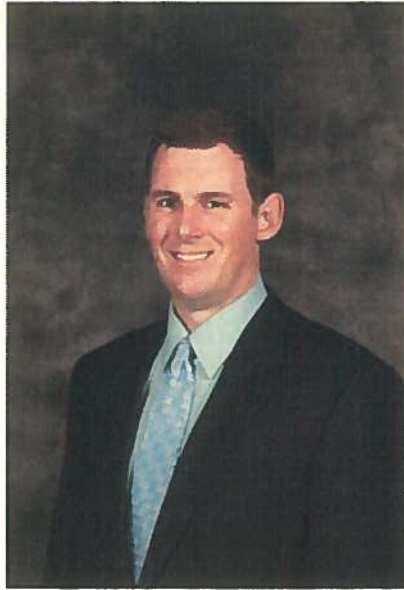


Self-Redacted Application



Mike Murphy
Circuit Judge
Osceola County Courthouse
2 Courthouse Square, Suite 6210
Kissimmee, FL 34741

August 20, 2019

Fifth District Court of Appeal Judicial Nominating Commission
c/o Michael C. Sasso, Chair
1031 W. Morse Blvd., Suite 120
Winter Park, FL 32789

Re: Application for Judicial Nomination to the Fifth District Court of Appeal

Dear Members of the Commission,

Accompanying this letter, please find my Application for Nomination to the Governor to fill the vacancy in the 5th District Court of Appeal as a result of the confirmation of Judge Wendy Berger to the U.S. District Court for the Middle District of Florida. I look forward to the opportunity to be interviewed by the commission to discuss my qualifications.

Sincerely,


Mike Murphy

APPLICATION FOR NOMINATION TO THE FIFTH DISTRICT COURT

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

DATE: August 19, 2019 Florida Bar No.: 0054046

GENERAL: Social Security No.: [REDACTED]

1. Name MICHAEL MURPHY (Mike) E-mail: ctjumm2@ocnjcc.org

Date Admitted to Practice in Florida: 09/20/1995

Date Admitted to Practice in other States: N/A

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

CIRCUIT JUDGE, STATE OF FLORIDA, 9TH JUDICIAL CIRCUIT

3. Business address: Osceola County Courthouse, 2 Courthouse Square, Suite 6210

City Kissimmee County Osceola State FL ZIP 34741

Telephone (407) 742-2413 FAX () -

4. Residential address: [REDACTED]

City [REDACTED] County Orange State FL ZIP [REDACTED]

Since March, 2008 Telephone (407) [REDACTED]

5. Place of birth: Winter Park, FL

Date of birth: 06/05/1970 Age: 49

6a. Length of residence in State of Florida: 48 years

6b. Are you a registered voter? Yes No

If so, in what county are you registered? Orange

7. Marital status: Married

If married: Spouse's name Eddie Meltzer

Date of marriage [REDACTED]

Spouse's occupation EMT

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.

Never divorced

8. Children

Name(s) Age(s) Occupation(s) Residential address(es)

none

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. Notwithstanding my answer, I concede that in the past ten years I have possessed and consumed cannabis in both Nevada and Colorado, two of the eleven states (twelve if you include Washington, DC) where the recreational possession and consumption are authorized by state law. In both states the cannabis was obtained from state regulated facilities. I include this information because some believe that such possession is a violation of Federal Law eventhough a state has authorized its possession and consumption, and I believe that candor requires that I disclose this information.

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.

<i>Schools</i>	<i>Class Standing</i>	<i>Dates of Attendance</i>	<i>Degree</i>
University of Florida	top 10% in	8/93-5/95	JD
University of Florida	undergrad	6/88-12/91	BSBA
Nova Southeastern University		8/92-5/93	Law, before transferring to UF
University of West		Fall, 1995	none

Florida

University of Central
Florida

Fall, 2001 and
Summer of 1989

none

- 18b. List and describe academic scholarships earned, honor societies or other awards.
Graduated with Honors from UF with the JD and BSBA degrees.

NON-LEGAL EMPLOYMENT:

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

<i>Date</i>	<i>Position</i>	<i>Employer</i>	<i>Address</i>
January 2008-May 2013	Adjunct Professor	UCF	4000 Central Florida Blvd. Orlando, FL 32816
1994-1995	Elections Clerk	Supervisor of Elections, Alachua County, FL	111 SE 1 st Avenue, Gainesville, FL 32601
Summer, 1992	Dorm Manager	Jekyll Isand Georgia Authority	100 James Road, Jekyll Island, GA 31527
Summer, 1991	Intern, MIS Department	Beall's Department Store, Corporate Office	1806 38 th Ave. East, Bradenton, FL 34208

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.

Florida Bar, Admitted September, 1995

U.S. Court of Appeals, Eleventh Circuit, Admitted March 2000 (no longer a member)

U.S. District Court, Middle District of Florida, Admitted December of 1995 (no longer a member)

I have never been suspended nor have I resigned from any of the above courts.
However, my membership has lapsed in both Federal Courts.

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:

<i>Position</i>	<i>Name of Firm</i>	<i>Address</i>	<i>Dates</i>
Staff Attorney	UCF Student Legal Services	P.O. Box 163650, Orlando, FL 32816	2000-2004
Attorney	Michael P. Murphy, PA	1520 E. Amelia Street, Orlando, FL 32803	1998-2004
Attorney	Stuart I. Hyman, PA	1520 E. Amelia Street, Orlando, FL 32803	1998-2004
Assistant State Attorney	18 th Judicial Circuit, Sanford, FL	P.O. Box 8006, Sanford, FL 32772	1996-1998
Clerk and then later, Attorney	Donald A. Lykkebak	250 S. Park Avenue, Suite 200, Winter Park, FL 32789	1995-1996

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.

Prior to taking the bench in January of 2005 my practice was primarily criminal defense, including related civil proceedings (Administrative Driver's License hearings) and appeals related to criminal cases.

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	<u> </u>	<1 %	Civil	<u> </u>
Federal Trial	<u> </u>	<1 %	Criminal	<u> </u>
Federal Other	<u> </u>	%	Family	<u> </u>
State Appellate	<u> </u>	5 %	Probate	<u> </u>
State Trial	<u> </u>	80 %	Other	<u> </u>
State Administrative	<u> </u>	10 %		
State Other	<u> </u>	5 %		
	<u> </u>	%		
TOTAL	<u> </u>	100 %	TOTAL	<u> </u>
				100 %

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

were:

Jury? >20

Non-jury? >50

Arbitration? _____

Administrative Bodies? >100

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).

I have been a judge for more than 5 years.

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).

I have been a judge for more than 5 years.

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

27d. During the last five years, how frequently have you appeared in Court?
_____ 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? _____%
Defendants? _____%

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.

I have been a judge for more than 5 years.

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.

I have been a judge for more than 5 years.

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.

Attached are four orders that I wrote. The Phillips case was edited by a staff attorney, State v. Liles was reversed, and the other two orders were affirmed.

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.

Yes, I was elected in August of 2004, for a term beginning in January of 2005 as a county court judge in Orange County, Florida. I was subsequently elected without opposition in 2010. In November of 2010 I was appointed to the Circuit Court. In 2012 and 2018 I was a candidate for Circuit Judge. In both 2012 and 2018 I was elected without opposition.

32b. List any prior quasi-judicial service:

<i>Dates</i>	<i>Name of Agency</i>	<i>Position Held</i>
none		

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.

Yes, Gainesville City Commission, District 3, in 1990. I lost the election.

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.

Christopher Skambis, 715 Vasser Street, Orlando, FL 32804 (407-649-0090)

Stephen Price, 1411 Edgewater Drive, Suite 200, Orlando, FL 32804 (407-843-3300 ext 12)

Richard West, 7009 Dr. Phillips Blvd, Ste 130, Orlando, FL 32819 (407-425-8878)

Susan W. Savard, 1000 Legion Place, Suite 1650, Orlando, FL 32801 (407-403-5558 ext. 113)

Lyle Mazin, 200 E. Robinson St., Ste 1150, Orlando, FL 32801 (407-499-4800)

Brock McClane, 215 E. Livingston Stret, Orlando, FL 32801 (407-872-0600)

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

I have been assigned to the following divisions: Circuit Civil/Mental Health/Probate since January of 2018. Previously I was assigned to the general Family division from January 2015 - December 2017; Circuit Criminal from March 2011 - December 2014; Domestic Violence (Injunctions and related family matters) December 2010 - February 2011; Misdemeanor Domestic Violence January 2009-November 2010; Booking and Release Center January 2007 - December 2008; and County Criminal from January 2005 - December 2006. It is fair to say that I have addressed well over 1000 cases in each of the divisions that I have been assigned, other than in my newest assignment, and when i was assigned to the Domestic Violence division for only a few months.

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

Phillips v. Republic Financial Corporation, 157 So.3d 320 (Fla. 5th DCA 2015).

State v. Liles, 21 Fla. L. Weekly Supp. 883a (Fla. 9th Cir. Ct. 2014).

State v. Byfield, 17 Fla. L. Weekly Supp. 1232a (Fla. Orange Cty Ct. 2010).

