FRANSON | ISELEY | RENDZIO

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August 10, 2018

Via Hand Delivery

Christopher J. Greene, Chair
Seventh Circuit Judicial Nominating Commission
238 Ponte Vedra Park Drive, Suite 104
Ponte Vedra Beach, FL 32082

Re: Bryan R. Rendzio, Esq.
<u>Application for Circuit Court Judicial Seat for the Seventh Circuit</u>

Dear Mr. Greene:

Please accept this as my application for the current judicial seat vacancy in the Seventh Judicial Circuit. Enclosed please find the following:

(1) Original, completed paper version of the application and attachments;
(2) PDF version of the application with all attachments (including the executed FDLE form and color photograph); and
(3) A redacted PDF version of the application excluding any exempt information under Chapter 119, Fla. Stat., as well as any AAA case styles due to the confidentiality of the AAA matters.

The PDF versions are being submitted on a flash drive. The documents are labeled as the original application, and the redacted application. The Commission's consideration in this matter is greatly appreciated.

Respectfully,

Bryan R. Rendzio

BRR/
Encl.

<u>APPLICATION FOR NOMINATION TO THE</u>
<u>SEVENTH JUDICIAL CIRCUIT COURT</u>
(REDACTED)

BRYAN R. RENDZIO, ESQ.

(904-662-1404)(Cell)
bryan.rendzio@gmail.com

APPLICATION FOR NOMINATION TO THE SEVENTH JUDICIAL CIRCUIT COURT

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

DATE: 08/10/2018 Florida Bar No.: 0496812

GENERAL: Social Security No.: [redacted]

1. Name Bryan Robert Rendzio E-mail: brendzio@fi-law.com

   Date Admitted to Practice in Florida: 09/11/2001

   Date Admitted to Practice in other States: District of Columbia (02/06/2004)

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

   Fla. Business & Construction Law Group, P.A. d/b/a Franson Iseley Rendzio (Shareholder)

3. Business address: 1400 Prudential Dr., Ste. 5

   City Jacksonville County Duval State FL ZIP 32207

   Telephone (904) 396-1800 FAX (904) 396-1804

4. Residential address: 205 Odom's Mill Blvd.

   City Ponte Vedra Beach County St. Johns State FL ZIP 32082

   Since June 16, 2013 Telephone (904) 373-0893

5. Place of birth: Killeen, TX (Fort Hood)

   Date of birth: 05/07/1975 Age: 43

6a. Length of residence in State of Florida: 37 years

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

   If so, in what county are you registered? St. Johns County

7. Marital status: Married

   If married: Spouse's name Stacy O'Connell Rendzio

   Date of marriage 04/21/2007

   Spouse's occupation Marketing Analyst for Brown & Brown Insurance Co.

   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.

   Christine Leon

   Current Address: 1695 Misty Lake Dr., Fleming Island, Clay County, Florida

   Date/Place of Divorce: 03/10/2005 (Duval County)

   Case No.: 2004DR011641FM

8. Children

Name(s)	*Age(s)*	*Occupation(s)*	*Residential address(es)*
Aiden	9	None	205 Odom's Mill Blvd., Ponte Vedra Beach, FL 32082
Lucas	6	None	205 Odom's Mill Blvd., Ponte Vedra Beach, FL 32082

9. Military Service (including Reserves)

Service	*Branch*	*Highest Rank*	*Dates*
None	N/A	N/A	N/A

Rank at time of discharge N/A Type of discharge N/A

Awards or citations N/A

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.

N/A

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.

  N/A

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.

N/A

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

No

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

No

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

No

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

No

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

No

EDUCATION:

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

Schools	*Class Standing*	*Dates of Attendance*	*Degree*
Florida State University	No Academic Distinction	1993-1998	BA English Literature
Florida Coastal School of Law	Top 1/3	1998-2001	JD

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

1. Law Review, Managing Editor: I was selected to Law Review through the write-on competition program. Through my hard work, I rose to the level of Managing Editor, which was second in command to the Editor-in-Chief. My responsibilities included: (i) supervising the editorial process; (ii) working with vendors; (iii) planning and managing writing competitions; and (iv) overseeing the timing of publication by working as the primary liaison with all staff editors.

2. Moot Court

3. Judicial Intern, Honorable Timothy J. Corrigan (District Judge for the Middle District of Florida)(Magistrate Judge at time of internship): In my role as an intern, I was given the opportunity to draft proposed orders and memoranda for the Judge's reivew. This was

an invaluable opportunity, and I am grateful for the time that I got to spend with Judge Corrigan and his Senior Law Clerk Susanne Weisman. They each provided great feedback and guidance as I prepared to enter the legal profession.

NON-LEGAL EMPLOYMENT:

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

Date	*Position*	*Employer*	*Address*
None	N/A	N/A	N/A

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.

Court or Administrative Body	*Date of Admission*
See Tab A	

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

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

Position	*Name of Firm*	*Address*	*Dates*
Judicial Intern	Honorable Timothy J. Corrigan	300 North Hogan Street, Jacksonville, FL 32202	2001 (During law school before graduation)
Associate	Tomchin & Odom, P.A.	6816 Southpoint Parkway, Suite 400, Jacksonville, FL 32216	2002-2008
Associate/Partner	Tritt & Associates, P.A.	707 Peninsular Place, Jacksonville, FL 32204	2008-2012
Partner	Albert T. Franson, P.A. d/b/a Franson, Iseley & Rendzio,	1400 Prudential Drive, Suite 5, Jacksonville, FL	2012-12/19/2017

	P.A.	32207	
Shareholder	Fla. Business & Construction Law Group P.A. d/b/a Franson Iseley Rendzio	1400 Prudential Drive, Suite 5 Jacksonville, FL 32207	12/20/2017-Present

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

My current practice, which has been the same over my nearly seventeen (17) years as a trial attorney, focuses primarily upon civil litigation with a concentration in complex commercial and construction litigation. I have a diverse array of clients ranging from individuals who need assistance with residential construction disputes to large corporate clients facing litigation. Clients have sought my services for all varieties of civil matters (including breach of contract, negligence and statutory causes of action). My practice is evenly balanced between representing Plaintiffs and Defendants (approximately 50/50). I have achieved Board Certification by the Florida Bar in the area of Construction Law. In addition to being certified, I have attained a position on the Executive Council for the Florida Bar Real Property, Probate and Trust Law (RPPTL) Section (both as an appointed At-Large Member and as the Vice Chair of the Construction Law Institute Committee). I previously served two (2) terms on the RPPTL Executive Council as the Chair of the Florida Bar Construction Law Certification Review Course Committee (i.e., the Committee responsible for overseeing and conducting the three (3) day review course for all attorneys who are seeking to take the exam to become Board Certified in the area of Construction Law). In addition to my litigation practice, I also actively serve as an arbitrator and mediator. My arbitration / mediation experience includes serving as: (1) a Florida Supreme Court Certified Circuit Civil Mediator; (2) a Certified Federal Mediator (Middle District of Florida); (3) a Certified Condominium Mediator (The Division of Florida Condominiums, Timeshares and Mobile Homes); (4) a Licensed Insurance Mediator for Florida Department of Financial Services; (5) a Panel Mediator for the American Arbitration Association ("AAA"); (6) a Panel Arbitrator for the AAA; (7) a Panel Mediator for the Financial Industry Regulatory Authority ("FINRA"); and (8) a Panel Arbitrator for FINRA. Through my role as an arbitrator, I have been tasked with sole responsibility for making rulings on motions, evidentiary objections, control of the overall arbitration process, as well as drafting detailed, reasoned Awards.

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	0 %	Civil	100 %
Federal Trial	1 %	Criminal	0 %
Federal Other	0 %	Family	0 %
State Appellate	1 %	Probate	0 %

State Trial	97 %	Other	0 %
State Administrative	1 %		
State Other	0 %		
	%		
TOTAL	100 %	TOTAL	100 %

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

Jury? 1 Non-jury? 28

Arbitration? 3 Administrative Bodies? 2

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).

Tracy L. Valente, Esq. (904-562-1060)

Case No.: 2007-CA-010138

Peter Robertson, Esq. (904-853-2612)

AAA Matter No.: 33 530 00177 11

Michael F. Orr, Esq. (904-358-8300)

94 So. 3d 585 (Fla. 1st DCA 2012)(Appeal from Clay County, Florida Circuit Court)

Thomas R. Ray, Esq. (904-356-6311)

998 So. 2d 1211 (Fla. 1st DCA 2009)(Appeal from Duval County Circuit Court)

George W. Healy, IV, Esq. (228-575-4006)

AAA Case No.: 69 110 E 04158 07

C. Ryan Eslinger, Esq. (904-346-3800)

963 So. 2d 308 (Fla. 1st DCA 2007)(Appeal from Duval County Circuit Court)

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).

Brent C. Bell, Esq. (407-835-6725)(Represented Plaintiff)

Case No.: 2016-CA-005864-O (Orange County, Florida)

Steven Earle, Esq. (904-361-0009)(Represented Plaintiff)

Case No.: 16-2018-CA-000215 (Duval County, Florida)

Jason H. Klein, Esq. (813-422-6912)(Represented Third-Party Plaintiff)

Case No.: 2015-CA-002081-15-K (Seminole County, Florida)

John B.Trawick, Esq. (850-476-0495)(Represented Plaintiff)

Case No.: 2016-CA-001629 (Escambia County, Florida)

Brian T. Crevasse, Esq. (904-829-9066)(Represented Defendant)

Presuit Settlement (St. Johns County, Florida)

Michael Ciocchetti, Esq. (386-253-1111)(Represented Plaintiff)

Case No.: 2017 30935 CICI; Division 32 (Volusia County, Florida)

27c. During the last five years, how frequently have you appeared at administrative hearings? less than 1 average times per month

27d. During the last five years, how frequently have you appeared in Court? 6 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? N/A (My practice was not substantially personal injury)% Defendants? N/A%

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.

I appeared in Court (including appellate matters) with more frequency during the years 2005-2011 with respect to actions that have reached a judgment or verdict. My role varied between second-chair and lead counsel. I handled approximately nine (9) arbitrations as counsel and had greater than one hundred (100) non-jury matters over that time frame. My jury trial also occurred during this time frame (second chair). I had another jury trial that settled during trial before the verdict.The above number of matters included in this response includes cases that did not reach judgment during a trial before a judge and verdict before a jury (i.e., matters that were resolved via summary judgments, foreclosure judgments and default judgments). From 2011 to the present, I

have been lead counsel for clients on larger construction cases (mainly condominium defect cases in excess of $5M). These cases rarely get to a judgment or verdict. Many are set for jury trial weeks exceeding eight (8) weeks. The Judges on these matters typically require two (2) to three (3) mediations before trial, and the lawsuits get resolved. Additionally, since 2011, in addition to my larger construction defect cases, I have also been sole counsel on commercial litigation claims that have required me to appear before Judges. These have included commercial foreclosure matters, and breach of contract matters. These cases have required extensive motion practice, and legal argument before the Court. I have not included them in my list of matters in Section 27(a) insomuch as they have been disposed of via summary judgment or default judgments.

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 had one (1) arbitration that has gone through the entire process through an Award by the arbitrator during the past five (5) years. I was sole counsel. No reported decisions (AAA Case tried through an Award in Duval County, Florida). A significant reason for not having more arbitrations within the past five (5) years is due to the fact that I have had a more active role as an arbitrator since October 2015. Hence, I have spent a greater percentage of my time undertaking the responsibilty as an arbitrator overseeing and managing the entire arbitration process.

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.

1. Jesse v. Commercial Diving Academy of Jacksonville, Inc. ("CDA"), 963 So. 2d 308 (Fla. 1st DCA 2007). This matter was heard before Judge Brad Stetson in Duval County. I represented the Defendant, CDA. I was lead counsel for all motions and the appeal. This case was signficant to me because my client was facing a situation wherein it may not have had insurance coverage for the personal injury claims that the Plaintiff was alleging against CDA. Through my investigative efforts, I was able to uncover a prior injury that Plaintiff did not disclose during his deposition. Ultimately, Judge Stetson dismissed the case for fraud upon the Court. Judge Stetson prepared a detailed Order, which outlined the basis in support of the ruling. I was impressed by the manner with which Judge Stetson prepared for all hearings, and made a point to ask questions so as to be fully informed. In my opinion, he was the epitome of what a Judge should be (i.e., professional and prepared). The other attorney in the case was C. Ryan Eslingler, Esq.

2. Wolf Creek Condominium Association, Inc. v. Pulte Home Corporation (no reported citation or appeal since it was arbitrated via AAA arbitration). This matter was heard before Arbitrator Henry ("Chip") Bachara. The matter was resolved prior to the final hearing. This matter was significant to me because I was lead counsel for the Claimant Association. The nature of claims exceeded $30M in demands. Thus, there was an astounding amount of pressure given that I had the interests of the whole community in my hands. The counsel for the Respondent was Theodore ("Ted") Estes, Esq. and Collin McLeod, Esq. This occurred in 2014.

3. Mr. Fox case. There were no reported appellate decisions for this matter. This matter occurred in 2003 (Duval County). The significant part of this case to me is not the Judge or the procedural facts. I do not recall the Judge and I cannot locate the full case citation. The reason that this case was significant to me is because Mr. Fox was HIV positive when he was struck by a car. The nature of the action was a hit-and-run, personal injury matter. Mr. Fox brought a claim under an insurance policy, and the issue centered around his HIV condition (including the fact that he had a medical history that was evidencing that he was potentially in the early stages of AIDS). It was not the facts of the case that created an impression upon me. It was the human nature of the Mr. Fox's condition. This was the first time that I had any exposure to anyone who was suffering from HIV. It was extremely humbling, and truly made me realize the fragile nature of life.

To often in the practice of law, we as attorneys only see things in black and white on the pages of motions and pleadings. This action reminded me that there are people behind the pleadings and motions, and we in the legal field must carry this burden with dignity and respect for all. Defense counsel for the insurance carrier in that matter was Kristen Van Der Linde, Esq. I was impressed with Mrs. Van Der Linde's professionalism in this matter insomuch as she advocated zealously for her client. However, she too never minimized the humanity of the situation.

4. Radius Condominium Association, Inc. v. CB Condominiums, Inc., et al. (Case No.: CACE 11016162; Broward County, Florida). This case was signifcant to me for the reason that I had the responsibility of representing a general contractor as a defendant in a complex, condominium defect lawsuit. This required me, as the counsel for the primary defendant, to oversee and tender claims against all of the subcontractors for defense and indemnification (including insurance additional insured issues). Not only did I have to prosecute and navigate the claims against the subcontractors, I had the responsibility of working to try to resolve the overall action with the Plaintiff Association. This task required me to manage the complexities of a condominium defect action. Through the actions of all parties, we were able to reach a favorable settlement for all parties. The attorney for the Plaintiff was Kenneth E. Zeilberger, Esq. This occurred in 2014.

5. Sears Home Improvement Products v. Porterfield, 949 So. 2d 318 (Fla. 1st DCA 2007). This matter was significant to me insomuch as it involved a class certifcation for a consumer class action. I had primary responsible for drafting all appellate documents once the Defendant (Sears Home Improvement Products) appealed the Circuit Court's Order granting my client's motion for class certification. This matter also stands out to me because it allowed me to work with Allan Sigel, Esq. Mr. Sigel was co-counsel in the toxic tort litigation associated with the "Erin Brockovich" movie.

6. Quality Sheet Metal, Inc. v. Pat Cook Construction, Inc. (Case No.: CA10-1258; St. Johns County, Florida). This matter involved a construction surety lawsuit wherein I represented a small mechanical subcontractor on a public school project. My client was owed a substantial amount of funds, and the dispute was creating a financial burden on my client. The general contractor was refusing to pay my client. I recall being frustrated with the situation because the reasons for refusing to pay my client were identical to other unrelated subcontractors. I knew this firsthand because I had a separate lawsuit against this same general contractor on behalf of another subcontractor. As trial approached, one of Pat Cook Construction, Inc.'s newly-retained counsel filed a motion for continuance. My first reaction was to fight the motion inasmuch as I believed that the action was simply a delay tactic to cover for the fact that Pat Cook Construction, Inc. was not ready for trial (through its prior counsel). I learned that the motion was because one of Pat Cook Construction, Inc.'s attorneys had to take his young son to a doctor for a long-term illness. This taught me to learn to assess and understand all situations before making any impulsive, personal judgments. This matter has resonated with me for another personal reason. Two (2) years ago, my oldest son, Aiden, was diagnosed with having an arachnoid cyst (cerebrospinal fluid covered by arachnoidal cells and collagen that develop between the surface of the brain and the cranial base or on the arachnoid membrane). Aiden's cyst was on his frontal lobe. We only learned of it due to Aiden suffering from migraine headaches and bloody noses. This caused great concern to my wife (Stacy) and me given the unknown nature of the condition. We ended up traveling to Duke Medical Center to meet with a pediatric neurosurgeon. He gave us the comfort

and explanation that we desperately needed. I truly came to appreciate through this experience the issue that opposing counsel in the Pat Cook lawsuit was faced with (not as an attorney, but as a parent). This occurred in 2013.

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.

Please see Tab B.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:

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

No

32b. List any prior quasi-judicial service:

Dates	*Name of Agency*	*Position Held*
10/2015 - Present	American Arbitration Association (AAA)	Arbitrator
09/2017- Present	Financial Industry Regulatory Authority (FINRA)	Arbitrator

Types of issues heard: Commercial, Construction and Securities Matters.

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.

No

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.

Erin R. Smith, Esq. (904-829-9066)(780 North Ponce de Leon Blvd., St. Augustine, FL 32085-3007)

Daniel J. Webster, Esq. (386-258-1222)(444 Seabreeze Blvd., Ste. 360, Daytona Beach, FL 32118)

Henry ("Chip") Bachara, Esq. (904-562-1066)(1 Independent Dr., Ste. 1800, Jacksonville, FL 32202)

Joshua R. La Bouef, Esq. (904-366-1500)(800 West Monroe St., Jacksonville, FL 32202)

Francis ("Frank") X. Rapprich, Esq. (386-428-3311)(340 N. Causeway, New Smyrna Beach, FL 32169)

Zachary R. Roth, Esq. (904-737-4600)(8818 Goodbys Executive Dr., Ste. 100, Jacksonville, FL 32217)

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

14 Arbitrations as the sole arbitrator.

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

No published opinions.

(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.

1. This was a AAA matter that I heard in 2017, which I consider signficant because I was the sole arbitrator. It was held in Daytona Beach Shores. The matter concerned a condominium association and a roofing contractor. It was a multiple-day hearing, which required me to control all aspects of the procedural process. The matter did not reach the closing arguments because the parties initiated settlement discussions during the later stages of the final hearing. The settlement conditions were finalized within the past couple of weeks according to the AAA filings. Counsel for the Association was Michael C. Sasso, Esq. and David F. Tegeler, Esq. Counsel for the Respondent was Christopher Utrera, Esq.

2. This was a private arbitration matter that I heard in 2018. This matter was significant because I was the sole arbitrator, and I was required to hear and rule upon several pre-hearing motions. I also conducted a multiple-day, final hearing (including ruling on evidentiary objections). This was a complete arbitration proceeding, which resulted in a written Award. More significant, however, was the fact that this dispute involved homeowners. I believe that counsel for Claimants and Respondent did a superb job preparing for and presenting their positions. The claims understandably presented an emotional aspect for the homeowners. However, as the ultimate decision maker in the arbitration, I was required to strictly adhere to the language in parties' contract, as well as the cited statutes when applying the law to the facts. This proceeding required me to set aside any emotional aspect of the matter in order to interpret the law according to its plain and ordinary meaning. Counsel for the Claimants was Frank Rapprich, Esq. Counsel for the Respondent was Daniel Webster, Esq..

3. This was a AAA matter that I heard in 2017 as the sole arbitrator. This proceeding not only required me to manage the overall arbitration process, it also gave me an opportunity to participate in a site inspection of the residence at issue with all parties and their clients. There was one point where counsel asked me whether I would be willing to climb into the attic above the garage to observe one of the alleged defective conditions. I conducted the attic inspection. This was significant to me for two (2) reasons. It required me to carefully navigate my direct interaction with the parties. The other significant aspect was the fact that I learned the lesson of not wearing a

suit to any future site inspections. Apparently, attics can be extremely hot in the Summer. Counsel for the Claimant was Barry Ansbacher, Esq. and Zachary Roth, Esq. Counsel for Respondent was Henry ("Chip") Bachara, Esq.

4. [redacted] This was a AAA matter that I heard in 2017. It is significant because one of the parties required a detailed Award so I drafted a detailed Award. This matter is also significant because it required me to oversee an arbitration process, which included a pro se party. Counsel for Claimant was Joshua R. La Bouef, Esq. Respondent was pro se.

5. [redacted] This was a AAA matter that I heard in 2018 as the sole arbitrator. This was significant because it required me to hear and rule on several pre-hearing motions. I also conducted a final hearing (including ruling on evidentiary objections), which resulted in rendering a written Award. Counsel for Claimant was Erin R. Smith, Esq. Counsel for Respondents was Donato J. Rinaldi, Esq.

(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.

No

(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.

No.

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.

None.

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

No

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

None

POSSIBLE BIAS OR PREJUDICE:

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

    None. There is no place in the justice system for any bias or prejudice. Regardless of whether I ever become a Judge, I have two (2) young boys who look up to me as a role model. My wife (Stacy) and I have been given the great opportunity to raise two (2) gentlemen who will treat everyone equally, and who will stand up for anyone who cannot stand up for herself or himself.

MISCELLANEOUS:

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

Yes ______ No __x__ If "Yes" what charges? N/A

Where convicted? N/A Date of Conviction: N/A

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

Yes ______ No __x__ If "Yes" what charges? N/A

Where convicted? N/A Date of Conviction: N/A

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

Yes ______ No __x__ If "Yes" what charges? N/A

Where convicted? N/A Date of Conviction: N/A

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.

No (aside from the dissolution of marriage, which is disclosed above). The dissolution proceeding did not go to trial, and was resolved amicably without counsel.

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

No

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

No

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

No

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

No

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

Yes ☒ No ☐ If no, please explain. N/A

43b. Have you ever paid a tax penalty?

Yes ☐ No ☒ If yes, please explain what and why. N/A

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.

Please see Tab C for a sample of the published articles (Florida Bar Journal Articles; ABA 2018 Midwinter Presentation; and Orlando Sentinel Article), which are identifed below.

Invoking "the Rule" During Depositions? Absolutely "Maybe" Fla. B.J., November 2008; cited by Judge Wilbur W. Anderson, Judge of Compensation Claims, Daytona Beach, Florida in the case Michael Davis v. Walton County Sheriff's Department North American Risk Services, Inc. (2016 Fla. Wrk. Comp. LEXIS 211); also cited in LEXIS secondary source for Section 90.616, Fla. Stat.

Venue Considerations in Construction Disputes, Fla. B.J., May 2010 (co-author); cited in LEXIS secondary source for Section 713.01, Fla. Stat.

"Identifying Underutilized Defenses in Condominium Defect Lawsuits," Claims Journal, July 15, 2011.

The Florida Bar's Advanced Construction Law Certification Review Course, "Chapter 558 Notice and Opportunity to Cure Act," March 2013 – 2015.

Lorman Seminars, "Construction Lien Law in Florida," July 2010.

Gabrielle Russon, "Disney Sued by Subcontractor Over Magic Kingdom Project," Orlando Sentinel, August 14, 2017 (this is not an article that I wrote. However, it is an article that was published citing to a case where I was lead counsel for the Plaintiff. The case style was Allstate Steel Co., Inc. of Jacksonville d/b/a Allstate Steel Co., Inc. v. Walt Disney Parks and Resorts U.S., Inc. d/b/a Walt Disney Resort, Case No.: 2017-CA-007276-O, Ninth Judicial Circuit, Orange County, Florida).

"Effective Use of Arbitration," 2018 American Bar Association ("ABA") Fidelity and Surety Law Midwinter Conference (Washington, D.C.)(Invited as an arbitrator panelist for the foregoing forum wherein I participated in drafting the written materials and speaking at the event on January 26, 2018. On August 2, 2018, I was advised that the presentation materials were being published in an upcoming ABA book. My level of involvement in both preparing the written materials and the actual forum presentation was 25%).

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

1. Florida Bar Board Certification in Construction Law (since 2010);

2. Recipient of The Florida Bar Construction Law Committee "Rising Star" Award (2017)(this award is only bestowed to one (1) person each year from a pool of greater than 400 attorneys who are members of the Florida Bar's Construction Law Committee; it was awarded to me in a ceremony with over 300 attorneys in attendance);

3. Florida Super Lawyers®, "Rising Star" (Construction Litigation)(2010-2014);

4. Florida Super Lawyers®, "Super Lawyer" (Construction Litigation)(2016-Present);

5. AV® Rated, Martindale Hubbell®;

6. AVVO® rating 10/10;

7. I was selected to be featured in the January 12, 2015 "Lawyer Snapshot" by the

Jacksonville Daily Record (a copy of the article is attached as Tab D); and

8. I was recently invited to be a fellow of the Construction Lawyers Society of America (an invitation-only construction law honorary society that is limited to 1,200 practicing fellows from the United States and Internationally).

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

1. Speaker: The Florida Bar's Advanced Construction Law Certification Review Course, "Chapter 558 Notice and Opportunity to Cure Act," March 2013-2015;

2. Guest lecturer on the topic of Arbitration (Florida Coastal School of Law; Course on Alternative Dispute Resolution)(2016);

3. Speaker: Columbia County Builders Association, "Construction Contracts," January 2012;

4. Speaker: Northeast Florida Builder's Association Remodeler's Council, "Contracts for Remodelers," November 2010-2013; and

5. Lecturer: Lorman Seminars, "Construction Lien Law in Florida," July 2010

6. Panelist: 2018 ABA Fidelity and Surety Law Midwinter Conference (Washington, D.C.), "Effective Use of Arbitration," January 26, 2018.

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

A/V Preeminent

PROFESSIONAL AND OTHER ACTIVITIES:

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

1. Florida Bar

2. District of Columbia Bar

3. Flagler Bar Association

4. St. Johns County Bar Association

5. Jacksonville Bar Association (Chair of the Construction Law Committee)(2015)

6. The Florida Bar, Construction Law Certification Review Course Committee (Co-Chair) (2014-2017)

7. The Florida Bar, Construction Law Institute Committee (Co-Vice Chair)(Present)

8. The Florida Bar, Construction Law Committee

9. The Florida Bar, Real Property, Probate and Trust Law Section (At-Large Member of the Executive Council)(Present)

10. American Bar Association, Tort Trial and Insurance Practice Section (Fidelity & Insurance Law Committee)

11. Northeast Florida Builders Association, St. Johns Builders Council, Board of Director (2013-2016)

12. The Florida Academy of Professional Mediators
13. Sawgrass Country Club, Property and Grounds Committee (2016-2018)
14. National Utility Contractors Association
15. Small Business Resource Network
16. Phi Alpha Delta Law Fraternity

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.

Associated Builders and Contractors (ABC), First Coast Chapter.

Palms Presbyterian Church

48c. List your hobbies or other vocational interests.

I enjoy spending time with my family. Particularly, I like coaching youth baseball, as well as spending time outdoors with my wife and two (2) sons Aiden (9 years old) and Lucas (6 years old). I am extremely grateful for SPF 70 and UV-blocking shirts, despite the humorous mocking by my friends. My wife and I make time for family movie nights where we rent a movie to watch with Aiden and Lucas. We also have family dance-offs to my older son's Kidz Bop CD. I must regretfully disclose that since the date of my last application to the JNC in 2017, my dancing skills have not improved. I am still in last place (still losing to my 6 year old son). I do not lack dedication, just ability. I comically also believe that the dance-off judge (my wife) is biased toward our sons when it comes to the dance voting system. However, I have been told by several friends that I have no dance talent, and admittedly I would have to agree. Given the busy nature of arbitration, mediation and litigation, I focus on the time more than the actual hobby. I cherish a game of catch with my boys or even just helping them draw pictures. In recent years, I have been focusing on trying to impress upon my sons the importance of giving back through charity. One of my favorite charitable groups is Blessings in a Backpack (a 100% non-profit group that provides food for students to take home over the weekend during the school year). I am still touched about an article that I read last year. The story was about a mother with a child named Austin. Austin was suffering from an ongoing illness. The mother asked readers to provide Austin with birthday cards because it brought him joy when he received a card in the mail. I asked my son Aiden if he wanted to make a card. In his innoncence, Aiden asked me why? I explained that this young boy was ill, and how good it made the boy feel when he received a card in the mail. Without hesitation, Aiden drew a card using his crayons. We mailed the card, and I could see how proud Aiden was after having done this selfless act. This made me proud as a parent, especially considering that it was done only days before Aiden's own birthday. In addition to Blessings in a Backpack, I have also been actively participating in the Flagler County charity Christmas Come True by sponsoring a family in need. During the 2017 holiday season, I took my two boys with me to meet with the Chair (Nadine King) so that they could see the process as we donated our gifts for our Christmas Come True family. I have already reached out to Nadine in order to start the process for this holiday season.

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.

I have provided pro bono mediation services as a mediator, and I have never turned down any request for pro bono mediations. Throughout 2018, I have provided approximately 24 hours.

SUPPLEMENTAL INFORMATION:

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

Yes. Construction Law and Mediation. I have become a specialist in construction law through my board certification. Each year I attend a three (3) day CLE in Orlando, Florida in the practice area of construction law. Every two (2) years, I attend mediation CE.

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?

Yes. I have taught a Florida Bar CLE on the topic of Chapter 558. I have also served as a guest lecturer at Florida Coastal School of Law on the topic of arbitration. Additionally, in January 2018, I was invited by the ABA to present as an arbitrator ("Effective Use of Arbitration" presentation, which is referenced above).

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

I believe that my arbitration experience will assist me in holding judicial office. As an arbitrator, I am responsible for weighing evidence, ruling on motions, ruling on evidentiary objections, overseeing the entire quasi-judicial process, as well as rendering binding decisions.

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

The Seventh Judicial Circuit has had a couple of outstanding recent additions to the bench with Judge Lee Smith and Christopher France. Judge Smith's value to the bench can best be summed up by the fact that he ran without opposition in the current election cycle. Both Judge Smith and Judge France had extensive and impressive backgrounds as prosecutors for the State Attorney's Office. Additionally, Governor Scott's recent appointment of Judge Steven Henderson to the Circuit Judge level was a great testament toward Judge Henderson's accomplishments. It is my opinion that the bench needs this background and experience in criminal and family law matters. I believe that my background in complex, civil litigation will complement and balance the current vacancy on the bench. An applicant with a criminal law background would have more jury trials than I have on my resume. However, I have been a trial lawyer for nearly

seventeen (17) years. I have litigated jury trials, which have settled prior to reaching a verdict. I do not see a lack of jury trials in civil matters as a negative aspect. Instead, I think it is a testament to how I have been able to manage cases including client expectations, and gain positive results for clients. Moreover, my background in large, complex matters does not lend itself to completing the trial process through a jury verdict. Quite often, the cases that I handle are greater than $5M (some reaching $35M), and involve not only the primary claims but also insurance coverage disputes. These types of cases are extremely complex during the pre-trial phase, and most settle through the efforts of all involved. This experience in both the primary claims, as well as the insurance-coverage aspect, allows me to understand the complexities and nuances that would come with overseeing the process in general. Furthermore, I believe that there is a heightened level of experience required to manage the pre-trial matters in a civil case. Most trials never reach a jury, and the Judge has an awesome responsibility to ensure that cases are proceeding in a timely and fair fashion. This all occurs during the pre-trial phase. For example, there is a level of experience that is imperative to truly understand how to properly implement case management (even with a standard Case Management Order). I have seen many cases where the disclosure order and timelines are simply not adequate for the type of case being litigated. When a case is not properly managed, the result is more delay for the parties. Along these lines, I would also be able to offer experience with multifaceted dispositive motions. Through my pre-trial experience, I have an understanding of the substantive law, as well as the procedural issues that can arise with complex motions. I believe that my experience allows me to learn and properly adjudicate any matter, whether it be civil, family or criminal. Along these lines, I have the benefit of having litigated matters Statewide (from Miami-Dade County to Escambia County). This exposure is valuable insomuch as I have not been limited to practicing in one area or primarily before one Judge. It is my belief that it is beneficial for a potential Judge to have a broad range of experience before different Circuit Courts in order to fully grasp and appreciate all of the nuances of procedural practice in the State of Florida. This is not to say that I have not had signifcant involvement in the Seventh Circuit. To the contrary, I regularly mediate and arbitrate cases in the Seventh Circuit. I believe that my arbitration experience (as an arbitrator) will be an asset to the bench. In my role as an arbitrator, I have been required to handle arbitrations from start to finish (including ruling on motions and drafting detailed Awards). I have served as the sole arbitrator on large, multiple-day construction cases. In addition to the legal contributions that I believe I would bring to the bench, I am committed to the local bar and community. It is vital for a Judge to be accessible to the local attorneys, as well as to give back to the community through charitable work. I am striving to be the absolute best role model that I can be for my sons Aiden and Lucas. I want to lead by example - not just for my sons, but as a leader in the community. I am committed to Flagler County, as well as any other County in the Seventh Circuit where the Chief Judge would assign me to hear matters. I have been actively sponsoring and attending Bar events in the Seventh Circuit. I have also been active with elevating attorneys in the Seventh Circuit to leadership positions within the Florida Bar's Real Property, Probate and Trust Law Section.

