Canaveral Port Authority has clearly and unequivocally stated that Ms. Kane was terminated for her involvement in the scheme to

have Peggy Gooch paid for nearly six (6) months despite not coming to work. The record clearly reflects that in January 2016 the Canaveral Port Authority Commissioners learned that Tim Macy had received severance pay in a manner contrary to Canaveral Port Authority policy. The undisputed facts also reflect that the commissioners were unhappy with the payment of severance to Mr. Macy and that the commissioners wanted to know about other payroll irregularities. As a result of inquiries from Canaveral Port Authority Commissioner Tom Weinberg, the commissioners learned that Peggy Gooch had received in excess of $44,000 in salary and benefits despite being absent from work.

When the commissioners learned about the payments to Ms. Gooch, they expressed their displeasure to outgoing CEO John Walsh. In doing so, the commissioners advised Walsh that Ms. Kane was likely to be fired as a result of her involvement in the payments to Ms. Gooch. Walsh relayed this information to Ms. Kane. Ms. Kane also received the same information from Mr. Cabrera as a result of his conversations with Rodger Rees. Following an investigation, and without any input from Rodger Rees or any other Canaveral Port Authority employee, Canaveral Port Authority CEO John Murray made the decision to terminate Ms. Kane on February 29, 2016. That decision was based upon Ms. Kane's involvement regarding the payments to Ms. Gooch.

As indicated above, the payments to Ms. Gooch resulted in the loss of nearly $44,000 in salary and benefits. As Capt. Murray indicated, this would be inappropriate in the public sector or the private sector. Because the reasons given by the Canaveral Port Authority are facially legitimate, non-discriminatory reasons for its decision, any

presumption of unlawful discrimination has disappeared. *See Valenzuela v. GlobeGround N. Am. LLC*, 18 So.3d 17, 25 (Fla. 3d DCA 2009).

The third step of the *McDonnell Douglas* analysis placed the burden of proof on Ms. Kane to prove that the reasons the Canaveral Port Authority has given our pretextual rather than genuine. *See Tillis v. Sheriff of Indian River Cty.*, 603 Fed.Appx. 851, 853 (11th Cir. 2015). If the defendant's legitimate nondiscriminatory reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it. *Wilson* v. *B/E Aerospace, Inc*., 376 F.3d 1079,1088 (11th Cir. 2004). Ultimately, a reason is not "pretext/or *discrimination* unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515,113 S.Ct. 2742,125 L.Ed. 2d 407 (1993) (emphasis in original) (quotation omitted).

The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs or "reality as it exists outside of the decision maker's head." *Alvarez* v. *Royal Atlantic Developers*, 610 F.3d 1253,1266 (11th Cir. 2010). If the reason is one that might motivate a reasonable employer, the plaintiff cannot succeed by simply quarrelling with the wisdom of the reason. *Chapman* v. *AI Transp*, 229 F.3d 1012,1030 (11th Cir. 2000) (*en banc*). The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff. *Pennington* v. *City of Huntsville*, 261 F.3d 1262,1266 (11th Cir. 2001). Conclusory allegations of discrimination are, without more, insufficient to carry the plaintiff's burden. *Mayfield v. Patterson Pump Co.*, 101 F.3d 1371,1376 (11th Cir. 1996).

Here, the Canaveral Port Authority has shown a legitimate, nondiscriminatory reason that would motivate a reasonable employer - the payment in excess of $44,000 in salary and benefits to a worker who was absent for six (6) months. Plaintiff has failed to show that this was pretext as she has failed to show that this reason was false, and that discrimination was the real reason. Consequently, Kane has totally and completely failed in her burden of proving the Canaveral Port Authority offered pretextual reasons, and thus has failed to establish a case of gender discrimination using circumstantial evidence. Accordingly, the Canaveral Port Authority is entitled to summary judgment as to the gender discrimination claim in Count I.

C. Ms. Kane Cannot Establish Causation between Gender Discrimination and Her Termination

Causation can be established in Title VII cases where the decisionmaker and harasser are not the same if "the plaintiff shows that the harasser employed the decisionmaker as her 'cat's paw' - i.e., the decisionmaker acted in accordance with the harasser's decision without herself evaluating the employee's situation." See *Llampallas v. Mini-Circuits, Lab. Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998). However, when a recommendation to discharge an employee is subject to independent review, the reviewer's decision to uphold the discharge cuts off any causal relationship between the recommender's allegedly retaliatory animus and the employee's ultimate discharge. *See Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999). In this case, since the alleged harasser, Rodger Rees, did not make the decision as to Ms. Kane's termination, Ms. Kane cannot "benefit from the inference of causation arising from the common identity

of a harasser and a decisionmaker." *Llampallas v. Mini-Circuits, Lab. Inc.*, 163 F.3d 1236, 1248 (11th Cir. 1998) (finding that plaintiff failed to establish a causal link between harasser's actions and decisionmaker's termination of plaintiff and reversing district court judgment in plaintiff's favor). Instead, Ms. Kane must show that Capt. Murray was motivated by the harassers' retaliatory animus, i.e., that Capt. Murray "acted in accordance with the decision of Rodger Rees without himself evaluating [Ms. Kane's] situation ...." *See Id*. at 1249. But, a subordinate's animus cannot be attributed to the ultimate decision-maker if he conducts his own evaluation and makes an independent decision. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) ("Where a decisionmaker conducts [her] own evaluation and makes an independent decision, [her] decision is free of the taint of a biased subordinate employee.") (citing string of cases). *See also Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) ("[W]hen the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant."); *See also Wright v. Southland Corp.*, 187 F.3d 1287, 1304 n. 20 (finding no discriminatory intent on the part of the decision-makers where biased employee was not involved in the decision to terminate the plaintiff and no evidence was presented that the employee manipulated the decision-maker).