State v. Ruiz, 16 Fla. L. Weekly Supp. 1066a (Fla. Orange Cty Ct. 2009).

State v. Payton, 16 Fla. L. Weekly Supp. 957a (Fla. Orange Cty Ct. 2009).

State v. Francis, 16 Fla. L. Weekly Supp. (Fla. Orange Cty Ct. 2009).

State v. Boschetti, 15 Fla. L. Weekly Supp. 916a (Fla. Orange Cty Ct. 2008).

State v. Cash, 12 Fla. L. Weekly Supp. 476a (Fla. Orange Cty. Ct. 2005).

State v. Rogers, 12 Fla. L. Weekly Supp 370b (Fla. Orange Cty. Ct. 2005)

- (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.

State v. Nowak, 48-2007-CF-1796-A-O. I presided over two initial appearances involving a former astronaut after she was accused of traveling across the country to confront her ex-lover's new girlfriend. The proceedings were broadcast live on CNN and were covered around the world. The hearings were held on February 6, 2007 and the attorneys involved were Amanda Cowan for the State and Donald Lykkebak for the Defense. This case was my first case that involved national media and I remember thinking that this is the type of case that many judges around the country would have set the bond at no bond, or at a million dollars, to "play it safe" to avoid criticism. However, I knew if I were to do that I would have been abandoning my constitutional obligations.

Yvonne Stewart v. Dale Wayne Smith, 2015-DR-18207-O. I presided over a case interpreting a statute that was actually written to assist the instant plaintiff in getting timesharing with her grandchildren after the mother went missing and was presumed dead. The case is significant to me because even though I personally believe that grandparents should have rights to visit with their grandchildren, I found that the statute as written did not apply to the plaintiff. The Fifth DCA affirmed. (My Order is attached as one of my writing samples.) The lawyers were Belvin Perry and Stephen J. Calvacca and my Order was entered in December of 2015.

██████████ v. ██████████, ██████████. This case was a contested matter where the mother wanted the child to be given up for adoption and the father objected. The case was significant to me because the law prevents the court from considering what would be in the child's best interest, and instead requires that the judge make factual findings that either would allow the father's rights to be terminated or not. Although the evidence was that the father had paid his lawyer over \$100,000 in legal fees fighting to keep his child, his rights were properly terminated. (My Order in this case is attached as one of my writing samples, and the opinion was affirmed by the Fifth DCA). The lawyers were Stephen Price, Debbie McAndrew, and Mike Miller and the Order was entered in January of 2016.

State v. Ballard, 2004-MM-482-A-E, In April of 2005 I sentenced a 78 year old woman who had pled to disorderly conduct, with antisemitic overtones, to probation to include a special condition of visiting either the local, state, or national Holocaust museum. The case was significant to me because although I had previously represented victims of a hate crime, this was the first case in which I had to tailor a sentence to allow the elderly defendant to understand why her actions were exceptionally hurtful to the victim. The Defense attorney was former State Attorney, Robert Eagan.

Florida Bar v. Rafool, SC06-164. This case was tried in June and July of 2006 in Bartow, Florida. I was the referee in case in which the attorney was alleged to have submitted an "Agreed Order" when the Order had not been agreed to. The case was significant to me because it was my first referee case and because the consequences to the attorney could be substantial. The attorneys were Ken Bryk for the Florida Bar and John A. Weiss for Mr. Rafool. The Supreme Court reversed my finding of a violation and affirmed my decision to send the case to a diversion program. Subsequently I learned that once a judge is a referee over a

lawyer's case, that judge gets to preside over any future contested violations by that lawyer. To date I have not had to see Mr. Rafool again, therefore it appears that the diversion program worked.

- (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.

I have never appeared before the JQC nor has there been a finding of probable cause. I do know that Rufus Hawkins II, filed a complaint with the JQC after he was arrested in 48-2009-CF-15679-O for practicing law without a license. He had appeared before me as a lawyer for another individual despite Mr. Hawkins having never been a lawyer. Mr. Hawkins filed a copy of his complaint to the JQC prior to being found guilty by a jury. I also know that the opponent I defeated in 2004 filed a complaint with the JQC. Neither of these cases resulted in any JQC action that I am aware of.

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

No.

- (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.

n/a

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 previously was the owner of Michael P. Murphy, PA from 1998-2004. The nature of the business was the practice of law.

- 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.

Adjunct professor, UCF, January 2008 - May 2013.

- 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.

None other than reimbursement from the State of Florida regarding court required education or transportation.

POSSIBLE BIAS OR PREJUDICE:

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

I do not preside over cases in which attorney Stuart I. Hyman is the attorney of record. I still use my previous business address, which is still Mr. Hyman's current business address, as my mailing address.

MISCELLANEOUS:

35a. Have you ever been convicted of a felony or a first degree misdemeanor?
Yes _____ No 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 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 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.

Yes. A former litigant sued me in my professional capacity as a judge in: *Montego El Xaymakali Bey v. State of Florida et. al.*, 6:17-cv-2144-Orl-18DCI. This case was dismissed with prejudice by Federal Judge Sharp on February 14, 2018. Additionally, a former litigant sued me in my professional capacity as a judge in: *Ortiz-Bachorik v. The Honorable Judge Michael Murphy*, 49-2011-943-O. This case was dismissed in March of 2011. Finally, in *Axtel v. Nguyen*, 1997-CA-9780-O, I was sued after I loaned my car to a person who was in a car crash. I was advised that the case settled out of court for less than \$5,000.

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.

Not that I am aware of.

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?

\$92 in my timely filed 2001 Federal Tax return and \$32 in my timely filed 2002 Federal Tax return. The penalty was due underpayment of withholding taxes that resulted from me having two sources of income where each calculated withholding as if each was the sole source of employment income.

Yes No If yes, please explain what and why.

- 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.
No.

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

2013 Gary Formet Award of Judicial Excellence.

2006, Hispanic Bar Association of Central Florida Jurist of the Year.

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

I have spoken at Inside the Courts, various Rotary Club meetings and as an adjunct professor at UCF.

47. Do you have a Martindale-Hubbell rating? Yes If so, what is it? ___ No

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.

Florida Bar, Orange County Bar Association, Osceola County Bar Association, and the Hispanic Bar Association. I have never been an officer in any of the organizations.

- 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.

In the past I previously was a member of: Rotary Club; Business and Professional Women, Winter Park Chamber of Commerce, Orlando Regional Chamber of Commerce, Central Florida Association of Criminal Defense Lawyers; Florida Association of Criminal Defense Lawyers; National Association of Criminal Defense Lawyers; and the Florida Prosecuting Attorneys Association. I was never an officer in any of these organizations.

48c. List your hobbies or other vocational interests.

Traveling, snow skiing, biking, the gym, and learning spanish.

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.

As a judge, I am unable to provide pro bono legal work. I do not recall any significant pro bono legal work prior to becoming a judge.

SUPPLEMENTAL INFORMATION:

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

No. However, judges are required to attend continuing judicial education (CJE) programs and I am current with my CJE requirements.

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?

Real Estate and Property Law as an adjunct at UCF as indicated above. I co-presented the Criminal Law case law update for Circuit Judges at the August, 2013 Conference of Circuit Court Judges.

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

I sat as an associate judge for the Fifth DCA in October of 2014. As a panel we addressed 9 cases and I drafted the opinion in one case.

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

I have had the opportunity to preside over multiple cases in many areas of the law. Prior to becoming a judge I have had the opportunity to represent the State, Defendants and victims of crimes. Additionally, I enjoy writing, and I enjoy complex cases. I believe my diverse background has helped prepare me to make decisions that are fair, impartial, and unemotional.

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.

9th Cir JNC in September of 2010. Fifth DCA JNC in May of 2012, May of 2018, and December of 2018.

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

As a circuit judge, I have been a part of appellate panels since 2013.

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.

Stuart I. Hyman, 1520 E. Amelia Street, Orlando, FL 32803. (407-896-0536)

John E. Jordan, 425 N. Orange Avenue, Orlando, FL 32801 (407-836-4709)

Mark Rabinowitz, 201 E. Pine Street, Suite 500, Orlando, FL 32801 (407-425-6559)

Richard West, 7009 Dr. Phillips Blvd, Ste 130, Orlando, FL 32819 (407-425-8878)

Brock McClane, 215 E. Livingston Stret, Orlando, FL 32801 (407-872-0600)

Lyle Mazin, 200 E. Robinson St., Ste 1150, Orlando, FL 32801 (407-499-4800)

Kafi D'Nese Kennedy Swanson, 1820 W. Colonial Drive, Orlando, FL 32804 (407-782-2912)

Stephen Price, 1411 Edgewater Drive, Suite 200, Orlando, FL 32804 (407-843-3300 ext 12)

Tad Yates, 3431 Edgewater Dr., Orlando, FL 32804 (407-608-7777)

Warren Lindsey, 1150 Louisiana Ave, Ste 2, Winter Park, FL 32789 (407-644-4044)

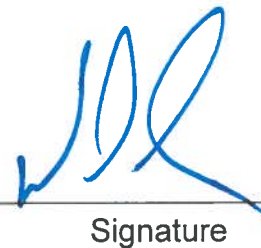
CERTIFICATE

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(I), 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 19 day of August, 2019.