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.

    Seventh Circuit Judicial Nominating Commission (08/15/2017).

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

your application.

I think it is important to fully appreciate an applicant's motivation for seeking judicial office. Through my experience as a litigator and mediator, I believe that I have a unique skill set in that I understand procedural nuances from a variety of approaches. This is advantageous because it has allowed me to observe firsthand which judicial practices are effective, as opposed to practices that, in my opinion, may not be an effective reflection of what this responsibility entails. My experience as an arbitrator also sets me apart from anyone who has never had the responsibility of overseeing a matter in a quasi-judicial role from initial filing through a final award. This is an indispensable asset in my opinion given my experience in hearing and ruling upon motions, as well as conducting multiple-day, final hearings (some of which have exceeded $1M demands). Finally, my passion to become a judge for the purest of reasons can also be seen by the fact that I would be accepting a pay decrease from what I earn now as a shareholder in a private firm. I have been asked numerous times why I wanted to become a Judge in the prime of my career. My response to this question is that being in the prime of my career is the exact reason why I want to become a Judge. We need more interest in the bench from those who are in the pinnacle of their careers as opposed to those using the bench as a pay raise or a retirement plan.

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.

    Please see Tab E

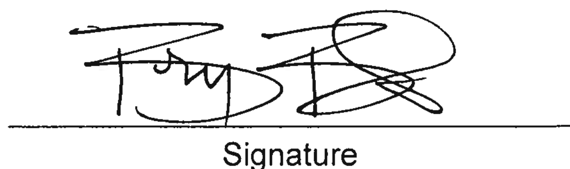
CERTIFICATE

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

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

Dated this 10th day of August, 2018.

BRYAN BENDZIO
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	$107,834.05.		
	$209,269.73	$205,634.24	$180,485.92
List Last 3 years	(2017)	(2016)	(2015)

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	$107,834.05		
	$179,269.73	$177,836.00	$134,453.00
List Last 3 years	(2017)	(2016)	(2015)

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

Current year to date	None		
List Last 3 years	None	None	None

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	None		
List Last 3 years	None	None	None

FORM 6
FULL AND PUBLIC DISCLOSURE OF FINANCIAL INTEREST

PART A – NET WORTH

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

My net worth as of August 10, 2018 was $1,235,365.49.

PART B - ASSETS

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

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

The aggregate value of my household goods and personal effects (described above) is $ 3,450.00

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Residence (205 Odom's Mill Blvd., Ponte Vedra Beach, FL 32082)	$530,642.00
Bank Account (Wells Fargo)	$7,800.00
Bank Account (Wells Fargo)	$9,700.00
Stock (Wells Fargo)	$48,939.69
IRA (Northwestern Mutual)	$88,106.06
Life Insurance Policy (Northwestern Mutual)	$1,000,000.00

PART C - LIABILITIES

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

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Student Loan (American Educational Services)(P.O. Box 2461, Harrisburg, PA 17105-2461)	$27,631.52
Student Loan (US Department of Education)(P.O. Box 105193, Atlanta, GA 30348-5193)	$30,103.52
Line of Credit (Fidelity Bank)(9802 Old Baymeadows Rd., Jacksonville, FL 32256)	$5,500.00
Mortgage for Residence at 205 Odom's Mill Blvd. (Fidelity Bank)(9802 Old Baymeadows Rd., Jacksonville, FL 32256)	$368,587.22

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
None	N/A
N/A	N/A
N/A	N/A

PART D - INCOME

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

☒ I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.
(if you check this box and attach a copy of your latest tax return, you need _not_ complete the remainder of Part D.]

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

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT

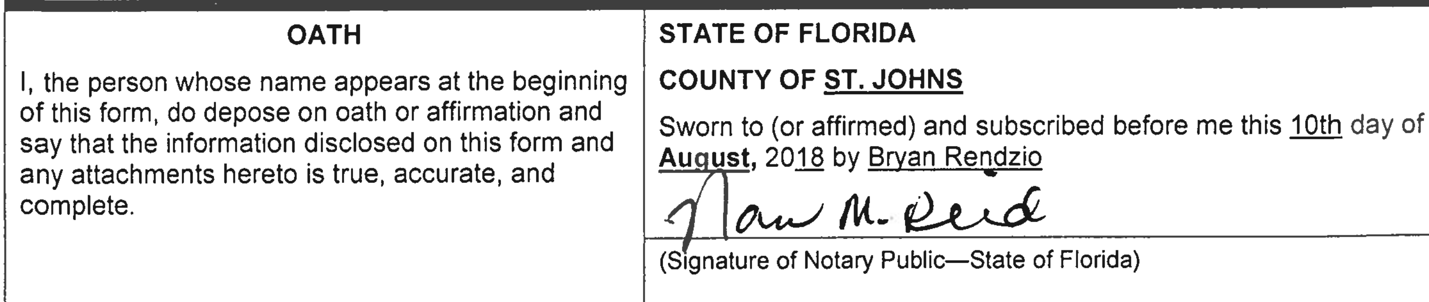
SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSIENSS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
None	N/A	N/A	N/A
None	N/A	N/A	N/A
None	N/A	N/A	N/A

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

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY	None	None	None
ADDRESS OF BUSINESS ENTITY	N/A	N/A	N/A
PRINCIPAL BUSINESS ACTIVITY	N/A	N/A	N/A
POSITION HELD WITH ENTITY	N/A	N/A	N/A
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS	N/A	N/A	N/A
NATURE OF MY OWNERSHIP INTEREST	N/A	N/A	N/A

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



OATH

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

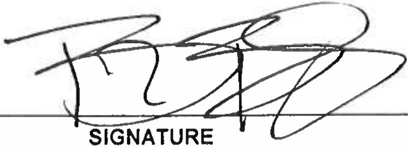
STATE OF FLORIDA

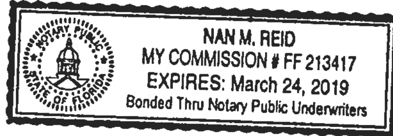
COUNTY OF ST. JOHNS

Sworn to (or affirmed) and subscribed before me this 10th day of **August**, 2018 by Bryan Rendzio

(Signature of Notary Public—State of Florida)

Rev. 100209-OGC

 SIGNATURE	(Print, Type, or Stamp Commissioned Name of Notary Public) Personally Known **x** *OR* Produced Identification _____ Type of Identification Produced _____



INSTRUCTIONS FOR COMPLETING FORM 6:

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

PART A – NET WORTH

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

To total the value of your assets, add:

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

To total the amount of your liabilities, add:

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

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

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

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

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

How to Identify or Describe the Asset:

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

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

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

How to Value Assets:

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

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

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

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

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

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

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

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

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

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

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

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

How to Determine the Amount of a Liability:

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

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

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

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

Examples:

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

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

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

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

PART D – INCOME

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

PRIMARY SOURCES OF INCOME:

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

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

Examples:

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

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

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

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

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

SECONDARY SOURCE OF INCOME:

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

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

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

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

Examples:

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

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

PART E – INTERESTS IN SPECIFIED BUSINESS

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

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

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

JUDICIAL APPLICATION DATA RECORD

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

(Please Type or Print)

Date: 08/10/2018

JNC Submitting To: Mr. Christopher J. Greene (Chair)

Name (please print): Bryan Robert Rendzio

Current Occupation: Attorney

Telephone Number: 904-662-1404 Attorney No.: 0496812

Gender (check one): ☒ Male ☐ Female

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

County of Residence: St. Johns County

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

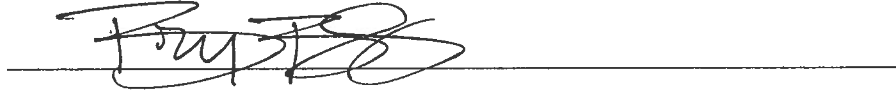
The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or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

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

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

Printed Name of Applicant: Bryan Robert Rendzio

Signature of Applicant:



Date: 08/10/2018

Rev. 100209-OGC

TAB

A

ITEM NO. 20 (COURT ADMISSIONS)

Name of Court Admission	Date	Any Resignation or Suspension?
Florida	09/11/2001	No. Member in Good Standing.
Middle District of Florida (Federal Court)	09/27/2001	No. Member in Good Standing.
United States Court of Appeals (11th Circuit) (Federal Court)	10/03/2002	No. Member in Good Standing.
United States Court of Appeals (5th Circuit) (Federal Court)	04/25/2003	No. Member in Good Standing.
District of Columbia	02/06/2004	No. Member in Good Standing.
Northern District of Florida (Federal Court)	10/10/2003	No. Member in Good Standing.
Southern District of Florida (Federal Court)	10/10/2003	No. Member in Good Standing.
Supreme Court of the United States	11/14/2005	No. Member in Good Standing.

TAB

B

WRITING SAMPLES

IN THE CIRCUIT COURT OF THE 15TH
JUDICIAL CIRCUIT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO.:502010CA030209XXXXMBAA

LANDIA YOSENIA PARKER
as PERSONAL REPRESENTATIVE
OF THE ESTATE OF CHARLES PARKER,

Plaintiff,

v.

MIKE LANG CONTRACTORS, INC., *et al.*,

Defendants.

_______________________________________/

DEFENDANT RENO'S PLUMBING AND POOL, INC.'S MOTION FOR SUMMARY FINAL JUDGMENT AS TO COUNTS X AND XI OF PLAINTIFF'S FOURTH AMENDED COMPLAINT (WITH INCORPORATED MEMORANDUM OF LAW)

Defendant, RENO'S PLUMBING AND POOL, INC. ("Reno's Plumbing" or "Defendant"), by and through its undersigned counsel and pursuant to Rule 1.510, Fla. R. Civ. P., hereby serves its Motion for Summary Final Judgment as to all claims against Reno's Plumbing in this action (Counts X and XI of the Fourth Amended Complaint), and in support states:

I. BRIEF BACKGROUND / ISSUE BEFORE THE COURT:

This action pertains to certain additions and alterations to Plaintiff's residence in Delray Beach, Florida. *See* Pl.'s Fourth Am. Compl. (hereinafter "Compl."), ¶ 14. Plaintiff has alleged that there are problems with the residence in the form of various incomplete and/or defective items. *See* Compl., ¶ 38. Despite the fact that Plaintiff had no contractual relationship with Reno's Plumbing, Plaintiff, through his estate, has sued Reno's Plumbing for Breach of Contract (Count X) and Breach of Implied Warranty to Construct in a Good and Workmanlike Manner (Count XI). The issues before the Court are: (1) whether Plaintiff as the owner may state a cause of action against one of the project's subcontractors for breach of contract; and (2) whether Plaintiff as the

owner may state a cause of action against one of the project's subcontractors for breach of implied warranty.

For the reasons stated in this Motion, Plaintiff cannot state a cause of action for either of the above claims. Accordingly, there are no genuine issues of material fact, and Reno's Plumbing is entitled to judgment as a matter of law.

II. **UNDISPUTED MATERIAL FACTS:**

1. Reno's Plumbing was a plumbing subcontractor of Mike Lang Contractors, Inc. ("Mike Lang"). *See* Compl., ¶¶ 8-9, 17 and 90; *see also* Reno's Plumbing's Answer to Compl., ¶¶ 8-9, 17 and 90.

2. Reno's Plumbing had a direct contract with Mike Lang, and had no contract with Plaintiff. *See* Affidavit of Renato Valli ("Valli Aff.") at ¶¶ 3-4.

3. There are no known defects with the PEX piping that was installed the project. Instead, Plaintiff claims that Reno's Plumbing somehow "realized an enormous windfall in costs savings" on the project when PEX piping was used instead of copper piping. *See* Pl.'s Response to Def. Reno's Plumbing and Pool, Inc.'s Amended Affirmative Defenses to Fourth Am. Compl., ¶ 10.

4. Reno's Plumbing did not realize any financial benefit from the use of PEX piping on the project in lieu of copper piping, and there was a price deduction for the use of PEX piping. *See* Valli Aff. at ¶ 5.

6. All work within Reno's Plumbing's scope of services was required to be inspected, and all work passed the required inspections by the building department. *See* Valli Aff. at ¶ 6.

III. MEMORANDUM OF LEGAL AUTHORITIES:

A. STANDARD FOR SUMMARY JUDGMENT:

Under Florida law, a party is entitled to summary judgment if there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000); *see also Mack v. Commercial Indus. Park*, 541 So. 2d 800 (Fla. 4th DCA 1989) (holding that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *citing* Rule 1.510(c), Fla. R. Civ. P.

B. ANALYSIS:

1. *Plaintiff's Fourth Amended Complaint Fails to State a Cause of Action Against Reno's Plumbing for Breach of Contract.*

This matter does not present complex issues requiring any detailed factual analysis. Plaintiff has alleged that Reno's Plumbing breached a contract with Plaintiff. In support of this claim, Plaintiff alleges that he was an intended third party beneficiary of the subcontract between Mike Lang and Reno's Plumbing. Contrary to Plaintiff's assertion, there is no contractual language expressly making Plaintiff an intended third party beneficiary of the subcontract between Mike Lang and Reno's Plumbing.

Under Florida law, a contract must mutually and clearly express an intent to primarily and directly benefit the third party. *See Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So. 2d 1028, 1030-31 (Fla. 4th DCA 1994) (internal citations omitted)(holding that "[a] person who is not a party to a contract may not sue for breach of that contract where that person receives only an incidental or consequential benefit from the contract. The exception to this rule is where the entity that is not a party to the contract is an intended third party beneficiary of the contract").

The concept of incidental versus being an intended third party beneficiary has been addressed by Florida Courts in the context of an owner-contractor-subcontractor scenario. *See, e.g., Publix Super Markets, Inc. v. Cheesbro Roofing, Inc.*, 502 So. 2d 484 (Fla. 5th DCA 1987) ("*Publix*"). In *Publix*, an owner entered into a construction contract with a general contractor, and the general contractor entered into a subcontract with a subcontractor for the purpose of constructing the project's roof. *See* 502 So. 2d 486. As part of the litigation, the owner sought to enforce certain provisions of the contract between the general contractor and the roofing subcontractor. *See id.* at 488. The owner argued that it was an intended third party beneficiary of the subcontract between the general contractor and the subcontractor since the work was ultimately being conducted for the owner. *See id.* The Court disagreed with the owner's argument that it was an intended third party beneficiary of the subcontract merely by virtue of being the owner. *See id.* Instead, the Court held that "a property owner is ***not the intended third party beneficiary of a contract between a general contractor and a subcontractor.*** *Corbin* [*citing to Corbin on Contracts* § 779D, at 47 (1951)] states that ***absent clear words in the contract to the contrary***, the owner has no right against the subcontractor; the benefit he receives must be regarded as merely incidental." (Emphasis added). *Id.* The Court went on to hold that "although the work performed by subcontractors ultimately accrues to the property owner, the owner is ordinarily regarded as only an incidental beneficiary of the subcontract." *Id.*

In the case at issue, there is no written subcontract between Mike Lang and Reno's Plumbing expressly making Plaintiff an intended third party beneficiary. Instead, just as was the situation in the *Publix* action, Mr. Parker, as the owner, was merely an incidental beneficiary of the contract between Mike Lang and Reno's Plumbing. Moreover, Reno's Plumbing cannot locate and is not aware of any direct invoices to Mr. Parker from Reno's Plumbing. Even if there were

any direct invoices or direct payments by Mr. Parker to Reno's Plumbing, the undersigned has located no authority to indicate that this would somehow convert a party from being an incidental beneficiary into being an intended third party beneficiary.

In its Reply to Reno's Plumbing's Affirmative Defense on this issue (i.e., Affirmative Defense No. 9), Plaintiff cited to *Ocean Ritz Condo. v. GGV Assoc.*, 710 So. 2d 702 (Fla. 5th DCA 1998) ("*Ocean Ritz*") for the proposition that Mr. Parker should be considered an intended third party beneficiary of the subcontract. The *Ocean Ritz* case is distinguishable from the instant action inasmuch as it did not pertain to a subcontract between a general contractor and a subcontractor, and actually involved a situation wherein there was an express intention to make the Plaintiff an intended third party beneficiary. 710 So. 2d at 702. The plaintiff was a condominium association who was bringing a claim on behalf of itself, as well as the individual unit owners. *See id.* The plaintiff brought its claim against a design professional (i.e., architect) who prepared a condominium conversion disclosure report pursuant to Section 718.616, Fla. Stat. *See id.* The architect's liability was based on its alleged faulty inspection and inaccurate disclosure and report prepared pursuant to its contract, which was intended to meet the developer's obligation under Section 718.606. *See id.* Unlike the situation between Reno's Plumbing and Mr. Parker, the report in the *Ocean Ritz* action was expressly intended to inure to the benefit of the condominium purchasers. Section 718.606 expressly states that "[e]ach unit owner and the association are third-party beneficiaries of the report." § 718.606(3)(c), Fla. Stat. *See id.* Accordingly, the condominium association was the intended third party beneficiary of the architect's report.

For the above reasons, Plaintiff was not an intended third party beneficiary of the subcontract between Mike Lang and Reno's Plumbing. Accordingly, there are no genuine issues

of material fact, and Reno's Plumbing is entitled to judgment as a matter of law as to Count X of Plaintiff's Fourth Amended Complaint.

2. ***Plaintiff's Fourth Amended Complaint Fails to State a Cause of Action Against Reno's Plumbing for Breach of Implied Warranty.***

Count XI of Plaintiff's Fourth Amended Complaint (Breach of Implied Warranty to Construct In a Good and Workmanlike Manner) fails to state a cause of action. Specifically, Florida law holds that contractors must install products that are "reasonably suited for the purposes for which the product was intended." *Lochrane Eng'g v. Willigham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228 (Fla. 5th DCA 1989). The foregoing authority under Florida law does not hold that a contractor impliedly promises that any product the contractor provides or utilizes will be free of defects. Reno's Plumbing's scope of services was within reasonable industry standard, and passed inspection as required. In fact, Plaintiff has not made any allegation that there is even a defect to the PEX piping. Plaintiff has stated in its Response [Reply] to Reno's Plumbing's Affirmative Defense No. 10 that "Plaintiff would state that the point is not that PEX piping will not work, but rather the plans called for copper piping, the contract called for copper piping, and Defendant instead supplied PEX piping." Pl.'s Response to Def. Reno's Plumbing and Pool, Inc.'s Amended Affirmative Defenses to Fourth Am. Compl., ¶ 10.

Count XI likewise fails to state a cause of action inasmuch as Plaintiff was not in privity of contract with Reno's Plumbing. Florida law holds that in order to recover for breach of an implied warranty, Plaintiff must be in contractual privity. *Rentas v. Daimler Chrysler Corp.*, 936 So. 2d 747, 751 (Fla. 4th DCA 2006); *see also Weiss v. Johansen*, 898 So. 2d 1009, 1012 (Fla. 4th DCA 2005). Reno's Plumbing did not have any contract with Plaintiff, and as such Plaintiff cannot meet the element of privity required for a breach of implied warranty claim.

IV. CONCLUSION:

For the above reasons, Reno's Plumbing requests that this Honorable Court grant Reno's Plumbing's motion for summary final judgment as to Counts X and XI of the Fourth Amended Complaint, as well as grant any further and other relief that the Court deems just and proper.

FRANSON, ISELEY
& RENDZIO, P.A.

By

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Pool, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the individuals on the attached "Service List" on this 30th day of September, 2015.

Attorney

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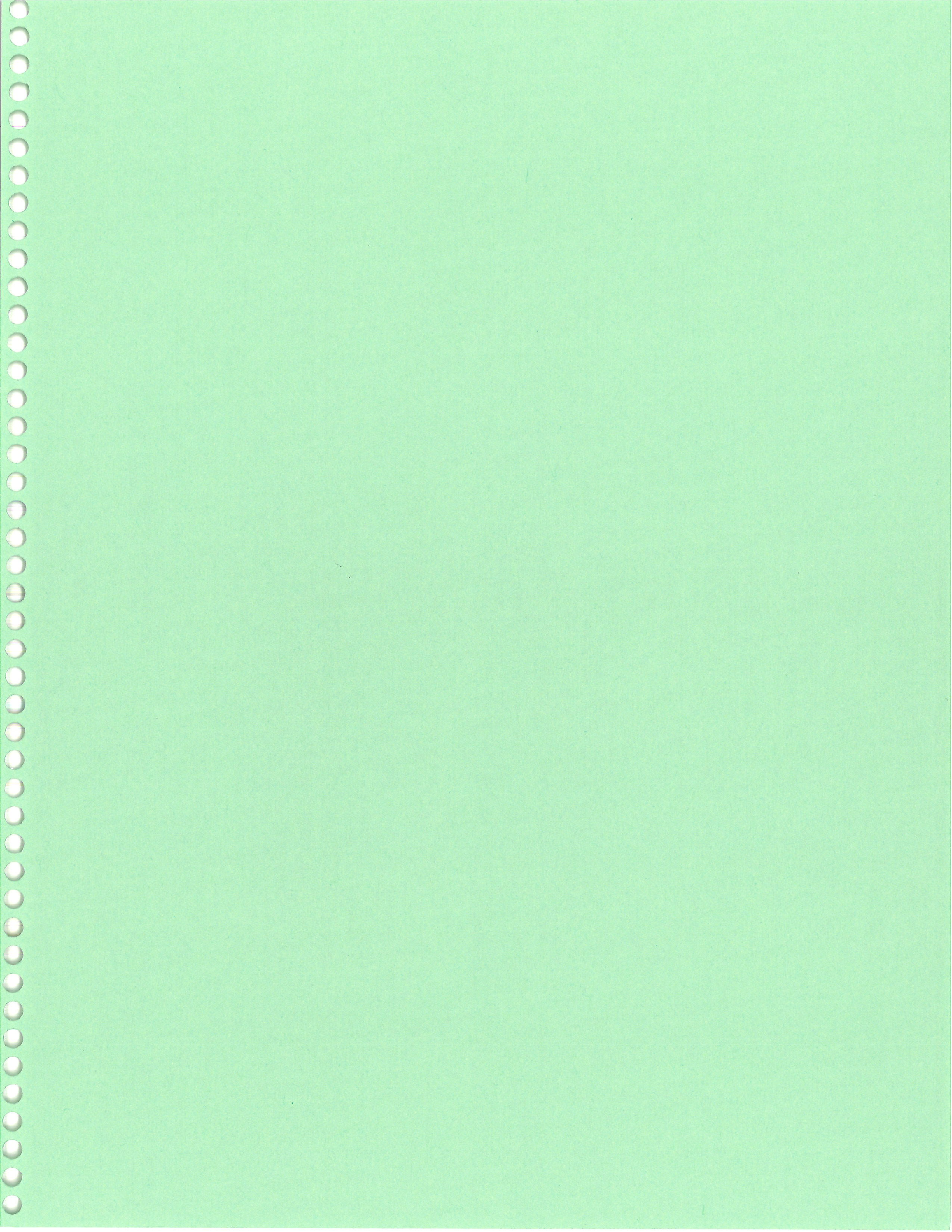

IN THE CIRCUIT COURT, THIRTEENTH
JUDICIAL CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CASE NO.: 12 01983
DIVISION: B

ALLSTATE STEEL CO., INC. OF
JACKSONVILLE D/B/A ALLSTATE
STEEL CO., INC., a Florida corporation,

Plaintiff,

vs.

SIMS CRANE & EQUIPMENT CO.,
a Florida corporation; and TADANO
AMERICA CORPORATION,
a Delaware corporation,

Defendants.
_______________________________________/

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO AFFIRMATIVE DEFENSES RAISED BY DEFENDANT SIMS CRANE & EQUIPMENT CO.

Plaintiff, ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC. ("Allstate Steel" or "Plaintiff"), by and through its undersigned counsel and pursuant to Rule 1.510, Fla. R. Civ. P., and the Court's May 5, 2014 Uniform Order Setting Cause for Trial and Pretrial (Jury Trial), hereby moves this Honorable Court for an Order granting partial summary judgment and/or striking certain affirmative defenses raised by Defendant SIMS CRANE & EQUIPMENT CO. ("Sims Crane"), and in support states:

I. DISPOSITIVE FACTS:

1. On or about January 30, 2012, Allstate Steel filed its Complaint in this action.

2. On or about April 2, 2012, Sims Crane served its Answer and Affirmative Defenses wherein it asserted five (5) affirmative defenses.

3. Among its defenses, Sims Crane asserted:

- First Defense: The damages allegedly sustained by the Plaintiff were both directly and proximately caused by the Plaintiff's own breach of the contract and not as a result of any breach on the part of the Defendant. Furthermore, said damages are both directly and proximately caused as a result of the negligent acts and/or omissions of the Plaintiff and as a consequence, the Plaintiff cannot recover against the Defendant.

- Third Defense: Any and all damages allegedly sustained by the Plaintiff were caused solely and exclusively by the acts, omissions and/or negligence of third parties, including but not limited to Tadano America Corporation, over which the Defendant had no control and for which the Defendant is not responsible and as a result, the Plaintiff may not recover from the Defendant. The Defendant specifically reserves the right to allege the negligence of other specifically named individuals and/or entities as those allegations become exigible through discovery.

- Fourth Defense: At all times relevant herein, the Plaintiff failed to mitigate its damages and has therefore forfeited its right to recover or in the alternative, should recover at a diminished amount.

- Fifth Defense: The Plaintiff's complaint is barred under Florida's economic loss rule.

4. On April 9, 2012, Allstate Steel served its Reply wherein it provided detailed reasoning why Sims Crane's above-referenced Affirmative Defenses were deficient as a matter of law. A true and accurate duplicate of Allstate Steel's Reply is attached hereto as **Exhibit "A."**

II. LEGAL ARGUMENT:

Under Florida law, a party is entitled to summary judgment if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

Under Florida law, certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *See Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136 (Fla. 4th DCA 1988). Furthermore, affirmative defenses should not constitute a mere denial of the allegations of the complaint and must set forth facts in such a manner as to reasonably inform the opposing party what is proposed to be proven in order to provide Plaintiff with a fair opportunity to meet it and prepare evidence in opposition. *Zito v. Washington Fed. Savings & Loan Assoc. of Miami Beach*, 318 So. 2d 175 (Fla. 3d DCA 1975).

Sims Crane's defenses are lacking the required ultimate facts to support the defenses. As such there are no genuine issues of material fact, and the defenses fail as a matter of law. Sims Crane has been on notice of the deficiency with its affirmative defenses since April 9, 2012 and has taken no steps to amend or otherwise furnish any ultimate facts to support the above-referenced affirmative defenses.

III. CONCLUSION:

WHEREFORE, Plaintiff requests that this Honorable Court enter an Order granting Plaintiff a partial summary judgment as to the above-referenced affirmative defenses, or alternatively striking the defenses, as well as grant and further and other relief that the Court deems just and proper.

FRANSON, ISELEY,
& RENDZIO, P.A.

By:______________________
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Christopher J.M. Collings, Esq.** (ccollings@morganlewis.com) / **Joshua C. Prever, Esq.** (jprever@morganlewis.com), Morgan, Lewis & Bockius, LLLP, 200 S. Biscayne Blvd., Suite 5300, Miami, Florida 33131; and **Gary M. Hellman, Esq.** (goldhellaw@aol.com), Goldman & Hellman, 800 SE 3rd Ave., Fl 4., Ft. Lauderdale, Florida 33316 via Electronic Mail on this 29th day of August, 2014.

Attorney

4/9-12

IN THE CIRCUIT COURT, THIRTEENTH
JUDICIAL CICRUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CASE NO.: 12 01983
DIVISION: B

ALLSTATE STEEL CO., INC. OF
JACKSONVILLE d/b/a ALLSTATE
STEEL CO., INC., a Florida corporation,

Plaintiff,

vs.

SIMS CRANE & EQUIPMENT CO., a Florida
corporation; and TADANO AMERICA
CORPORATION, a Delaware corporation,

Defendants.
_______________________________________/

**PLAINTIFF'S REPLY TO DEFENDANT SIMS CRANE &
EQUIPMENT CO.'S AFFIRMATIVE DEFENSES**

Plaintiff, ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC. ("Allstate Steel"), by and through its undersigned counsel and pursuant to Rule 1.100(a) Fla. R. Civ. P., herby serves this Reply to the Affirmative Defenses asserted by SIMS CRANE & EQUIPMENT CO.("Defendant" or "Sims Crane"), and states:

1. Allstate Steel denies each and every affirmative defense asserted by Defendant and demands strict proof thereof.

2. An affirmative defense is one that admits the cause of action asserted in the initial pleading but avoid liability wholly or partly, by allegations of excuse, justification or other matter negating the action. *See* Rule 1.110(d), Fla. R. Civ. P.; *see also St. Paul Mercury Ins. Co. v. Coucher*, 837 So. 2d 483, 487 (Fla. 5th DCA 2002).

3. Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *See Cady v. Chevy Chase*

EXHIBIT A

Savings and Loan, Inc., 528 So. 2d 136 (Fla. 4th DCA 1988). Furthermore, affirmative defenses should not constitute a mere denial of the allegations of the Complaint and must set forth facts in such a manner as to reasonably inform the opposing party what is proposed to be proven in order to provide Plaintiff with a fair opportunity to meet it and prepare evidence in opposition. *Zito v. Washington Fed. Savings & Loan Assoc. of Miami Beach*, 318 So. 2d 175 (Fla. 3d DCA 1975).

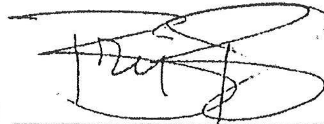
4. Defendant's First Affirmative Defense is a mere denial and a conclusion of law that contains no factual support.

5. Defendant's Third Affirmative Defense is a mere denial and a conclusion of law that contains no factual support.

6. Defendant's Fourth Affirmative Defense is a mere denial and a conclusion of law that contains no factual support.

7. Defendant's Fifth Affirmative Defense is a mere denial and a conclusion of law that contains no factual support. Moreover, the Fifth Affirmative Defense is legally deficient insomuch as Allstate Steel has not alleged any claims against Sims Crane that would invoke the economic loss rule (i.e., tort claims with the existence of a contract).