In this case, Capt. Murray started his employment with the Canaveral Port Authority on February 15, 2016 and learned of the situation with Ms. Kane on February 17, 2016 after receiving a document request from Ms. Kane's attorney. Capt. Murray immediately

called Canaveral Port Authority attorney Harold Bistline to ask him about the Cindy Kane situation. During their telephone conversation, Harold Bistline told Capt. Murray that Kane was on administrative leave.

Capt. Murray was concerned that he was operating without a senior HR person and needed to have a senior HR leader, regardless of whether it was Ms. Kane or someone else. Consequently, Capt. Murray asked that the investigation be completed as soon as possible so that he could move forward.

Capt. Murray received Mr. Bonner's report on or about February 29, 2016.

Prior to receiving Mr. Bonner's report, Capt. Murray did not call Canaveral Port Authority in-house attorney Craig Langley to ask questions about the Cindy Kane situation or payments to Peggy Gooch. Likewise, Capt. Murray never spoke with Rodger Rees regarding Ms. Kane either before or after Ms. Kane's termination. Similarly, Capt. Murray did not call Mr. Bonner to ask questions regarding the report prior to making the decision to terminate Ms. Kane. In fact, Capt. Murray could not recall discussing Mr. Bonner's report with anyone prior to making his decision to terminate Ms. Kane. Rather, Capt. Murray's decision to terminate Ms. Kane was based solely upon his review of the report.

There is absolutely no evidence that Capt. Murray had any awareness of any discriminatory animus on the part of Rodger Rees. He did not have any communication with Mr. Rees regarding Ms. Kane. Instead, he relied on an independent investigation and made his decision independent of any influence by Rodger Rees. Consequently, Ms. Kane cannot infer that Capt. Murray's termination of Ms. Kane was motivated by discriminatory intent. S*ee Llampallas*, 163 F.3d at 1249, and *Pennington*, 261 F.3d at 1270. Therefore,

Ms. Kane cannot create an issue of fact as to retaliatory motive. *Pennington,* 261 F.3d at 1264.

III. Ms. Kane Failed to Establish a Prima Facie Case Under the Florida Public Whistleblower Act

The Florida Public Whistleblower Act prohibits an employer from taking a retaliatory action against an employee "who reports to an appropriate agency violations of law on the part of a public employer ... that create a substantial and specific danger to the public's health, safety, or welfare." Florida Statute §112.3187(2). In analyzing a retaliation claim under the Florida Public Whistleblower Act, courts use the Title VII burden-shifting method of proof. *Sierminski v. Transouth Fin. Corp.*, 216 F.3d 945, 950 (11th Cir. 2000). To establish a violation of the Florida Public Whistleblower Act, an employee must show that: (1) he engaged in a statutorily protected activity; (2) he suffered an adverse employment action; and (3) there existed a causal connection between the two events. *See Fla. Dept. of Children and Families v. Shapiro,* 68 So.3d 298 (Fla. 4th DCA 2011).

If the employee satisfies these three elements of a prima facie case under the Florida Public Whistleblower Act, the employer may rebut that case by proffering a legitimate, non-retaliatory reason for its actions. *Rice–Lamar v. City of Fort Lauderdale,* 853 So.2d 1125, 1133 (Fla. 4th DCA 2003); Florida Statute §112.3187(10) (stating that it is a defense to "any action brought pursuant to this section that the adverse action was predicated upon grounds other than, and would have been taken absent, the employee's or person's exercise of rights protected by statute.").

Once the employer satisfies its burden of articulating a legitimate, non-retaliatory reason for its action, the presumption of retaliation is eliminated. The burden then shifts back to the employee to prove by a preponderance of the evidence that the employee's proffered reason is merely pretext for prohibited, retaliatory conduct. *Sierminski*, 216 F.3d at 950.

A. Ms. Kane Has Failed to Produce Evidence of Protected Conduct

In her whistleblower letter, Kane claims that Rodger Rees engaged in "gross mismanagement and/or gross neglect" of his duties to the Canaveral Port Authority by virtue of the following:

- Improper and unlawful comments regarding the sexual orientation of a candidate for general counsel;
- Improper and unlawful comments regarding the age of a candidate for Senior Director of Construction, Engineering and Maintenance;
- Sharing of protected health information of employees out on Family and Medical Leave Act leave with non-management level employees;
- Using acting pay for employees well after those employees were no longer acting and then letting them keep the pay outside of the budget cycle;
- Giving an employee with customer service deficiencies a pay increase out of cycle when the employee was already paid above the established band;
- Allowing his team to keep comp time logs and using comp time in lieu of vacation or sick leave; and
- Favoring employees, allowing some to use time off while placing others on performance plans for using such time and allowing some to have flexible work schedules while not others.

Kane's whistleblower complaint regarding the above matters does not qualify as protected activity. A complaint is protected if the complainant demonstrates a "good faith, reasonable belief that the employer engaged in unlawful employment practices. It is critical to emphasize that a plaintiff's burden has both a subjective and objective component." *Little v. United Technologies, Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997). Furthermore, the Florida Public Whistleblower's Act expressly provides that the information disclosed must include "[a]ny violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of agency ... which creates and presents a substantial and specific danger to the public's health, safety, or welfare." Florida Statute §112.3187(5)(a). The information must be disclosed "in a written and signed complaint" to the "chief executive officer" of the agency, or "other appropriate local official." Florida Statute §112.3187(6).