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	93,735		
List Last 3 years	160,688	149,732	146,080

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	\$147,297		
List Last 3 years	109,498	99,132	98,833

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

	<200 (all of these numbers are based upon interests and dividends)		
Current year to date			
List Last 3 years	<500	<500	<500

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	same as above		
List Last 3 years	same as above	same as above	same as above

Please print or type your name, mailing address, agency name, and position below:

FOR OFFICE USE ONLY:

LAST NAME — FIRST NAME — MIDDLE NAME:
MURPHY MICHAEL

MAILING ADDRESS:
1520 E. AMELIA STREET

CITY: ORLANDO ZIP: 32803 COUNTY: ORANGE

NAME OF AGENCY:
NINTH JUDICIAL CIRCUIT

NAME OF OFFICE OR POSITION HELD OR SOUGHT:
CIRCUIT JUDGE, GROUP 19

CHECK IF THIS IS A FILING BY A CANDIDATE

PART A -- NET WORTH

Please enter the value of your net worth as of December 31, 2018 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 December 31, 20 18 was \$ aprox \$996,000.

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, whether owned or leased.

The aggregate value of my household goods and personal effects (described above) is \$ 50,000

ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:

DESCRIPTION OF ASSET (specific description is required - see instructions p.4)	VALUE OF ASSET
HOME [REDACTED]	\$330,000
Non-Retirement Accounts: TD Ameritrade, Suntrust, BOA, Citibank & Wells Fargo**	\$601,476
Retirement Accts (non-pension), TIAA Cref, TD Ameritrade, and Defferred Comp**	\$82,052
Time Share, [REDACTED] (\$10,000); Automobile (\$10,000) ** see attached for details	\$20,000

PART C -- LIABILITIES

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

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Quicken Loans, PO Box 6577, Carlstream, IL 60197	\$87,901
No other debts	

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
None	

PART D -- INCOME

Identify each separate source and amount of income which exceeded \$1,000 during the year, including secondary sources of income. Or attach a complete copy of your 2018 federal income tax return, including all W2s, schedules, and attachments. Please redact any social security or account numbers before attaching your returns, as the law requires these documents be posted to the Commission's website.

I elect to file a copy of my 2018 federal income tax return and all W2's, schedules, and attachments.
 [If you check this box and attach a copy of your 2018 tax return, you need not complete the remainder of Part D.]

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

NAME OF SOURCE OF INCOME EXCEEDING \$1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
State of Florida (Judicial Salary)	200 E. Gaines Street, Tallahassee, FL	\$160,688

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person--see instructions on page 5]:

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSINESS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
none			

PART E -- INTERESTS IN SPECIFIED BUSINESSES [Instructions on page 6]

	BUSINESS ENTITY # 1	BUSINESS ENTITY # 2	BUSINESS ENTITY # 3
NAME OF BUSINESS ENTITY			
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

PART F - TRAINING

For officers required to complete annual ethics training pursuant to section 112.3142, F.S.

I CERTIFY THAT I HAVE COMPLETED THE REQUIRED TRAINING.

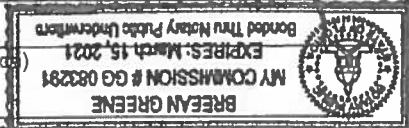
OATH

STATE OF FLORIDA
 COUNTY OF Osceola

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.

Sworn to (or affirmed) and subscribed before me this 19 day of June, 2019 by Michael Murphy

Brian Greene
 (Signature of Notary Public--State of Florida)



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

Personally Known OR Produced Identification

Type of Identification Produced _____

 SIGNATURE OF REPORTING OFFICIAL OR CANDIDATE

If a certified public accountant licensed under Chapter 473, or attorney in good standing with the Florida Bar prepared this form for you, he or she must complete the following statement:

I, _____, prepared the CE Form 6 in accordance with Art. II, Sec. 8, Florida Constitution, Section 112.3144, Florida Statutes, and the instructions to the form. Upon my reasonable knowledge and belief, the disclosure herein is true and correct.

 Signature

 Date

Preparation of this form by a CPA or attorney does not relieve the filer of the responsibility to sign the form under oath.

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

ATTACHMENT TO FORM 6 (2018 year)

Non-Retirement Accounts, Detail

Walt Disney Co. 500 South Buena Vista Street Burbank,, CA 91521	TD Ameritrade JPMorgan Chase & Co. 270 Park Avenue New York, NY 10017
IAC/InterActiveCorp 555 West 18th Street New York, NY 10011	Pepsico, Inc. 700 Anderson Hill Road Purchase, NY 10577
Vanguard Index symbol VOO Phone: 800-662-7447	Alphabet Inc 1600 Amphitheater Pkwy Mountain Valley, CA
Amazon 410 Terry Ave North Seattle, WA 98109	Coca Cola Company One Coca-Cola Plaza Atlanta, GA 30313
Facebook, Inc 1601 Willow Road Menlo Park, CA 94025	FedEx Corporation 942 South Shady Grove Road Memphis, TN 32810
Netflix.com 100 Winchester Circle Los Gatos, CA 95032	United Health Group 9900 Bren Road East Minnetonka, MN 55343
Above stocks total \$462,320 Insured Deposit Account (IDA): \$43,457	

Additional, non-retirement accounts

SunTrust: \$80,000 (cash); Wells Fargo: \$53,104 (cash);
Bank of America: \$2000 (cash); Citibank: \$3000 (cash).

Retirement Accounts (does not include present value of future pension)

TIAA Cref:	\$75,000
TD Ameritrade Roth IRA:	\$1,635
Deferred Comp:	\$5,417

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: 08/19/2019

JNC Submitting To: 5th DCA JNC

Name (please print): Michael Murphy (Mike Murphy)

Current Occupation: Circuit Judge

Telephone Number: 407-742-2413 Attorney No.: 0054046

Gender (check one): Male Female

Ethnic Origin (check one): White, non Hispanic

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: Orange

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

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

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

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

Printed Name of
Applicant:

Michael Murphy (Mike Murphy)

Signature of Applicant:



Date: 08/19/2019

WRITING SAMPLES REFERENCED IN QUESTION 31

31-A Phillips v. Republic Financial Corporation, 157 So.3d 320 (Fla. 5th DCA 2015).

31-B State v. Liles, 21 Fla. L. Weekly Supp. 883a (Fla. 9th Cir. Ct. Apr. 29, 2014).

31-C Stewart v. Smith, No. 48-2015-DR-018207-O (Fla. 9th Cir. Ct. Dec. 5, 2016).

31-D In Re: D.R.H., No. [REDACTED] (Fla. 9th Cir. Ct. Dec. 26, 2015).

157 So.3d 320
District Court of Appeal of Florida,
Fifth District.

Laura PHILLIPS, as guardian of Ronald
Phillips; Laura Phillips, individually; Laura
Phillips, as guardian of Brianna Phillips,
Chance Phillips, and Wyatt Phillips, Appellants,

v.

REPUBLIC FINANCIAL CORPORATION;
Don M. Buckner, personally; American
Manufacturing & Machine, Inc., and
Timothy G. Fischer, individually, Appellees.

Nos. 5D13-3170, 5D 13-3174.

|

Jan. 2, 2015.

|

Rehearing and Rehearing En
Banc Denied March 2, 2015.

Synopsis

Background: Spouse of independent contractor who fell through a warehouse's painted-over skylight brought a premises-liability action, individually and as guardian for contractor and together with her children, against warehouse owner, former warehouse operator, service provider for former warehouse operator, and employee of service provider. The Circuit Court, Lake County, G. Richard Singeltary, J., granted summary judgment in favor of the defendants. Spouse and children appealed.

Holdings: The District Court of Appeal, Murphy, M., Associate Judge, held that:

[1] genuine issue of material fact existed as to whether the skylight was a latent defect, precluding summary judgment as to warehouse owner;

[2] service provider and employee could not be liable for contractor's injuries, given that they did not have the power to possess or control the warehouse; and

[3] former warehouse operator could not be liable for contractor's injuries, absent evidence that it exercised control of the warehouse on the date of the incident.

Affirmed in part, reversed in part, and remanded.

Lawson, J., concurred specially and filed opinion.

West Headnotes (11)

[1] **Judgment**

↔ Existence or non-existence of fact issue

If evidence presented on a motion for summary judgment raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it. West's F.S.A. RCP Rule 1.510(c).

Cases that cite this headnote

[2] **Labor and Employment**

↔ Work of Independent Contractor

Generally, one who hires an independent contractor is not liable for injuries suffered by that contractor's employees in their work.

1 Cases that cite this headnote

[3] **Labor and Employment**

↔ Construction cases

Negligence

↔ Accidents and Injuries in General

As an exception to the general rule that one who hires an independent contractor is not liable for injuries suffered by that contractor's employees in their work, a property owner may be held liable if he has been actively participating in the construction to the extent that he directly influences the manner in which the work is performed.