TRITT|RENDZIO



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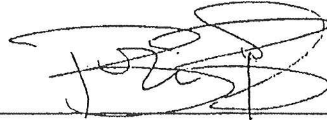
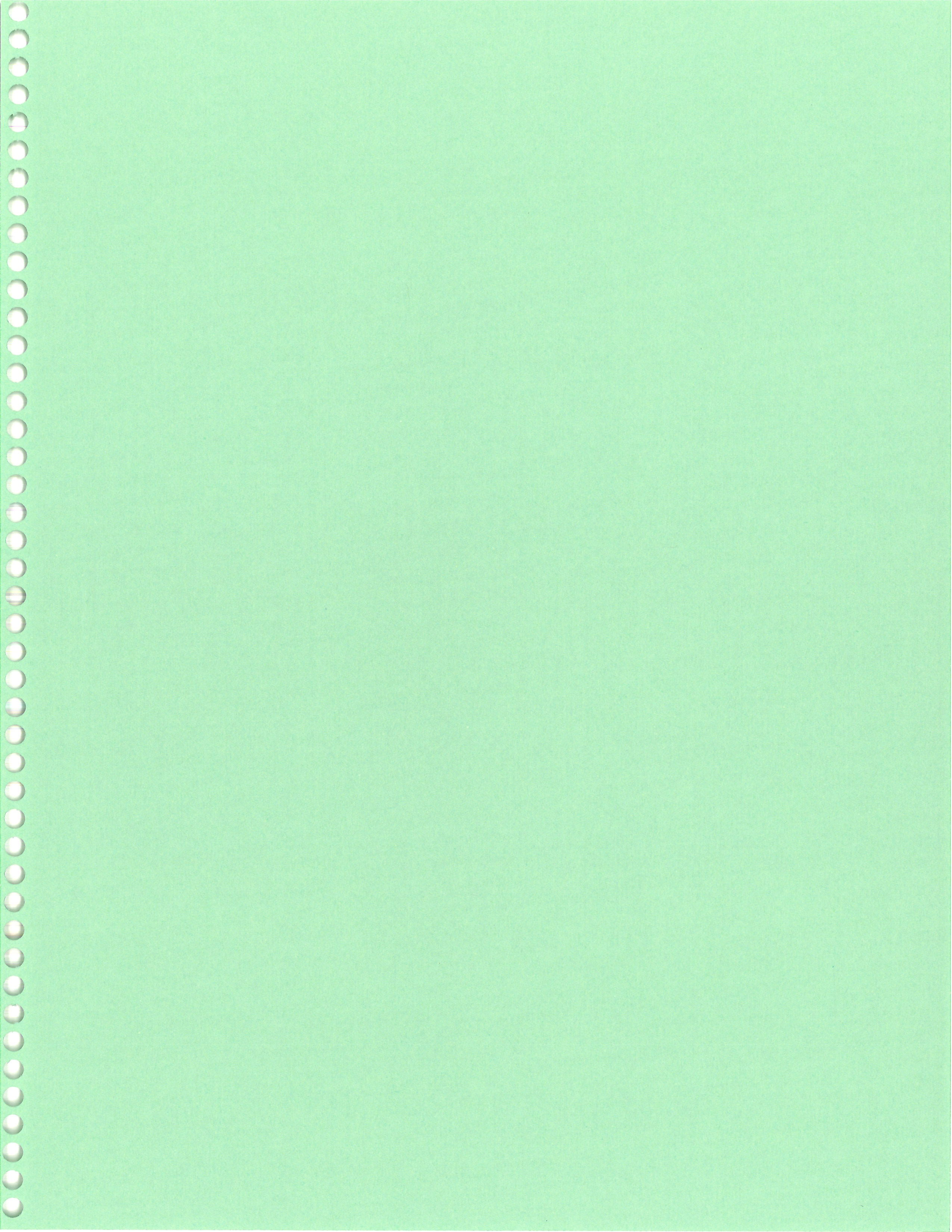
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **John C. Matthews, Esq.**, Morgan, Lewis & Bockius, LLLP, 5300 Wachovia Financial Center, 200 S. Biscayne Boulevard, Miami, Florida 33131; and **Gary M. Hellman, Esq.**, Goldman & Hellman, 800 Southeast Third Avenue, Fourth Floor, Fort Lauderdale, Florida 33316 via U.S. Mail on this 9th day of April, 2012.



Attorney



IN THE CIRCUIT COURT, THIRTEENTH
JUDICIAL CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CASE NO.: 12 01983
DIVISION: B

ALLSTATE STEEL CO., INC. OF
JACKSONVILLE d/b/a ALLSTATE
STEEL CO., INC., a Florida corporation,

Plaintiff,

vs.

SIMS CRANE & EQUIPMENT CO.,
a Florida corporation; and TADANO
AMERICA CORPORATION,
a Delaware corporation,

Defendants.

_______________________________/

PLAINTIFF'S MOTION IN LIMINE, OR IN THE ALTERNATIVE MOTION TO STRIKE, TO EXCLUDE TESTIMONY AND EXPERT REPORT OF DEFENDANT SIMS CRANE & EQUIPMENT CO.'S DAMAGES EXPERT, LANCE E. GUNDERSON

Plaintiff, ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC. ("Plaintiff" or "Allstate Steel"), pursuant to § 90.104, Florida Evidence Code,[1] hereby files its Motion in Limine, or in the Alternative Motion to Strike, to Exclude Testimony And Expert Report of Defendant Tadano America Corporation's Damages Expert, Lance E. Gunderson ("Motion in Limine"), and in support states:

I. STANDARD:

The purpose of a motion in limine is to shorten trial, simplify issues, and reduce the potential for a mistrial, thereby moving the case toward a conclusion of the merits. *Rosa v. Florida*

---

[1] All sections of the Florida Statutes that are cited herein and pertain to evidentiary rules are being referred to as the "Florida Evidence Code" as permitted by § 90.101, Fla. Stat.

Power & Light Co., 636 So. 2d 60 (Fla. 2d DCA 1994). Moreover, a motion in limine is intended to "prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Fittipaldi USA, Inc. v. Helio Castroneves*, 905 So. 2d 182, 187 (Fla. 3d DCA 2005). The Florida Evidence Code makes it clear that "[i]n cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." § 90.104(2), Florida Evidence Code.

II. RULE OF LAW:

Under Florida law, mediation communications are confidential, and may not be disclosed except under certain enumerated exceptions. Specifically, Florida's Mediation Confidentiality and Privilege Act holds that, except for a few exceptions, "*all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel* . . . If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees." (Emphasis added). § 44.405(1), Fla. Stat.

A "mediation communication" is defined by the Florida legislature to mean "an oral or *written statement*, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, *or prior to mediation if made in furtherance of a mediation* . . .." (Emphasis added). § 44.403(1), Fla. Stat.

It is error for a trial court to allow the contents of conversations which took place during mediation into evidence in violation of Section 44.405(1). *See Sun Harbor Homeowners' Ass'n v. Bonura*, 95 So. 3d 262, 270 (Fla. 4th DCA 2012) (holding that mediation could not take place if

litigants had to worry about admissions against interest being offered into evidence at trial, if settlement was not reached).

III. ANALYSIS:

1. On September 10, 2014, SIMS CRANE & EQUIPMENT CO. ("Sims Crane") filed and served its purported Amended Witness List. Allstate Steel has moved to strike the untimely expert witness disclosure via a separate motion inasmuch as Sims Crane's amended witness disclosure violates the Court's Pretrial Order.

2. Apparently, Sims Crane is seeking to adopt or otherwise engage the former experts of TADANO AMERICA CORPORATION ("Tadano") since Plaintiff has settled with Tadano via a confidential settlement agreement.

3. Through this Motion in Limine, Allstate Steel is not waiving its argument that Sims Crane's Amended Witness List should be stricken. Instead, Allstate Steel is seeking to have the Court exclude the testimony and report of Sims Crane's alleged expert, Lance E. Gunderson ("Mr. Gunderson"), on additional independent grounds.

4. During the course of this lawsuit, the parties engaged in a mediation as required by the Court's Uniform Order Setting Cause for Trial and Pretrial (Jury Trial) (i.e., requiring that a mediation occur before the Pretrial Conference).

5. The mediation reached impasse with no written settlement.

6. On or about March 25, 2014, Tadano served an expert report from Mr. Gunderson.

7. In his report, Mr. Gunderson states: "[a]ttached as Schedule 3 [entitled "Information Considered"] is a list of the documents that have been produced in this litigation as well as other information that I have reviewed to date in forming my opinions in this case." Gunderson Report, p. 2.

8. Among other items in Schedule 3 of his report, Mr. Gunderson considered Allstate Steel's February 15, 2013, mediation statement in forming the basis for his expert report and his opinion. The undersigned has not attached a copy of Mr. Gunderson's report to this Motion since the report recites portions from Allstate Steel's mediation statement, and Allstate Steel does not wish to improperly file the document in the public court records. Allstate Steel will present the report to the Court for an *in camera* inspection or will otherwise produce the same to the Court as the Court directs.

9. Specific references to Allstate Steel's mediation statement are cited to at least six (6) times throughout Mr. Gunderson's expert report.

10. On March 27, 2014, Mr. Gunderson was deposed. During his deposition, he admitted that he relied upon all of the information in Schedule 3 not only to form the basis for his report, but also his opinion in general.

> Q [Attorney Rendzio]: And then looking back on page 2, under the header "Information Reviewed and Considered," there's a sentence that says: "Attached as Schedule 3 is a list of the documents that have been produced in this litigation as well as other information that I have reviewed to date in forming my opinions in this case." Is that -- does that appear to be accurate?
>
> A. Yes.

(Deposition of Lance E. Gunderson "Gunderson Dep." at 34:12-21)

****

> Q. And then Schedule 3 is the information you considered in forming this report?
>
> A. Yes.

(Gunderson Dep. at 35:3-5)

****

Q. If you look at page 17 of your report in the section entitled "Other Issues." Do you see that? And it looks like, the first paragraph, you just -- it states: "The citations listed in this report are illustrative, and as part of my analysis, I have also considered the additional documents and information listed on Schedule 3." Do you see that?

A. Yes.

Q. And again, that's just referring to –

A. Information reviewed.

Q. -- the information considered for this report?

A. Right.

Q. Okay. And that's information considered in forming your opinion?

A. Yes.

(Gunderson Dep. at 79:5-23)

11. Mr. Gunderson was not present at the parties' mediation, and was not even engaged to serve as an expert until several months after the mediation. Despite this fact, Mr. Gunderson improperly received a copy of Allstate Steel's mediation statement (a mediation communication). Thereafter, Mr. Gunderson improperly relied upon the mediation communication as a part of his role as an expert in this lawsuit.

12. This is not a situation, which is open to interpretation. The facts are clear that there was a violation of Florida's mediation rules by improperly disclosing a mediation communication (i.e. the mediation statement). Mr. Gunderson further violated Florida's mediation rules by citing to and relying upon a mediation communication during the course of this litigation.

13. The violations contained herein may not simply be cured by any limiting language since it is impossible to determine how poisoned the well is by the improper disclosure and the improper consideration by Mr. Gunderson. Moreover, merely limiting the report or testimony

would send a message that parties could violate Florida's strict mediation confidentiality rules, and then simply redact or limit any portions relating to the mediation communications after-the-fact if ever challenged on the issue. This goes against the very purpose and protections that come with mediation.

WHEREFORE, Plaintiff requests that this Honorable Court enter an Order excluding Mr. Gunderson's expert report and his opinions during trial. Moreover, Plaintiff requests such other and further relief that the Court deems just and proper.

FRANSON, ISELEY,
& RENDZIO, P.A.

By:____________________

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Allstate Steel Co., Inc. of Jacksonville d/b/a
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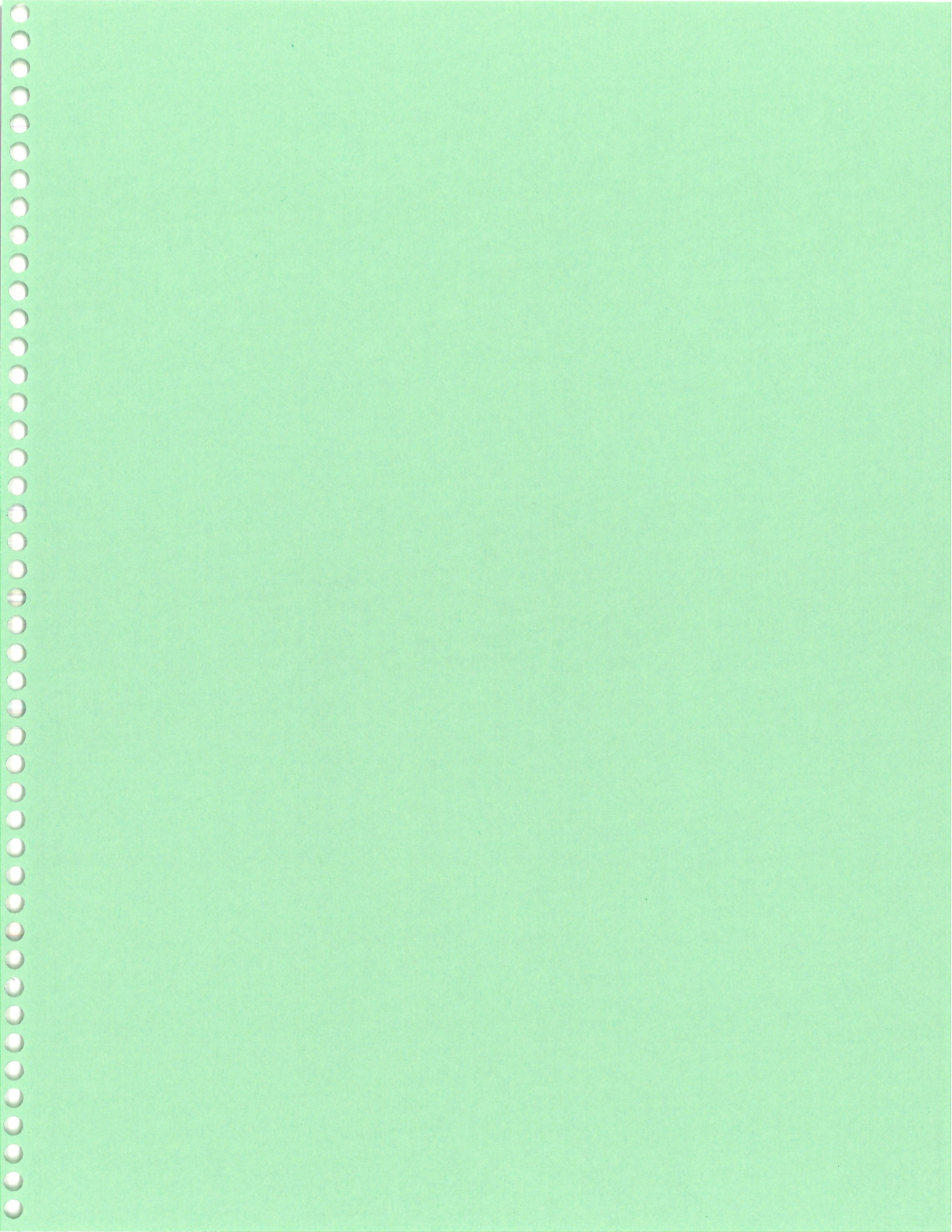
Attorney



IN THE CIRCUIT COURT, THIRTEENTH
JUDICIAL CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

CASE NO.: 12 01983
DIVISION: B

ALLSTATE STEEL CO., INC. OF
JACKSONVILLE d/b/a ALLSTATE
STEEL CO., INC., a Florida corporation,

Plaintiff,

vs.

SIMS CRANE & EQUIPMENT CO.,

Defendant.

_______________________________/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT SIMS CRANE & EQUIPMENT CO.'S AMENDED MOTION TO CONTINUE

Plaintiff, ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC. ("Plaintiff" or "Allstate Steel"), hereby serves its memorandum in opposition to Defendant's Amended Motion to Continue, and in support states:

1. This action is set to proceed to trial on the Court's October 20, 2014, trial docket.

2. On or about September 23, 2014, Defendant, SIMS CRANE & EQUIPMENT CO. ("Defendant" or "Sims Crane") filed an Amended Motion to Continue ("Motion to Continue") whereby Defendant is moving to continue the trial in this matter.

3. As justification for its Motion to Continue, Sims Crane argues the following:

- That Sims Crane has alleged mitigation as a defense;
- That Sims Crane learned during the continued deposition of Sharon Suggs (Allstate Steel's designated corporate representative) that former Defendant Tadano America Corporation ("Tadano") settled with Allstate Steel via a confidential settlement;
- That Sims Crane *adopted by reference* Tadano's experts but that Sims Crane did *not* retain the experts;

- That Allstate Steel filed a Motion to Strike Sims Crane's untimely Amended Witness List, and also has separately moved to strike Tadano's former damages expert, Lance Gunderson, inasmuch as Mr. Gunderson improperly relied upon confidential mediation communications when forming his opinion and report for this matter; and
- That Sims Crane recently served discovery toward Allstate Steel regarding the recent sale of the crane at issue in this lawsuit.

4. In summary, Defendant only has two (2) reasons to support its Motion to Continue which are: (1) that it has no experts; and (2) that it requires details of the sale of the subject crane to "assess the impact of the settlement and sale of the crane upon the damages issue."

5. Sims Crane has cited no legal authority to support its Motion to Continue, and claims that Allstate Steel will suffer no prejudice if a continuance is granted.

6. Contrary to Sims Crane's allegation, Allstate Steel will suffer prejudice if this trial is continued, and Sims Crane has offered no justifiable reason to support any continuance.

7. This lawsuit has been pending since January 2012.

8. This matter has been set for trial five (5) times, including the currently-scheduled trial date. This matter has already been continued four (4) times, and Sims Crane's Motion to Continue would be the fifth (5th) continuance in this action.

9. Former Defendant Tadano sought the first continuance when the matter was set for the Court's June 10, 2013, trial docket. A true and accurate duplicate of the first motion to continue is attached hereto as **Ex. "A."**

10. After the first continuance, the matter was once again set for the Court's trial docket of December 9, 2013. As a professional courtesy to former Defendant Tadano, Allstate Steel agreed to a second continuance of trial given the fact that Tadano's lead counsel left the law firm defending Tadano. A true and accurate duplicate of the second motion to continue is attached hereto as **Ex. "B."**

11. The matter was once again reset for the Court's trial docket of May 12, 2014. Allstate Steel again agreed to a continuance so that Defendants could complete some fact witness depositions. It was agreed by the parties that the trial would be continued to the Court's July 14, 2014, trial docket. A true and accurate duplicate of the third motion to continue is attached hereto as **Ex. "C."**

12. Prior to the scheduled July 14, 2014, trial period, counsel for Sims Crane advised Allstate Steel that his firm had a conflict with date scheduled for the Pretrial Conference. As such, Allstate Steel again agreed to the continuance. In fact, the trial date was rescheduled two (2) months out to the Court's current October 20, 2014, trial docket. A true and accurate duplicate of the fourth motion to continue is attached hereto as **Ex. "D."**

13. This brings the Court to the fifth (5th) Motion to Continue, which is pending and is the subject of this memorandum in opposition.

14. As established above, Allstate Steel has been prepared to proceed with trial, and Sims Crane has represented on numerous occasions that it was likewise prepared.

15. Under Florida law, "[a]ll judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge . . .." Rule 2.545(e), Fla. R. Jud. Admin. Moreover, a continuance is not warranted when the matter has been continued in the past. *See Wash-Bowl, Inc. v. Wroton,* 432 So. 2d 766, 767 (Fla. 2d DCA 1983)(wherein the Second DCA affirmed a trial court's denial of a continuance since there were two prior continuances; holding that second and third continuances are looked on with disfavor). Finally, a continuance is not deserved when it is due to the result of a moving party's own lack of diligence. *See Higgins v. Johnson,* 422 So. 2d 16 (Fla. 2d DCA 1982)(wherein the Second DCA held that a party's lack of an expert witness was not sufficient grounds for a continuance).

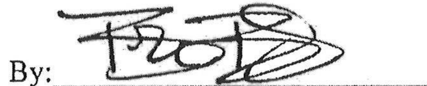
16. As for its first argument (i.e., lack of experts), Sims Crane has no party to blame but itself for its position. Sims Crane could have entered into a joint defense agreement or could have otherwise retained experts at any juncture before any of the four (4) prior times that this lawsuit was set for trial. Sims Crane's lack of diligence cannot somehow be displaced to Allstate Steel for settling with the defendant who retained and disclosed the experts. Moreover, Sims Crane still retains the ability to try to impeach Allstate Steel's experts during trial. Thus, any alleged prejudice is without merit.

17. As for its second claim (i.e., that it requires details of the sale of the subject crane to assess the impact of the settlement and damages issue), is again not the result of any actions by Allstate Steel. Allstate Steel has never hindered Sims Crane's ability to depose anyone from Allstate Steel, and Sims Crane was well aware of the pretrial deadlines and pending trial date when it set the continued deposition of Sharon Suggs (designated corporate representative). Moreover, Sims Crane could have served supplemental discovery at any point to ascertain as to any sale of the crane. Sims Crane served its Third Request for Production of Documents on September 10, 2014. Allstate Steel is preparing responsive materials, and will serve materials before the thirty (30) days that it is allotted. Any prejudice, however, is the result of Sims Crane's lack of due diligence, and is not a result of any act by Allstate Steel.

18. As established above, any prejudice that Sims Crane is alleging is self-imposed. Allstate Steel has expended significant funds for its experts in this matter, and has coordinated with all of the experts, as well as fact witnesses, to ensure that the trial may proceed on the October docket. This matter has already been set for trial on four (4) occasions and has been continued four (4) times. Allstate Steel will suffer prejudice is this matter is continued for a fifth (5th) time.

WHEREFORE, Plaintiff requests that this Honorable Court enter an Order denying Defendant's Motion to Continue, and for such other and further relief that the Court deems just and proper.

FRANSON, ISELEY,
& RENDZIO, P.A.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Gary M. Hellman, Esq.** (goldhellaw@aol.com), Goldman & Hellman, 800 SE 3rd Ave., Fl 4., Ft. Lauderdale, Florida 33316 via Electronic Mail on this 2nd day of October, 2014.

Attorney

IN THE CIRCUIT COURT,
THIRTEENTH JUDICIAL CIRCUIT, IN
AND FOR HILLSBOROUGH COUNTY,
FLORIDA

ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC., a Florida corporation,
Plaintiff,

v.

SIMS CRANE & EQUIPMENT CO., a Florida corporation; and TADANO AMERICA CORPORATION, a Delaware corporation,
Defendants.
_______________________________/

CASE NO. 12-01983

DIVISION B

DEFENDANT TADANO AMERICA CORPORATION'S UNOPPOSED MOTION FOR CONTINUANCE OF TRIAL DATES

Defendant Tadano America Corporation, ("Defendant" or "Tadano") by and through undersigned counsel hereby respectfully requests that this Court grant a continuance of the trial dates for this matter and as grounds states as follows:

1. On November 15, 2012, this Court entered a Uniform Order Setting Cause for Trial and Pre-Trial setting this matter for trial during the weeks of June 10 and June 17, 2013.

2. Due to unforeseen delays in discovery, including witness disclosures and depositions, the parties will need additional time to complete discovery, including depositions of all fact and expert witnesses. The parties also will need additional time, following the completion of that discovery, to prepare and file dispositive motions.

3. The parties have conferred and agreed that a 60 day continuance would provide all parties the necessary time to complete discovery, prepare dispositive motions, and otherwise prepare for trial.

MORGAN, LEWIS & BOCKIUS LLP
200 S. B[illegible] [illegible]EVARD S[illegible] [illegible]RIDA 3[illegible]31-2339 • TELEPHONE (305) 415.3000

EXHIBIT A

4. The parties have further conferred and agreed that they are available and can be prepared for trial 60 days after the time period initially set for trial.

5. Upon entry of an order extending the trial date and case deadlines by 60 days, the parties will contact the Court's judicial assistant regarding placing the matter on the Court's first available trial dates after that 60-day period.

6. For these reasons, Tadano requests the Court exercise its considerable discretion and reset the trial of this case to a date at least 60 days following the initial date. *See State v. Florida Turnpike Auth.*, 134 So. 2d 12, 15, (Fla. 1961); *Glades Gen. Hosp. v. Louis*, 411 So. 2d 1318, 1319 (Fla. 4th DCA 1981).

7. As established above, this motion for continuance is made for good cause and not solely for delay or any other improper purpose, and should be granted.

Wherefore, the Defendant, Tadano America Corporation respectfully requests that this Court grant a 60-day continuance of the trial date and case deadlines in this matter.

MORGAN, LEWIS & BOCKIUS LLP
TELEPHONE (305) 415-3000

Dated: March 25, 2013

Respectfully submitted,

By____________________

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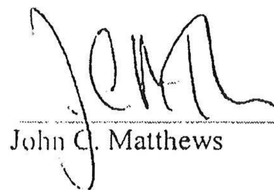
Counsel for Tadano America Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing by E-mail on March 25, 2013 to: Attorneys for Plaintiff, Bryan R, Rendzio, Esq. Franson & Iseley, P.A., 1650 Prudential Drive, Suite 100, Jacksonville, FL 32207 Attorney for Defendant Sims Crane & Equipment Co., Gary M. Hellman, Esq. Goldman & Hellman, 800 SE 3rd Avenue, Fl 4, Ft. Lauderdale, FL 33316-1152.



By: ____________________
John C. Matthews

IN THE CIRCUIT COURT, 13TH
JUDICIAL CIRCUIT, IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

ALLSTATE STEEL CO., INC. OF
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Plaintiff,
v.

CASE NO. 12-01983

DIVISION B

SIMS CRANE & EQUIPMENT CO., a
Florida corporation; and TADANO
AMERICA CORPORATION, a Delaware
corporation,
Defendants.
_______________________________/

PLAINTIFF ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC.'S UNOPPOSED MOTION FOR CONTINUANCE OF TRIAL DATE AND ASSOCIATED PRE-TRIAL DEADLINES

Plaintiff, ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC. ("Allstate Steel"), by and through its undersigned counsel, and pursuant to Rule 1.460, Fla. R. Civ. P., hereby respectfully requests that this Court grant a continuance of the trial dates for this matter, as well as the associated pre-trial deadlines, and as grounds states as follows:

1. On June 12, 2013, this Court entered a Uniform Order Setting Cause for Trial and Pre-Trial setting this matter for trial during the week of December 9, 2013.

2. During the last hearing on the notice to set for trial, Judge Foster agreed to provide the parties herein with the December trial date at the parties' request, however, Judge Foster also indicated that due to the Court's current docket, this jury trial would not likely proceed in December.

EXHIBIT B

3. On or about August 29, 2013, John Matthews, primary counsel for Tadano America Corporation ("Tadano"), left the law firm that has been defending Defendant Tadano.

4. Defendants Tadano and Sims Crane & Equipment Co. ("Sims") were scheduled to depose Allstate Steel's liability expert on September 11, 2013.

5. Due to the unforeseen departure of Mr. Matthews from the case, Allstate Steel's undersigned counsel contacted Tadano's undersigned counsel as a professional courtesy, and inquired whether the Defendants would like to reschedule the deposition.

6. Tadano's undersigned counsel advised that it would like to reschedule the deposition given the change in the attorney responsible for handling the matter.

7. All parties to this action have conferred in good faith and agree that they would like additional time to ensure that all depositions can be taken, and are in agreement with continuing the trial date and re-setting all pre-trial deadlines to coincide with the new trial date to accomplish this goal.

8. The parties will coordinate with each other and the Court to select a date to re-set this matter for trial, as well as re-setting all pre-trial deadlines.

9. For these reasons, Allstate Steel, in conjunction with the other parties, requests that the Court exercise its considerable discretion and permit the parties to re-set the trial and associated pre-trial deadlines. *See State v. Florida Turnpike Auth.*, 134 So. 2d 12, 15, (Fla. 1961); *see also Glades Gen. Hosp. v. Louis*, 411 So. 2d 1318, 1319 (Fla. 4th DCA 1981).

10. As established above, this motion for continuance is made for good cause and not solely for delay or any other improper purpose, and should be granted.

11. Allstate Steel's undersigned counsel certifies that he has provided a copy of this motion for continuance to counsel for Tadano and Sims, and all parties are in agreement with this motion. Moreover, as indicated by the below signature, Allstate Steel consents to this motion.

WHEREFORE, Plaintiff respectfully requests that this Court grant a continuance of the trial date, and all pre-trial case deadlines in this matter, as well as grant any further and other relief that the Court deems just and proper.

FRANSON, ISELEY,
& RENDZIO, P.A.

By:________________________

Bryan R. Rendzio, Esq.
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Allstate Steel Co., Inc. of
Jacksonville d/b/a Allstate Steel Co., Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Christopher J.M. Collings, Esq.** (ccollings@morganlewis.com) / **Joshua C. Prever, Esq.** (jprever@morganlewis.com), Morgan, Lewis & Bockius, LLLP, 200 S. Biscayne Blvd., Suite 5300, Miami, Florida 33131; and **Gary M. Hellman, Esq.** (goldhellaw@aol.com), Goldman & Hellman, 800 SE 3rd Ave., Fl 4., Ft. Lauderdale, Florida 33316 via email on this 13th day of September, 2013.

Attorney

CLIENT CONSENT

In accordance with Rule 1.460, Fla. R. Civ. P., the undersigned client has been advised of this Motion for Continuance, and has reviewed the same. The undersigned client consents to this Motion in all respects.

ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC.

Sharon J. Suggs, CEO
Printed Name/Title

Sharon J. Suggs
Signature

9-13-13
Date

IN THE CIRCUIT COURT,
THIRTEENTH JUDICIAL CIRCUIT, IN
AND FOR HILLSBOROUGH COUNTY,
FLORIDA

ALLSTATE STEEL CO., INC. OF JACKSONVILLE d/b/a ALLSTATE STEEL CO., INC., a Florida corporation,
Plaintiff,

v.

SIMS CRANE & EQUIPMENT CO., a Florida corporation; and TADANO AMERICA CORPORATION, a Delaware corporation,
Defendants.
_______________________________/

CASE NO. 12-01983

DIVISION B

JOINT MOTION FOR CONTINUANCE OF TRIAL DATES

Pursuant to Fla. R. Civ. P. 1.460, Plaintiff Allstate Steel Co., Inc. of Jacksonville d/b/a Allstate Steel Co., Inc., Defendant Sims Crane & Equipment Co., and Defendant Tadano America Corporation (collectively the "Parties") hereby jointly request that this Court grant a continuance of the trial dates for this matter, and as grounds state as follows.

1. On November 14, 2013, the Court entered a Uniform Order Setting Cause for Trial and Pre-Trial setting this matter for trial during the week of May 12, 2014.

2. Due to unforeseen delays in discovery, including repeatedly needing to reschedule certain third-party depositions due to inclement weather in the Northeast, the parties have been unable to complete discovery despite their best efforts.

3. As a result, the parties conferred and agreed that a continuance of the trial date for the this matter to the trial period commencing **July 14, 2014** is necessary and would provide all parties sufficient time to compete discovery, prepare dispositive motions, and otherwise prepare for trial.

EXHIBIT C

4. For these reasons, the parties request that the Court exercise its considerable discretion and continue the trial date of this case to the trial period commencing **July 14, 2014**, and re-set all associated pre-trial deadlines accordingly. *See State v. Florida Turnpike Auth.*, 134 So. 2d 12, 15, (Fla. 1961); *Glades Gen. Hosp. v. Louis*, 411 So. 2d 1318, 1319 (Fla. 4th DCA 1981).

5. As established above, this motion for continuance is made for good cause and not for delay or any other improper purpose, and should be granted.

WHEREFORE, the parties respectfully request that this Court grant a continuance of the trial dates to the trial period commencing **July 14, 2014** and re-set the associated pre-trial deadlines accordingly.

Dated: April 4, 2014

By: *s/Bryan R. Rendzio*
Bryan R. Rendzio
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Counsel for Allstate Steel Co., of Jacksonville d/b/a Allstate Steel Co., Inc.