The matters referenced by Kane in her complaint to Mr. Walsh do not constitute a statutorily-protected complaint by Kane that the Canaveral Port Authority or Rodger Rees were violating laws that would "present[ ] a substantial and specific danger to the public's health, safety, or welfare." Florida Statute §112.3187(5)(a). Likewise, the matters complained of do not constitute "gross mismanagement, malfeasance, misfeasance, gross waste of public funds ... or gross neglect of duty committed by an employee or agent of an agency ...." Florida Statute §§112.3187(5)(a) and (b).

B. Ms. Kane's Whistleblower Complaint Was Not Timely

Ms. Kane's whistleblower complaint is also insufficient for the additional reason that it was made after Kane learned that she would be terminated because of her involvement in

the payments to Ms. Gooch. One of the requirements for a whistle-blower complaint is that the complaint "was not made ... after an agency's personnel action against the employee." *King v. State of Fla.*, 650 F.Supp.2d 1157, 1163-64 (N.D. Fla. 2009). Although, admittedly, the decision to terminate Ms. Gooch was made on February 29, 2016, at the time that Ms. Kane submitted her whistleblower letter to outgoing CEO John Walsh, she had already been advised by Walsh and Mr. Cabrera that the commissioners were looking to fire her because of her involvement in the payments to Peggy Gooch.

C. Ms. Kane Cannot Establish Causation Between Her Whistleblower Complaint and Her Termination

Here, Kane cannot establish a causal link between the protected activity and the adverse action. Prior to making her "whistleblower complaint" to the Canaveral Port Authority CEO John Walsh, Kane was told by Walsh that the commissioners wanted to fire her because of her involvement in the payments to Ms. Gooch. Prior to making her "whistleblower complaint", Kane was also told by Canaveral Port Authority employee Alberto Cabrera that he had heard from Rodger Rees that the commissioners wanted to fire Ms. Kane because of her involvement in the payments to Peggy Gooch. The January 19, 2016 comments by Cabrera and Walsh caused Kane concern that she would be terminated.

Following those conversations, Ms. Kane drafted her "whistleblower complaint" and sent it to her attorney, Michael Kahn. Late on the afternoon of January 19, 2016, Mr. Kahn sent an e-mail to Ms. Kane in which he stated "Cindy, I have attached a slightly edited version of the document. See how you like the minor revisions. If you like them, and you are certain you are going to be fired (as certain as one can be), then send it and realize that if you are

wrong, the letter and its reply may themselves get you terminated." Ms. Kane then sent the whistleblower letter to Canaveral Port Authority CEO John Walsh by e-mail at 5:50 p.m. on January 19, 2016. The whistleblower letter sent to Canaveral Port Authority CEO John Walsh at 5:50 p.m. on January 19, 2016 included the following statement "… at this point from the information I garnered this morning from you and your conversations with Commissioner Justice and from Alberto Cabrera's conversation January 8, 2016, with Rodger Rees, I am preparing to be unjustly terminated …."

Given that Ms. Kane had been told that she would be terminated prior to drafting her "whistleblower letter", it defies logic and common sense to claim that she was terminated because of her "protected activity."

Moreover, it is abundantly clear that the Canaveral Port Authority has demonstrated a legitimate, non-retaliatory reason for firing Ms. Kane - she was discharged after an independent investigation confirmed employment-related misconduct. The evidence presented indicated that Ms. Kane was involved in a scheme to pay Peggy Gooch even though Ms. Gooch was no longer coming to work. The Canaveral Port Authority Board of Commissioners had learned of the scheme and had indicated that Ms. Kane would be terminated. Attorney Robert Bonner was then retained to conduct an independent investigation into the matter. On February 29, 2016, Mr. Bonner produced the investigation to the Canaveral Port Authority. After reviewing the investigative report, Canaveral Port Authority CEO Capt. John Murray made the decision to terminate Ms. Kane.

Kane claims that the Canaveral Port Authority reached the wrong conclusion after the investigation or that the investigation was not complete. However, a factually incorrect result

after an employer's investigation does not, by itself, create a disputed factual issue, nor is it evidence of a pretext on the part of the Canaveral Port Authority. See *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290 (D.C. Cir. 2015). Instead, a plaintiff must show that the employer is "making up or lying about the underlying facts that formed the predicate for the employment decision," the employer is egregiously wrong in its factual findings, or the "employer's investigation ... is so unsystematic and incomplete that a [jury] could conclude that the employer sought, not to discover the truth, but to cover up its own [prohibited conduct]." *Id*. at 296. That is not the case here. The report clearly indicated that former Canaveral Port Authority CEO had issued a memo to Ms. Kane directing the payment to Ms. Gooch. However, the report also indicated that Ms. Kane did nothing to object to the improper payments or make any Ethics Point complaint regarding those payments. As Capt. Murray indicated in his deposition, such payments are not appropriate in the private sector and are likewise not appropriate in the public sector.

As discussed in the Florida Civil Rights Act claim analysis above, Kane also cannot prove evidence of causation under a "cat's paw" theory of liability. In the employment law context, cat's paw liability refers to a situation in which a biased subordinate, who lacks decision making power, "clearly causes the tangible employment action, regardless of which individual actually signs the employee's walking papers." *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998). "In other words, by merely effectuating or 'rubber-stamp[ing]' a discriminatory employee's 'unlawful design,' the employer plays the credulous cat to the malevolent monkey and, in so doing, allows itself to get burned - i.e., successfully

sued." *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (citation omitted).