1 Cases that cite this headnote

[4] **Negligence**

↔ Duty to warn

Negligence

☞ Care required in general

As an exception to the general rule that one who hires an independent contractor is not liable for injuries suffered by that contractor's employees in their work, a property owner owes a business visitor a duty to warn of latent and concealed perils that are known to the owner, or which by the exercise of due care should have been known to him, and which were not known by the visitor or which, by the exercise of due care, could not have been known to him.

1 Cases that cite this headnote

[5] **Judgment**

☞ Tort cases in general

Genuine issue of material fact existed as to whether a warehouse's painted-over skylight was a latent defect, which went to whether warehouse owner had a duty to warn independent contractor about the skylight, precluding summary judgment on a premises-liability claim brought against owner by contractor's spouse and her children after contractor, who was hired to work on the warehouse's roof, fell through the skylight.

Cases that cite this headnote

[6] **Negligence**

☞ Persons working on property

A property owner will be held liable for negligence in connection with injuries to an independent contractor's employee only with regard to those dangers that are not known to the independent contractor or could not have been discovered through the exercise of due care.

Cases that cite this headnote

[7] **Negligence**

☞ Duty to warn

Crux of a cause of action for premises liability is not the ownership of the premises but the negligence of the possessor in permitting licensees and invitees to come unwarned to an area where they could foreseeably be injured by a dangerous condition that is not readily apparent.

Cases that cite this headnote

[8] **Landlord and Tenant**

☞ Ownership, custody, and control

In a case involving a leased premises, the extent of responsibility for injuries occurring on the leased premises during the term of the lease depends on the extent the owner of the property maintains control over the premises.

Cases that cite this headnote

[9] **Landlord and Tenant**

☞ Questions of Law or Fact

When a landlord and a tenant have a lease that expressly sets forth which party has the power to possess and control the property during the term of the lease, the issue of control is a matter of law, for the purpose of determining the extent of responsibility for injuries occurring on the leased premises.

Cases that cite this headnote

[10] **Negligence**

☞ Liabilities of Particular Persons Other Than Owners or Occupiers

Service provider for former warehouse operator and employee of service provider could not be liable for injuries suffered by independent contractor when he fell through a painted-over skylight while working on the warehouse's roof, where service provider and employee did not have the power to possess or control the warehouse.

Cases that cite this headnote

[11] **Negligence**

☞ Liabilities of Particular Persons Other Than Owners or Occupiers

Former warehouse operator could not be liable for injuries suffered by independent contractor when he fell through a painted-over skylight while working on the warehouse's roof, absent evidence that operator exercised control over the warehouse on the date of the incident.

Cases that cite this headnote

Attorneys and Law Firms

*322 Karen Cox, of Bush Ross, P.A., Tampa, for Appellants.

James W. Sherman, of Richard A. Sherman, P.A., Fort Lauderdale; Scott Albee and Gerald C. Biondi, of Fulmer, LeRoy, Albee, Baumann, P.L.C., Tampa; and Jack R. Reiter, of Carlton Fields Jordan Burt, P.A., Miami, for Appellee, Republic Financial Corporation.

Darryl R. Richards, of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Tampa, for Appellees, Don M. Buckner and American Manufacturing.

Patrick H. Telan and T'anjuiming A. Marx, of Grower, Ketcham, Rutherford, Bronson, Eide & Telan, P.A., Orlando, for Appellee, Timothy J. Fischer.

Opinion

MURPHY, M., Associate Judge.

Laura Phillips, both individually and as guardian for her husband, Ronald Phillips (individually “Phillips”), and her children, Brianna Phillips, Chance Phillips, and Wyatt Phillips (collectively “Appellants”), timely appeals three summary-judgment orders in favor of Republic Financial Corporation (“Republic”), Timothy Fischer (“Fischer”), American Manufacturing & Machine, Inc. (“American Manufacturing”), and Don Buckner (“Buckner”) (collectively “Appellees”). After Phillips fell through a warehouse's painted-over skylight, Appellants brought suit, alleging Appellees had control over the warehouse and breached a duty to warn of a latent defect—the skylight's painted-over condition. On appeal, Appellants argue that the trial court erred when it entered summary judgments for Appellees and held (1) Appellees had no duty to warn, (2) Appellants failed to pierce the corporate veil, and (3) Appellees did not have control over the warehouse. We reverse, holding summary judgment for Buckner, the owner of the *323 warehouse, was improper because the question of whether a defect was latent presents a genuine issue of material fact. However, we affirm the summary judgment in favor of Fischer, Republic, and American Manufacturing because they did not exercise control sufficient for a premises-liability claim.

In 2000, Buckner purchased land and the warehouse. Soon after, Buckner leased the property to his company, American Manufacturing, to make industrial vacuum equipment under the brand name Vac-Tron. Between 2000 and 2008, American Manufacturing paid for repairs and painting of the warehouse's roof. In 2008, Buckner terminated American Manufacturing's lease and sold a sixty-six percent interest in American Manufacturing to Vac-Tron Holding, Inc., a newly formed subsidiary of Republic Private Equity I, LLP, a company owned by Republic. Under the terms of the contract, a new company was created called Vac-Tron Equipment, LLC (“Vac-Tron Equipment”). In the deal, American Manufacturing's assets were transferred to Vac-Tron Equipment, and American Manufacturing took a thirty-three percent interest in Vac-Tron Equipment. Buckner then leased the warehouse to Vac-Tron Equipment. The lease provided that Vac-Tron Equipment was responsible for repairs to the property other than “maintenance, repair or replacement costs in excess of \$2,500.” Maintenance, repair, or replacement costs in excess of \$2,500 remained Buckner's responsibility and required his approval prior to initiation. Since 2008, in addition to being the sole owner and CEO of American Manufacturing, Buckner remained the sole owner of the property, and he was the CEO at Vac-Tron Equipment.

Republic's connection to the property is set forth in a financial services agreement with Vac-Tron Equipment. The agreement stated that Republic would provide Vac-Tron Equipment with “certain management and financial advisory services ...,” assist with accounting and legal issues, and advise on management and financial operations. The agreement further provided that Republic was an independent contractor, that Vac-Tron was not obligated to follow any advice or recommendation, and that management, policies, and operations were Vac-Tron's sole responsibility. Fischer, a board member on Vac-Tron Equipment's board of directors and a Republic employee, was paid by Republic for his consultation work to Vac-Tron Equipment. However, at the time of the instant incident, Fischer was no longer on Vac-Tron Equipment's board of directors.

In 2010, Vac-Tron hired a roofing repair company owned by Phillips to work on the warehouse's corrugated metal roof. The contract required that Phillips clean and paint the roof and clean and caulk existing skylights. Phillips hired Brad Short (“Short”) to assist with the project. Both Phillips and Short walked the roof for measurements before contracting to perform the work. The roof contained skylights and had very little pitch. The roof's existing paint appeared aged. The

skylights were visible from the roof and were made from corrugated fiberglass panels with a corrugation pattern that matched the metal roof. Neither Phillips nor Short attempted to view the skylights from within the warehouse or map the skylights before performing work on the roof.

In July 2010, Phillips was seriously injured when he fell through a painted-over skylight as he started the work his company was hired to perform. The skylight that Phillips fell through was painted the same color as the metal panels. When viewed from the roof, the skylight was indistinguishable from the metal panels. *324 After the injury, Short was shown photographs from within the warehouse of the warehouse's roof, including the existing skylights. Short acknowledged that the photos showed that the skylights were visible, including the specific skylight that Phillips fell through.¹

After the injury, Appellants entered into a settlement with Vac-Tron Equipment and Vac-Tron Holdings, Inc. The settlement released employees and directors from liability. Appellants subsequently filed the instant suit against Buckner, as the owner of the warehouse, American Manufacturing, Fischer, and Republic.²

Buckner and American Manufacturing moved for summary judgment, arguing the painted-over condition was a patent defect and that American Manufacturing did not exercise control over the property. In a separate motion, Republic argued there was no duty to warn and that Appellants failed to pierce the corporate veil. Finally, in a separate motion, Fischer argued that he was released from liability in the settlement, there was no duty to warn, and he did not exercise control over the property. Fischer joined Republic's motion, and Republic joined Fischer's motion. The trial court only ruled on American Manufacturing and Buckner's motion for summary judgment and on Republic's motion for summary judgment. The trial court did not rule on Fischer's separate motion—the only ground the trial court considered for Fischer was Republic's argument that Appellants did not pierce the corporate veil.

[1] “A trial court's ruling on a motion for summary judgment is subject to a de novo standard of review.” *Baxter v. Northrup*, 128 So.3d 908, 909 (Fla. 5th DCA 2013) (citing *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla.2000)). “Summary judgment is appropriate only where ‘there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.’ ” *MacClatchey v. HCA Health Servs. of Fla., Inc.*, 139

So.3d 970, 972 (Fla. 4th DCA 2014) (quoting Fla. R. Civ. P. 1.510(c)). “The burden is on the moving party to show ‘conclusively the absence of any genuine issue of material fact and the court must draw every inference in favor of the party against whom a summary judgment is sought.’ ” *Id.* (quoting *Moore v. Morris*, 475 So.2d 666, 668 (Fla.1985)). “If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it.” *Id.* (quoting *Moore*, 475 So.2d at 668).