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Counsel for Sims Crane & Equipment

Respectfully submitted,

By: *s/Christopher J.M. Collings*
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Counsel for Tadano America Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail on April 4, 2014 to attorneys for Plaintiff, Bryan R, Rendzio, Esq. Franson & Iseley, P.A., 1400 Prudential Drive, Suite 5, Jacksonville, FL 32207, attorneys for Defendant Sims Crane & Equipment Co., Gary M. Hellman, Esq. Goldman & Hellman, 800 SE 3rd Avenue, Fl 4, Ft. Lauderdale, FL 33316-1152.

By: *s/Christopher J.M. Collings*
Christopher J.M. Collings

Filing # 13225979 Electronically Filed 05/02/2014 03:40:30 PM

IN THE CIRCUIT COURT OF THE 13TH
JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA

ALLSTATE STEEL CO., INC. OF
JACKSONVILLE d/b/a ALLSTATE
STEEL CO., INC., a Florida Corporation,

CASE NO.: 12-01983 B

Plaintiff,

vs.

SIMS CRANE & EQUIPMENT, CO., a Florida
Corporation; and TADANO AMERICA
CORPORATION, a Delaware corporation,

Defendants.
_______________________________________/

JOINT MOTION FOR CONTINUANCE OF TRIAL DATES

Pursuant to Fla. R. Civ. P. 1.460, Plaintiff Allstate Steel Co., Inc. of Jacksonville d/b/a Allstate Steel Co., Inc., Defendant Sims Crane & Equipment Co., and Defendant Tadano America Corporation (collectively the "Parties") hereby jointly request that this Court grant a continuance of the trial dates in this matter, and as grounds state as follows:

1. On April 25, 2014, the Court entered a Uniform Order Setting Cause for Trial and Pre-Trial setting this matter for trial during the week of July 14, 2014, with the Pre-Trial conference scheduled for July 8, 2014.

2. Counsel for Sims Crane & Equipment, Co. is scheduled to commence a jury trial in Broward County on July 8, 2014 and cannot attend the Pre-Trial Conference currently scheduled in this matter.

3. As a result, the parties conferred and agreed that a continuance of the trial date in this matter to the trial period commencing **October 20, 2014** is necessary and amenable.

4. For these reasons, the parties request that the Court exercise its considerable discretion and continue the trial date of this case to the trial period commencing **October 20,**

EXHIBIT D

2014, and re-set all associated pre-trial deadlines accordingly. *See, State v. Florida Turnpike Auth.*, 134 So. 2d 12, 15, (Fla. 1961); *Glades Gen. Hosp. v. Louis*, 411 So. 2d 1318, 1319 (Fla. 4th DCA 1981).

5. As established above, this motion for continuance is made for good cause and not for delay or any other improper purpose, and should be granted.

WHEREFORE, the parties respectfully request that this Court grant a continuance of the trial dates to the trial period commencing **October 20, 2014** and re-set the associated pre-trial deadlines accordingly.

Dated: May 2, 2014

Respectfully submitted,

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By: *s/Bryan R. Rendzio*
BRYAN R. RENDZIO
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LEGAL AUTHORITY

Rule 2.545. Case Management

(a) *Purpose.* --Judges and lawyers have a professional obligation to conclude litigation as soon as it is reasonably and justly possible to do so. However parties and counsel shall be afforded a reasonable time to prepare and present their case.

(b) *Case Control.* --The trial judge shall take charge of all cases at an early stage in the litigation and shall control the progress of the case thereafter until the case is determined. The trial judge shall take specific steps to monitor and control the pace of litigation, including the following:

(1) assuming early and continuous control of the court calendar;

(2) identifying priority cases as assigned by statute, *rule* of procedure, case law, or otherwise;

(3) implementing such docket control policies as may be necessary to advance priority cases to ensure prompt resolution;

(4) identifying cases subject to alternative dispute resolution processes;

(5) developing rational and effective trial setting policies; and

(6) advancing the trial setting of priority cases, older cases, and cases of greater urgency.

(c) *Priority Cases.*

(1) In all noncriminal cases assigned a priority status by statute, *rule* of procedure, case law, or otherwise, any party may file a notice of priority status explaining the nature of the case, the source of the priority status, any deadlines imposed by law on any aspect of the case, and any unusual factors that may bear on meeting the imposed deadlines.

(2) If, in any noncriminal case assigned a priority status by statute, *rule* of procedure, case law, or otherwise, a party is of the good faith opinion that the case has not been appropriately advanced on the docket or has not received priority in scheduling consistent with its priority case status, that party may seek review of such action by motion for review to the chief judge or to the chief judge's designee. The filing of such a motion for review will not toll the time for seeking such other relief as may be afforded by the *Florida Rules* of Appellate Procedure.

(d) *Related Cases.*

(1) The petitioner in a family case as defined in this *rule* shall file with the court a notice of related cases in conformity with family law form 12.900(h), if related cases are known or reasonably ascertainable. A case is related when:

(A) it involves any of the same parties, children, or issues and it is pending at the time the party files a family case; or

(B) it affects the court's jurisdiction to proceed; or

(C) an order in the related case may conflict with an order on the same issues in the new case; or

(D) an order in the new case may conflict with an order in the earlier litigation.

(2) "Family cases" include dissolution of marriage, annulment, support unconnected with dissolution of marriage, paternity, child support, UIFSA, custodial care of and access to children, proceedings for temporary or concurrent custody of minor children by extended family, adoption, name change, declaratory judgment actions related to premarital, martial, or postmarital agreements, civil domestic, repeat violence, dating violence, stalking, and sexual violence injunctions, juvenile dependency,

termination of parental rights, juvenile delinquency, emancipation of a minor, CINS/FINS, truancy, and modification and enforcement of orders entered in these cases.

(3) The notice of related cases shall identify the caption and case number of the related case, contain a brief statement of the relationship of the actions, and contain a statement addressing whether assignment to one judge or another method of coordination will conserve ***judicial*** resources and promote an efficient determination of the actions.

(4) The notice of related cases shall be filed with the initial pleading by the filing attorney or self-represented petitioner. The notice shall be filed in each of the related cases that are currently open and pending with the court and served on all other parties in each of the related cases, and as may be directed by the chief judge or designee. Parties may file joint notices. A notice of related cases filed pursuant to this ***rule*** is not an appearance. If any related case is confidential and exempt from public access by law, then a Notice of Confidential Information Within Court Filing as required by ***Florida Rule*** of ***Judicial Administration*** 2.420 shall accompany the notice. Parties shall file supplemental notices as related cases become known or reasonably ascertainable.

(5) Each party has a continuing duty to inform the court of any proceedings in this or any other state that could affect the current proceeding.

(6) Whenever it appears to a party that two or more pending cases present common issues of fact and that assignment to one judge or another method of coordination will significantly promote the efficient ***administration*** of justice, conserve ***judicial*** resources, avoid inconsistent results, or prevent multiple court appearances by the same parties on the same issues, the party may file a notice of related cases requesting coordination of the litigation.

(e) *Continuances.* --All judges shall apply a firm continuance policy. Continuances should be few, good cause should be required, and all requests should be heard and resolved by a judge. All motions for continuance shall be in writing unless made at a trial and, except for good cause shown, shall be signed by the party requesting the continuance. All motions for continuance in priority cases shall clearly identify such priority status and explain what effect the motion will have on the progress of the case.

History

Reorganized eff. Sept. 21, 2006 (939 So. 2d 966); amended eff. Oct. 6, 2011 (2011 Fla. Lexis 2356); amended Jan. 16, 2014, eff. Apr. 1, 2014 (SC12-2007)

LexisNexis ***Florida Rules*** of Court Annotated
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Wash-Bowl, Inc. v. Wroton

District Court of Appeal of Florida, Second District

June 10, 1983.

NO. 82-2253

Reporter

432 So. 2d 766; 1983 Fla. App. LEXIS 19580

WASH-BOWL, INC., a Florida corporation, and TED HARRIS, individually, Appellants, v. LEONARD L. WROTON and JOAN WROTON, his wife, Appellees.

Prior History: [**1] Appeal from the Circuit Court for Manatee County; Evelyn Gobbie, Judge.

Case Summary

Procedural Posture

Appellant sellers challenged a judgment from the Circuit Court for Manatee County (Florida), in which a jury awarded appellee buyers lost business profits in relation to their contract with appellants for the purchase of machinery and equipment to operate a laundry and business under appellants' franchise name.

Overview

Appellant sellers entered into a contract with appellee sellers for the sale of machinery and equipment to operate a laundromat and business under appellants' franchise name. Due to leasing problems, it took appellees two months to find another business location. Appellees sued appellant for breach of contract and sought damages for loss of income and costs of moving and relocating. Appellees introduced evidence, over appellants' objections, of anticipated profits. The jury found appellants liable, awarded appellees lost business profits, and appellants challenged the decision. Appellants contended the trial court erred in granting a continuance, the verdict was contrary to the evidence, and no basis for awarding lost profits. The court affirmed with respect to appellants' liability and held the trial court did not err in ***denying*** appellants' request for a continuance and that the evidence supported the verdict. The court vacated with respect to the award for lost profits, because the damages could not be ascertained with reasonable certainty when appellees had no prior history of involvement in the business, and remanded for a new trial on damages.

Outcome

The court affirmed the trial court's judgment as to appellant sellers' liability, vacated the award of damages, and remanded for a new trial on the issue of damages without the consideration of lost profits. The court held that appellee buyers' anticipated profits of the laundromat were too speculative, given the fact that appellees had no prior history in the business and had not commenced its venture to establish a record of profits.

Counsel: Robert H. Dillinger of Stolba, Lumley & Dillinger, P.A., St. Petersburg, for appellants.

James A. Garland, Bradenton, for appellees.

Judges: Before SCHEB, Judge. GRIMES, A.C.J., and CAMPBELL, J., Concur.

Opinion by: SCHEB

Opinion

[*766] SCHEB, Judge.

Appellants, Wash Bowl, Inc. and Ted Harris, challenge a jury verdict awarding damages for lost business profits to appellees, the Wrotons.

On January 18, 1977, the Wrotons entered into a contract with appellants for the purchase of

machinery and equipment to operate a laundry and business under the franchise of Wash-Bowl, Inc. The laundromat was to be located at the Palma Sola Shopping Center in Bradenton, Florida. However, due to problems which developed over leasing arrangements and leasehold improvements, the laundromat was never constructed, and the Wrotons were unable to conduct any business at the Bradenton location. About two months later they found a new business location.

The Wrotons then brought a breach of contract action against appellants seeking damages for loss of income, cost of moving and relocating, and other damages. The case [**2] proceeded to a jury trial. The court, [*767] over appellants' objections, allowed evidence of profits which had been realized at an existing laundromat. Appellees introduced this evidence to establish the profit they allegedly would have earned from their own business undertaking. The court then instructed the jury, over appellants' ***continuing*** objection, that if it found for the Wrotons, then loss of anticipated net profits would be the proper measure of damages for breach of contract. The jury returned its verdict in favor of appellees and awarded them $ 10,000. This appeal ensued.

Appellants contend the trial court erred in failing to grant their ***motion*** for a third continuance, that the verdict was contrary to the evidence, and that there was no basis for awarding damages for lost profits. We reject their first two arguments. First, the granting of a continuance is a matter of discretion with the trial judge. *Kasper Instruments, Inc. v. Maurice, 394 So.2d 1125 (Fla. 4th DCA 1981)*. Here, the court had previously granted two continuances, and we find no abuse of its discretion in ***denying*** a third, especially since second and third continuances are looked on with disfavor. [**3] *See McWhorter v. McWhorter, 122 So.2d 504 (Fla. 2d DCA 1960)*. Second, although the evidence was conflicting, there was substantial, competent evidence from which the jury could conclude that appellants assumed the responsibility to negotiate a lease with the developer of the shopping center and arrange for leasehold improvements on behalf of appellees. Under such circumstances it is improper for this court to re-evaluate the evidence. *Helman v. Seaboard Coast Line Railroad, 349 So.2d 1187 (Fla. 1977)*.

Appellants' contention that the trial court erred in allowing the jury to assess damages for lost profits has merit. Appellants argue that such an award was speculative since no ongoing business was ever established and since appellees had no previous experience in this type of business.

The general rule set forth in *New Amsterdam Casualty Co. v. Utility Battery Manufacturing Co., 122 Fla. 718, 166 So. 856 (1935)*, is that anticipated profits of a commercial business are too speculative and dependent on changing circumstances to warrant a judgment for their loss. An exception has been recognized when such loss of profits, from the interruption of an established [**4] business, can be shown with reasonable certainty by competent proof. *New Amsterdam; Conner v. Atlas Aircraft Corp., 310 So.2d 352* (Fla. 3d DCA), *cert.* ***denied***, *322 So.2d 913 (Fla. 1975)*.

Damages for breach of contract must be proved with reasonable certainty. Thus, loss of profits is not the general measure of damages for an untried venture which has no history of operation or profits. *Innkeepers International, Inc. v. McCoy Motels, Ltd., 324 So.2d 676 (Fla. 4th DCA 1975)*, *cert.* ***denied***, *336 So.2d 106 (Fla. 1976)*. Proof of profits for a reasonable time prior to a breach is required to establish lost profits. *A & P Bakery Supply & Equipment v. Hawatmeh, 388 So.2d 1071 (Fla. 3d DCA 1980)*; *Welbilt Corp. v. All State Distributing Co., 199 So.2d 127 (Fla. 3d DCA 1967)*.

There was no track record here to establish a history of profits in the business, since the laundromat was never opened. Further, appellees

admitted having had no prior experience in either owning or managing a laundromat business. Since no record of past profitability was available to inform the jury's deliberations, its award of damages had to have been based on pure speculation. *A &* [**5] *P Bakery.* Thus, appellees should not have been permitted to recover lost profits resulting from appellants' breach.

Accordingly, we affirm the judgment as to liability but vacate the award of damages. We remand for a new trial solely on the issue of damages without consideration of loss of profits as an element.

GRIMES, A.C.J., and CAMPBELL, J., Concur.

Higgins v. Johnson

District Court of Appeal of Florida, Second District

July 12, 1982, Decided.

NO. 82-1514

Reporter
422 So. 2d 16; 1982 Fla. App. LEXIS 20549

CHESTER HIGGINS, Petitioner, v. DR. WESLEY JOHNSON, Respondent.

Prior History: [**1] Petition for Writ of Certiorari to the Circuit Court for Sarasota County; Evelyn Gobbie, Judge.

Case Summary

Procedural Posture

Petitioner filed a petition for a writ of certiorari for review of the order from the Circuit Court for Sarasota County (Florida), which granted respondent's ***motion to continue*** the trial date set in petitioner's suit against respondent for medical malpractice.

Overview

Petitioner sued respondent for failure to diagnose petitioner's cancer. One month prior to trial, respondent requested a continuance so that his newly retained attorney could prepare a defense. Petitioner opposed the continuance on the ground that he was so ill that he would not survive until the new trial date. The trial court granted the continuance, and petitioner sought a writ of certiorari with the court. The court held that absent an abuse of discretion, an order on an application for continuance should not be disturbed. Here, the fact that petitioner's death prior to trial could materially prejudice his legal position had to be balanced against the fact that respondent's prior counsel had not pursued discovery or obtained an expert to testify in his defense. Therefore, due to the compelling nature of the factors favoring intervention, coupled with the policy that the lack of diligence of one's attorney could not serve to penalize the opposing party, intervention was necessary in order for justice to be done. Accordingly, the order of the trial court was quashed, and the trial court was ordered to reset the trial at the earliest reasonable date.

Outcome

Order granting respondent's ***motion to continue*** the trial date was quashed where, because petitioner's legal position would be materially prejudiced if he died prior to trial, justice required that the trial be reset at the earliest possible date.

Counsel: Adrienne S. Weitzner, Sarasota, for Petitioner.

William E. Partridge of Dickinson, O'Riorden, Gibbons, Quale, Shields & Carlton, P.A., Sarasota, for Respondent.

Judges: GRIMES, A.C.J., and RYDER, J., Concur. CAMPBELL, J., Dissents With Opinion.

Opinion

[*16] PER CURIAM.

This is a petition for certiorari to review an order granting a continuance of the trial.

Petitioner Chester Higgins filed suit on June 3, 1980, against respondent Dr. Wesley Johnson, a chiropractor, for failure to diagnose his cancerous condition. Dr. Johnson filed his answer on June 24, 1980. Subsequently, Higgins joined Dr. Johnson's malpractice insurance carrier as an additional defendant.The insurance carrier obtained a summary judgment on grounds of lack of coverage which Higgins unsuccessfully appealed to this court.

Thereafter, on February 12, 1982, Higgins filed a ***motion*** for trial by jury. On May 17, 1982, the court set the case for trial during the week of July 19, 1982, with a pretrial conference scheduled for July 1, 1982. Early in June, Dr. Johnson arranged for the retention of new [**2] counsel, and, on [*17] June 14, 1982, his new counsel filed an appearance pursuant to stipulation with his former counsel. On the same date, Dr. Johnson filed a ***motion for continuance*** of the trial so that his new counsel could adequately prepare a defense. Dr. Johnson's new counsel, after failing to obtain agreement with Higgins's counsel for a continuance, hand delivered a notice calling up for hearing the ***motion for continuance*** on the following day.

At the hearing held on June 25, 1982, Higgins's counsel opposed the continuance on the premise that Higgins was terminally ill from cancer. She supported her position with an affidavit from a doctor specializing in radiation therapy who had treated Higgins. The doctor stated that a continuance would be detrimental to Higgins's health and that because of the progressive nature of his illness he might die before the new trial date. Higgins had been suffering from metastatic prostate cancer for more than three years, and his attorney proffered that he could obtain medical affidavits that the average survival rate for persons with cancer of this type was from two to three years. Nevertheless, the court granted the ***motion for*** [**3] ***continuance*** and reset the trial for October of 1982.

Absent an abuse of discretion, an order of the trial court on an application for continuance should not be disturbed. *Fain v. Cartwright, 132 Fla. 855, 182 So. 302 (1938)*; *Biederman v. Cheatham, 161 So. 2d 538 (Fla. 2d DCA 1964)*. Nevertheless, we believe that this is one of those rare cases in which we must intervene in order to do justice.

One can assume that Higgins's inability to personally testify at the trial would weaken his case. More significant, however, is the fact that should Higgins die before the trial, the character of his malpractice action would be completely changed. As long as he is alive, he has a personal injury action which entitles him to claim damages in his own right. *See* § 768.48, Fla. Stat. (1981). However, if he dies, Higgins's cause of action abates. *§ 768.20, Fla. Stat.* (1981). The personal representative would then have to institute a new suit on behalf of Higgins's survivors and his estate. *§ 768.20, Fla. Stat.* (1981). The elements of damage would be entirely different because they would depend upon the relationship of Higgins and his survivors. *§ 768.21, Fla. Stat.* (1981). [**4] Thus, it is evident that Higgins's death prior to trial could materially prejudice his legal position.

Balanced against these compelling factors is the fact that apparently Dr. Johnson's prior counsel had not pursued discovery or obtained expert medical testimony to testify in his defense. Yet, the lack of diligence of one's own attorney should not serve to penalize the opposing party. *See* 11 Fla. Jur.2d, Continuance § 10 (1979). Moreover, Dr. Johnson's new counsel had more than a month prior to the trial date within which to conduct discovery. We are confident that under the circumstances the court's previous admonition to complete discovery before the pretrial conference could have been accommodated.

As reluctant as we are to interfere with trial schedules, we feel compelled to quash the order of continuance. Of course, we recognize that by virtue of the time necessary to prosecute this petition for certiorari it may not now be feasible, as a practical matter, for the court and the parties to commence the trial during the week of July 19, 1982, as originally scheduled. Therefore, we request the court to reset the trial at the earliest reasonable date consistent [**5] with the spirit of this opinion and to allow Dr. Johnson liberal rights of discovery in the interim.

GRIMES, A.C.J., and RYDER, J., Concur.

CAMPBELL, J., Dissents With Opinion.

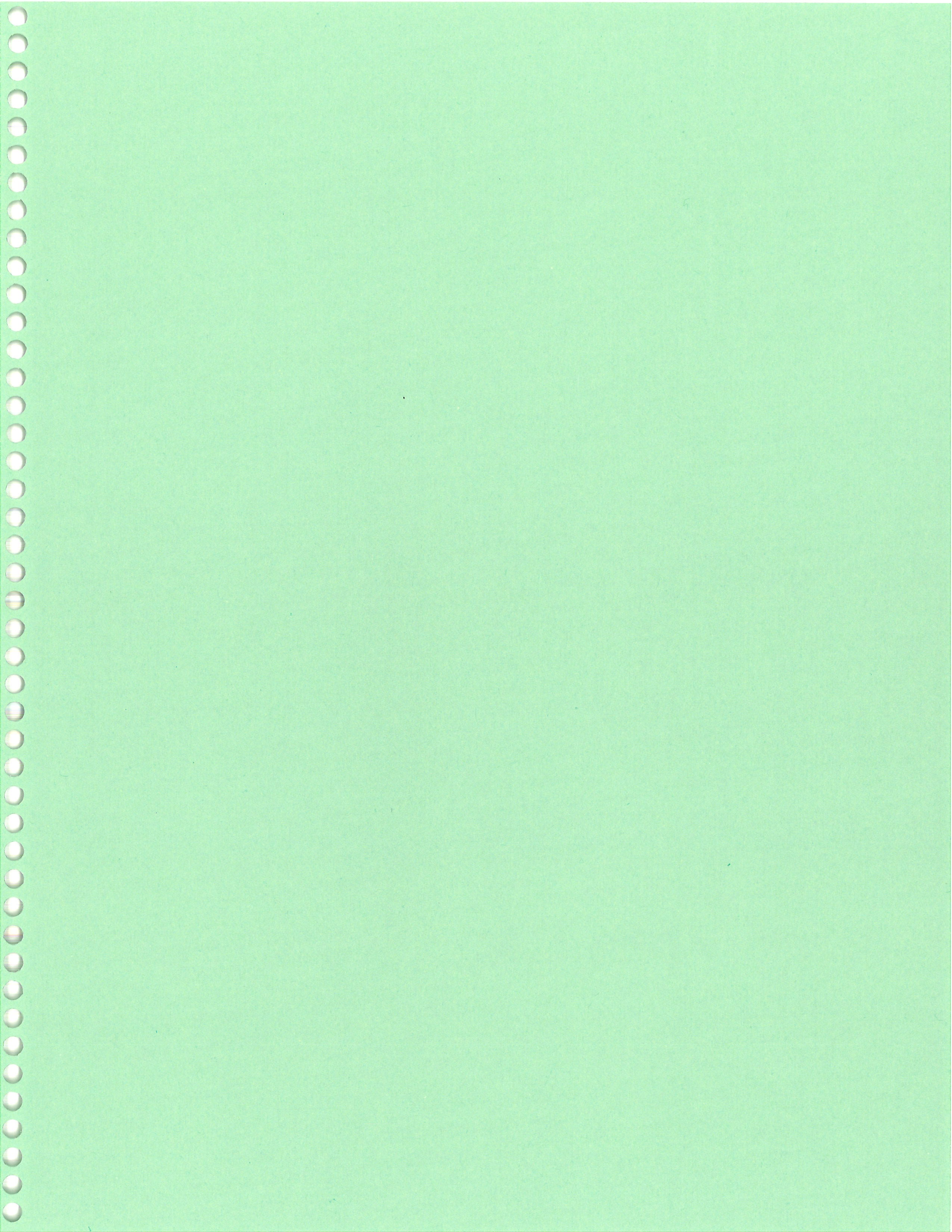
Dissent by: CAMPBELL

Dissent

CAMPBELL, Judge, Dissenting.

I must respectfully dissent.

While I concur with my colleagues' request for the trial court to set the trial of this cause at the earliest reasonable date and to allow Dr. Johnson liberal rights of discovery, I must presume that the trial judge has done this for there is nothing in [*18] the record to indicate otherwise. We all recognize the general principal that the granting or ***denying*** of a ***motion for continuance*** is left to the sound discretion of the trial judge, and a district court of appeal should not simply substitute its opinion for that of the trial court. *In Re Gregory, 313 So. 2d 735 (Fla. 1975)*. As was expressed in *Buckley Towers Condominium, Inc. v. Buchwald, 340 So. 2d 1206, 1208 (Fla. 3d DCA 1977)*: "It is black letter law that a ***motion for continuance*** is grounded in the sound judicial discretion of the trial court and the ruling of the court will not be disturbed unless an abuse of discretion is clearly shown." Not only [**6] must there be an abuse of discretion, it must be a gross or flagrant abuse and adequately demonstrated by the record before the reviewing court. *Padgett v. First Federal Savings & Loan Ass'n, 378 So. 2d 58 (Fla. 1st DCA 1979)*; *Edwards v. Pratt, 335 So. 2d 597 (Fla. 3d DCA 1976)*; *Williams v. Gunn, 279 So. 2d 69 (Fla. 1st DCA 1973)*. While the record reveals that Mr. Higgins is terminally ill and it is possible that he might expire before the new trial date, the record also reveals that the trial judge had the benefit of that information and yet saw fit, in light of it, to grant the ***motion for continuance***. We do not have a transcript of the hearing on the ***motion for continuance*** and there is nothing in the record other than Mr. Higgins' medical prognosis upon which to base a finding of a gross or flagrant abuse of discretion. It is certainly not demonstrated that the trial judge abused her discretion by granting a ninety-day continuance rather than some shorter period as my colleagues urge.



IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA

CASE NO.: 2013-CA-1211
DIVISION:

THE PALM COAST COMMERCIAL PROPERTY
LIMITED PARTNERSHIP, a Colorado Limited
Partnership,

Plaintiff,

vs.

GINN DEVELOPMENT COMPANY, LLC,
a Georgia limited liability company,

Defendant.
_______________________________________/

PLAINTIFF'S MOTION FOR SUMMARY FINAL JUDGMENT AGAINST DEFENDANT GINN DEVELOPMENT COMPANY, LLC

Plaintiff, THE PALM COAST COMMERCIAL PROPERTY LIMITED PARTNERSHIP ("Plaintiff" or "PCCPLP"), by and through its undersigned counsel and pursuant to Rule 1.510, Fla. R. Civ. P., hereby moves for summary final judgment against Defendant GINN DEVELOPMENT COMPANY, LLC ("Defendant" or "Ginn Development"), and in support states:

I. NATURE OF ACTION:

This lawsuit pertains to a breach of a commercial lease by Ginn Development. The fact that PCCPLP and Ginn Development entered into a lease is not in dispute. The only dispute is whether Ginn Development has any legal basis to avoid its obligations under the lease. As will be established in this Motion, Ginn Development has no legal justification to avoid its obligations under the lease.

II. DISPOSITIVE FACTS:

1. PCCPLP and Ginn Development entered into a commercial lease agreement ("Lease"), and true and accurate duplicate of the Lease has been attached to the Complaint as Exhibit "A." *See* Compl., ¶ 7, Ex. "A."; *see also* Pl.'s Req. for Admis., No. 1 and Def.'s Resp. to Pl.'s Req. for Admis., No. 1.

2. On the face of the Lease, Ginn Development agreed to a five (5) year lease term, which commenced on September 1, 2006. *See* Compl., ¶ 7, Ex. "A" (Lease, Section 3 entitled "Initial Term").

3. On the face of the Lease, Ginn Development agreed to a base rent adjustment of 3% increase, which was to occur at each anniversary of the rent commencement date. As such the first increase was to occur on September 1, 2007, and continue to increase each subsequent year. *See* Compl., ¶ 7, Ex. "A" (Lease, Sections 7-8 entitled "Base Rent" and "Base Rate Adjustment").

4. On September 1, 2008, Ginn Development failed to pay the yearly rent increase as was required under the Lease, and to date has not made the payment. *See* Affidavit of Edwin O. Sia, M.D. ("Dr. Sia Aff.") at ¶ 4.

5. Starting on March 1, 2009, Ginn Development failed to make any rental payments whatsoever, and to date has not made any payments. *See* Dr. Sia Aff. at ¶ 5.

6. PCCPLP has been forced to retain counsel to collect the money due by Ginn Development to PCCPLP, and is seeking to recover all of its legal fees and costs, as well as prejudgment interest. *See* Dr. Sia Aff. at ¶ 6; *see also* Compl., ¶ 15, Ex. "A" (Lease, Section 33 entitled "Litigation").

7. PCCPLP has complied with the terms of the Lease by providing default notices in accordance with the Lease terms. *See* Dr. Sia Aff. at ¶ 7.

8. At no point did PCCPLP ever accept Ginn Development's surrender of the premises, and at no point did PCCPLP resume exclusive possession inconsistent with the Lease by occupying and controlling the premises to the exclusion of Ginn Development. *See* Dr. Sia Aff. at ¶ 8;

9. PCCPLP made efforts to try to re-lease the property at issue, and was unable to do so. *See* Dr. Sia Aff. at ¶ 9;

10. At no point did PCCPLP prevent Ginn Development from taking any of its office furniture and equipment, and has actually asked Ginn Development to remove the property. Ginn Development advised PCCPLP that Ginn Development had no funds to store the equipment and furniture. *See* Dr. Sia Aff. at ¶ 10;

11. PCCPLP is owed $1,851,008.99 from Ginn Development. *See* Dr. Sia Aff. at ¶ 11; *see also* Compl., ¶ 14.

III. STANDARD:

Under Florida law, a party is entitled to summary judgment if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Certainty is required when pleading defenses, and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *See Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136 (Fla. 4th DCA 1988). Affirmative defenses should not constitute a mere denial of the allegations of the complaint and must set forth facts in such a manner as to reasonably inform the opposing party what is proposed to be proven in order to provide Plaintiff with a fair opportunity to meet it and prepare evidence in opposition. *Zito v. Washington Fed. Savings & Loan Assoc. of Miami Beach*, 318 So. 2d 175 (Fla. 3d DCA 1975). Finally, when moving for summary judgment, the movant has the burden of disproving Defendant's affirmative defenses. *Stop & Shoppe Mart, Inc. v. Mehdi,* 854 So. 2d 784 (Fla. 5th DCA 2003).

As established below, there are no genuine issues of material fact, and PCCPLP is entitled to judgment as a matter of law. Moreover, PCCPLP has met its burden by disproving Ginn Development's affirmative defenses.

IV. ANALYSIS:

There is no dispute regarding the existence of or the terms of the Lease. This entire action comes down to whether Ginn Development was legally justified in avoiding its obligations to make rent payments under the Lease, and the amount due from Ginn Development to PCCPLP under the Lease.

As established by the pleadings and affidavit of PCCPLP in this matter, PCCPLP is owed $1,851,008.99 from Ginn Development. This has been calculated by taking the amount of $1,583,545.55 in principal and prejudgment interest through August 1, 2013, which was alleged in the Complaint, and by adding $267,463.44 in additional prejudgment interest from August 2, 2013 through December 31, 2014 ($518.34 *per diem*).

Ginn Development has raised eight (8) Affirmative Defenses in an effort to try to avoid its payment obligations under the Lease. The defenses, as well as PCCPLP's response to disprove each defense, is as follows:

First Affirmative Defense (Failure to Mitigate)

As its first defense, Defendant alleges that PCCPLP failed to mitigate its damages. This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. In its discovery responses, Defendant does allege some facts in support. *See* Def.'s Response and Objections to Pl.'s First Set of Interrogatories, No. 4. Specifically, Ginn Development claims that PCCPLP unreasonably withheld its consent for a sublease. Additionally, Ginn Development claims that upon vacating the premises it "left" furniture and equipment totaling approximately $282,299.00.