Applying the cat's paw theory of liability to the facts of this case would stretch the bounds of existing authority in a manner that would arguably have no limiting principles. While Rodger Rees was initially involved in the investigation of Kane's role with respect to the Peggy Gooch payments to the extent that he provide information to the commissions and placed Ms. Kane on paid administrative leave, he did not initiate the independent investigation, did not direct the independent investigation and did not provide any input to Capt. Murray. Stated differently, there was nothing provided by Rees for Capt. Murray to rubber-stamp or blindly follow, and therefore any retaliatory animus that Rees possessed could not have resulted in vicarious liability to the Canaveral Port Authority under the cat's paw theory. Therefore, Kane cannot establish causation and her claim must be denied.

D. Ms. Kane Cannot Show That the Grounds for Her Termination Were Pretextual

As discussed above, an employer may rebut a prima fascia case by proffering a legitimate, non-retaliatory reason for its actions. *Rice-Lamar v. City of Fort Lauderdale*, 853 So.2d 1125, 1133 (Fla. 4th DCA 2003). Once the employer satisfies its burden of articulating a legitimate, non-retaliatory reason for its action, the presumption of retaliation is eliminated. The burden then shifts back to the employee to prove by a preponderance of the evidence that the employee's proffered reason is merely pretext for prohibited, retaliatory conduct. *Sierminski,* 216 F.3d at 950. The ultimate burden is on the plaintiff to prove by a preponderance of the evidence that the reason provided by the employer is a pretext for

prohibited, retaliatory conduct. *Id*. To show pretext, a plaintiff cannot recast the reason but must meet it head on and rebut it. *Holland v. Gee*, 677 F.3d 1047, 1055 (11th Cir. 2012). The plaintiff must show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's rationale." *Id*. at 1055-56 (quotation omitted). It is not the court's obligation to judge whether an employer's decisions are "prudent or fair." Instead, the sole concern is whether unlawful discriminatory animus motivated an employment decision. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs or "reality as it exists outside of the decision maker's head." *Alvarez v. Royal Atlantic Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010). If the reason is one that might motivate a reasonable employer, the plaintiff cannot succeed by simply quarrelling with the wisdom of the reason. *Id*. at 1265-66. Additional, but undisclosed, non-discriminatory reasons for the employment action which are not inconsistent do not necessarily demonstrate pretext. *Tidwell v. Carter Prod*., 135 F.3d 1422, 1428 (11th Cir. 1998). Similarly, differing reasons that are not necessarily inconsistent do not show pretext. *Zaben v. Air Prod. & Chemicals, Inc*., 129 F.3d 1453, 1458-59 (11th Cir. 1997)

In this case, the Canaveral Port Authority has clearly satisfied its burden of articulating a legitimate, nonretaliatory reason for terminating Ms. Kane. The Canaveral Port Authority has presented undisputed evidence that the commissioners were upset regarding the payments to Ms. Gooch. The Canaveral Port Authority has also presented undisputed evidence that an independent investigation was undertaken into the payments made to Ms. Gooch and that Capt. Murray based the decision to terminate Ms. Kane on the results of that investigation.

Although Ms. Kane may disagree with the nature and extent of the investigation and the investigation's conclusion, her disagreements are not sufficient to demonstrate pretext. Therefore, the Canaveral Port Authority is entitled to summary judgment in its favor and against Cindy Kane.

Conclusion

WHEREFORE, the Defendant, CANAVERAL PORT AUTHORITY, respectfully requests that this Court grants its Motion for Summary Judgment and enter judgment in its favor and against the Plaintiff.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of March, 2019, I electronically filed the foregoing with the Clerk of the Court by using Florida Courts eFiling Portal to all counsel on the attached Service List.

*s/s Robert E. Bonner*_____
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Tab 6 - Writing Sample – Masci General Contractor v. Jacobs Engineering, etc., et al. Motion for Summary Judgment

Filing # 91257811 E-Filed 06/18/2019 11:09:52 AM

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2015-CA-046973

MASCI GENERAL CONTRACTOR, INC.,
a Florida Corporation, individually
and as assignee of BREVARD COUNTY

Plaintiff,

vs.

JACOBS ENGINEERING GROUP, INC.; a Foreign Corporation; CITY OF MELBOURNE; and CITY OF WEST MELBOURNE,

Defendants.
_____/

MOTION OF CITY OF MELBOURNE FOR SUMMARY JUDGMENT

Pursuant to Rule 1.510(b) of the Florida Rules of Civil Procedure, the Defendant, CITY OF MELBOURNE, files and serves its Motion for Summary Judgment in its favor and against the Plaintiff, MASCI GENERAL CONTRACTOR, INC., as assignee of BREVARD COUNTY. In support thereof, the Defendant states that the pleadings, depositions and other documents filed in this action show there is no genuine issue as to any material fact. Consequently, the Defendant is entitled to summary judgment as a matter of law. Specifically, the Defendant states:

Statement of the Case and Facts

1. This case is a civil action for money damages arising out of the Wickham Road Reconstruction Project.

2. This case is now on the Third Amended Complaint.

3. The original Complaint was filed on October 22, 2015. The original Complaint sought damages solely from BREVARD COUNTY and JACOBS ENGINEERING GROUP, INC.

4. With respect to BREVARD COUNTY, the original Complaint sought damages under theories of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); Breach of Implied Covenant of Good Faith (Count III); and Quantum Meruit/Implied Contract (Count IV).

5. The original Complaint did not contain any claims for relief against the CITY OF MELBOURNE.

6. The original Complaint did not contain any allegations that BREVARD COUNTY acted as the agent for the CITY OF MELBOURNE.