DUTY OWED TO AN INDEPENDENT CONTRACTOR

[2] [3] [4] Generally, “one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in their work.” *Cecile Resort, Ltd. v. Hokanson*, 729 So.2d 446, 447 (Fla. 5th DCA 1999) (quoting *Van Ness v. Indep. Constr. Co.*, 392 So.2d 1017, 1019 (Fla. 5th DCA 1981)). In *Cecile Resort*, this court recognized two exceptions to this general rule. First, an “owner may be held liable if he has been actively participating in the construction to the extent that he directly influences the manner in which the work is *325 performed.” *Id.* (quoting *Conklin v. Cohen*, 287 So.2d 56, 60 (Fla.1973)). Second, “an owner owes a business visitor [a] duty” to warn “of latent and concealed perils known to the [owner], or which by the exercise of due care should have been known to him, and which were not known by [the visitor] or which, by the exercise of due care, could not have been known to him.” *Id.* at 448 (internal quotation marks omitted) (quoting *Hall v. Holland*, 47 So.2d 889 (Fla.1950)).

[5] Appellants claim that the skylight Phillips fell through was a latent defect in the roof because this single skylight, unlike all the other skylights, was covered with paint and was, therefore, not visible from the roof. Appellants rely primarily on *Pertl v. Exit Information Guide, Inc.*, 708 So.2d 956 (Fla. 1st DCA 1997), to support their position that the skylight was a latent defect. In *Pertl*, a contractor was hired to paint a roof, and he fell through a skylight that had been painted over. *Id.* at 958. Significantly, some of the skylights had been painted over and many of the skylights were difficult to distinguish from the corrugated roof. *Id.* The first district applied *Holland*, 47 So.2d 889, reversed the lower court's order granting summary judgment, and held that the contractor was a “business visitor, or invitee” on the premises.

Id. at 957–58. The *Pertl* court held that the defendant owed a duty to warn of latent defects, as follows:

[The building owner owed the independent contractor a duty] to use reasonable care in maintaining the premises in a reasonably safe condition and to give the plaintiff timely notice and warning of latent and concealed perils, known to the defendant or which by the exercise of due care should have been known to him, and which were not known by plaintiff or which by the exercise of due care could not have been known by him.

Id. (quoting *Holland*, 47 So.2d at 891).

Appellees argue that the first district, in *Strickland v. Timco Aviation Services, Inc.*, 66 So.3d 1002 (Fla. 1st DCA 2011), limited its prior holding in *Pertl*. In *Strickland*, the contractor was hired to pressure wash the roof and perform repair and maintenance on the skylights. *Strickland*, 66 So.3d at 1005. While pressure washing the roof, the contractor fell through one of the skylights and claimed that TIMCO was negligent because the skylights were indistinguishable from the roof. *Id.* The first district recognized that in *Pertl*, there was no evidence that the contractor knew the roof contained skylights or that the contract required skylight repair. *Id.* at 1008. In *Strickland*, the contractor had knowledge of the existence and location of the skylights. *Id.* at 1009. Furthermore, *Strickland* held that:

The danger of falling through the skylights was an obvious hazard in light of [the independent contractor's employee's] knowledge that the skylights existed and [the independent contractor's] obligation under the contract to repair and maintain them. Moreover, TIMCO plainly had no duty to warn [the independent contractor's employee] of the obvious hazard or danger posed by the skylights since that hazard was an integral part of the

work that [the independent contractor] was hired to perform.

Id. at 1010.

In reaching its conclusion, the first district followed the fourth district's decisions in *Johnson v. Boca Raton Community Hospital, Inc.*, 985 So.2d 593 (Fla. 4th DCA 2008), and *Morales v. Weil*, 44 So.3d 173 (Fla. 4th DCA 2010), which both held that a landowner does not have a duty to protect an independent contractor from the hazards of the job that cause the job to *326 be dangerous. In *Johnson*, the court found that inhaling asbestos was a “usual hazard” incidental to asbestos installation and therefore ruled that the hospital did not owe a duty to warn the independent contractor's employee of that hazard. *Johnson*, 985 So.2d at 596. In *Morales*, the court found that Morales was hired to perform a “dangerous demolition job on a heavily-damaged structure” in which the “dangerous condition of the roof was patently obvious to all.” *Morales*, 44 So.3d at 179.

Unlike the injured parties in *Strickland*, *Johnson*, and *Morales*, Phillips was not injured due to a fall through a skylight known to exist by him, nor was the dangerous condition of the painted over skylight “patently obvious to all,” nor is falling through a painted-over skylight a “usual hazard” of cleaning and painting a roof or repairing and caulking skylights.

[6] Appellees nonetheless argue that the photographs from within the warehouse of the roof show the painted-over skylight that Phillips fell through was visible, and Phillips could have located the skylight prior to working on the roof. “[A] property owner will be held liable for negligence only with regard to those dangers that are not known to the independent contractor *or could not have been discovered through the exercise of due care.*” *Strickland*, 66 So.3d at 1007 (emphasis added) (citing *Florida Power & Light Co. v. Robinson*, 68 So.2d 406, 411 (Fla.1953)); *see also Pertl*, 708 So.2d at 957–58. Whether searching for skylights solely from the roof is a reasonable inspection, or the exercise of due care, is a jury question. *See Kala Invs., Inc. v. Sklar*, 538 So.2d 909, 914 (Fla. 3d DCA 1989) (“It is well established that it is ‘peculiarly a jury function to determine what precautions are reasonably required in the exercise of a particular duty of due care.’ ” (quoting *Orlando Exec. Park v. Robbins*, 433 So.2d 491 (Fla.1983))). Therefore, the trial court erred in granting

summary judgment for all Appellees on the issue of duty to warn.

CONTROL OVER THE PROPERTY

[7] [8] [9] “The crux of a cause of action for premises liability is not the ownership of the premises, but the negligence of the possessor in permitting licensees and invitees to come unwarned to an area where they could foreseeably be injured by a dangerous condition which is not readily apparent.” *Houssami v. Nofal*, 578 So.2d 495, 496 (Fla. 5th DCA 1991); *Bovis v. 7-Eleven Inc.*, 505 So.2d 661 (Fla. 5th DCA 1987). “In cases like this, where the facts involve a leased premises, the extent of responsibility for injuries occurring on the leased premises during the term of the lease depends on the extent the owner of the property maintains control over the premises.” *Brown v. Suncharm Ranch*, 748 So.2d 1077, 1078 (Fla. 5th DCA 1999). When the landlord and tenant have a lease that expressly sets forth which party has the power to possess and control the property during the term of the lease, the issue of control is a matter of law. *See, e.g., Russ v. Wollheim*, 915 So.2d 1285 (Fla. 2d DCA 2005) (holding that as a matter of law, a lessor retains a possessory interest or control when a lease provision requires the lessee to obtain prior written approval before lessee can alter or improve property); *Colon v. AutoZone Ne., Inc.*, 148 Conn.App. 435, 84 A.3d 1234, 1237 (2014) (“Although questions of fact ordinarily are not decided on summary judgment, if the issue of control is expressed definitively in the lease, it becomes, in effect, a question of law.” (quoting *Fiorelli v. Gorsky*, 120 Conn.App. 298, 991 A.2d 1105, 1112 (2010))).

[10] [11] As to summary judgment in favor of Fischer and Republic, we find no *327 reversible error.³ Pursuant to the Financial Services Agreement, neither Fischer nor Republic had the power to possess or control the property. The terms of the contract were not in dispute; therefore, we affirm the summary judgment in favor of Fischer and Republic because neither had the power to possess or control the property pursuant to *Russ* and *Colon*. We also affirm summary judgment with regard to American Manufacturing.⁴ Despite evidence establishing that the company operated in the warehouse until 2008 and paid for two roof repairs in 2009, there was no evidence that American Manufacturing exercised control over the property on the date of the incident, July 8, 2010. Therefore, summary judgment was appropriate with regard to American Manufacturing. *See Pertl*, 708 So.2d

at 958 (holding that because the record does not contain any evidence that the previous owner controlled the property on the date of the incident, the previous owner owed no duty).

We reverse, however, because Buckner did not argue in his motion for summary judgment that he, as owner of the property, did not have control.⁵ He only argued that summary judgment was appropriate on the duty-to-warn issue. Accordingly, because the issue of control was not raised below, and because the trial court erred when it held Buckner did not have a duty to warn, we reverse the summary judgment for Buckner and remand for further proceedings.

AFFIRMED in Part; REVERSED in Part; and REMANDED.

BERGER, J., concurs.

LAWSON, J., concurs specially, with opinion.

LAWSON, J., specially concurring.