By its own admission in its above-referenced Interrogatory response, Ginn Development admits that it was not involved in the final negotiations between PCCPLP and the potential subtenant. As such, Defendant has no facts to support any argument that PCCPLP was somehow unreasonable in its negotiations with the potential subtenant or otherwise unreasonably withheld its consent. Specifically, PCCPLP stated in its response to Interrogatory No. 4 that after presenting the potential subtenant to PCCPLP it "was not involved in the negotiations with the potential subtenant."

With respect to the furniture and equipment that was left by Defendant, at no time did PCCPLP negotiate for any of it to be left for mitigation purposes. Instead, PCCLP requested that Ginn Development take the furniture and equipment to which Defendant failed to respond or otherwise remove the items. Ginn Development advised PCCPLP that Ginn Development had no funds to store the property.

Second Affirmative Defense (Termination of Lease)

As its next defense, Defendant alleges that the Lease has been terminated thus relieving Defendant of any payment obligations. This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. In its discovery responses, Defendant does allege some facts in support. *See* Def.'s Response and Objections to Pl.'s First Set of Interrogatories, No. 5. Specifically, Ginn Development claims that PCCPLP failed to approve the potential subtenant. Additionally, Ginn Development claims that it surrendered its possession of the premises and that PCCPLP retook possession thus terminating the Lease.

As stated in the response to the First Affirmative Defense, PCCPLP did not unreasonably withhold any approval for the potential subtenant. With respect to the alleged "surrender," such never occurred per mutual agreement or through operation of the law. It is well established under Florida law that to surrender a lease term of more than one (1) year there must be a written

surrender instrument signed by the person making the surrender in the presence of two (2) witnesses. § 689.01, Fla. Stat.; *see also Kanter v. Safran,* 68 So. 2d 553, 556 (Fla. 1953) (holding that an express surrender is purely contractual, and Courts must look to the agreement to find the intent of the parties).

The only other argument for a purported surrender would be through operation of law. This never occurred in that PCCPLP never acted in a manner incompatible with the continued existence of the landlord/tenant relationship. At no time did PCCPLP resume exclusive possession inconsistent with the Lease by occupying and controlling the premises to the exclusion of Ginn Development.

Third Affirmative Defense (Surrender of Lease)

As established in the response to the Second Affirmative Defense, there has been no surrender through mutual agreement or through operation of the law.

Fourth Affirmative Defense (Statute of Limitations)

As its next defense, Defendant alleges that the Lease is barred by the statute of limitations. This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. On the face of the Complaint, PCCPLP's action has been timely raised within the statute of limitations period.

Fifth Affirmative Defense (Prior Breach of Lease)

As its next defense, Defendant alleges that PCCPLP breached the Lease by unreasonably withholding and delaying consent to a sublease. This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. Moreover, as established above in the First Affirmative Defense Ginn Development admits that it was not involved in the final negotiations between PCCPLP and the potential subtenant. As such, Defendant has no facts to

support any argument that PCCPLP was somehow unreasonable in its negotiations with the potential subtenant or otherwise unreasonably withheld its consent.

Sixth Affirmative Defense (Breach of Implied Covenant of Good Faith and Fair Dealing)

As its next defense, Defendant alleges that PCCPLP breached an implied covenant of good faith and fair dealing by unreasonably withholding and delaying consent to a sublease. This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. Moreover, as established above in the First Affirmative Defense Ginn Development admits that it was not involved in the final negotiations between PCCPLP and the potential subtenant. As such, Defendant has no facts to support any argument that PCCPLP was somehow unreasonable in its negotiations with the potential subtenant or otherwise unreasonably withheld its consent.

Seventh Affirmative Defense (Setoff)

As its next defense, Defendant alleges that it should be entitled to setoff for the value of the furniture and equipment "left by Defendant for Plaintiff's use and benefit." This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. Additionally, there are no facts to support any agreement wherein PCCPLP would take the equipment and furniture. PCCPLP has never prevented Ginn Development from taking the equipment and furniture, and actually asked Ginn Development to remove the property. Ginn Development advised PCCPLP that Ginn Development had no funds to store the equipment and furniture. PCCPLP has raised waiver as a Reply to this Affirmative Defense in that there existed benefit which could be waived, actual or constructive knowledge of the right, and the intention to relinquish the right. Even if Ginn Development had any right to allege this defense, it has been waived.

Eighth Affirmative Defense (Unjust Enrichment)

As its next defense, Defendant alleges PCCPLP has been unjustly enriched by the value of the furniture and equipment "left behind by Defendant for Plaintiff's use and benefit." This defense fails. The defense as drafted is not supported by any ultimate facts, and thus fails as a matter of law. Additionally, there are no facts to support any unjust enrichment. PCCPLP has never prevented Ginn Development from taking the equipment and furniture, and actually asked Ginn Development to remove the property. Ginn Development advised PCCPLP that Ginn Development had no funds to store the equipment and furniture. PCCPLP has raised waiver as a Reply to this Affirmative Defense in that there existed benefit which could be waived, actual or constructive knowledge of the right, and the intention to relinquish the right. Even if Ginn Development had any right to allege this defense, it has been waived.

For the above reasons, PCCPLP has addressed and disproven Defendant's affirmative defenses. There are no genuine issues of material fact, and Plaintiff is entitled to judgment as a matter of law.

V. <u>CONCLUSION</u>:

WHEREFORE, Plaintiff requests that this Honorable Court enter an Order granting Plaintiff's motion for summary final judgment as to the above-referenced matter, as well as grant any further and other relief that the Court deems just and proper. PCCPLP further asks that the Court reserve jurisdiction to determine the amount of attorneys' fees and costs that are awardable, as pled in the Complaint.

(Signature Block / Certificate of Service on Next Page)

FRANSON, ISELEY
& RENDZIO, P.A.

By:________________________

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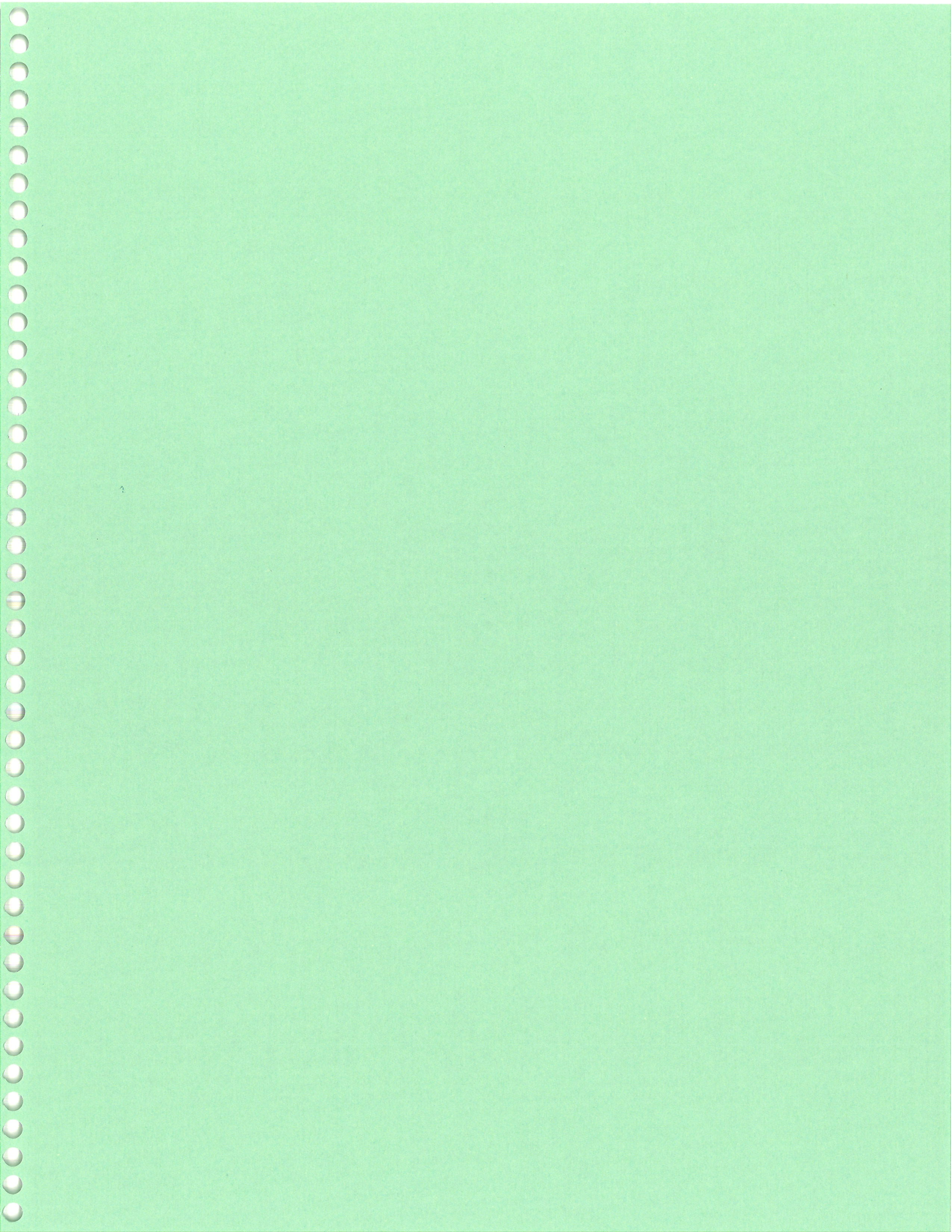
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Kevin D. Fowler, Esq. (kfowler@foley.com; bshelley@foley.com) / Jessica E. Joseph, Esq. (jjoseph@foley.com; jmiller@foley.com),** Foley & Lardner, LLP, 111 North Orange Avenue, Ste. 1800, Orlando, Florida 32801-2386 via Electronic Mail on this 8th day of December, 2014.

Attorney



TREGONING INDUS. CORP. v. ALL-STATE HEATING & AIR CONDITIONING, INC.

CASE NO.: 11CA449

Circuit Court of the Fourth Judicial Circuit of Florida, Nassau County

August 8, 2012

Reporter
2012 FL Cir. Ct. Motions LEXIS 23622 *

TREGONING INDUSTRIES CORPORATION, a Florida corporation, Plaintiff, vs. ALL-STATE HEATING AND AIR CONDITIONING, INC., a Florida corporation; NINO J. PARRALES, an individual; PAT COOK CONSTRUCTION, INC., a Florida corporation; and WESTFIELD INSURANCE COMPANY, a foreign corporation authorized to transact business in Florida; Defendants.

Type: Motion

Counsel

[*1] TRITT|***RENDZIO***, ***Bryan*** R. ***Rendzio***, Esq., Florida Bar No. 496812, Jacksonville, FL, Attorneys for Plaintiff Tregoning Industries Corporation.

Title

PLAINTIFF TREGONING INDUSTRIES CORPORATION'S MOTION FOR SUMMARY FINAL JUDGMENT AGAINST DEFENDANTS

Text

Plaintiff, TREGONING INDUSTRIES CORPORATION ("Tregoning" or "Plaintiff), by and through its undersigned counsel and pursuant to *Rule 1.510, Fla. R. Civ. P.*, hereby files its motion for summary final judgment against Defendants ALL-STATE HEATING AND AIR CONDITIONING, INC. ("All-State"), NINO J. PARRALES ("Mr. Parrales"), PAT COOK CONSTRUCTION, INC. ("PCCI"), and WESTFIELD INSURANCE COMPANY ("Westfield"), and in support states:

I. CONCISE STATEMENT OF RELIEF REQUESTED

Plaintiff, Tregoning, moves this Honorable Court for summary final judgment as to all counts in the Complaint, namely: Count I (Breach of Contract - All-State); Count II (Quantum Meruit - All-State); Count III (Action on Personal Guaranty - Mr. Parrales); and Count IV (Chapter 255.05 Payment Bond Claim - PCCI and Westfield). For the reasons set forth herein, there are no genuine issues of material fact and Tregoning is entitled to judgment as a matter of **[*2]** law.

II. UNDISPUTED FACTS:

1. On or about May 6, 2008, Tregoning and Defendant All-State entered into a master, credit application (hereinafter "Contract") for thermal insulation materials. A true and accurate duplicate of the Contract is attached to the Complaint as **Exhibit "A."***See* All-State's Answer, P 12.

2. The project at issue is Southside Elementary School No. 071, which is located at 1112 Jasmine Street, Fernandina Beach, Florida 32034 (hereinafter "Project"). *See* All-State's Answer, P 13.

3. Tregoning and Defendant All-State entered into specific Purchase Orders for the materials that Plaintiff furnished to All-State for the Project. True and accurate duplicates of the Purchase Orders are attached to the Complaint as Composite **Exhibit "B."** In accordance with its Contract and Purchase Orders, Tregoning furnished all required insulation materials for the Project. *See* All-State's Answer, P 14.

4. All-State requested that Tregoning furnish thermal insulation materials for the Project. *See* All-State's Answer, P 22.

5. All-State knew that Plaintiff was not volunteering its materials and that Tregoning expected compensation. *See* **[*3]** All-State's Answer, P 24.

6. On May 7, 2008, Mr. Parrales executed and delivered to Tregoning a Personal Guaranty securing payment for materials supplied by Plaintiff to All-State. A true and accurate duplicate of the Personal Guaranty is attached to the Complaint as **Exhibit "C."***See* All-State's Answer, P 27.

7. Defendant PCCI, as principal, and Defendant Westfield, as surety, furnished a Labor and Material Payment Bond (the "Bond"). A true and accurate duplicate of the Bond is attached to the Complaint as **Exhibit "D."***See* PCCI and Westfield's Answer, P 32.

8. Under the terms of the Bond, PCCI, as principal, and Westfield, as surety, bound themselves jointly and severally for the use and benefit of all persons supplying labor, materials and equipment for the construction and completion of the Project. *See* PCCI and Westfield's Answer, P 32.

III. MEMORANDUM OF LEGAL AUTHORITIES

A. STANDARD FOR SUMMARY JUDGMENT:

Under Florida law, a party is entitled to summary judgment if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000);* **[*4]** *see also Mack v. Commercial Indus. Park, 541 So. 2d 800 (Fla. 4th DCA 1989)* (holding that summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *citingRule 1.510(c), Fla. R. Civ. P.*

B. ANALYSIS:

This matter does not present a complex set of facts. Tregoning was a material supplier for the Project. Tregoning was *not* responsible for any installation of its materials. Tregoning complied with its obligations by furnishing materials for the Project. Tregoning's agreement was with All-State and All-State has not paid Tregoning. Based upon All-State's Answer in this action, All-State has not paid

Tregoning because PCCI did not pay All-State. Westfield, as the surety, is obligated to ensure that Tregoning receives the funds for the materials that Tregoning supplied for the Project. Moreover, under Florida law, Tregoning is entitled to recover its attorneys' fees from All-State, Mr. Parrales, PCCI and Westfield pertaining to this [*5] lawsuit.

1. Tregoning Is Entitled to A Summary Final Judgment Against All-State and Mr. Parrales.

In their Answer to Tregoning's Complaint, All-State and Mr. Parrales have alleged three (3) affirmative defenses, none which prevent this Court from entering a summary final judgment. The first affirmative defense is that of offset. Through this defense, the Defendants merely ask for a credit for any payments that were made. Under Florida law, a party must plead ultimate facts to support an affirmative defense. *See Cady v. Chevy Chase Savings and Loan, Inc., 528 So. 2d 136 (Fla. 4th DCA 1988).* Accordingly, this defense, which does not allege any ultimate facts supporting a credit, fails as a matter of law.

All-State and Mr. Parrales's second defense is impossibility of performance. In support of this defense, All-State and Mr. Parrales state that All-State failed to make payment because PCCI stopped making payment to All-State. Under Florida law, impossibility of performance occurs where it becomes impossible for one party to perform under the contract. *See* *Home Design Center v. County Appliances of Naples, Inc., 563 So. 2d 767, 770 (Fla. 2d DCA 1990)* [*6] (holding that economic difficulty did not render the purpose of a party's contract "impossible"). Because of the above, this defense fails as a matter of law.

All-State and Mr. Parrales raise statute of limitations as the final defense (as to the written credit agreement and Mr. Parrales's personal guaranty). With respect to the credit agreement, this is a written document and as such the statute of limitations is five (5) years under Florida law. *See§ 95.11(2)(b), Fla. Stat.* Moreover, Tregoning's action against Mr. Parrales regarding the personal guaranty is likewise subject to the above five (5) year limitations period. *See The Cadle Company v. Cindy Rhoades, 978 So. 2d 833 (Fla. 3d DCA 2008)*(holding that *§ 95.11(2)(b), Fla. Stat.* applies to personal guarantees).

All-State and Mr. Parrales have not raised any defenses that prevent this Honorable Court from entering the summary final judgment.

2. Tregoning Is Entitled to A Summary Final Judgment Against PCCI and Westfield.

By all indications, PCCI and Westfield have done nothing to investigate Tregoning's claims in good faith to verify whether the monies are owed to Tregoning. All-State has stated [*7] in its affirmative defense that PCCI did not pay All-State, which is why All-State has not paid Tregoning. This action has been pending since August of 2011. PCCI and Westfield have failed and refused to timely respond to most of Tregoning's discovery and instead have routinely filed motions for extension of time to respond to Tregoning's discovery. The most-recent motion for extension of time was filed on June 8, 2012. PCCI and Westfield have raised no defenses in their responses to the discovery to explain or otherwise account for any funds that Tregoning is allegedly not owed. All-State was in privity with Tregoning and All-State is the party who knows what Tregoning did or did not supply for the Project. All-State, through its affirmative defense, states that it did not pay Tregoing because PCCI did not pay All-State.

PCCI and Westfield have raised seven (7) affirmative defenses, none of which complies with Florida law. PCCI and Westfield have alleged everything from waiver to payment. However, the Defendants' affirmative defenses are mere conclusory statements with no ultimate facts to support the claims. Under

Florida law, certainty is required when pleading defenses, and pleading **[*8]** conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *See Cady v. Chevy Chase Savings and Loan, Inc., 528 So. 2d 136 (Fla. 4th DCA 1988).* Furthermore, affirmative defenses should not constitute a mere denial of the allegations of the complaint and must set forth facts in such a manner as to reasonably inform the opposing party what is proposed to be proven in order to provide Plaintiff with a fair opportunity to meet it and prepare evidence in opposition. *Zito v. Washington Fed. Savings & Loan Assoc. of Miami Beach, 318 So. 2d 175 (Fla. 3d DCA 1975).*

PCCI and Westfield have raised no specific defenses nor provided any discovery responses to establish that payment of Tregoning's invoices has been paid. Tregoning has a right under Florida law to demand payment from PCCI and Westfield under the payment bond. Tregoning, being a material supplier for a public project (i.e. Chapter 255.05 Bond), had two (2) obligations to perfect a demand against the Project's surety and general contractor - namely: (1) timely serve a notice to contractor; and (2) timely serve a notice of non-payment.

Tregoning has done both. Tregoning **[*9]** served its notice to contractor within forty-five (45) days as required by Section 255.05(2)(a)2, Fla. Stat. *See* Compl., P 34; *see also* Affidavit of Cheryl Johns ("Cheryl Johns Aff.") at P 10. Moreover, Tregoning timely served its notice of non-payment within ninety (90) days as required by Section 255.05(2)(a)2, Fla. Stat. *See* Compl., P 35; *see also* Cheryl Johns Aff. at P 11.Tregoning has invoiced and has not been paid the amount of **$ 15,461.67**. *See* Compl., P 36; *see also* Cheryl Johns Aff. at P 12.

Tregoning is also entitled to recover attorneys' fees as follows:

1. All-State (Master Credit Application affords fees);
2. Mr. Parrales (Personal Guaranty affords fees);
3. PCCI (Section 255.05(2)(a)2, Fla. Stat.); and
4. Westfield (Section 255.05(2)(a)2, Fla. Stat.)**III. CONCLUSION:**

For the above reasons, Tregoning requests that this Honorable Court award Tregoning a summary final judgment in this matter against all Defendants, award Tregoning its attorneys' fees, prejudgment interest and costs, as well as grant any further and other relief that the Court deems just and proper.

TRITT|*RENDZIO*

By: **[*10]** /s/ ***Bryan*** R. ***Rendzio***

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Attorneys for Plaintiff
Tregoning Industries Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Nino J. Parrales**, All-State Heating & Air Conditioning, Inc., 8286 Western Way Circle, Suite C-7, Jacksonville, Florida 32256; and **George J. Dramis, Esq.**, Morgan . Dramis, 2364 Fruitville Road, Sarasota, Florida 34237 via U.S. Mail on this 7th day of August, 2012.

/s/ [Signature]

Attorney

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November, 2008 Volume 82, No. 10

Journal HOME

Invoking "the Rule" During Depositions? Absolutely "Maybe"

by Bryan R. Rendzio

Page 54

Your Honor, I'd like to go ahead and invoke 'the rule.'" Most litigators have uttered these words during a trial, or conversely, heard the phrase come from the direction of opposing counsel's table. There comes little astonishment when the expression is conveyed within the confines of the courthouse walls. When someone mentions invoking "the rule" during a deposition, however, quite a different reaction can occur — looks of initial amazement, followed by the inevitable face-off. "You can't do that." Can you?

What Does It Mean to Invoke "the Rule"

When someone invokes the rule, he or she is seeking to implement the rule of sequestration — *i.e.*, the rule requiring that certain witnesses remain outside of the presence of testifying witnesses.[1] The premise behind the rule is that it prevents witnesses from hearing the testimony of other witnesses so that each person's testimony is his or her own, and is not influenced or tainted because of another witness' testimony.[2] The rule may be invoked during trial, as well as during pretrial hearings at which witnesses are called to testify.[3]

Witnesses Who Are Not Subject to the Rule

Any discussion of the scope of the rule must begin with an analysis of those individuals who are not subject to the rule. According to the Florida Evidence Code,[4] there are four groups who may *not* be excluded from a trial or other proceeding. The first group

includes a party who is a natural person.[5] Hence, in both civil and criminal matters, it is inappropriate to invoke the rule against a person who is a party to the lawsuit. The second group applies to civil actions, and concerns designated corporate representatives.[6] According to F.S. §90.616, a corporation or governmental body, which is a party, is treated the same as a natural person under the Florida Evidence Code.[7] Thus, just as a natural person who is a party may remain and hear testimony of other witnesses, so may a representative of a corporate party remain present during the testimony of another.

The third group is comprised of those individuals whose presence is shown to be essential to the offering party's cause.[8] This may include expert witnesses,[9] and, in criminal matters, law enforcement officers.[10] The final group, which pertains to criminal matters, includes victims of crimes, parents, or guardians of minor child victims, a victim's next of kin and lawful representatives of a victim.[11] The trial judge has authority to exclude individuals within this last group if the court determines, upon motion, that their presence in the courtroom is prejudicial.[12]

Overview of the *Dardashti* and *Smith* Decisions

Two seminal cases discuss the subject of invoking the rule at deposition. In *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th DCA 1982), the plaintiff sued the defendant alleging breach of an oral contract.[13] In response to interrogatories, the plaintiff named as a witness his wife who was present during the alleged contractual negotiations and who would support the plaintiff's allegations.[14] The defendant sought to invoke the rule to sequester the wife from being present at the husband's deposition.[15] The trial court refused to sequester the wife from the deposition.[16] The Fourth District Court of Appeal reversed, holding that a party could invoke the rule at a deposition. It noted the nature of depositions — that is, that there is "little advance warning during a deposition of unexpected and oblique questions requiring instantaneous response[s]."[17] Moreover, the court reasoned that "[t]o permit [a person] to sit and absorb the answers of [another person] in a case such as [the one at hand] obviously facilitates the very 'coloring of a witness's testimony' frowned upon by [Florida's] Supreme Court in [*Spencer v. State*] . . . ."[18] Hence, according to *Dardashti*, a party can invoke the rule during a deposition.

Some years after the *Dardashti* decision, the First District was called upon to address the rule in a deposition context. In *Smith v. Southern Baptist Hospital of Florida, Inc.*, 564 So. 2d 1115 (Fla. 1st DCA 1990), the First District did not follow the Fourth District rule. There, the plaintiff sued a physician and a hospital, as well as the hospital's board of regents, for negligence in failing to diagnose a circulation disorder, which ultimately resulted in a leg amputation.[19] The plaintiff alleged that a resident who assisted the defendant-physician was negligent.[20] The resident, however, was not named as a defendant due to a statutory

provision prohibiting officers and employees from being personally sued absent certain maliciousness or other bad faith.[21]

The plaintiff scheduled the defendant-physician for deposition during which plaintiff's counsel realized that the resident physician, a nonparty, was present.[22] Upon discovering who the resident physician was, plaintiff's counsel invoked the rule and asked that the resident physician leave the deposition room.[23] Defense counsel refused to exclude the resident physician.[24] The court denied the subsequent motion for protective order based upon the fact that the deposition had been in progress for some time prior to any sequestration being sought.[25]

The First District affirmed.[26] It stated that the "unwritten rule" — *i.e.*, sequestration of witnesses — applied at trial and *not* during depositions.[27] The court reasoned that parties seeking to preclude persons from depositions needed to employ a motion for protective order by means of Rule 1.280(c).[28] Consequently, parties litigating in the First District could no longer invoke the rule during depositions, and instead, they needed to seek court intervention prior to the deposition.

In reaching its ruling, the First District analyzed the *Dardashti* decision, but was not persuaded to align itself with its sister court. The First District stated: "In *Dardashti*, the [Fourth District] did not cite any case to support its conclusion that the unwritten rule of sequestration of witnesses at trial is applicable to deposition, and we have been unable to find any such case except *Dardashti*."[29] This led the First District to look to federal law for guidance. Specifically, the court looked to Federal Rule of Evidence 615 (the federal sequestration rule), as well as federal decisions interpreting Rule 615.[30]

The First District observed that federal courts applied Rule 615 to hearings and trials — *not* to depositions.[31] Federal courts instead required that parties implement Federal Rule of Civil Procedure 26(c) (*i.e.*, motions for protective order) to exclude witnesses from depositions.[32] This was instrumental to the First District's *Smith* decision since Federal Rule 26(c) is virtually identical to Florida's Rule of Civil Procedure 1.280(c).[33] The court found the federal framework to be persuasive and chose to adopt the same logic for Florida.

Determining the Intent of F.S. §90.616

With the *Smith* holding, it became obvious that there was a split between the Florida District Courts of Appeal as to whether a party could invoke the rule during depositions. The Fourth District in *Dardashti* ruled affirmatively that parties could use the informal sequestration practice, while the more recent *Smith* decision held that parties could not ▲ invoke the rule in a deposition. In 1990, the Florida Legislature added another

component to this conundrum when it enacted F.S. §90.616.[34] The section states as follows: "At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a *proceeding* so that they cannot hear the testimony of other witnesses except as provided in subsection (2)."[35]

Ambiguity remains as to whether F.S. §90.616 was enacted to address the rule in the deposition context. In fact, Florida's Legislature has actually created further confusion for practitioners trying to navigate the already obscure discovery waters. The dilemma comes from the term "proceeding" as it is used in the evidence code.[36] Section 90.616 lacks a definition to clarify whether a proceeding includes a deposition. What is more, there is no apparent case law interpreting the term. Black's Law Dictionary defines the term "proceeding" as "[t]he business conducted by a court or other official body; a hearing."[37] This suggests at least that a proceeding is restricted to hearings and other court-conducted matters.

Section 90.616's legislative history does provide some guidance as to what Florida's Legislature intended when it enacted the statute. It notes that out of the 31 states to enact a code of evidence, Florida was the only state without a provision governing the exclusion of witnesses.[38] With that said, the historical notes provide little direction beyond reciting this rather obvious motive. The best that one can glean from the historical notes is that the legislature *may* have intended for the statute to apply to depositions insomuch as *Dardashti* is specifically referenced: "Consistent with the language in a case decided by the Florida Supreme Court [*citing to Spencer v. State*] and the language in a recent District Court of Appeal opinion [*citing to Dardashti*], the bill provides that exclusion of witnesses is a matter of right on demand of a party."[39] There is no reference to the First District's *Smith* decision in the legislative note.

Albeit inconclusive, the legislative history appears to favor and support the *Dardashti* view that the rule may be invoked at a deposition. There is another aspect of the mystery, however, which casts doubt as to this conclusion. The uncertainty comes when one looks to other Florida statutes to determine how Florida's Legislature has defined and applied the term "proceeding" in the context of other Florida laws. There is at least one Florida statute to look to for assistance in defining the term "proceeding." Section 90.801 (hearsay definitions and exceptions) uses the term "proceeding" in conjunction with the terms "trial," "hearing," and "deposition."[40] It provides:

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [i]nconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a *trial, hearing*, or *other proceeding* or in a *deposition*. . . .[41]

The fact that this statute, also in the evidence code, mentions a "trial, hearing, or *other* proceeding" suggests that a proceeding is analogous to a trial or a hearing.[42] However, a deposition is treated distinctly from trials, hearings, and other proceedings. The word "deposition" is placed at the end of the sentence and is independently identified after the term "proceeding." This provides evidence that on at least one occasion Florida's Legislature has declined to employ the word "deposition" interchangeably with the term "proceeding."[43] This interpretation of "proceeding" falls in line with Black's Law Dictionary insomuch as Black's equates a proceeding to a court-conducted matter.

To summarize, legislative history indicates that F.S. §90.616 was enacted, in part, to provide parties with the right to invoke the rule during depositions. If this is the state of affairs, then the term "proceeding" would include a deposition. Another Florida statute, also in the evidence code, however, conspicuously distinguishes depositions from proceedings.

Influence of the Federal Rules on F.S. §90.616

Federal law can be persuasive when tackling and resolving the motives behind Florida law. Unfortunately, under the scenario at hand, the federal influence has failed to provide a bright-line rule. One Florida court has followed the federal groundwork (*i.e.*, the First District), while another court has not (*i.e.*, the Fourth District). As indicated above, the First District relied upon federal law for guidance in reaching its *Smith* decision. Federal courts refuse to allow parties to use the federal evidence rule (Rule 615) as a means to invoke the rule during a deposition and instead require that a protective order be sought pursuant to Rule 26(c).[44]

The Fourth District's *Dardashti* ruling, on the other hand, did not follow the federal pattern. The Fourth District recognized Rule 615, but only to make mention of its surprise that Florida had not previously codified the rule as the federal system had done.[45] The court did not cite to federal case law discussing the rule or otherwise engage in any analysis to reconcile the fact that federal courts utilized Rule 26(c) (*i.e.*, motions for protective orders), and not Rule 615, when dealing with the rule during depositions.[46] Instead, the Fourth District cited to Rule 615 for the general idea that parties could invoke the rule to exclude witnesses at trial. The court then bridged the gap between trials and depositions by explaining that the motivation for invoking the rule was similar in both circumstances.

Section 90.616's history indicates that the Florida Legislature was seeking to follow suit with the federal government, as well as the other code states, by enacting an evidence code concerning "the rule." Nonetheless, the legislature apparently accepted the

Dardashti viewpoint. Such a decision deviates from the federal framework insomuch as a *Dardashti*-backed §90.616 would mean that parties could invoke the rule during a deposition. Again, parties in federal lawsuits cannot employ Rule 615 as a measure to preclude a witness from a deposition. Instead, parties in federal litigation must move for a protective order via Rule 26(c).

Practical Considerations

So where do practitioners go from here? First and foremost, it would be prudent for a well-prepared litigator to construct a general deposition folder comprised of the *Smith* and the *Dardashti* decisions, as well as §90.616 (including the legislative history, Ch. 174, 1990 Laws of Fla.). From there, the process can be described as nothing short of a truncated game of chess. While each litigator will obviously have his or her own unique approach to handling the rule at depositions, there are a few simple considerations to ensure well-reasoned arguments for either side.

As discussed above, the First District ruled in *Smith* that the rule does not apply in depositions in that district. Therefore, it is imperative to have the *Smith* case in hand if in the First District and your opponent attempts to invoke the rule during a deposition. If opposing counsel presses the issue, it may be wise to point out the position set forth in *Smith*, which states that parties must anticipate the need to prevent witnesses from attending a deposition and seek a preemptive protective order.