7. The original Complaint did not contain any allegations that BREVARD COUNTY was vicariously responsible for any negligence on the part of the CITY OF MELBOURNE.

8. The original Complaint did not contain any allegations that MASCI GENERAL CONTRACTOR, INC., had sustained any damages as the result of the sole negligence of the CITY OF MELBOURNE.

9. On June 30, 2017, MASCI GENERAL CONTRACTOR, INC., filed an Amended Complaint.

10. The Amended Complaint sought damages from BREVARD COUNTY; JACOBS ENGINEERING GROUP, INC.; FRAZIER ENGINEERING, INC.; AT&T CORP.; FLORIDA POWER & LIGHT COMPANY; CITY OF MELBOURNE; and CITY OF WEST MELBOURNE.

11. With respect to BREVARD COUNTY, the Amended Complaint sought damages under theories of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); and Breach of Implied Covenant of Good Faith (Count III).

12. The Amended Complaint did not contain any allegations that BREVARD COUNTY acted as the agent for the CITY OF MELBOURNE.

13. The Amended Complaint did not contain any allegations that BREVARD COUNTY was vicariously responsible for any negligence on the part of the CITY OF MELBOURNE.

14. The Amended Complaint did not contain any allegations that MASCI GENERAL CONTRACTOR, INC., had sustained any damages as the result of the sole negligence of the CITY OF MELBOURNE.

15. On August 25, 2017, BREVARD COUNTY filed a Cross-Claim against the CITY OF MELBOURNE and CITY OF WEST MELBOURNE.

16. On August 29, 2017, MASCI GENERAL CONTRACTOR, INC., voluntarily dismissed its claim against the CITY OF MELBOURNE.

17. On August 29, 2017, MASCI GENERAL CONTRACTOR, INC., filed a Second Amended Complaint.

18. The Second Amended Complaint sought damages from BREVARD COUNTY; JACOBS ENGINEERING GROUP, INC.; FRAZIER ENGINEERING, INC.; AT&T CORP.; and FLORIDA POWER & LIGHT COMPANY.

19. With respect to BREVARD COUNTY, the Second Amended Complaint sought damages under theories of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); and Breach of Implied Covenant of Good Faith (Count III).

20. The Second Amended Complaint did not contain any claims for relief against the CITY OF MELBOURNE.

21. The Second Amended Complaint did not contain any allegations that BREVARD COUNTY acted as the agent for the CITY OF MELBOURNE.

22. The Second Amended Complaint did not contain any allegations that BREVARD COUNTY was vicariously responsible for any negligence on the part of the CITY OF MELBOURNE.

23. The Second Amended Complaint did not contain any allegations that MASCI GENERAL CONTRACTOR, INC., had sustained any damages as the result of the sole negligence of the CITY OF MELBOURNE.

24. On October 31, 2018, MASCI GENERAL CONTRACTOR, INC., filed a Third Amended Complaint.

25. The Third Amended Complaint sought damages from BREVARD COUNTY; JACOBS ENGINEERING GROUP, INC.; and the CITY OF WEST MELBOURNE.

26. With respect to BREVARD COUNTY, the Third Amended Complaint sought damages under theories of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); Breach of Implied Covenant of Good Faith (Count III); and Fraud (Count IV).

27. The Third Amended Complaint did not contain any claims for relief against the CITY OF MELBOURNE.

28. The Third Amended Complaint did not contain any allegations that BREVARD COUNTY acted as the agent for the CITY OF MELBOURNE.

29. The Third Amended Complaint did not contain any allegations that BREVARD COUNTY was vicariously responsible for any negligence on the part of the CITY OF MELBOURNE.

30. The Third Amended Complaint did not contain any allegations that MASCI GENERAL CONTRACTOR, INC., had sustained any damages as the result of the sole negligence of the CITY OF MELBOURNE.

31. MASCI GENERAL CONTRACTOR, INC., settled all its claims against BREVARD COUNTY. Pursuant to the settlement, BREVARD COUNTY paid the sum of $1.9 million to MASCI GENERAL CONTRACTOR, INC. Additionally, BREVARD COUNTY assigned its claims against the CITY OF MELBOURNE and the CITY OF WEST MELBOURNE to MASCI GENERAL CONTRACTOR, INC.

32. The claims assigned by BREVARD COUNTY to MASCI GENERAL CONTRACTOR, INC., arise out of the August 25, 2017 Cross-Claim. Those claims sound in Contractual Indemnity (Count I) and Breach of Contract (Count II). Those claims

essentially state that the CITY OF MELBOURNE breached its Interlocal Agreement with BREVARD COUNTY by failing to indemnify and defend BREVARD COUNTY with respect to the claims asserted against BREVARD COUNTY in this action by MASCI GENERAL CONTRACTOR, INC.

33. The Interlocal Agreement between the CITY OF MELBOURNE and BREVARD COUNTY attached to the cross-claim states, in pertinent part, as follows:

> **(6)** **Indemnification**: The City agrees that it will indemnify and hold harmless the County, to the extent permitted by law, from any and all liability, claims, damages, expenses, proceedings, and causes of action of any kind and/or nature arising out of or connected with the City's sole negligence in the "project" subject to Florida Statute 768.28. The City agrees that it will, at its own expense, defend any and all actions, writs or proceedings which are brought against the county and which arise out of circumstances, set out previously in this paragraph; and that it will satisfy, pay and discharge any and all judgment that may be entered against the county in any such actions or proceedings.