I agree that a disputed issue of material fact exists with regard to whether the painted-over skylight was a latent defect. *See, e.g., Pep Boys–Manny, Moe & Jack, Inc. v. Four Seasons Commercial Maint., Inc.*, 891 So.2d 1160, 1161 (Fla. 4th DCA 2005) (“Where a jury could find from the evidence that a defect is latent, summary judgment should not be entered.” (citation omitted)). Appellees argue that the nature of the defect was patent because the injured contractor could have discovered it had he exercised reasonable care. *See, e.g., Kala Invs., Inc. v. Sklar*, 538 So.2d 909, 913 (Fla. 3d DCA 1989) (“[T]he test for patency is not whether the object itself ... was obvious ..., but whether the *defective nature* of the object was obvious ... with the exercise of reasonable care.” (citation omitted)). However, there is evidence on this point that appears to support Appellants. For example, a co-worker of the injured contractor testified in deposition that he had been hired to paint thousands of roofs over his thirty-year career without ever once encountering a skylight painted over to blend in with the surrounding *328 roof like the one onto which his co-worker stepped on the day of the injury. The evidence also strongly suggests that the dangerous condition was unlikely to be noticed by anyone who did not know to look for it.

I also agree with the majority's decision to affirm the summary judgments for Fischer, Republic and American Manufacturing on grounds that they did not “control” the premises because the record demonstrates no issue of

disputed material fact as to the issue. Finally, I agree with the majority that because Buckner did not seek summary judgment on this issue, we should not address it on this record. Doing so would deprive Appellants of any opportunity to place evidence that could bear on the issue before the trial court. I write separately, however, to briefly address the “control” issue as it relates to Buckner and the other Appellees. I do so, in part, because the briefs in this case reflect confusion over the legal concept of “control” as it relates to a premises liability cause of action.

As explained by the majority: “The crux of a cause of action for premises liability is not the ownership of the premises, but the failure of the possessor of the premises to use due care (negligence) in permitting licensees and invitees to come, unwarned, to an area where, foreseeably, they may be injured by a dangerous condition which to them is not readily apparent.” *Bovis v. 7-Eleven, Inc.*, 505 So.2d 661, 663 (Fla. 5th DCA 1987) (footnotes omitted). As such, “[t]he duty to protect others from injury resulting from a dangerous condition on a premises rests on the party who has the right to *control access* by third parties to the premises, be it the owner, an agent, or a lessee of the property.” *Brown v. Suncharm Ranch, Inc.*, 748 So.2d 1077, 1078 (Fla. 5th DCA 1999) (citing *Bovis*) (emphasis added). An exception to the general rule that the party controlling access to the premises owes the legal duty to its invitees is recognized “where the owner of commercial property leases part of the property to tenants while at the same time retaining the sole responsibility under the lease to maintain the common areas....” *Id.*

Additionally, a “lessor (owner) may be liable in tort to the lessee and to third persons for injuries resulting from latent dangerous conditions of which the lessor (owner) knew or should have known and which existed on the leased premises

when the lessor (owner) delivered possession of the leased premises to the lessee without appropriate warnings[.]” *Bovis*, 505 So.2d at 664. As explained in *Bovis*, the owner’s potential liability in this context does not flow from some vague notion of “control,” but from the fact that the dangerous condition existed without correction or warning when the owner did *control access* to the premises, and entrusted the property to another. *Id.*

Appellants’ confusion appears to stem from the fact that Buckner and Republic own Vac-Tron. Not surprisingly, there is ample evidence that the owners of Vac-Tron exercised some “control” over Vac-Tron, including evidence that Republic influenced Vac-Tron’s maintenance decisions for the property. Appellants argued below and on appeal that this evidence of “control” (control over Vac-Tron and its decisions regarding property repairs) creates a factual dispute (to be resolved by a jury) on the premises liability issue, even while candidly acknowledging the lack of any evidence suggesting that Buckner or Republic dominated Vac-Tron to the extent necessary to “pierce the corporate veil.” *See, e.g., Gasparini v. Pordomingo*, 972 So.2d 1053, 1055 (Fla. 3d DCA 2008) (discussing the three factors that must be proven to “pierce the corporate veil” and *329 hold individual shareholders liable for the actions or debts of a corporation.)⁶ In affirming the judgment in favor of Republic and Fischer, however, the majority necessarily and properly recognize that the term “control” for premises liability purposes is governed by the lease giving Vac-Tron exclusive possession of the premises, along with its concomitant control over access to the property.

All Citations

157 So.3d 320, 40 Fla. L. Weekly D103

Footnotes

- 1 While the painted-over skylight was visible from inside the warehouse, it looked darker than the other skylights, but Short still recognized it as a skylight.
- 2 On appeal, Appellants do not argue Buckner is liable as a Vac-Tron Equipment employee, recognizing that he was released under the terms of the settlement. Appellants only argue that Buckner is liable as owner of the property.
- 3 Appellants did not sue Republic based upon Republic’s ownership authority; therefore, the trial court erred in requiring the Appellants to pierce the corporate veil. However, the trial court arrived at the right result albeit for the wrong reason.
- 4 Appellants sued American Manufacturing, alleging that Buckner, in his capacity as CEO of American Manufacturing, failed to warn of the painted-over skylight or maintain it in a safe condition. The amended complaint further alleged that American Manufacturing “owned, operated, and/or maintained” the premises on which the warehouse was located.
- 5 Buckner only argued that the settlement released him. Contrary to Buckner’s assertion, the release expressly permitted Appellants to pursue a claim against Buckner in his capacity as owner of the property.

- 6 It is worth noting that accepting this argument would effectively eviscerate the liability protections historically associated with the corporate structure, at least for those corporations that control access to property.

21 Fla. L. Weekly Supp. 883a

Online Reference: FLWSUPP 2109LILE

Criminal law -- Evidence -- Blood test -- Warrantless, nonconsensual, nonexigent blood draw violates state and federal constitutions -- Section 316.1933, which directs law enforcement to require person to submit to blood test by reasonable force if necessary without requiring existence of exigency, is unconstitutional and cannot form basis for good faith exception to exclusionary rule -- Motion to exclude test results is granted

STATE OF FLORIDA, Plaintiff, v. WADE LILES, Defendant. Circuit Court, 9th Judicial Circuit in and for Orange County. Case No. 48-2011-CF-13421-A-O. April 29, 2014. Mike Murphy, Judge.

REVERSED. 41 Fla. L. Weekly D892a (State v. Liles, 5D14-1654, 4-8-2016)

ORDER ON DEFENDANT'S MOTION TO EXCLUDE

RESULTS OF TESTING CONDUCTED ON

BLOOD DRAWN FROM THE DEFENDANT

THIS CAUSE having come on to be heard on the DEFENDANT'S MOTION TO EXCLUDE RESULTS OF TESTING CONDUCTED ON BLOOD DRAWN FROM THE DEFENDANT and the Court being fully advised on the premises, it is hereby

ORDERED AND ADJUDGED as follows:

Absent a warrant, blood can only be obtained by the Government from a person, including the Defendant, if there is an exception to the search warrant requirement. In the instant case the only possible exceptions would be exigency, consent and Fla. Stat. 316.1933.

With regard to exigency, the case of *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) [24 Fla. L. Weekly Fed. S150a], makes it clear that *Schmerber v. California*, 86 S.Ct. 1826 (1966) did not authorize a warrantless searches of a person's blood simply because a blood alcohol level declines over time. Instead, under *Schmerber*, each case is looked at on an individual basis to determine if an exigency requires the taking of the blood. In the instant case, the evidence failed to establish an exigency existed to take the Defendant's blood without his consent.

With regard to consent, the record is clear the Defendant did not expressly consent. However, implied consent may¹ be a recognized exception to the warrant requirement to obtain a defendant's blood. See *McNeely* at 1566. Fla. Stat. 316.1932(1)(c), a part of implied consent, provides for when a driver has impliedly consented to a blood draw. However, the facts as testified to at the hearing failed to establish that this subsection applied and the State indicated that the State was not proceeding under this subsection.

Instead, the State indicated that the State was relying on Fla. Stat. 316.1933 to justify the warrantless search of the Defendant's blood. However, Fla. Stat. 316.1933 is not part of the implied consent law.² Fla. Stats. 316.1932(1)(a)1a, 316.1932(1)(a)1b, 316.1932(1)(c), and 316.1932(1)(e) clearly set forth what is covered by Florida's implied consent law. While previous versions of Fla. Stat. 316.1933 were part of implied consent and in fact contained the word "consent," the statute covering the time frame

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when the instant blood was withdrawn does not. Prior to July 1, 2002 Fla. Stat. 316.1933(1) required that a person “shall submit, upon the request of a law enforcement officer, to a test of the person's blood . . .” if the officer had probable cause to believe that the defendant had driven a vehicle while under the influence of alcohol or drugs and caused the death or serious bodily injury of a human being. However, Laws of Florida Chapter 2002-263 (the result of the passage of the C.S.C.S.H.B. 1057) altered the state of affairs and now no longer directs that a person shall submit to a blood test. The amended statute now directs the law enforcement officer to require a person to submit to a test by reasonable force if necessary. In amending the statute, the legislature appears to have misinterpreted *Schmerber v. California*, 384 U.S. 757 (1966). This finding is based upon the staff analysis for CSCSHB 1057 under the section titled “Constitutional Issues” which states:

The United States Supreme Court has held that requiring someone to submit to breath or blood testing in DUI cases does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures or the Fifth Amendment right against self-incrimination. See *Schmerber v. California*, 384 U.S. 757 (1966).