Now, if you find yourself in a situation in the First District where you believe you need to invoke the rule, another approach is needed. Although the *Smith* case clearly holds that the rule does not apply unless a protective order has been obtained, the prepared attorney still may argue that F.S. §90.616 applies and trumps *Smith*. As discussed previously, the Florida Legislature apparently aligned itself with the Fourth District's *Dardashti* decision.

The reasoning set forth above will work for the most part in the Fourth District by reversing the logic. Because the Fourth District held in *Dardashti* that a party may invoke the rule during a deposition, there obviously is no need to seek a protective order prior to the deposition. Hence, in a perfect world, a practitioner can simply invoke the rule, much the same as at trial. Opposing counsel may try to argue that the *Smith* case is more on point. However, the proper response is that *Dardashti* controls in the district. A prudent practitioner seeking to invoke the rule would also have F.S. §90.616 in his or her back pocket as the backup to *Dardashti*. At this juncture, it would also be wise to have the legislative history in hand to counter opposing counsel's inevitable argument that depositions were neither explicitly mentioned nor intended to be included under F.S. §90.616.

▲

What about depositions in the Second, Third, or Fifth districts? The above arguments are equally effective when employed in a district other than the First or Fourth. The tools for making a case to support the rule, or alternatively to oppose the rule, are the same as above. The fundamental approach is simply to understand the case law, as well as the statute, to ensure that persuasive arguments can be made to support the chosen position.

Conclusion

Until the courts clarify the scope of the rule as it applies to depositions, the ambiguous and uncertain interplay between the *Dardashti* and *Smith* decisions, as well as F.S. §90.616, permit the creative attorney to argue that the rule should or should not apply given the exigencies of the case. The most direct approach to clarifying the issue would seem to be for the Florida Legislature to amend F.S. §90.616 to include a definition of "proceeding," which would in turn specifically include the term "deposition." Until that occurs, practitioners will be left with *Smith* versus *Dardashti*, with a taste of F.S. §90.616 on the side. These materials are tools in the Florida lawyer's toolbox that can be used to provide the best possible arguments for or against invoking the rule at depositions.q

[1] *See* Fla. Stat. §90.616 (2007); *see also* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.) (Professor Ehrhardt states that "[i]n order to avoid a witness coloring his or her testimony by hearing the testimony of another, any party may invoke the rule of sequestration of witnesses after which the trial judge will ordinarily exclude all prospective witnesses from the courtroom.") (internal citations omitted).

[2] *See* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.) (internal citations omitted).

[3] *Id.*

[4] *See* Fla. Stat. §90.101 (Ch. 90 of the Florida statutes is referred to as the "Florida Evidence Code").

[5] *See* Fla. Stat. §90.616(2)(a) (2007); *see also Ferrigno v. Yoder*, 495 So. 2d 886, 888 (Fla. 2d D.C.A.
1986).

[6] *See* Fla. Stat. § 90.616(2)(b) (2007); *see also Goodman v. West Coast Brace & Limb, Inc.*, 580 So. 2d 193 (Fla. 2d D.C.A. 1991).

[7] *See* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.).

[8] *See* Fla. Stat. §90.616(2)(c) (2007).

[9] *See* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.)(providing a useful example of a complex business fraud case wherein an C.P.A.-expert would be permitted to remain in the courtroom to advise counsel and to testify to an expert opinion; further noting that experts are less likely to be subject to exclusion than fact witnesses since experts testify as to opinions as opposed to factual matters).

[10] *See* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.) (internal citations omitted).

[11] *See* Fla. Stat. §90.616(2)(d) (2007).

[12] *See* C. Ehrhardt, Florida Evidence §616.1 (2006 ed.) (internal citations omitted).

[13] *Dardashti v. Singer*, 407 So. 2d 1098 (Fla. 4th D.C.A. 1982).

[14] *Id.* at 1099-1100 (noting that the plaintiff named his wife as a witness "on no less than [14] occasions" in his interrogatory responses).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id., citing Spencer v. State*, 133 So. 2d 729 (Fla. 1961).

[19] *Smith v. Southern Baptist Hosp. of Florida, Inc.*, 564 So. 2d 1115, 1116 (Fla. 1st D.C.A. 1990).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1117.

[28] *Id.* at 1118; *citing* Fla. R. Civ. P. 1.280(c)(5) ("Upon motion by a party or by person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including . . . (5) that discovery be conducted with no one present except persons designated by the court").

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See* Fla. Stat. §90.616 (2007); *see also* Michael Flynn, *Invoking What Rule?*, 24 Nova L. Rev. 367 (1999)(discussing the circumstances surrounding the enactment of Fla. Stat. §90.616)(internal citations omitted).

[35] Fla. Stat. §90.616(1) (2007).

[36] *See* Michael Flynn, *Invoking What Rule?*, 24 Nova L. Rev. 367 (1999)(discussing use of the term "proceeding" in Fla. Stat. §90.616)(internal citations omitted).

[37] Black's Law Dictionary 1241 (8th ed. 2004).

[38] *See* 1990 Fla. Laws Ch. 174.

[39] *Id.* (*Spencer v. State* is discussed *supra*).

[40] *See* Fla. Stat. §90.801 (2007).

[41] Fla. Stat. §90.801(2)(a) (2007).

[42] *Id.*

[43] *Id.*

[44] *See, e.g., BCI Communication Sys., Inc. v. Bell Atlanticom Sys., Inc.*, 112 F.R.D. 154 (N.D. Ala. 1986); *see also Skidmore v. Northwest Eng'g Co.*, 90 F.R.D. 75 (S.D. Fla. 1981).

[45] *See Dardashti v. Singer*, 407 So. 2d at 1100 (Fla. 4th D.C.A. 1982).

[46] *Id.*

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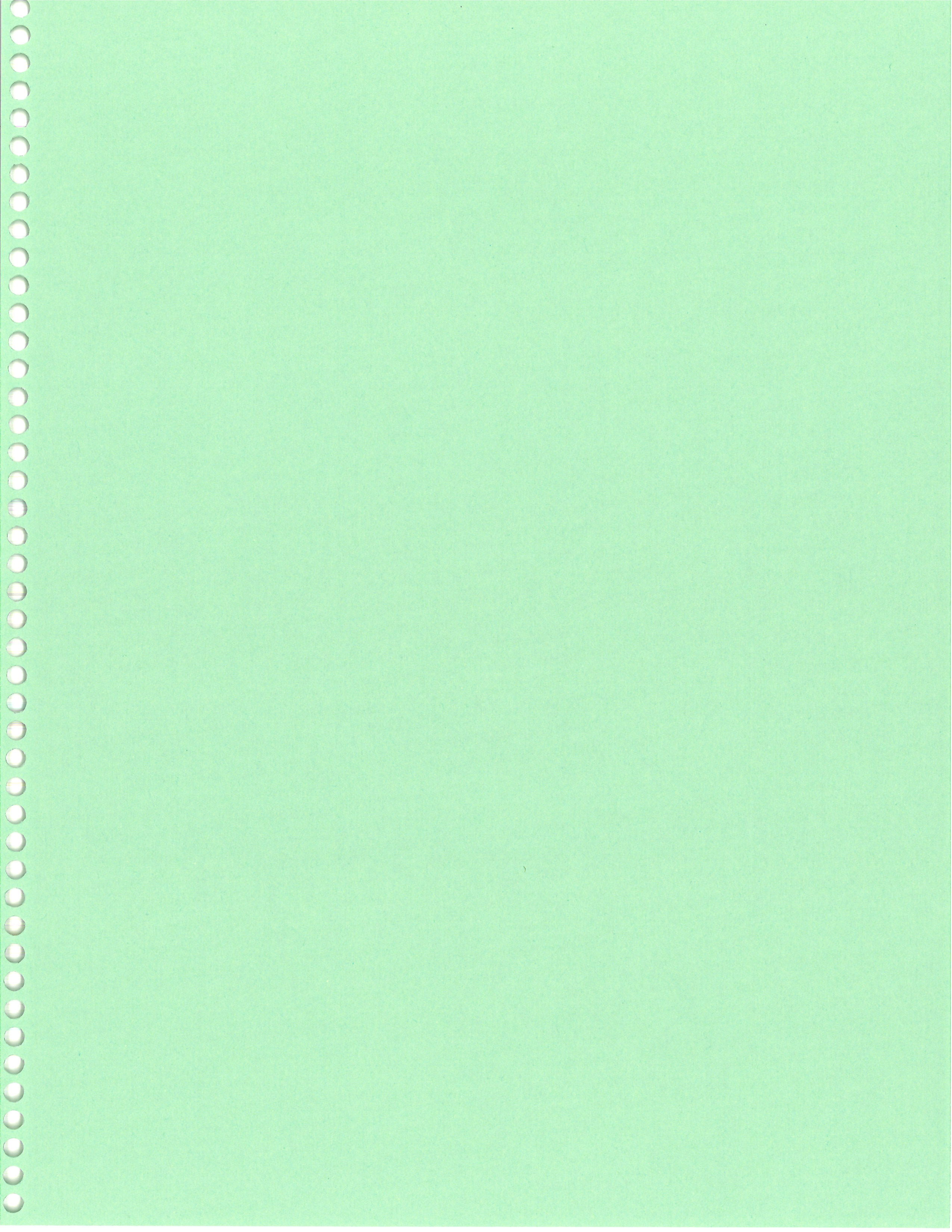
This column is submitted on behalf of the Trial Lawyers Section, Bradley E. Powers, chair, and D. Matthew Allen, editor.

[Revised: 02-10-2012]



2016 Fla. Wrk. Comp. LEXIS 211

State of Florida Division of Administrative Hearings Office of the Judges of Compensation Claims Panama City District Office, State of Florida Division of Administrative Hearings Office of the Judges Of Compensation Claims Panama City District Office

February 11, 2016; April 1, 2014, D/A; April 01, 2014

OJCC Case No. 15-027124WWA

Reporter
2016 Fla. Wrk. Comp. LEXIS 211 *

Michael Davis, Employee/Claimant, v. Walton County Sheriff's Department North American Risk Services, Inc., Employer/Carrier/Servicing Agent

Core Terms

deposition, claimant, attend, attorney's fees, sequester, verified petition, carrier, invoke, travel, beach, verified response, protective order, refuse to agree, reasonable fee, spouse, abort

Panel: Wilbur W. Anderson, Judge of Compensation Claims

Opinion

[*1] FINAL EVIDENTIARY ORDER

Claimant filed a verified petition for attorney's fees and costs on November 18, 2015. After an evidentiary hearing on the motion was scheduled to occur in Panama City on February 9, 2016, the Employer/Carrier filed a verified response to the motion on January 7, 2016. Because of Judge Roesch's retirement in Panama City, I conducted the hearing by telephone from Daytona Beach. Attorney John B. Carr appeared for Claimant. Attorney R. Stephen Coonrod appeared for the E/C.

Exhibits

Claimant

1. Attorney's Fee Affidavit and Costs Affidavit/Verified Petition for Entitlement & Amount of Attorney's Fees and Costs Pursuant to *Rule 60Q-6.124 (2)* [1]

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[1] Numbers in parentheses refer to the OJCC docket number.

E/C

1. Employer/Carrier's Verified Response to Claimant's Verified Petition for Entitlement and Attorney's Fees and Costs (21)

Findings of Fact

1. The facts are undisputed. Before a petition for benefits was filed in this case, the E/C scheduled Claimant's **[*2]** deposition to occur on October 19, 2015, in DeFuniak Springs, where Claimant resides. The E/C's counsel traveled from his office in Tallahassee (approximately 120 miles) , and Claimant's counsel traveled from his office in Pensacola (approximately 80 miles) , to attend the deposition. Before the deposition was scheduled to begin, Claimant's counsel met with Claimant and Claimant's wife and then informed E/C's counsel that Claimant's mental condition was such that his wife would need to be present during the deposition.

2. Both sides apparently anticipated future litigation. E/C's counsel therefore inquired if Claimant's wife would be a witness at a future final hearing. When Claimant's counsel said she would, E/C's counsel sought to invoke the rule of sequestration to prevent the wife from attending the deposition. When Claimant's counsel refused to agree to exclude the wife from attendance at the deposition, the deposition was terminated. Claimant thereafter filed a verified petition (motion) for attorney's fees, seeking a fee of $ 1,750 based on seven hours of attorney time devoted to preparing for, traveling to, and attending the aborted deposition.

Conclusions of Law

3. Although **[*3]** the verified fee motion cites *section 440.34 (3)(a)-(d), Florida Statutes*, as the basis for awarding attorney's fees in this matter, Claimant's counsel clarified at the hearing on the motion that the fee is actually being sought under *section 440.30, Florida Statutes.* That statute provides in pertinent part that "If no claim has been filed, the carrier or employer taking the deposition shall pay the claimant's attorney a reasonable fee for attending said deposition. " Claimant argues he was justified because of Claimant's mental state in refusing to agree to exclude Claimant's wife from attending the deposition and, more broadly, that the rule of sequestration does not apply to depositions. The E/C argues the rule of sequestration was properly invoked and, in any event, that *section 440.30, Florida Statutes*, does not apply because the deposition was not taken.

4. Neither party has cited a case addressing the applicability of the fee provision in section 440.30 when a deposition does not occur because of an objection to a third party's attendance. The civil case cited **[*4]** by Claimant, *Smith v. Southern Baptist Hospital of Florida, Inc., 564 So. 2d 1115 (Fla. 1st DCA 1990),* held that the formerly uncodified rule of sequestration does not apply to depositions. Under that case, a party seeking to limit those in attendance at a deposition should first seek a protective order under *Florida Rule of Civil Procedure 1.280(c)(5)*. The holding in Smith, however, is contrary to an earlier case from the Fourth District Court of Appeal, *Dardashti v. Singer, 407 So. 2d 1098 (Fla. 4th DCA 1982)* (holding trial court abused discretion in denying motion to compel sequestration of plaintiff's spouse during taking of plaintiffs discovery deposition) , and may or may not have been superseded by adoption of the statutory rule of sequestration in section 90.616 of the Florida Evidence Code. [2]

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[2] See C. Ehrhardt, Florida Evidence § 616.1 (2015 ed.); ***Bryan*** R. ***Rendzio***, Invoking "The Rule" During Depositions? Absolutely "Maybe", Fla. B.J., November 2008, at 54; Joseph E. Brooks, "Invoking the Rule" at Depositions, Trial Advoc. Q., Summer 2004, at 12.

5. I conclude Claimant's counsel spent time traveling to attend Claimant's **[*5]** deposition, and conferencing with his client at the deposition site, at a time when no petition for benefits was pending. I further conclude that Smith appears to continue to be controlling precedent from the First District Court of Appeal. Consequently, Claimant's objection to invocation of the rule of sequestration was justified. Because the deposition did not occur due to Claimant's justifiable refusal to proceed without the presence of Claimant's spouse absent a protective order excluding her, I conclude Claimant is entitled to a reasonable attorney's fee for attending the aborted deposition.

6. I have considered Claimant's counsel's request for a fee of $ 1,750, but conclude a reasonable fee in this unique circumstance is $ 875.

It is therefore,

ORDERED AND ADJUDGED that the E/C shall pay Claimant's counsel an attorney's fee of $ 875.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS AND CARRIER LISTED BELOW this 11th day of February, 2016, in Daytona Beach, Volusia County, Florida.

Wilbur W. Anderson
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Daytona Beach District Office

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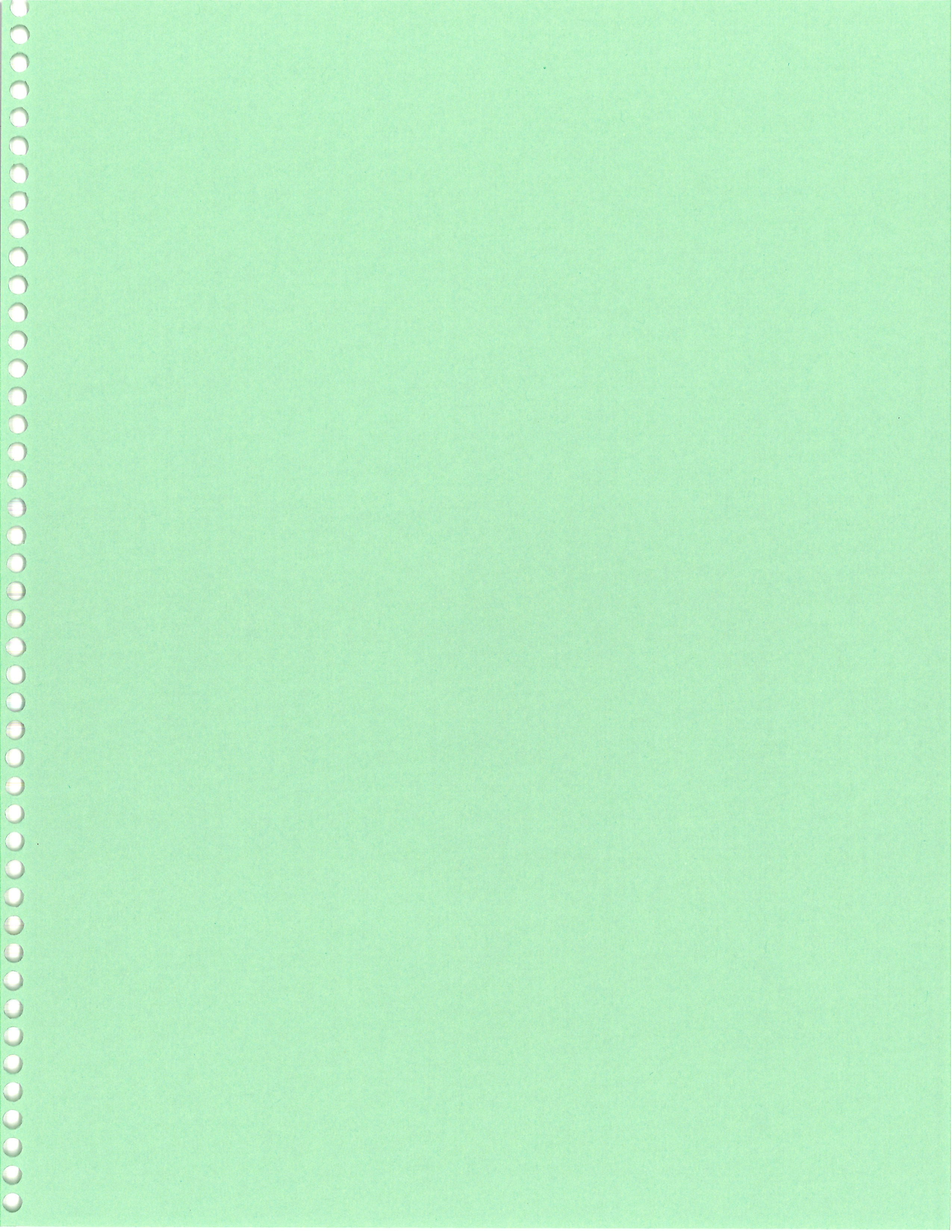

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May, 2010 Volume 84, No. 5 Journal HOME

Venue Considerations in Construction Disputes

by Christopher M. Cobb and Bryan R. Rendzio

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During the early stages of a construction dispute, it is critical to consider how best to preserve or enforce a contractual venue provision. Construction disputes commonly include numerous players (*i.e.*, owners, contractors, subcontractors, suppliers, etc.), which can result in multiple contracts among the related parties. With the multitude of contractual provisions and statutory requirements, coupled with defendants in different locations, even the most seemingly straightforward construction dispute can involve complex issues. This article discusses varying venue concerns that must be taken into account in construction disputes. Although the focus of this article involves Florida and state-based claims, readers should also be mindful that there are federal venue considerations that will come into play when litigating a federal Miller Act claim.[1] When dealing with venues in Florida, there are two fundamental considerations: Should the lawsuit be brought in Florida and, if the answer is yes, where should venue lie within the state?

Venue in General

Before discussing venue considerations in a construction setting, one must first consider the fundamental principles of venue. Most Florida actions are governed by F.S. §47.011, the general venue statute. Florida's general venue statute controls actions brought under common law, as well as matters brought pursuant to statutes that do not contain specific venue provisions.[2]

In addition to the general venue statute, Ch. 47 also contains several specific venue

statutes. If there is a specific venue statute, the next step is to determine whether there is a conflict between the specific statute and the general statute. All conflicts between the general statute and a specific venue statute will be resolved in favor of applying the specific statute.[3]

Absent some statutory venue exception, parties are generally free to establish venue by agreement or stipulation.[4] Many construction contracts contain venue provisions that have pre-determined the location and forum for bringing and maintaining disputes regarding the contract.[5]

Absent a negotiated contract, parties must look to the Florida Statutes for guidance to determine proper venue. The Florida Legislature has provided a roadmap to aid construction attorneys in navigating this issue by enacting a specific venue statute that voids contractual venue provisions requiring resident contractors, subcontractors, sub-subcontractors, or materialmen to litigate claims outside of the state of Florida for disputes involving improvements to real property in this state. For this reason, the initial consideration for a practitioner handling a construction action is to determine whether the action must be litigated in Florida.

The Scope of F.S. §47.025

In Florida, contractual provisions for the improvement of real property that require the action be brought outside of the state are void as a matter of public policy pursuant to F.S. §47.025. Section 47.025, entitled "Actions against contractors," provides as follows:

> Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman, as defined in part I of chapter 713, to be brought outside this state is void as a matter of public policy. To the extent that the venue provision in the contract is void under this section, any legal action arising out of that contract shall be brought only in this state in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located, unless, after the dispute arises, the parties stipulate to another venue.[6]

Before litigants can employ the protections of this construction venue statute, a preliminary determination must be made regarding whether or not the statute even applies. Having a construction dispute is not in itself dispositive of whether §47.025 applies. The statute protects *resident* "contractors," "subcontractors," "sub-subcontractors," and "materialmen,"[7] as defined by F.S. §713.01, *et seq.*[8]

If the litigants at issue do not fall within one of the above defined categories, then §47.025 does not apply. When the lawsuit does not involve a "contractor," "subcontractor,"

"sub-subcontractor," or "materialmen," an out-of-state venue provision may be enforceable unless void for some other reason. If, on the other hand, the affected party is identified as being in one of the above defined categories, then §47.025 would likely apply, and the venue will lie in Florida unless the parties stipulate to a non-Florida venue *after* the dispute arises.

Interpreting F.S. §47.025

The seminal case interpreting §47.025 is *Kerr Construction, Inc. v. Peters Contracting, Inc.*, 767 So. 2d 610 (Fla. 5th DCA 2000). In *Kerr*, a Florida subcontractor filed suit against a contractor in Orlando for damages stemming from breach of a subcontract.[9] The subcontract at issue contained a venue selection clause, which stated: "This agreement shall be construed in accordance with the laws of the Commonwealth of Kentucky and shall be enforced only in the courts of the Commonwealth of Kentucky."[10] The contractor moved to dismiss the complaint for improper venue based upon the subcontract's forum selection clause.[11]

On appeal, the Fifth District reviewed the legislative intent of §47.025 and ruled that the subcontract's venue selection clause was void.[12] According to the court, venue needed to be determined in accordance with Florida's general venue statute (*i.e.*, F.S. §47.011).[13] In rendering its decision, the court was careful to avoid choice-of-law issues so as not to create an overly broad ruling. Specifically, the Fifth District noted that §47.025 did not address choice-of-law clauses, and, thus, they would remain valid and applicable despite the venue selection clauses being void.[14] Hence, contracts could still require application of out-of-state law, even though the venue would lie in Florida.

Who Is Considered a "Resident" Under §47.025?

The above scenario seems to pave a comprehensive path for practitioners. However, the issue of who qualifies as a "resident" could arise, since §47.025 specifically references and applies only to "resident" contractors, subcontractors, sub-subcontractors, or materialmen.[15] Suppose that you represent a Florida-licensed contractor who resides in Mississippi but has offices in Mississippi and Florida. Your client is served with a complaint or arbitration demand from a home-owner who is bringing an action for alleged damages to an unfinished home-construction project located in Pensacola. The homeowners currently reside in Mississippi and have filed the action in Mississippi insomuch as the construction contract's venue provision identifies Mississippi as the location to resolve all disputes. Moreover, the parties executed the contract in Mississippi. Can your client employ §47.025 as a basis to argue that venue lies in Florida? While §47.025 is clear regarding venue provisions against contractors, subcontractors, sub-subcontractors, or materialmen who reside within the state, it is less obvious when considering contractors, subcontractors, sub-subcontractors, or materialmen who

perform services in Florida, but who in fact reside outside of the state.[16]

The crux of the argument may come down to whether the contractor is considered to be a "resident" contractor within the meaning of §47.025. There is no apparent case law interpreting this issue. Moreover, there does not appear to be any legislative history from which to garner an answer. From one perspective, it would seem that the protections of §47.025 would not apply under this scenario since the section is arguably designed to protect Florida residents who work on Florida-based projects from being dragged across the country due to onerous, multi-party contractual provisions. The protections of §47.025 would seem to have little to no significance if a contractor actually resides in the out-of-state locale where the action has been brought. Thus, if seeking to have the matter resolved in Florida, the contractor may be forced to forego a §47.025 argument and instead may fashion another broader venue argument (*i.e.*, forum non conveniens, etc.).

Once it has been determined that an out-of-state venue provision is unenforceable, general venue principles can be considered to determine where venue lies within the state. Suppose, however, the contract does *not* contain an impermissible out-of-state venue provision, but the parties have contractually agreed to venue of disputes within the state. Below is a discussion of the numerous factors for parties to consider once it is determined that Florida is the proper venue (*i.e.*, issues of contractual interpretation and transfer of venue within the state).

Permissive Versus Mandatory Contractual Venue Provisions

Contractual venue provisions are generally valid and enforceable in Florida.[17] Furthermore, by operation of a "flow-down clause," which incorporates the terms and conditions of an upper-tier contract or prime contract, a venue provision may also be enforced against a subcontractor, sub-subcontractor, or material supplier.[18] Only by examining the actual language of the venue provision can the construction practitioner be guided to the appropriate forum. Mandatory venue provisions generally contain words such as "shall," "must," and "only," which express a clear intention that all claims and disputes will be maintained in the specifically selected venue,[19] and which specifically identify the forum in which the action must be brought. For example, if the contract provides, "All actions, claims, or disputes arising or relating to this contract *shall only* be brought and maintained in the Circuit Court of Duval County," the fact that another venue may be appropriate for the action will not weigh in the court's enforcement of the mandatory venue provision.[20]

Any ambiguity contained in the contractual venue provision may result in an interpretation of the venue provision as permissive. Permissive venue provisions typically

do not contain the express mandates for a particular forum; rather, permissive venue provisions indicate that one forum is favored over the other. The general venue considerations under F.S. Ch. 47 would apply to permissive venue provisions.[21] Permissive venue provisions allow the party bringing a claim to choose the venue, as long as the selected venue has some connection with the contractual provision or the general venue statute. Permissive venue provisions are, therefore, rather weak and may only provide the filing party with forum options in which to bring the action.

The choice of mandatory or permissive language can be significant if the party filing the claim intends to maintain some type of "home field advantage." However, the issue becomes more complex when the action involves the foreclosure of a construction lien to obtain payment for labor, materials, and services under the contract.

Venue for Construction Lien Foreclosures

Construction liens must be recorded in the public records in the county where the labor, services, and materials were provided,[22] regardless of any contractual venue provision and §47.011. Actions brought to foreclose a construction lien on real property should be brought in the county in which the property is located.[23] In *VL Orlando Building Corp. v. A.G.D. Hospitality*, 762 So. 2d 956 (Fla. 4th DCA 2000), the Fourth District affirmed the transfer of the construction lien foreclosure action to the county where the real property was located and held that circuit courts in other counties may have subject matter jurisdiction over construction lien foreclosure, but they do not have in rem jurisdiction. Therefore, the action to foreclose the construction lien was properly transferred to the county in which the property was located.

Even though a venue provision calls for venue in a different county, a court will be permitted to utilize its discretion and maintain a lien foreclosure action in the county where property is located. Keep in mind that a lien foreclosure action is asserted against the owner of real property, and, thus, the action to foreclose the claim of lien directly affects the property improved. The construction practitioner should conduct an analysis of the claims and related contractual provisions to conclude which county is appropriate for venue. Transferring a contractual claim to another forum in accordance with a venue provision may result in two separate actions in two separate counties regarding the same labor, service, and materials. The equation becomes even more unsettled when the contractor asserting the claim is in contractual privity with the owner of the real property. If the direct contract requires venue in a completely unrelated county, a court may still be within its discretion to maintain the action in the county where the real property improved is located, and, thus, give no weight to a valid venue provision. Of course, not all construction disputes involve construction liens. Sometimes the owner will transfer a construction lien from the real property to a bond. The owner of a construction project

may also require the contractor to provide (through a surety) a payment bond for the labor, services, and materials in order to exempt the real property from construction liens. In these situations, the lienor may not have lien rights on the owner's real property, but can assert its claim against the bond instead.

Venue with F.S. §713.23 Payment Bonds and §713.24 Transfer Bonds

Section 713.24(3) provides that proper venue for a claim on a transfer bond is the county where the security was deposited.[24] In *Miller & Solomon General Contractors, Inc. v. Brennan's Glass Company, Inc.*, 837 So. 2d 1182 (Fla. 4th DCA 2003), the Fourth District affirmed the denial of a motion to transfer venue based upon the statutory venue provision in §713.24. There, the contractor had secured a payment bond on a project in Broward County. A subcontractor filed suit against the contractor for breach of contract and to foreclose a construction lien. The lien was transferred to the bond. Dade County was the venue selected in the parties' contract. The surety was not made a party to the subcontract. The court held the Dade County venue provision did not apply to the claim on the bond, nor would it be appropriate to sever the bond claim and breach of contract claim in separate counties.

The court recognized that taken alone, the contract claim should be filed in Dade County, pursuant to the contractual venue provision, but that the statutory venue in §713.24 prohibited the determination of the bond claim in Dade County and ultimately prohibited the severability of the action into two separate lawsuits. The court enforced the statutory venue over the contractual venue by utilizing its discretion to consider the appropriate venue to avoid multiple suits in different forums, which could result in two different outcomes.

In *Morganti South, Inc. v. Hardy Contractors, Inc.*, 397 So. 2d 378 (Fla. 4th DCA 1981), a material supplier to a subcontractor recorded a construction lien in Palm Beach County. The contractor transferred the construction lien to the payment bond under §713.24. The material supplier brought its action on the bond in Broward County. In reversing the trial court's denial of transfer of venue requested by the contractor, the appellate court held that proper venue of the action was in Palm Beach County, since the security for the bond was posted in Palm Beach County.[25] There is no indication in the appellate court's opinion as to whether a contractual venue provision prompted the material supplier to file its action in Broward County when the construction project, construction lien, and bond were all located in Palm Beach County. Regardless, assuming the surety was neither named or identified in the venue provision, the assumption can be made that, even in the presence of a venue provision, the action would have been transferred to the county where the security for the bond was located pursuant to the statutory venue mandated in §713.24.

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The assumption above is further confirmed by the case of *Miller & Solomon*. In *Miller & Solomon*, a subcontractor on a construction project located in Broward County brought an action in Broward County to foreclose a construction lien and for breach of contract. The lien was transferred to a bond under §713.23(2), but the contractor filed a motion to enforce a venue provision in the subcontract by transferring the action to Dade County. The trial court denied the motion to transfer and refused to enforce the venue provision.[26] In upholding the trial court's ruling, the appellate court noted that 1) the surety was not a party to the venue provision; 2) the claim on the bond is independent from the contract claims; 3) splitting the action into two separate cases in two different counties may result in two separate outcomes; and 4) the statutory venue of §713.23 controlled.[27] The trial court applied its discretion and refused to sever the action. Furthermore, §713.23(1)(f) provides that a payment bond "must not contain any provisions restricting the venue of any proceeding."[28]

Conversely, in *Walbridge Aldinger Company v. Robert's Plumbing Contractors, Inc.*, 800 So. 2d 285 (Fla. 3d DCA 2001), the Third District reversed the trial court's denial of a contractor's motion to change venue. A plumbing subcontractor filed a construction lien in Monroe County for amounts due, and the contractor transferred the construction lien to a bond under F.S. §713.24(1). When the subcontractor filed suit, the contractor moved to change venue to Broward County based upon a contractual venue provision in the subcontract.