34. The pleadings, depositions, answers to interrogatories and other documents filed in this action show there is no genuine issue as to any material fact. Consequently, the Defendant is entitled to summary judgment as a matter of law.

Memorandum of Law

I. Legal Standard for Summary Judgment

"A party against whom a claim ... is asserted ... may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." Florida Rule of Civil Procedure 1.510(b). Summary judgment is warranted where the plaintiff is unable to present requisite proof of the claims alleged in the complaint. *Hall v. Talcott*, 191 So. 2d 40 (Fla. 1966). Florida Courts have long held that

summary judgment may be granted when there are no genuine issues as to material fact and the moving party is entitled to a judgment as a matter of law. *Moore v. Morris*, 475 So.2d 666(Fla. 1985); *Hall v. Talcott*, 191 So.2d 40 (Fla. 1966).

In order to avoid the granting of summary judgment against it, the opposing party must demonstrate both the existence of a material fact and a genuine issue as to that material fact. A fact is material if it constitutes a legal defense to an action or is essential to the resolution of legal questions raised in the case. *Wells v. Wilkinson*, 391 So.2d 266 (Fla. 4th DCA 1980). It is not enough for the opposing party to merely assert that an issue exists. *Landers v. Milton*, 370 So.2d 368 (Fla. 1979), citing *Harvey Building, Inc. v. Haley*, 175 So.2d 780 (Fla. 1965); *4444 Corp v. City of Orlando*, 598 So.2d 287 (Fla. 5th DCA 1992). If there are no genuine issues as to any material facts, summary judgment is appropriate as it avoids needless and costly litigation and promotes judicial efficiency.

II. Nature of Masci's Claims Against the City of Melbourne

MASCI's claims against the CITY OF MELBOURNE arise solely out of the assignment made by BREVARD COUNTY. An assignment is a transfer of all the interests and rights to the thing assigned and that the assignee stands in the shoes of the assignor and may enforce the contract against the original obligor. *Price v. RLI Insurance Co.*, 914 So.2d 1010, 1013-14 (Fla. 5th DCA 2005); *Weiss v. Johansen*, 898 So.2d 1009, 1011 (Fla. 4th DCA 2005) (internal citations omitted); *see also Cone Constructors, Inc. v. Drummond Cmty. Bank*, 754 So.2d 779, 780 (Fla. 1st DCA 2000) (recognizing that assignee was bound by the terms of assigned contract, including arbitration provision); *Parkway Gen. Hosp., Inc. v. Allstate Ins. Inc.*, 393 So.2d 1171, 1172 (Fla. 3d DCA 1981).

In this action, the assigned claims against the CITY OF MELBOURNE are set forth in Count I and Count II of the August 25, 2017 Cross-Claim filed by BREVARD COUNTY. Those claims sound in Contractual Indemnity (Count I) and Breach of Contract (Count II). Although they have been plead as two (2) separate and distinct legal claims, both Count I and Count II arise out of the alleged failure of the CITY OF MELBOURNE to indemnify and defend BREVARD COUNTY in accordance with the obligations set forth in the Interlocal Agreement between BREVARD COUNTY and the CITY OF MELBOURNE. That Interlocal Agreement reads:

> **(6)** **Indemnification**: The City agrees that it will indemnify and hold harmless the County, to the extent permitted by law, from any and all liability, claims, damages, expenses, proceedings, and causes of action of any kind and/or nature arising out of or connected with the City's sole negligence in the "project" subject to Florida Statute 768.28. The City agrees that it will, at its own expense, defend any and all actions, writs or proceedings which are brought against the county and which arise out of circumstances, set out previously in this paragraph; and that it will satisfy, pay and discharge any and all judgment that may be entered against the county in any such actions or proceedings.

This agreement is consistent with the provisions of Florida Statute §768.28(19), which states:

> (19) Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the other party's negligence or to assume any liability for the other party's negligence. This does not preclude a party from requiring a nongovernmental entity to provide such indemnification or insurance. The restrictions of this subsection do not prevent a regional water supply authority from indemnifying and assuming the liabilities of its member governments for obligations arising from past acts or omissions at or with property acquired from a member government by

> the authority and arising from the acts or omissions of the authority in performing activities contemplated by an Interlocal Agreement. Such indemnification may not be considered to increase or otherwise waive the limits of liability to third-party claimants established by this section.

A plain reading of the statutory language reveals that government entities are prohibited from entering into agreements to indemnify another government entity for the other entity's negligence, or to assume any liability for the other entity's negligence. This interpretation of Florida Statute §768.28(19) is also consistent with the common law right of indemnification. At common law, a nonnegligent party who is vicariously liable for the tortious actions of another can seek indemnification from the tortfeasor. *See, e.g., Houdaille Indust., Inc. v. Edwards*, 374 So.2d 490 (Fla. 1979). Therefore, the right to indemnity and defense conferred by the Interlocal Agreement is essentially no different than the common law right to indemnity and defense. Under either the common law, Florida Statute §768.28(19) or the Interlocal Agreement, BREVARD COUNTY would only be able to seek indemnity from the CITY OF MELBOURNE for claims "… arising out of or connected with the City's sole negligence in the project." As discussed infra, none of the assigned claims are fit this description.