Intellectual honesty requires this Court to find that this modification of the law was the legislature's adoption of the *Schmerber* exigency standard and removal of Fla. Stat. 316.1933 out of the implied consent law.³ Unfortunately for the State, as discussed above, the evidence at the hearing failed to establish that an exigency existed to authorize the blood withdraw. Without an established exigency, *Schmerber* did not authorize a warrantless blood withdrawal. See *McNeely*.

If the legislature's amendment was not an attempt to adopt the *Schmerber* standard by amending Fla. Stat. 316.1933, the statute would be unconstitutional by failing to require the existence of an exigency before directing the officer to obtain blood. See *McNeely*. The next issue is whether or not, under the circumstances, the officer was allowed to rely upon a statute that has not been declared invalid.⁴ In *Montgomery v. State*, 69 So.3d 1023 (Fla. 5th DCA2011) [36 Fla. L. Weekly D2046a], the Fifth DCA laid out the general good faith exception to the exclusionary rule. However, with all general rules there are recognized exceptions. In *Illinois v. Krull*, 480 U.S. 340, 349-350, 355, 107 S. Ct. 1160, 1167, 94 L. Ed. 2d 364 (1987) the United States Supreme Court addressed whether the good faith exception could be applied to a clearly unconstitutional statute:

Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. . . . A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. . . . As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers.

Pursuant to *Munoz v. State*, 629 So.2d 90, 98 (Fla. 1993) “the legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right.” In the instant case, the Florida Legislature's 2002 amendment of Fla. Stat. 316.1933 directed law enforcement to conduct a warrantless nonconsensual non-exigent search of a non-arrested person's blood. Such a statute, as written, clearly violates the Federal and State constitution as much as statute that directs a police officer to take a warrantless nonconsensual non-exigent DNA or blood sample of any non-arrested person the officer has probable cause to believe committed a sexual battery.

Under *Krull* and *Munoz*, even assuming the facts of the instant case met Fla. Stat. 316.1933, unless the statute adopted the *Schmerber* standard, the statute is clearly unconstitutional without an exigency requirement and where the statute is no longer part of implied consent. By failing to include an exigency requirement in the statute the legislature wholly abandoned its responsibility to enact constitutional laws and under *Krull* the State cannot rely upon a good faith reliance on a statute in the instant case which purports to trump the Fourth Amendment to the United States Constitution.

In conclusion, the warrantless, nonconsensual, nonexigent blood draw of the Defendant violates the State and Federal Constitutions and therefore the Defendant's Motion to Exclude is Granted.

¹Cf. *Frost v. Railroad Commission*, 271 US 583 (1926), cited with approval in *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2596 (2013) [24 Fla. L. Weekly Fed. S435a] (for invalidating regulation that required the petitioner to give up a constitutional right “as a condition precedent to the enjoyment of a privilege.”)

²This fact seems to be ignored due to older case law interpreting the pre 2002 amended version of Fla. Stat. 316.1933.

³Even if this Court were to find that the legislature was not attempting to adopt *Schmerber*, the amended Fla. Stat. 316.1933 clearly is no longer included in implied consent.

⁴The Defense argues that the State failed to lay the predicate to allow the blood to be withdrawn under Fla. Stat. 316.1933; however, that determination is not necessary at this time. However, if this Opinion is reversed on appeal, this Court will be prepared to issue a separate Order on that issue.

* * *

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

CASE NUMBER: 2015-DR-018207-O

DIV 29

YVONNE STEWART

Petitioner,

vs.

DALE WAYNE SMITH, II

Respondent.

**ORDER ON RESPONDENT'S AMENDED MOTION TO DISMISS PETITION FOR
GRANDPARENT VISITATION**

THIS CAUSE, having come before this Court on the Respondent's Amended Motion To Dismiss Petition For Grandparent Visitation filed October 03, 2016 and the Court, having reviewed the motion and petition; and heard argument of counsel hereby

ORDERS AND ADJUDGES AS FOLLOWS:

The Motion to Dismiss is GRANTED. A prior military court conviction for domestic violence¹ on a person other than the subject grandchildren's mother and prior to the grandchildren being born does not constitute an "offense of violence evincing behavior that poses a substantial threat of harm to the minor child's health or welfare."

In Florida "[d]omestic violence may constitute harm if it occurs in the presence of a child." CW V. DCF, 10 So.3d 136, 138 (Fla. 1st DCA 2009). However, here is it undisputed that the prior victim was not the mother of the instant grandchildren nor did the offense occur within the presence of any child, much less the instant grandchildren. In JC v. DCF, 947 So.2d 1246 (Fla. 2d DCA 2007) the Court found that evidence of a person's violence against the future mother, but before the children were born², was not predictive of abuse to that person's children.

¹ The instant petition alleges that the prior offense was for domestic battery, pursuant to Fla. Stat. 775.08(2) and 784.03, the offense would be a misdemeanor.

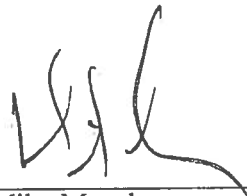
² There was no allegation of pregnancy at the time of the abuse in JC.

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Although JC and CW both address chapter 39 of the Florida Statutes, that chapter as well as chapter 61 are to be read in par materia with chapter 752. See State v. Fuchs, 769 So.2d 1006 (Fla. 2000) (“statutes which relate to the same or closely related subjects should be read in pari materia”).

Based upon the aforementioned cases, the instant Petition fails to allege that the instant grandparents have statutory authorization to petition the court for court-ordered visitation. Therefore the motion to dismiss is granted without prejudice to amend the petition.³

DONE AND ORDERED at Orlando, Orange County, Florida on this 5 day of Dec, 2016.



Mike Murphy
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was delivered to the below parties on this 5 day of Dec, 2016.

Belvin Perry, Jr, Esquire Po Box 905
Orlando Fl 32802

Stephen J Calvacca, Esquire 189 S Orange Ave Ste 1800
Orlando Fl 32801



Judicial Assistant to Judge Mike Murphy

³ The remainder of issues raised in the Motion to Dismiss are moot based upon this decision.

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

IN THE MATTER OF THE
TERMINATION OF PARENTAL RIGHTS
FOR THE PROPOSED ADOPTION OF
A MINOR CHILD:

CASE NO.: [REDACTED]

D. [REDACTED] A. R. [REDACTED] H. [REDACTED]
DOB: [REDACTED]

FINAL JUDGMENT TERMINATING PARENTAL RIGHTS

THIS CAUSE came before the Court on November 30, 2015, December 1, 2015, and December 2, 2015, on the verified Amended Petition for Termination of Parental Rights filed by Bethany Christian Services of Florida, Inc., a licensed child-placing agency. The Court, having heard testimony, reviewed the documentary exhibits, heard argument of counsel, and weighed the credibility and demeanor of the witnesses, and otherwise being fully advised in the premises, finds by clear and convincing evidence as follows:

1. The minor child at issue is [REDACTED] ("Child"), a female child born on [REDACTED], in Ocala, Marion County, Florida, as verified by the Child's birth certificate.
2. The Child's mother is [REDACTED] ("Mother").
3. The Mother identified [REDACTED] (" [REDACTED]" or "Mr. [REDACTED]") as the unmarried biological father of the Child. The Child was not conceived or born while [REDACTED] was married to the Mother, [REDACTED] has not adopted the child, [REDACTED] was not adjudicated by court proceedings to be the father before the Petition for Termination of Parental Rights was filed, and [REDACTED] was not listed as the father on the Child's birth certificate before the Petition for Termination of Parental Rights was filed with the Court.

4. Bethany Christian Services, Inc. ("Bethany Christian") is a non-profit, licensed child placing agency in the State of Florida and the Adoption Entity in this Chapter 63 proceeding. Bethany Christian has standing to file this termination of parental rights action pursuant to the Mother's written Consent to Adoption. §63.087(4)(b), Fla. Stat. (2013).

5. The Court has jurisdiction over the subject matter, the Child and the parties.

6. Pursuant to §63.062(3), Fla. Stat., [REDACTED] was personally served with a Notice of Intended Adoption Plan and the statutory Adoption Disclosure on July 25, 2013.

7. On August 12, 2013 [REDACTED] filed his Claim of Paternity with the Florida Putative Father's Registry and on August 13, 2013, filed his Response to Notice of Intended Adoption Plan.

8. The child was born on October 29th and on October 31, 2013, the Mother executed a consent for adoption surrendering the Child for adoption with Bethany Christian. The Consent to Adoption has not been challenged and was obtained according to the requirements of Chapter 63, has not been withdrawn, and is binding and irrevocable.

9. On November 5, 2013, Bethany Christian filed the Petition for Termination of Parental Rights and personally served [REDACTED]. Bethany Christian filed an Amended Petition to Terminate Parental Rights on October 21, 2015, and [REDACTED] filed an answer on October 26, 2015, which did not raise any affirmative defenses.

10. In addition, subsequent to the initiation of this action, [REDACTED] filed a paternity action. On June 12, 2014, [REDACTED] was adjudicated as the Child's father, and the court referred any additional matters concerning the Child to this Court. After the finding of paternity, Mr. [REDACTED] has visited with the child approximately once per month.