In reversing the trial court's denial of the change of venue, the appellate court held that a mandatory venue selection clause in a contract should be enforced when there is no contention that the venue clause was somehow unreasonable, unjust, or procured through fraud. In addition, the venue provision contained an express reference to claims against the surety,[29] and the court deemed that contractual venue provision to control over the statutory provision in §713.24.

If the party filing a complaint desires to avoid the venue provision in the subcontract, it may file the action only against the surety since claims against the payment bond may be independently maintained.[30] In *American Insurance Company v. Joiner Electric, Inc.*, 618 So. 2d 799 (Fla. 1st DCA 1993), a subcontractor on a prison facility located in Columbia County filed suit against the surety under §255.05. The action was brought in Leon County, but the surety sought an order requiring the transfer of the action to Lake County, pursuant to the venue provision contained in the subcontract between the contractor and subcontractor.

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The trial court refused to transfer the venue. The First District upheld the decision and

found that the surety had ignored the language contained in its labor and material bond issued to the prime contractor requiring that an action against the surety or contractor may be brought in the county in which the public building or public work is being constructed or in any other place authorized by the provisions of F.S. Ch. 47.[31] The court also applied the reasoning in *Carlson Southeast Corp. v. Geolithic, Inc.*, 530 So. 2d 1069 (Fla. 1st DCA 1998), that when the performance required under a contract is a payment of money and no place for payment is specified in the contract, payment is due where the creditor resides because in such instance the debtor must seek the creditor. For purposes of this analysis, the contract is a surety bond which adopts the venue provisions of Ch. 47 and contains its own venue provision. The venue selected by the surety in its bond was Leon County, and the court refused to transfer venue.

Procedure to Transfer Venue

The party complaining about venue must raise the issue in its first responsive pleading, either by motion or affirmative defense,[32] and failure to raise the venue issue at the outset will result in a waiver of any contractual venue provision.[33] A motion to dismiss is not the favored procedural mechanism to enforce the venue provision.[34] Instead, a motion to transfer action for improper venue should be filed, asserting the existence of the contractual venue provision. Filing the motion to transfer under Fla. R. Civ. P. 1.140(b)(3) (2009) will not only protect against the waiver of the venue defense, but it will also serve as the responsive motion to the complaint, thus, preventing the claimant from seeking a default. The actual provision, with reference to the page and provision designation, should be included verbatim into the motion to transfer, since some complex construction contracts may be lengthy and complex.

If the motion to transfer is granted, careful attention should be paid to drafting the transfer order. Under Fla. R. Civ. P. 1.060 (2009), the party who commenced the action will likely be ordered to effectuate the transfer. The transfer of the case to the appropriate venue is accomplished when the transferring party contacts the clerk of the court of the appropriate venue and pays the clerk's service charge in the court to which the action is being transferred. The case file, along with a certified copy of the order transferring the case will be sent to the new venue.[35] If the transfer is not made within 30 days, the court ordering the transfer *shall* dismiss the action without prejudice.[36] The party requesting the transfer should take care to include a specific reference to this provision of the rule in the order as the dismissal of the action may affect applicable statute of limitations for construction lien foreclosures and actions against payment bonds.

Conclusion

Venue in construction disputes can involve a myriad of statutory schemes coupled with multifaceted contractual provisions. As a starting point, parties need to address §47.025 to ascertain whether their respective actions must be brought in Florida. If venue lies within Florida, parties should then address the specific principles that pertain to Florida venue — *i.e.*, permissive versus mandatory contractual provisions, as well as statutory provisions, case law and procedural rules regarding construction liens, payment bonds, and transfer of venue. Due consideration must be given to the choice of venue and the specific facts so that a venue provision is not waived or rendered void or unenforceable, resulting in the loss of the benefit of the bargain related to the venue of construction disputes.

[1] *See In re Fireman's Fund Ins. Co.*, 588 F.2d 93 (5th Cir. 1979) (wherein the Fifth Circuit transferred an action away from the location where the contract was to be performed. The court held that the Miller Act's venue provision is not jurisdictional, and, thus, can be waived or varied via a contract's negotiated forum selection clause) (note that this case cites to 40 U.S.C. §270, which is the former section for the Miller Act. The current section for the Miller Act is 40 U.S.C. §3131, *et seq.*).

[2] *See* Philip J. Padovano, Florida Civil Practice §2.1 (2003 ed.), *citing Barr v. Florida Bd. of Regents*, 644 So. 2d 333 (Fla. 1st D.C.A. 1994).

[3] *See id., citing Mingione v. Mingione*, 756 So. 2d 197 (Fla. 4th D.C.A. 2000).

[4] *See, e.g., Four Star Resorts Bahamas Ltd. v. Allegro Resorts Mgt. Servs. Ltd.*, 734 So. 2d 576 (Fla. 3d D.C.A. 1999) (discussing the premise that parties are free to establish venue by agreement or stipulation); *but see Florida Dep't of Children and Families v. Sun-Sentinel, Inc.*, 865 So. 2d 1278 (Fla. 2004) (addressing the "home venue privilege." The "home venue privilege" is the statutory requirement, which provides that actions brought against the state, or an agency or subdivision of the state, is only proper in the county in which the state, or the agency, or subdivision of the state, maintains its principal headquarters.).

[5] *See* American Institute of Architects A201, General Conditions of the Construction Contract (2007), Art. 15.3.3, requiring dispute resolution to be maintained in the county where the project is located.

[6] *See* Fla. Stat. §47.025 (2009).

[7] *See id.*

[8] "Contractor" is defined as "a person other than a materialman or laborer who enters into a contract with the owner of real property for improving it, or who takes over from a contractor as so defined the entire remaining work under such contract. The term 'contractor' includes an architect, landscape architect, or engineer who improves real property pursuant to a design-build contract authorized by [section 489.103(16)]." Fla. Stat. §713.01(8) (2009). "Subcontractor" is defined as "a person other than a materialman or laborer who enters into a contract with a contractor for the performance of any part of such contractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in [§443.101]." Fla. Stat. §713.01(28) (2009). "Sub-subcontractor" is defined as "a person other than a materialman or laborer who enters into a contract with a subcontractor for the performance of any part of such subcontractor's contract, including the removal of solid waste from the real property. The term includes a temporary help firm as defined in [§443.101]." Fla. Stat. §713.01(29) (2009). "Materialman" is defined as "any person who furnishes materials under contract to the owner, contractor, subcontractor, or sub-subcontractor on the site of the improvement or for direct delivery to the site of the improvement or, for specially fabricated materials, off the site of the improvement for the particular improvement, and who performs no labor in the installation thereof." Fla. Stat. §713.01(20) (2009).

[9] *See Kerr Construction, Inc. v. Peters Contracting, Inc.*, 767 So. 2d 610, 611-12 (Fla. 5th D.C.A. 2000).

[10] *Id.* at 612.

[11] *See id.*

[12] *See id.* at 613.

[13] *See id.* at 613.

[14] *See id.*

[15] *See, e.g.*, Fla. Stat. §47.025 (2009).

[16] As a practical note, an initial inquiry must be made when dealing with an out-of-state contractor, namely, determining whether the contractor is even properly licensed to perform its scope of services in Florida. *See* Fla. Stat. §489.128 (2009).

[17] *Quality Concrete and Rental, Inc. v. K.A. Lumber Company, Inc.*, 895 So. 2d 1230 (Fla. 4th D.C.A. 2005).

[18] *Druhill Construction., Inc. v. RSH Constructors, Inc.*, 518 So. 2d 951 (Fla. 1st D.C.A. 1988).

[19] *See* Larry R. Leiby, Florida Construction Law Manual, *Contract Terms* §7:28 (2008-2009 ed.).

[20] *Travel Country RV Center, Inc. v. Baxter*, 932 So. 2d 547 (Fla. 1st D.C.A. 2006).

[21] Place of payment, location of defendants, and location where the cause of action or transaction accrues.

[22] Fla. Stat. §713.08(5) (2009).

[23] *Tietig Company v. Riccio*, 551 So. 2d 1016 Fla. (Fla. 3d D.C.A. 1984).

[24] Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited, or file a motion in a pending action to enforce a lien, for an order to require additional security, reduction of security, change, or substitution of sureties, payment of discharge thereof, or any other matter affecting said security. Fla. Stat. §713.24(3) (2009).

[25] *See Morganti South*, 397 So. 2d at 379.

[26] The court did recognize that standing alone, the contract claim was subject to the venue provision.

[27] *Miller & Solomon*, 837 So. 2d at 1184.

[28] Any lienor has a direct right of action on the bond against the surety. A bond must not contain any provisions restricting the classes of persons protected thereby or the venue of any proceeding. Fla. Stat. §713.23(1)(f) (2009).

[29] The venue provision in *Walbridge* read as follows: "In the event of a suit by Walbridge, or its surety, against Subcontractor, or its surety, or those with whom it deals on behalf of this Subcontract Agreement, or suit by Subcontractor, or its surety, or those with whom it deals on behalf of this Subcontract Agreement against Walbridge or its surety, the venue of such suit shall only be in the state court of Hillsborough County, Florida." Walbridge ▲

and its subcontractor subsequently executed a change order which changes Hillsborough County to Broward County.

[30] Any lienor has a direct right of action on the bond against the surety. A bond must not contain any provisions restricting the classes of persons protected thereby or the venue of any proceeding. Fla. Stat. §713.23(f) (2009).

[31] *American Insurance Co.*, 618 So. 2d at 799.

[32] *Gross v. Franklin*, 387 So. 2d 1046 (Fla. 3d D.C.A. 1980).

[33] *Marine Environmental Partners, Inc. v. Johnson*, 863 So. 2d 423 (Fla. 4th D.C.A. 2003).

[34] *Gross*, 387 So. 2d at 1048.

[35] Fla. R. Civ. P. 1.170(j) (2009).

[36] See Fla. R. Civ. P. 1.060(c) (2009).

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This column is submitted on behalf of the Real Property, Probate and Trust Law Section, John B. Neukamm, chair, and William P. Sklar and Richard R. Gans, editors.

Journal HOME

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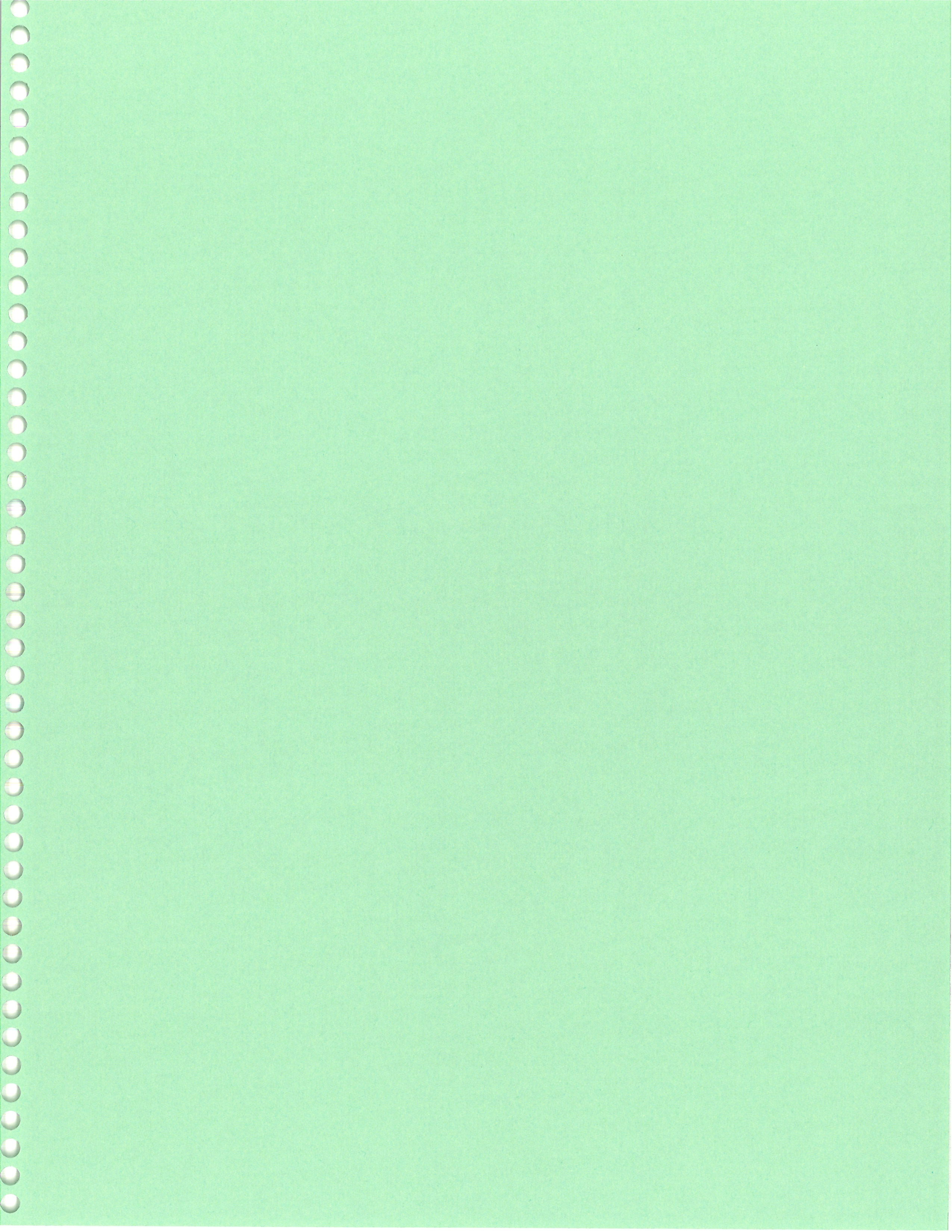

Disney sued by subcontractor over Magic Kingdom project

Disney Parks and Resorts previews the "Star Wars" projects coming to Disney's Hollywood Studios and Disneyland theme parks using a model at the D23 Expo.

By **Gabrielle Russon**
Orlando Sentinel

AUGUST 14, 2017, 1:40 PM

A subcontractor that provided steel for a Magic Kingdom construction project is suing Disney, alleging nearly $80,000 in unpaid bills.

Jacksonville-based Allstate Steel Company accused the theme parks and the general contractor, Vanson Enterprises of Winter Park, of not paying for construction work at a site in Adventureland's Liberty Square, according to a lawsuit filed Thursday in Orange Circuit Court.

"We will respond to these allegations in court," Disney said in a statement when reached for comment Monday.

In March 2015, Allstate signed a subcontractor's agreement with Vanson for the work, court documents said.

The project included the Verandah Restaurant, which has been known for its character meet-and-greets.

Allstate provided the labor and "specially fabricated steel" for the project, finishing the work in August 2016, but Vanson and Walt Disney refused to pay the remaining $79,481 allegedly owed, the lawsuit said.

"Allstate has exhausted all other remedies by making multiple payment demands upon Vanson," the lawsuit said. "Upon information and belief, Vanson has not been paid for the scope of services for which Allstate is seeking payment."

In November, the company, which is also seeking interest, court costs and attorney fees, recorded a claim of lien on the property, according to court records.

Vanson could not be reached for comment. Allstate's attorney declined to comment.

Got a news tip? grusson@orlandosentinel.com or 407-420-5470; Twitter, @GabrielleRusson

Disney fans buy up goodbye merchandise as two rides close »

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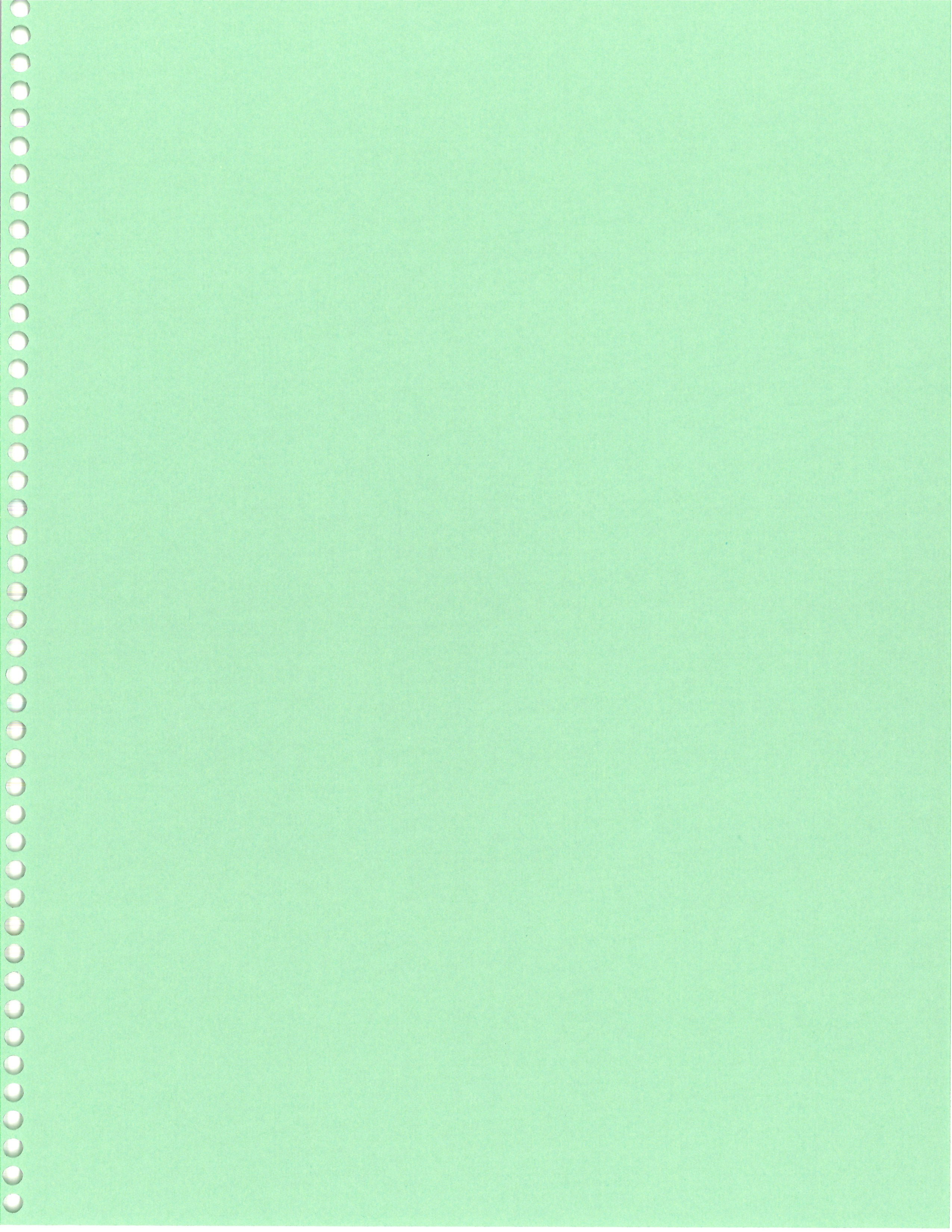

EFFECTIVE USE OF ARBITRATION

Friday, January 26, 2018

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EFFECTIVE USE OF ARBITRATION

I. Introduction

Arbitration is an alternative dispute resolution technique that, managed effectively, can be quicker, more economical, and more efficient than traditional litigation. In the United States, arbitration results from the parties' voluntarily agreement, either through an arbitration clause in a contract or a signed agreement after a dispute arises. A well written agreement and effectively managed proceeding allow the parties more control over costs, scheduling, and procedures than in litigation. Accordingly, many companies choose arbitration as the preferred method of dispute resolution. This paper, authored by attorneys experienced as advocates and neutrals in construction and commercial arbitration, discusses many ways in which sureties and other participants in construction disputes may improve the effectiveness of the arbitration process.

II. Flexibility – the key to effective arbitrations

A. Flexibility is key to achieving the fundamental goals of arbitration

Arbitration is intended to be a private, prompt, and economical means of resolving disputes in a final and binding manner, outside the traditional court system.1 The surest way for parties to achieve these goals is to intentionally structure the arbitral process to meet their needs and preferences. There is no one type of arbitration; it can be tailored by the participants in many ways.2 "[A]rbitration is all about opportunities for choosing--both pre-dispute (at the time of contracting) and post-dispute (both before and during the arbitration process)."3 Arbitrations, rightly planned, afford the parties to a private dispute the opportunity to decide that dispute using an agreed-upon process that avoids the types of often "lawyer-driven" and "legalized" court-like procedures that give lawsuits such a deservedly bad reputation.

In arbitration, unlike in litigation, the parties have flexibility to make the following types of choices:4

- The parties may make the following process decisions:
  - What "rules", if any will apply;
  - Scope of discovery;
  - Protection of confidential information in discovery and hearings, to insure privacy to an extent unavailable in public court proceedings;
  - When, how, and how long the evidentiary and any other hearings will be conducted;

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1 Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law,* 70 TULANE L. REV. 1945 (1996).

2 As Thomas J. Stipanowich reminds us in his symposium keynote speech for the 2016 Pound Conferences, titled *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution,* "When people ask you about your perspectives on arbitration, I tell them, always ask, 'What *kind* of arbitration?'" 18 CARDOZO J. OF CONFLICT RESOLUTION 513, 533 (2017).

3 Stipanowich, *Living the Dream*, supra note 2, at 533.

4 This list is not intended to be exhaustive, and is compiled from many sources, including the author's experience. Additionally, see e.g., Roy Weinstein, Cullen Edes, Joe Hale and Nels Pearsall, *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings* 24-25 (March 2017), www.micronomics.com.

- The types of motion practice that will be allowed;
- Availability and type of sanctions;
- The length of time for the entire dispute resolution process;
- Whether to have mediation and if so when;
- The format and degree of detail provided by the arbitrator(s) in the final decision; and
- Whether and how any appellate review may be allowed

- The parties also may decide on legal issues such as:
  - What arbitral, choice of law, and subject matter law will apply;
  - Whether a court or the arbitrator will decide questions of arbitrability and enforceability of arbitration agreement;
  - What evidentiary law will apply;
  - What remedies, including injunctive relief will be allowed in arbitration or whether limited recourse to the courts will be allowed or needed; and
  - Standard of review, if any, on appeal.

- The parties have a right to select arbitrator(s), including possible appellate arbitrators, and make choices concerning:
  - The number of arbitrators;
  - Arbitrator qualifications and experience;
  - Arbitrator neutrality;
  - Arbitrator temperament and commitment to efficient, cost effective resolution; and
  - The Arbitrator's authority.

- The parties' control of process and the time involved results in more flexibility as to their direct and indirect costs, including:
  - Savings in legal fees and expenses;
  - Limiting the loss of use of funds, accrual of interest due to delay; and
  - Avoiding unnecessary delay and thus, loss of time, energy and focus of company executives and employees.

B. *The drafting of the pre-dispute arbitration agreement is the first and best opportunity to exercise control and flexible decision making.*

The often-criticized drift of arbitration away from a party-controlled, cost effective and expeditious form of conflict resolution towards the worst aspects of litigation is due in part to the "lack of proper contract drafting."[5] Too often the arbitration provision in a contract is little more than boilerplate, taken "off the shelf," rather than carefully and specifically negotiated for the particular construction project or to accommodate the parties' preferences and requirements. As a result, sometimes, the arbitration agreement is silent as to important issues, or so ambiguous or in conflict with other provisions of the contract documents, that the parties find themselves embroiled in court proceedings – just where they did not want to be – for purposes of interpreting or enforcing the arbitration agreement.

Anecdotal but informative studies appear to indicate that many clients feel that pre-dispute negotiation of arbitration agreements is neither open-ended nor a priority, given many other, more significant business terms and conditions in play. Thus, when the arbitration

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5Stipanowich, *Living the Dream*, supra note 2, at 537.

provisions of a contract are limited to a few sentences or even a clause that merely mandates arbitration pursuant to the rules of a particular institutional arbitration organization, parties may be reluctant to try to change this construct, even if they know they would like to and probably could negotiate something better. Or, it is possible that transactional lawyers involved in drafting a particular contract are not sufficiently experienced in conflict resolution to be able to anticipate the risks associated with boiler plate arbitration provisions. "Finally, when parties enter into contractual relationships they can only hazard educated guesses about the nature and scope of disputes that might arise, requiring contractual templates to be flexible enough to accommodate whatever might happen."6

One of the challenges in drafting arbitration agreements is the delicate balancing act between the "*sin*" of omission (i.e., omitting a crucial or useful element from an arbitration clause), and over-specificity (i.e., providing too much detail, which could produce a clause that is unnecessary or inappropriate for the parties' actual dispute or is difficult to put into practice). Ideally, at a bare minimum, arbitration provisions should specify guidelines that would facilitate better and efficient management of the process. They may include a fair but abbreviated timeline and limitations on discovery and motions in order to diminish delay and reduce cost.

There are a number of templates, articles and other resources available that can serve as guidelines or checklists to suggest language that will better articulate the drafting parties' dispute resolution goals and expectations. For example, acknowledging that a "one size fit all" approach to arbitration no longer meets the needs of business clients' needs, the leading ADR providers, including JAMS and the American Arbitration Association ("AAA"), offer drafting guidance for designing a flexible, streamlined, economical and efficiency-focused conflict resolution process.7

When drafting arbitration agreements, counsel should address, at a minimum, the following issues:

- Are any of the provisions of the proposed arbitration agreement inconsistent with other provisions of the contract in which the agreement is embedded or provisions in any other contracts relevant to the transaction, so as to give rise to unwanted litigation to resolve the inconsistency?
- Should arbitration be mandatory or permissive?
- Should there be conditions precedent to arbitration, such as mediation?
- Should there be one, two, or three arbitrators, should they all be neutral, and should they have particular professional expertise or other qualifications?
- What should be done, in the event an arbitrator is unable to serve through the end of the decisional process, due to illness or other incapacity?
- Should the arbitration agreement specifically incorporate the rules of a particular ADR institutional service provider or should it be "*ad hoc*"?

6Stipanowich, *Living the Dream*, supra note 2, at 538.

7 *See e.g.*, PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION (Thomas J. Stipanowich, ed. Coll. Comm. Arbitrators 2010) [hereinafter PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION], published as a stand-alone document or as the appendix to the College of Commercial Arbitrators' GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION (James M. Gaitis, ed., 2014) ; *See also, e.g.,* JAMS Clause Workbook, "A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts" (JAMS 2015) which suggests clauses for negotiation or mediation prior to arbitration, appointment of an emergency arbitrator, arbitrator qualifications, processes for appointment of arbitrators, confidentiality, governing law, punitive damages, limitation of liability, awarding fees, appeal, expedited arbitration procedures, discovery limitations, pre-hearing resolution of dispositive issues, and process deadlines.

- Should the agreement contain provisions that modify institutional provider rules, or specific statutory schemes, if so, how?
- Should the parties allocate fees or limit damages?
- Are there any litigation type excesses or abuses that the parties specifically want to preclude?
- Should the agreement set out a detailed regimen for the mechanics of the process, including venue, discovery, motions, length of time for conclusion of the process, and scope of review?
- Should the arbitrator's power be broader or more limited than otherwise provided by relevant statutes or rules?
- Should the process be expedited or streamlined?
- Should there be specifically defined appellate remedies?
- Should the agreement cover claims by or against the parents or subsidiaries of the contracting corporate parties or provide for joinder of other nonparties to the agreement?
- Should the agreement be limited to contract based claims and damages or include tort and statutory claims and extraordinary remedies?

Counsel who take the time to master the law related to the scope and enforceability of arbitration agreements and to understand the options as to rules and expedited procedures available with nearly every ADR provider will afford their clients the option to craft a private dispute resolution process that may better meet their needs and expectations in a particular transaction. Additionally, a proficiency in drafting arbitration agreements is another opportunity for outside counsel to provide value to their clients and thereby distinguish themselves from their competitors.

C. Expedited construction adjudication of performance bond disputes as an example of a detailed arbitration agreement drafted for a specific type of construction dispute.

An excellent example of an arbitration agreement carefully crafted to suit a specific business need is a performance bond form recently offered by Travelers Casualty and Surety Company of America for use with special drafted JAMS rules in connection with certain types of construction projects.8 Performance bond claims often arise mid-job, when an obligee declares the principal in default. Because of the need for the project to proceed with minimal delay, such claims raise issues of unique urgency. For the sake of the parties and the construction project, it would be best, if termination or default claims on performance surety bonds could be resolved quickly enough to allow the project to proceed, with the least possible legal expense, based on the decisions of an impartial decision maker knowledgeable about the construction processes and the construction, surety, and dispute resolution law at issue, while at the same time, preserving the parties' rights in the event of decisional error significant enough to warrant a party seeking later review.

Many sureties and their attorneys readily cite bitter, expensive war stories, resulting in what they perceive to be wrongly reasoned rulings, to justify their distaste for arbitration. Thus, many in the surety industry oppose participation in construction arbitration, even when other parties to a bonded project try to join them in a pending arbitration proceeding. Perhaps for reasons related to a belief that a surety's rights and defenses will not be understood or treated fairly in arbitration, sureties frequently opt to incur the expense of moving to stay or dismiss efforts to force them to participate in arbitration. A successful battle against participation in arbitration is not only expensive, but is fraught with risk at several levels, including that a surety

8 A copy of the prototype of this bond is attached to this paper as Appendix A.

may find itself barred from later litigating issues decided in the arbitration to which it was not a party. Also, it may be speculative, if not erroneous, to assume in any one case, that an unknown judge or jury will give greater weight to or even understand the surety's legal arguments than the arbitrator(s) would have.

However, since 2015, new JAMS surety dispute resolution rules, in tandem with the new Travelers performance bond, provide an alternative method for resolving performance bond claims in arbitration, which meets each of the desired dispute resolution dream goals cited above.[9]

In the Travelers bond, the surety agrees it will arbitrate questions of whether its principal is in default; whether the obligee has complied with its contractual obligations; and whether Travelers is legally obligated to perform as demanded by the obligee. Moreover, the bond mandates an arbitration process that is immediate; mandates quick decision-making – usually within 30 days - to minimize delay to the project and legal expense; specifies the use of a JAMS neutral with proven expertise in the construction, engineering, architectural and insurance industries as well as the best construction dispute resolution processes, using the 2015 JAMS rules specifically designed for use in expedited construction surety dispute resolution; and is binding on the parties, until the project is completed, but preserves the parties' right of appeal on the merits, in the event they believe any perceived error merits the expense of legal proceedings.

The new JAMS Dispute Resolution Rules for Surety Bond Disputes are unique in the surety/ADR industry, and were designed to insure a speedy resolution of obligee claims under performance bonds, regardless of the specific bond language. While it might appear to be a novel experiment to include the concept of expedited resolution of construction disputes pursuant to JAMS rules as a specific provision of a performance bond, the concept of such expedited dispute resolution is not new to international construction jurisprudence. Travelers' bond was modeled in part on a dispute resolution method commonly used in Britain, known as expedited construction adjudication. Like the procedures outlined in the Travelers' bond and JAMS rules, Britain's construction adjudication process provides that disputes arising during construction will be decided by a party-agreed-upon neutral with proven expertise in construction law, usually within 30 days of submission of the dispute. Philip Bruner of JAMS Global Engineering and Construction Group, who was an advisor to Travelers in the drafting this performance bond, credits this ADR method with reducing construction litigation in the United Kingdom by 80%.[10] Moreover, he says it is the British experience that the parties accept the neutral adjudicator's expedited decision in nearly 85% of the cases. Thus, under this expedited resolution process, delay to the project is minimized, dispute resolution expenses are curtailed, and, usually, litigation is avoided altogether, notwithstanding the fact that the parties' rights of appeal are preserved.