III. The City of Melbourne has No Duty to Defend or Indemnify Brevard County

Florida law is clear that "[i]n considering whether a party has a duty to defend an underlying lawsuit, the trial court is limited to reviewing the allegations raised in the underlying Complaint" and "[t]here is no duty to defend where the only claim raised against the party was a negligent claim for its own active negligence." *State of Fla. Dep't*

of Transp. v. Florida Keys Elec. Coop. Ass'n, 831 So.2d 713, 714 (Fla. Dist. Ct. App. 2002) (internal citations, quotations and emphasis omitted); *see also Jones v. Florida Ins. Guar. Ass'n.*, 908 So.2d 435, 443 (Fla. 2005) (duty to defend is determined from the allegations in the complaint); *McCreary v. Florida Residential Property and Cas. Joint Underwriting Ass'n*, 758 So.2d 692 (Fla. 4th DCA 1999); *Westinghouse Elec. Corp. v. Dade County*, 472 So.2d 866 (Fla. 3d DCA 1985).

In this case, the Cross-Claim erroneously asserts that the Third Amended Complaint raises claims arising out of the negligence of the CITY OF MELBOURNE. Nonetheless, a simple reading of the Third Amended Complaint shows that it does not contain any allegations that MASCI GENERAL CONTRACTOR, INC., sustained any damages as the result of the sole negligence of the CITY OF MELBOURNE. Instead, the Third Amended Complaint sought damages against BREVARD COUNTY under theories of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); Breach of Implied Covenant of Good Faith (Count III); and Fraud (Count IV). The Third Amended Complaint did not contain any allegations that BREVARD COUNTY acted as the agent for the CITY OF MELBOURNE. Likewise, the Third Amended Complaint did not contain any allegations that BREVARD COUNTY was vicariously responsible for any negligence on the part of the CITY OF MELBOURNE.

The situation presented by this case is similar to that addressed by the court in *SEFC Building Corp. v. McCloskey Window Cleaning Inc.*, 645 So.2d 1116 (Fla. 3d DCA 1994), in which the Third DCA declined to read an indemnity agreement to provide a duty to defend where the *only claim raised* against the party *was* a negligent claim *for its own*

active negligence. In *SEFC,* a building owner contracted with a window service for exterior window cleaning. The agreement between the parties contained an indemnity provision which provided that the window service company agrees to indemnify the owner for any suit arising out of or relating to the window service. *See SEFC,* 645 So.2d at 1117. An employee for the window cleaning company was injured while washing windows at the site and sued the owner alleging that his injuries were sustained as a result of the owner's negligence. After being sued, the owner asked that the window cleaning company assume the defense pursuant to the indemnity provision. The window cleaning company refused and the owner filed a third-party claim for indemnification. On a Motion for Summary Judgment, the trial court concluded that the indemnity provision did not expressly provide an intent to defend and/or indemnify the owner for its *own* wrongful acts. *See SEFC,* 645 So.2d at 1117. Specifically, the court concluded as a matter of law, that the owner was not entitled to indemnification because the indemnification clause did not express an intent to indemnify the owner for its own negligence in clear and unequivocal terms.

Here, as in *SEFC,* the claims raised against BREVARD COUNTY in the Third Amended Complaint are not actions contemplated by the Interlocal Agreement. While the indemnity and defense obligations of the CITY OF MELBOURNE set forth in the Interlocal Agreement are clearly limited to claims arising out of the "sole negligence" of the CITY OF MELBOURNE, the Third Amended Complaint contains absolutely no allegations that any of the claims against BREVARD COUNTY arise out of the "sole negligence" of the CITY OF MELBOURNE or that BREVARD COUNTY is otherwise

vicariously responsible for the "sole negligence" of the CITY OF MELBOURNE. Consequently, there is no duty to indemnify or defend. Rather, the only claims asserted against BREVARD COUNTY in the Third Amended Complaint are claims for Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); Breach of Implied Covenant of Good Faith (Count III); and Fraud (Count IV). Absolutely none of those claims are addressed by the terms of the Interlocal Agreement. Absolutely none of those claims arise out of the "sole negligence" of the CITY OF MELBOURNE. Because the determination of the duty to defend is limited to a review of the the allegations raised in the underlying Complaint, it is abundantly clear that the CITY OF MELBOURNE had no duty to defend BREVARD COUNTY against allegations of Breach of Contract (Count I); Breach of Implied Warranty of Constructibility (Count II); Breach of Implied Covenant of Good Faith (Count III); and Fraud (Count IV). Therefore, the CITY OF MELBOURNE is entitled to summary judgment in its favor and against MASCI GENERAL CONTRACTOR, INC., as assignee of BREVARD COUNTY.

CONCLUSION

WHEREFORE, the Defendant, the CITY OF MELBOURNE, respectfully requests that this Court grant its Motion for Summary Judgment and enter judgment in its favor and against the Plaintiff, MASCI GENERAL CONTRACTOR, INC., as assignee of BREVARD COUNTY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of June, 2019, I electronically filed the foregoing with the Clerk of the Court by using Florida Courts eFiling Portal to all counsel on the attached Service List.

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Tab 7 – Curriculum Vitae

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EDUCATION:

The Ohio State University, B.A., Social Science, 1976
University of Florida, J.D., with honors, 1981
Member, Board of Editors, Appellate Advocacy, University of Florida 1980-1981
Phi Delta Phi (Magister, 1981)

TEACHING:

Instructor, Appellate Advocacy, University of Florida, 1980

Instructor, Legal Writing, University of Florida, 1981

Adjunct Professor, Dwayne O. Andreas School of Law, Barry University, 2019

AUTHOR:

"Protecting Work Product from Discovery," Trial Advocate Quarterly, April 1989

“Defense of Law Enforcement Agencies and Officers-An Ethical Nightmare,” Trial Advocate Quarterly, October 2012

EMPLOYMENT:

Founding Shareholder, Meier, Bonner, Muszynski, O’Dell & Harvey, P.A., 1997-present. Civil trial practice with emphasis on representing local governments, law enforcement agencies, individual law enforcement officers and elected officials in a variety of civil matters in both state and Federal courts.