11. The Court has been asked to terminate the biological father's rights pending adoption pursuant to various parts of Fla. Stat. 63.089(3) and (4); and the related portions of Fla. Stat. 63.062(2) (b). In making the legal determination to terminate an objecting parent's parental rights the burden of proof is on the Petitioner to prove by clear and convincing evidence. The best interests of the child and any emotional impact on the child or any adult are completely irrelevant.

12. The facts established at trial by clear and convincing evidence that [REDACTED] failed to comply with Fla. Stat. 63.062(2) (b) and furthermore it has been proven by clear and convincing evidence that [REDACTED] abandoned the minor under Fla. Stat. 63.089(3) (e) and (4).

13. In addition to the facts listed in paragraphs 1-10 above, the following facts were established:

- a. Mr. [REDACTED] is the biological father of the child D [REDACTED]
- b. Mr. [REDACTED] appears to be mentally and physically fit to provide for the child in question.
- c. Mr. [REDACTED] has the financial ability to care for the minor child.
- d. Mr. [REDACTED] objects to his parental rights being terminated.
- e. Mr. [REDACTED] was aware that the mother claimed to be pregnant with his child at the time Mr. [REDACTED] allowed the mother to move in with him.
- f. Mr. [REDACTED] advised his parents, while the mother was living with him, that the mother of the child claimed to be pregnant with his child.
- g. Once the mother moved into the father's house, the parties had a great relationship. However, after a few weeks, the two of them became increasingly verbally insensitive and emotionally abusive to each other.

- h. Mr. [REDACTED] was aware that the mother claimed to be having complications with her pregnancy that required her to be taken by him to the hospital. He in fact took her to the hospital and considered his role solely that of a driver.
- i. Mr. [REDACTED] was aware that the mother of the child claimed she was pregnant with his child at the time he told her to leave the shared house.
- j. On the day that the mother was told to leave the shared home Mr. [REDACTED] woke the mother up by grabbing the mother's legs, waking her up, and then advised the mother that he wanted her out of his place by the time he returned from work.
- k. Mr. [REDACTED] after waking the mother up to advise her he wanted her out of his place by the time he returned from work, told the mother he did not care she was pregnant.¹
- l. Mr. [REDACTED] was advised by the mother, on the day she was asked to leave the shared home, that she had no place to go and would put the child up for adoption.
- m. Mr. [REDACTED] had the mother's telephone number at all times relevant to this case.
- n. Mr. [REDACTED] texted the mother three times shortly after she moved out; however, none of the texts were to inquire about her welfare and one of the texts referenced the fact he had kicked her out of the house.
- o. Mr. [REDACTED] never made any inquiry from the mother of her pregnancy status or health condition after she was told to leave his home and prior to him receiving the notice of intended adoption plan.

¹ The Court has considered the entirety of the night/early morning that resulted in the mother being forced out of the house. Clearly Mr. [REDACTED]'s violent grabbing of the mother's leg was as much of a battery as was the mother's slapping of Mr. [REDACTED] after he insulted her child and her mothering skills. However, the focus on chapter 63 is on the father's actions/inactions and not the mother's (other than any allegation that she prevented him from being able to comply with 63.062(2)(b)(2)).

- p. Mr. [REDACTED] did not file with the putative registry prior to being served with the notice of adoption plan.
- q. Mr. [REDACTED] never provided any money or offer of any money or any other support for the mother after he told her to move out and prior to his receipt of the notice of intended adoption plan.
- r. There was no evidence introduced that indicated that Mr. [REDACTED] had any concern about the mother being pregnant after he told her to leave his place until he received the notice of intended adoption plan.
- s. Mr. [REDACTED] testified that he did not believe the mother was really pregnant at the time he told her to leave his house.
- t. Mr. [REDACTED] never provided any emotional support to the mother after he told the mother to move out and during the mother's pregnancy.
- u. Mr. [REDACTED] made no efforts to locate the mother after he told her to leave his home despite knowing her number and the address of the mother's mother.²
- v. Mr. [REDACTED] testified he did not truly believe the mother was pregnant when he received the notice of intended adoption plan.
- w. Mr. [REDACTED] timely filed a response to the notice of intended adoption plan; however, the response was not in substantial compliance with Fla. Stat. 63.062(2)(b)(2) for the following reasons: a. the document fails to meet the definition of affidavit as it is couched in the terms of "true and correct to the best of his knowledge;"³ and b. the

² Mr. [REDACTED] testified he knew the address of the maternal grandmother and had been at the house before.

³ Substantial compliance, not strict compliance is required. See, DS v. JL, 18 So.3d 1103 (Fla. 1st DCA 2009). Fla. Stat. 92.525(2) provides when a verified document is allowed to use the phrase "knowledge and belief" and the instant relevant statutes do not authorize that couching language. Therefore even under a substantial compliance standard, the response is not an affidavit.

evidence from Mr. [REDACTED] established that the sum of \$100 a month, listed in his response, was less than what Mr. [REDACTED] had the ability to pay.⁴

- x. Even though the response indicated that he was willing to provide money to the adoption agency for the mother's behalf, other than the \$100 check that the maternal grandmother provided, no other money was ever provided to the mother or the agency for the benefit of the pregnant mother.
- y. Mr. [REDACTED] provided no emotional or financial support for the pregnant mother after he told her to leave his house and other than the \$100 check the paternal grandmother sent to the mother at Mr. [REDACTED]'s request after he received the notice of intended adoption plan, Mr. [REDACTED] provided no financial support to her, despite his ability to do so.

14. The Petitioner has established by clear and convincing evidence that Mr. [REDACTED] failed to comply with Fla. Stat. 63.062(2)(b)(2) and (2)(b)(3) prior to the time the mother executed her consent for adoption on October 31, 2015. Additionally, the above further established by clear and convincing evidence that the father had abandoned the child by the father's actions and inactions toward the mother before the child was born. See 63.062(3)(e) and (4) and EAW v. GSW, 658 So.2d 961 (Fla. 1995).

15. The Court recognizes that the law places a person who is told by a woman that she is pregnant with his child in a Catch-22. If he does nothing, he risks losing any rights to a child that is his. If he pays money to the woman that is not telling the truth, of it the child is some other person's child, the father may not never be able to recoup any money provided to the mother. However, regardless of how fair the law may be in some situations, the law is still the law and must be followed by the Court.

⁴ At trial Mr. [REDACTED] testified he could have paid much more than the \$100 per month he had indicated in the responsive document.

16. In the instant case the father has spent a considerable amount of money in an attempt to protect his paternal rights; however, that money has been spent after the mother gave her consent for adoption and not on the pregnant mother or for medical expenses. Additionally, although the Petitioner's request this Court to also find abandonment for actions post consent for adoption, this Court finds it unnecessary to address that matter based upon this Courts other findings.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED

1. The parental rights that [REDACTED] a/k/a [REDACTED] has to [REDACTED] born [REDACTED] are herein terminated.
2. [REDACTED] consent to the termination of parental rights or the adoption of [REDACTED] [REDACTED], born [REDACTED] is not required pursuant to §63.062. At the time the Mother executed her consent for adoption, Stokes had no parental rights to the Child and he was not a parent as defined in §63.032(12) because:
 - A. The Child was not conceived or born while he was married to the Mother;
 - B. The Child is not his by adoption;
 - C. The Child was not adjudicated by court proceedings to be his child before the petition for termination of parental rights was filed;
 - D. He did not timely file an affidavit of paternity pursuant to §382.013(2)(c) nor was he listed on the Child's birth certificate before the petition for termination of parental rights was filed;
 - E. Although [REDACTED] filed a notarized claim of paternity form with the Florida Putative Father Registry, he did not comply with all the requirements of §63.062(2)

as Mr. [REDACTED] failed to respond within 30 days with an document that meets the legal requirement of an affidavit or by providing the Mother with a fair and reasonable amount of the living and medical expenses incurred in connection with her pregnancy and the child's birth in accordance with [REDACTED] financial ability to pay these expenses. Any efforts [REDACTED] made to provide such support were marginal, and did not evidence a settled purpose to assume all parental duties;

3. Additionally, this Court terminates any and all parental rights that [REDACTED] may have to the Child, [REDACTED] born [REDACTED] because [REDACTED] abandoned the Mother and the Child pursuant to sections 63.089(3)(e) and 63.089(4)(a) due to his emotional abuse to the mother and the failure to provide financial and emotional support to the mother after she was kicked out of his residence by [REDACTED] even though he was able to provide the financial support.
4. The grandparents of the Child do not have any rights in connection with this matter and no other person has had legal custody of the Child, other than the Adoption Entity.
5. The Child is committed to the legal custody of Bethany Christian Services, Inc. for subsequent adoption.
6. Each party is to pay for their own attorney's fees.
7. The Court reserves jurisdiction to enforce this Order.

DONE AND ORDERED in Orlando, Orange County, Florida, on this 26 day of
December, 2015.



MIKE MURPHY
CIRCUIT JUDGE

Case Number: [REDACTED]

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On this 4 day of JANUARY, 2016 by R. J. [Signature], Judicial

Assistant to Judge Mike Murphy by email and US Mail