Member, Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A., 1981-1997. Civil trial practice with emphasis on personal injury litigation, including representation of self-insured entities, insurance carriers and their insureds.

BAR ADMISSIONS:

Admitted to Florida Bar, 1981; U.S. District Court, Middle District of Florida, 1981; U.S. District Court, Southern District of Florida, 2008; U.S. District Court, Northern District of Florida, 2016; U.S. Court of Appeals, Eleventh Circuit, 1982; U.S. Supreme Court, 1989.

PROFESSIONAL CERTIFICATION:

Board Certified Civil Trial Lawyer, Florida Bar Board of Legal Specialization and Education since 1989.

Board Certified Civil Trial Advocate, National Board of Trial Advocacy.

MEMBERSHIPS:

ABOTA; the Florida Bar-Trial Lawyers Section; Florida Defense Lawyers Association (Immediate past President 2017-2018; President 2016-2017; President–Elect 2015-2016; Secretary-Treasurer 2014-2015; Board of Directors 2008-2012); Defense Research Institute (DRI); Claims and Litigation Management Alliance; Florida Municipal Attorneys Association; Florida Association of Police Attorneys; Seminole County Bar Association.

HONORS AND AWARDS:

DRI Exceptional Performance Citation, 2016-2017

Florida Defense Lawyers Association Joseph P. Metzger Outstanding Achievement Award 2016.

Florida Defense Lawyers Association Continuing Legal Education Award 2014

Florida Defense Lawyers Association President's Award 2011

PROFESSIONAL RECOGNITION:

AV® Preeminent rated by Martindale-Hubbell

Florida Super Lawyers selection 2017, 2018, 2019

Florida Trend Legal Elite selection 2012

PRESENTATIONS:

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Liability Claims Conference. Walt Disney World Boardwalk Resort. June 2019.

Use of Reptile Strategy as a Defense Tactic in Police Misconduct Cases. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2018.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Webinar Presentation for the Florida Defense Lawyers Association. April 6, 2017.

The Quagmire of Closing Argument: How to Recognize, Anticipate and Defend Improper Tactics. Presentation at the Florida Defense Lawyers Winter Meeting. Big Sky Resort, Montana. January 2017.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2016.

Surviving and Thriving in Federal Court. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky Resort, Montana. January 2016.

Embracing the Reptile: Using Reptile Tactics for a Successful Defense. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2015.

Excluding Expert Opinion Testimony under Daubert. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2015.

Effective Use of Daubert Motions to Exclude Expert Testimony. Webinar Presentation for the the Florida Defense Lawyers Association. June 18, 2015.

Social Media in Civil Litigation: A Practical Perspective. Presentation for the Claims & Litigation Management Alliance. Orlando, Florida. March 2015.

Federal Court Survival Guide. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. October 2014.

Strategic Use of Motions in Limine. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2014.

Joint Representation of Law Enforcement Agencies and Officers: An Ethical Nightmare. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2014.

Joint Representation of Law Enforcement Agencies and Officers: An Ethical Nightmare. Presentation at the Florida Association of Police Attorneys Winter Meeting. Orlando, Florida. January 2014.

Effective Use of Daubert Motions and Motions in Limine. Presentation at the Florida Defense Lawyers Association Advanced Litigation Boot Camp. Longwood, Florida. November 2013.

Strategic Use of Motions in Limine. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2013.

Initial Case Workup – Doing Your Homework. Presentation at the Florida Defense Lawyers Association Young Lawyers Boot Camp. Longwood, Florida. March 2012.

Recent Legal Developments and Best Strategies for Removal to Federal Court. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2011.

Initial Case Workup – Doing Your Homework. Presentation at the Florida Defense Lawyers Association Young Lawyers Boot Camp. Longwood, Florida. November 2010.

Exclusion of Experts in the 11th Circuit. Presentation at the Florida Defense Lawyers Association Winter Meeting. Big Sky, Montana. January 2010.

Motions in Limine and Trial Objections. Presentation at the Florida Defense Lawyers Association Winter Meeting. Park City, Utah. January 2006.

Ethical Considerations Regarding Multiple Representation. Presentation at Police Misconduct in Florida. Orlando, Florida December 2005.

Shocking Developments: Excessive Force Claims Arising Out of the Use of Tasers. Presentation at the Florida Defense Lawyers Association Winter Meeting. Steamboat Springs, Colorado. January 2005.

Defense and Prevention of Law Enforcement Claims. Presentation at the Florida Liability Claims Conference. Walt Disney World Contemporary Resort. June 2004.

Defending Police Liability Claims: The Law, Practical Considerations and Sovereign Immunity. Presentation at the Florida Defense Lawyers Association Winter Meeting. Steamboat Springs, Colorado. January 2004.

Premises Liability for Criminal Acts. Presentation at the Florida Defense Lawyers Association Winter Meeting. Snowmass, Colorado. January 2000.

Successful Defense of Wrongful Death Actions. Presentation at the Florida Defense Lawyers Association Winter Meeting. Snowmass, Colorado. January 1999.

Defense Planning for the Wrongful Death Case. Presentation at Trying the Wrongful Death Case in Florida: Strategies in Preparation and Valuation. Orlando, Florida. March 1997.

UM Claims: A Practical Perspective. Presentation at Recent Developments in Insurance Law. Orlando, Florida. March 1994.

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