The early dispute resolution procedure provided in the Travelers performance bond also is considered to be beneficial for business reasons as it is intended to provide a better, quicker, less expensive way of solving construction disputes. The promise of quick resolution of the decision whether or not the surety will perform is intended to address an obligee's most common complaint about traditional bonds: the harm caused to the project by the surety's perceived delay in making its decision to perform or its outright refusal to perform, even when the obligee believes its claim is undisputable. Consequently, at this point in time, Travelers is offering the

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9 Travelers has made this bond form available to the industry, rather than assert any proprietary claim to its provisions. The JAMS expedited rules can be used independent of the Travelers bond.

10 *See* Philip Bruner, *Settle Now, Argue Later: Expedited Construction Adjudication is Coming to North America,* THE DISPUTE RESOLVER (Am. Bar Ass'n Nov. 16, 2016), http://abaconstructionforumdivision1.blogspot.com/.

bond on design-build projects as a better alternative to the unconditional letters of credit that obligees may otherwise require as security for contractor performance on certain large projects, especially international ones.

The great success of similar early dispute resolution methods in Britain, the fact that parties to any surety bond or construction contract can agree to use the JAMS construction dispute resolution rules after a dispute arises, even though the bond or contract has no arbitration provisions, and the existence of the experienced construction and surety lawyers on JAMS Global Engineering and Construction Panel, justifies serious consideration for using this type of quicker, less expensive, business-positive process for resolution of performance bond and other construction disputes.

D. *Once a dispute arises, all stakeholders in the arbitration process have key roles to play in designing and managing the arbitration to avoid the delay and expense of litigation and reinforce the desired benefits of arbitration.*

There are usually at least three or four sets of stakeholders in the construction arbitration process: the business users, their in-house counsel (if any), their outside advocates, and their chosen arbitrator(s). Each can influence the design and management of a given dispute process to find solutions to the types of challenges that can graft unnecessary and inadvisable attributes of litigation onto the arbitration process.11

Once a dispute arises, several choices are critical to the ability of parties and their counsel to design an arbitration proceeding that is as economical, efficient and otherwise consistent with their business priorities, as possible. Some of these choices include the following.

Whether or not the arbitration contract requires "step" dispute resolution, the parties should consider requiring mediation or formalized negotiation of a dispute before or immediately after initiating arbitration. Dispute resolution outside an adversarial proceeding may help preserve the parties' relationships, as well as save time and avoid unnecessary expense.

As discussed in more detail below, the parties and the arbitrator should limit discovery to only what is proportionate and necessary, rather than a broader scope of discovery that their advocates may be used to getting in litigation.

The parties should adopt a cooperative approach to the arbitration process as much as possible, minimize motion practice and agree to adopt time and cost savings solutions in presenting their evidence at the final hearing. The arbitrator and parties should agree to interim and outside time limits for conducting the arbitration phases and the final hearing. Whether or not a surety is involved, fast track or expedited arbitration may be particularly useful in a construction context. Both AAA and JAMS have expedited or streamlined rules for arbitration which parties could invoke if it suits the circumstances of the dispute.

The parties and their in-house counsel should remain actively involved in the process, throughout the arbitration. It is the parties' responsibility to ensure that all such strategic decisions by outside counsel are consistent with the parties' desires to save money and avoid delay. First, this includes careful preparation for and possible participation by the party or its in-house counsel in the early, prehearing conference(s) at which important decisions are made about limiting discovery, the scope of motion practice, and how long the arbitration will take. These discussions afford excellent opportunities for the parties to collaborate with the arbitrator to design an effective prehearing process tailored to the issues and needs of their dispute. An experienced arbitrator – and experienced arbitration counsel - will insure that at least the following issues are discussed and, if possible, decided, before or not later than the prehearing

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11 *See* Richard Chernick & Zela Claiborne, *Reimaging Arbitration,* in 37 LITIGATION, NO. 4 (Am. Bar Ass'n 2011) for an excellent discussion of the respective roles of these four stakeholders in "reimaging" arbitration to avoid the evils of litigation.

conference(s):12

- Clarification of scope of the issues to be resolved;
- Identification of the parties to be included;
- Arbitrability of the issues;
- Neutrality of party appointed arbitrators;
- Governing law, applicable rules and arbitration law;
- The parties' interest in mediation;
- Hearing venue(s);
- Exchange of information among parties;
- Securing information from third parties;
- Limits on depositions;
- eDiscovery;
- Expert witness designation and discovery;
- Confidentiality protections;
- Procedures to resolve discovery disputes;
- Whether there is a need for and timing of dispositive motions;
- Identification of witnesses and documents to be used at hearing;
- Use of witness statements in lieu of live testimony;
- Procedures for expedited introduction of documents at hearing;
- Applicability of rules of evidence;
- Order of proof;
- Whether to have a transcript or other record of the hearing;
- Bifurcation of issues to suit witnesses or hear discrete issues in a logical order;
- Briefing and oral argument requirements for hearing;
- Remedies sought and any limitations thereon;
- Form of award;
- Availability and proof of attorneys' fees and costs; and
- Any appellate procedures and standards.

It is incumbent on the parties and the arbitrator to ensure that the decisions made at the preliminary conference are realistic, consistent with the parties' goals and the arbitral model, and thereafter, that the decisions are enforced. Thus, selection of a strong, experienced, managerial arbitrator is a key aspect of designing effective processes and achieving flexibility, economy and efficiency in effecting those processes. The effective selection and role of the arbitrator are discussed in detail below.

In summary, the cooperation of all stakeholders in a given arbitration is necessary to bring about the best that arbitration can be. As Richard Chernick, managing Director of the JAMS Arbitration Practice and former Chair of the ABA's Dispute Resolution Section, observes:

> Where parties and arbitrators approach the design and effectuation of the arbitration proceeding as a partnership, and where all participants have an interest in achieving a process that is best suited to the particular case, and where the arbitrator is a skilled manager of the arbitration, even the most complex arbitration can present the opportunity for an effective exercise in quality

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12 This list is similar to those used by countless arbitrators and similar variations can be found in numerous articles and other authorities. It is also discussed in Richard Chernick & Zela Claiborne, *Reimaging Arbitration, supra* note 10.

decision-making.13

III. Mastering the Arbitral Rules and Statutes

A. The Rules

The rules promulgated by governing arbitral organizations like AAA and JAMS afford the parties the opportunity to relax or limit the applicability of formal rules of evidence and judicial rules of procedure, while also limiting the scope of motion practice.14 These rules are intended to allow for quicker resolution of matters (including complex disputes) without costly pre-hearing discovery and motion practice. Additionally, both AAA and JAMS endorse the use of relaxed rules of evidence. The AAA's Rules for Commercial Arbitration provide that "[c]onformity to legal rules of evidence shall not be necessary . . .."15 The Rules further provide that "[t]he arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant."16 Similarly, JAMS' Comprehensive Arbitration Rules & Procedures states:

> [s]trict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence....17

In addition to the relaxed rules of evidence, arbitration procedures customarily include expedited rules of procedure. For instance, JAMS provides clients with the option to select a simplified arbitration process for those cases where the claims and counterclaims do not exceed $250,000, while providing a full and fair hearing for all parties.

Under JAMS' Streamlined Arbitration Rules & Procedures:

> The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ("ESI")) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined

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13 Richard Chernick, *Developing Issues in Commercial Arbitration: The "Managerial" Arbitrator Model,* 12 (Internal JAMS training materials, on file with JAMS) [hereinafter Chernick, *The "Managerial" Arbitrator Model]*

14 This article is not intended to represent that the AAA and JAMS are the only independent groups that have procedures in place for arbitration. There are several other governing bodies that contain their own procedures and rules for arbitration. For purposes of this presentation, JAMS and the AAA are merely examples.

15 Rule 34(a), AAA Commercial Arbitration Rules [hereinafter AAA Commercial Rules].

16 Rule 34(b), AAA Commercial Rules.

17Rule 22(d), JAMS Comprehensive Arbitration Rules & Procedures [hereinafter JAMS Comprehensive Rules].

by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.18

The AAA has its own expedited procedures. In particular, the AAA's Commercial Arbitration Rules provides that "[u]nless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds $75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs."19 Under AAA's expedited procedures, parties are not required to exchange copies of exhibits that they intend to use at the final hearing until two business days prior to the hearing.20

Regardless of the track (i.e., whether expedited or regular track matters), both JAMS and the AAA limit permissible discovery. Under a regular track matter in the AAA, the arbitrator is vested with the authority to manage the scope of document exchange.21 The AAA rules expressly require that any exchange of information be done with the view of "achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claim and defenses."22 Under these same rules, the arbitrator manages the issue of whether depositions will occur, and if so, how many. While some limited discovery is permitted, the arbitrator must balance the need for information with the goal of keeping the arbitration process streamlined and efficient.

JAMS procedures likewise confer the arbitrator with authority regarding document exchange and depositions. Under JAMS Rule 17,

> [t]he Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, and names of individuals whom they may call as witnesses at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.23

With respect to depositions, the JAMS rules expressly permit some limited depositions. Pursuant to JAMS Rule 17,

> [e]ach Party may take one deposition of an opposing Party or of one individual under the control of the opposing Party. The Parties shall attempt to agree on the time, location and duration of the deposition. If the Parties do not agree, these issues shall be determined by the Arbitrator. The necessity of additional depositions shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.24

Both the AAA and JAMS have mechanisms in place to control the exchange of discovery. The balancing act becomes how much discovery the parties seek to import into the arbitration process. Arbitration is not intended to become litigation, and safeguards must be in

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18 Rule 13(a), JAMS Streamlined Arbitration Rules & Procedures.

19 Rule 1(b), AAA Commercial Rules.

20 *See* Rule E-5, AAA Commercial Arbitration Rules for Expedited Procedures.

21 *See* Rule 22, AAA Commercial Rules.

22 *Id.*

23 Rule 17(a), JAMS Comprehensive Rules.

24 Rule 17(b), JAMS Comprehensive Rules.

place to ensure that parties do not abuse the arbitration process by employing litigation tactics. The advantages of arbitration can be lost if parties turn the process into a form of litigation.

Unlike litigation and its countless pre-trial motions, arbitration typically limits motion practice. Under the AAA rules, the permissibility of pre-hearing motions, including dispositive (summary judgment) motions, is governed by the arbitrator. Specifically, AAA states that "[t]he arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case."[25]

By contrast, JAMS rules explicitly afford parties with a right to file dispositive motions. Under JAMS Rule 18, "[t]he Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the request."[26] Otherwise, in both JAMS and AAA proceedings, the arbitrator must balance the interests of efficiency with considerations of procedural fairness to the parties.

As indicated above, arbitration governing bodies do not customarily provide for the same amount of discovery as is permitted in litigation. There is no blanket discovery formula that works for every arbitration. Instead, again, the balancing of the equities and efficiency must be done on a case-by-case basis by the arbitrator.

B. The statutes

Effective use of arbitration involves not only a mastery of the rules and procedures of the arbitration process, it also requires that counsel understand any state-specific requirements, to the extent not preempted by the Federal Arbitration Act ("FAA").[27] In 1925, Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[28] The FAA governs the enforcement of arbitration agreements, by making them "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," when relating to interstate commerce or maritime transactions.[29] In the 1980s, Congress expanded the FAA's reach to include international commercial, construction industry, employer-employee, and professional sport disputes.[30] This expansion made arbitration a more practicable option compared to lengthy litigation.[31] The enactment also compelled all fifty states to enact statutes governing arbitration in order to comply with federal law.[32]

The states derive their arbitration statutes from either the Uniform Arbitration Act (UUA)

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25 Rule 33, AAA Commercial Rules.

26 Rule 18, JAMS Comprehensive Rules.

27 The FAA applies to any contract "evidencing a transaction involving commerce", and it prevails over any conflicting state law, including state arbitration law. *See* 9 U.S.C.A. § 2 (2012).

28 Matthew R. Kissling, Note, *"A Sure and Expedited Resolution of Disputes": The Federal Arbitration Act and the One-Year Requirement for Summary Confirmation of Arbitration Awards, Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003) (quoting In re Consol. Rail Corp., 867 F. Supp. 25, 31 (D.D.C. 1994))*, 60 CASE W. RES. 889, 889 [hereinafter *A Sure and Expedited Resolution*].

29 9 U.S.C. §§ 1 et seq.; § 2

30 Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 7 (2008).

31 *Id.*

32 *See* Lexis Nexis, *50 State Survey: Alternative Dispute Resolution in Civil Cases (Statutes)* (April 2017).

or the Revised Uniform Arbitration Act (RUAA).33 The UAA addresses (1) jurisdiction; (2) venue; (3) compelling arbitration; (4) appointment of arbitrators; (5) rights of the parties to be represented by an attorney; (6) compelling witness testimony; ability to issue subpoenas; (7) depositions; and (8) the issuance, filing, modification, correction, or vacation of awards.34 Most states have adopted the UAA in some form.35

However, only nineteen states have adopted the RUAA.36 The RUAA covers provisions (1) regarding an arbitrator's power to grant summary dispositions; (2) providing temporary remedies; (3) consolidating arbitration proceedings; (4) requiring arbitrators to make disclosures; (5) granting arbitrators immunity; (6) arbitrator's authority; (7) and concerning the power of the arbitrator to award punitive damages or other remedies.37

State law can be pre-empted by the FAA even though there is no express provision or congressional intent for favoring pre-emption over arbitration.38 However, state arbitration laws are only pre-empted if state law conflicts with the FAA's objectives.39 For example, the New Jersey Supreme Court held arbitration agreements are not pre-empted by the FAA when they fail to inform plaintiff, "clearly and unambiguously," that he/she is waiving their right to a trial.40 On the other hand, the Supreme Court concluded Kentucky's "clear-statement rule" was pre-empted by the FAA because it "singles out arbitration agreements for disfavored treatment."41

Each state has its own set of variations that must be followed, the nuances of which are too voluminous for this presentation, as is a discussion of the interplay between the FAA and its state counterparts. Instead, as an example, a summary of the Florida arbitration law offers a general roadmap to use when researching arbitration codes and procedures in other states.

The Revised Florida Arbitration Code (i.e., Ch. 682, Fla. Stat.) ("Revised Code")42 governs arbitrations arising under Florida law. An agreement to arbitrate providing for arbitration in Florida confers exclusive jurisdiction on the court to enter judgment on an award under the Revised Code.43 Florida law makes it clear that certain provisions of the Revised Code may not be waived. For instance, before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not waive or agree to vary the effect of the requirements of: (i) commencing a Petition for Judicial Relief; (ii) making agreements to arbitrate valid, enforceable, and irrevocable; (iii) permitting provisional remedies; (iv) conferring

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33 *Id.*

34 *Id.*

35 *Id.* (Alabama, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin, and Wyoming)

36 *Id.* Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, Washington, and West Virginia

37 *Id.*

38 Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 432 (9th Cir. 2015).

39 *Id.*

40 Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 431, 441, 99 A.3d 306 (2014).

41 Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1425 (2017).

42 The Revised Code governs an agreement to arbitrate made on or after July 1, 2013. As of July 1, 2016, the Revised Code applies to all actions commenced after July 1, 2013 regardless of when the agreement was entered into by the parties. The Revised Code does not apply to actions or proceedings commenced or rights that have accrued before July 1, 2013. *See* § 682.013, Fla. Stat.

43 *See* § 682.181, Fla. Stat.

authority on arbitrators to issue subpoenas and permit depositions; (v) conferring jurisdiction; or (vi) stating the bases for appeal.44

Moreover, before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not: (i) agree to unreasonably restrict a party's right to notice of the initiation of an arbitration proceeding; (ii) agree to unreasonably restrict the right to disclosure of any facts by a neutral arbitrator; or (iii) waive the right of a party to have representation by an attorney at any proceeding or hearing (exception being that an employer and a labor organization may waive the right to representation by an attorney in a labor arbitration).45

In addition, parties to arbitrations that are subject to the Revised Code may not vary the effect of: (i) the applicability of the Revised Florida Arbitration Code (including the timeframes for when the Revised Code became effective); (ii) the availability of proceedings to compel or stay arbitration; (iii) the immunity conferred on arbitrators and arbitration organizations; (iv) a party's right to seek judicial enforcement of an arbitration pre-award ruling; (v) the authority conferred on an arbitrator to change an award; (vi) the right to confirmation of an award; (vii) the grounds for vacating an arbitration award; (viii) the grounds for modifying an arbitration award; (ix) the validity and enforceability of a judgment or decree based on an award; (x) the validity of the Electronic Signatures in Global and National Commerce Act; or (xi) the effect of excluding from arbitration under Chapter 682 of the Revised Code, disputes involving child custody, visitation, or child support.

Another significant variation is whether the arbitrator or a court will determine the arbitrability of a dispute.46 The Revised Code differentiates between the issue of enforceability of the contract as a whole and the issue of the enforceability of the contract's arbitration provision.47 Enforceability of the contract as a whole (unconscionability, fraud in the inducement, and other defenses to the contract itself) falls within the authority of the arbitrator to determine.48 Conversely, enforceability of the arbitration provision itself (i.e., whether a particular type of dispute is arbitrable under the law) remains the decision of the Court.49

Another state-specific aspect involves the breadth of an arbitration clause. In Florida, for example, the phrase "arising out of or relating to" the contract has been interpreted broadly to encompass virtually all disputes between the contracting parties, including related tort claims.50 The addition to the phrase "relating to" in conjunction with the phrases "arising out of" or "under," has been construed under Florida law as broadening the scope of the arbitration provision.51

One situation that often arises in the surety and construction context is the interplay between a construction lien foreclosure action and arbitration. Under Florida law, so long as parties preserve their right to enforce a claim of lien before expiration of the lien, it is proper for

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44 See § 682.014 (2)(a), Fla. Stat.

45 *See* § 682.014 (2)(b)-(d), Fla. Stat.

46 *See* Portland General Electric Co. v. Liberty Mutual Ins. Co., 862 F.3d 981 (9th Cir. 2017) (holding that arbitrability of project owner's claims against surety is a determination for the arbitrator pursuant to the applicable rules of the International Chamber of Commerce and Oregon substantive law).

47 *See* § 682.02, Fla. Stat.

48 *See id.*

49 *See id.*

50 *See, e.g.*, Perdido Key Island Resort Dev., L.L.P. v. Regions Bank, 102 So. 3d 1 (Fla. 1st DCA 2012).

51 *See id.*

the matter to be heard in arbitration.52 The filing of a limited claim in Court (as limited to construction lien foreclosure count) does not waive a party's right to demand arbitration.53 Along these same lines, it is imperative for counsel to know that in Florida, among other jurisdictions, a party must preserve the foreclosure claim by filing a claim in Court. The mere filing of an arbitration action, without initiating a construction lien foreclosure claim through the Court system, will not preserve the right to enforce the construction lien through the arbitration process or otherwise.54

Counsel must also recognize that states have specific statutes outlining the circumstances under which a party may seek to vacate an arbitration award. Florida has established the right of a party to move to vacate an award if: (i) the award was procured by corruption, fraud, or other undue means; (ii) there was evident partiality by an arbitrator appointed as a neutral arbitrator; (iii) there was corruption by an arbitrator; (iv) there was misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (v) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary so as to prejudice substantially the rights of a party to the arbitration proceeding; (vi) an arbitrator exceeded the arbitrator's powers; (vii) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection; or (viii) the arbitration was conducted without proper notice of the initiation of an arbitration as required so as to prejudice substantially the rights of a party to the arbitration proceeding.55

Another aspect that is dependent upon a state's specific laws pertains to the issue of appealing an arbitration award. In Florida, an appeal may be taken from: (i) an order denying a motion to compel arbitration; (ii) an order granting a motion to stay arbitration; (iii) an order confirming an award; (iv) an order denying confirmation of an award under certain circumstances; (v) an order modifying or correcting an award; (vi) an order vacating an award without directing a rehearing; or (vii) a judgment or decree entered pursuant to the Revised Code.56

States will also dictate the level of immunity that arbitrators are afforded. Subject to limited exceptions, Florida recognizes arbitrator immunity.57 Pursuant to Florida law, an arbitrator is immune from civil liability to the same extent as a judge acting in a judicial capacity.58 In fact, the failure of an arbitrator to make a disclosure required by the Revised Code (Section 682.041, Fla. Stat.) does not cause any loss of immunity.59 Furthermore, in a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any

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52 *See* Royal Palm Collection, Inc. v. Lewis, 36 So. 3d 168, 169 (Fla. 4th DCA 2010) (holding that a party was entitled to the entry of final judgment of foreclosure by a Court after the lien foreclosure matter was ordered to arbitration, and after the arbitrator entered his award).
53 *See* Price v. Fax Recovery Sys., 49 So. 3d 835, 837 (Fla. 4th DCA 2010) (holding that there was no waiver of arbitration rights where a party filed a motion to compel arbitration and a counterclaim at the same time without some indicia of waiver such as participating in discovery).
54 *See* Brookshire v. GP Construction of Palm Beach, Inc., 993 So. 2d 179 (Fla. 4th DCA 2008).
55 *See* § 682.13, Fla. Stat.
56 *See* § 682.20, Fla. Stat.
57 *See* § 682.051, Fla. Stat.
58 *See id.*
59 *See id.*

statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent as a judge acting in a judicial capacity.60

In summary, prudent arbitration counsel must research and become familiar with the specific rules and procedures of any applicable arbitral governing body and understand now to maximize the effectiveness of the process using the relaxed rules of evidence and procedure. It is a "process," and counsel must not get bogged down with every legal strategy that would otherwise have been utilized in litigation. Instead, there must be an understanding as to which arguments should be raised via limited motions, and which depositions—if any—are imperative for the arbitration process. Additionally, counsel must be aware of the state-specific statutory requirements and variations that may affect the arbitration process.

IV. Arbitration Counsel

There are obviously several pieces to the puzzle that ultimately lead to a successful arbitration. An important component in the process is the selection of arbitration counsel. This is fundamental for any effective arbitration. So how does a party go about researching and selecting appropriate counsel?

With the abundance of technology in today's market, the first step should be to search for the right fit for the particular matter. This may include reaching out to colleagues for any referrals, as well as utilizing online tools such as legal and professional search engines such as, but not limited to, LexisNexis®, Westlaw®, Martindale-Hubbell®, Google® or LinkedIn®.

When selecting arbitration counsel, it is important to take into consideration that litigation and arbitration are not the same, and cannot necessarily be prosecuted or defended through identical tactics. Unlike litigation, arbitration typically involves more big-picture themes as opposed to the degree of detail that may come with a bench or jury trial. The seasoned litigator who is accustomed to the theatrics or quick thinking that can accompany a jury trial may not necessarily be the best fit for a construction arbitration claim involving a surety, a general contractor and numerous subcontractors—all being heard by a single arbitrator. Conversely, the litigator who primarily handles arbitration matters may not be the best fit for a personal injury matter being tried for the eyes and ears of the jury. There are clearly those litigators who can comfortably wear either hat. The trick is to find that person who can present or defend the arbitration without allowing the process to get off-track.

Part of the selection process requires flexibility of expectation. Rarely will someone find one perfect attorney who fits every checkbox on the internal attorney-selection list. The party seeking counsel must define what it is looking for in the attorney based upon arbitration experience (both in the field of law, as well as in the arbitration process in general). Experience cannot be overlooked. If the matter involves a complex, construction dispute, the ideal attorney may not be the person who has exclusively handled employment-labor disputes.

Once the list of potential counsel is reduced to those who have the skill set for the dispute (i.e., construction and surety law experience), the next step is to further narrow down the list to those individuals who have arbitration experience. Due diligence here is vital. Counsel with modest experience in the field or nominal arbitration experience could prove detrimental.

Many issues can arise when counsel is not familiar with the arbitration process. One consequence is an increase in the cost of the arbitration, if the party is paying for counsel to learn the arbitration process as opposed to having counsel who is familiar with the various nuances of arbitration found within governing bodies such as AAA or JAMS. Counsel unfamiliar with the various rules and procedures can affect the speed, efficiency and cost of the arbitration process.

Another direct impact of having counsel unfamiliar with the arbitration process can be

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60 *See id.*

the creation of a negative perception of counsel for the arbitrator or arbitration panel. Arbitration, unlike litigation, is more focused on permitting most evidence in order for the arbitrator to see the full picture. Arbitrators will ultimately decide what information or evidence they do not consider persuasive. However, arbitrators often will not exclude evidence absent a compelling reason to do so. For this reason, arbitrators may become frustrated with counsel repeating evidentiary objections and arguments as if to build a record. This can slow the process for all parties. Counsel who focus more on the "show" versus the facts may believe their conduct creates a favorable impact on jury or an appellate court; but the opposite is true in arbitration, as arbitrators must be mindful of keeping arbitrations as efficient as possible for all participants.

V. The Arbitrator

The arbitrator (or arbitral panel) is the decision maker throughout the arbitration proceedings, serving as both judge and jury. The arbitrator will consider the law and the facts, and will eventually determine the final award. As discussed below, arbitration awards are very difficult to challenge.61 Thus, it is most important to choose an arbitrator carefully who is qualified to manage, understand and fairly resolve the type of complex dispute that is most likely to result from a troubled construction project. There are several other reasons why the choice of arbitrator is one of the most important the parties must make.

First, the arbitrator has considerable power over legal, factual and process decisions. Depending on the law of the jurisdiction, the language of the arbitration agreement, and the provisions of the applicable rules, the arbitrator may have the right to determine what issues are within the scope of the arbitration agreement.62 The arbitrator also rules on issues involving the sometimes-esoteric law of arbitration, the substantive law controlling the parties' dispute, scope of discovery, admissibility of evidence and all factual disputes.

Second, a good managerial arbitrator can act as an experienced guide to help the parties navigate the rules applicable to the proceeding, and when necessary will need to make decisions concerning management of a workable discovery plan and hearing scheduling issues, that best achieve the parties' desires for efficient and effective resolution of their dispute.

Third, an experienced arbitrator should know how to conduct efficient hearings, assist the parties in how best to provide their proof, and make rulings as needed to actively strike a balance between efficiency and fairness.

"Finally, an effective arbitrator creates a professional atmosphere and insists that counsel

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61 Pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, there are only four instances when a court may vacate an arbitration award: (1) where the award was procured by corruption, fraud, or undue means, (2) where there was arbitrator bias, (3) where there was arbitrator misconduct, or (4) where the arbitrator exceeded his or her powers. Pursuant to 9 U.S.C. § 11, there are only three circumstances where a court may modify or correct an award: (1) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award, (2) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted, or (3) where the award is imperfect in matter of form not affecting the merits of the controversy.

62 See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) (the parties may by contract give the arbitrator the power to determine issues of arbitrability); See e.g., JAMS Comprehensive Rule 11(b): "Jurisdictional and arbitrability disputes ... shall be submitted to and ruled on by the Arbitrator. The Arbitrator has authority to determine jurisdiction and arbitrability issues as a preliminary matter."

cooperate with each other and the arbitrator in all procedural aspects of the arbitration."63

A. The Ability to Choose

1. Selection of the arbitrator by agreement of the parties

One of the major differences between litigation and arbitration is the parties' ability to choose the decision maker. When litigating a case, the final decision is made by an appointed judge or a jury drawn from a randomly selected venire. Arbitration is decided by the arbitrator whom the parties select. Generally, the arbitration agreement between the parties will govern how to choose an arbitrator. Because an arbitration agreement is a contract, arbitrators must be selected pursuant to the method provided,64 otherwise the award may be vacated.65

For example, in *PoolRe Insurance Corp. v. Organizational Strategies, Inc.*,66 the United State Court of Appeals for the Fifth Circuit held that an arbitration award was properly vacated when the arbitrator was not chosen according to the method outlined in the arbitration agreement. There, the arbitration agreement clearly indicated that in the event of a dispute, an arbitrator would be selected by the Anguilla, B.W.I. Director of Insurance.67 After a dispute arose, an arbitrator was appointed "in a manner contrary to that provided in the [agreement]."68 The court reasoned that because the arbitrator had not been selected according to the contract-specified method, the award had to be vacated.69

A trivial departure from the parties' agreement, however, may not bar enforcement of an award.70 For example, in *Lexington Insurance Co. & Chartis v. Southern Energy Homes, Inc.*, the Supreme Court of Alabama held that the arbitrator-selection process unfolding only a few days outside the 30–day timeframe indicated in the arbitration agreement was a trivial departure from the agreement, and thus it was not necessary to vacate the award.71

2. Court appointment of Arbitrators

The FAA, authorizes a court to intervene in the arbitrator selection process upon the application of either party in only three instances: (1) if the arbitration agreement does not provide a method for selecting arbitrators, (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method, or (3) if there is a lapse in the naming of an arbitrator or arbitrators.72 Courts have defined "lapse" to

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63 Richard Chernick & Zela Claiborne, *Reimaging Arbitration,* note 10 *supra*.
64 *See* Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 625 (5th Cir. 2006), *see also Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672–73 (5th Cir. 2002).
65 *See* Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223, 226 (4th Cir. 1994); Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 832 (11th Cir. 1991); Avis Rent A Car Sys., Inc. v. Garage Employees Union, 791 F.2d 22, 25 (2d Cir. 1986).
66 PoolRe Ins. Corp. v. Organizational Strategies, Inc., 783 F.3d 256, 263 (5th Cir. 2015).
67 *Id.*
68 *Id.* at 264.
69 *Id.*
70 *See* R.J. O'Brien & Assocs., Inc. v. Pipkin, 64 F.3d 257, 263 (7th Cir. 1995); Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 626 (5th Cir. 2006).
71 Lexington Ins. Co. & Chartis v. S. Energy Homes, Inc., 101 So. 3d 1190, 1198 (Ala. 2012).
72 9 U.S.C. § 5.

mean "a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator selection process."73

The Uniform Arbitration Act (UAA), adopted by 19 states and the District of Columbia, gives three instances where the court, on a motion of a party to the arbitration proceeding, will appoint the arbitrator: (1) if the parties have not agreed on a method, (2) the agreed method fails, or (3) an arbitrator appointed fails or is unable to act and a successor has not been appointed.74

For example, in *New Port Richey Medical Investors, LLC v. Stern ex rel. Petscher*, the Florida Second District Court of Appeal held that a circuit court must appoint another arbitrator or arbitrators when an arbitration agreement designated a specific organization to administer the arbitration, but the organization was unavailable.75 There, the arbitration agreement subjected all disputes to the AAA rules, which determined how arbitrators were chosen.76 However, the AAA had recently changed its rules and no longer arbitrated certain types of disputes, including the dispute at issue.77 The court noted that pursuant to the language of Florida's adaptation of the Uniform Arbitration Act, the arbitration agreement was neither unenforceable nor invalid; rather, the arbitration proceedings would continue with a court-appointed arbitrator because the parties' agreed method of arbitrator selection failed.78

In codifying when the court will select an arbitrator, states that have adopted the UAA often chose language identical to the UAA's, although some states may vary the language slightly. For example, Arizona79 and Oklahoma's80 statutes adopt the UAA's language, while Florida's arbitration statute § 682.04(2), differs slightly, authorizing the court, on motion of a party to an arbitration agreement, to appoint one or more arbitrators, if (1) parties have not agreed on a method, (2) the agreed method fails, (3) one or more of the parties failed to respond to the demand for arbitration, or (4) an arbitrator fails to act and a successor has not been appointed.81

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73 BP Expl. Libya Ltd. v. ExxonMobil Libya Ltd., 689 F.3d 481, 492 (5th Cir. 2012) (internal quotation marks omitted); *see also* In re Salomon Inc. Shareholders' Derivative Litig. 91 Civ. 5500 (RRP*)*, 68 F.3d 554, 560 (2d Cir. 1995); Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 814 F.2d 1324, 1328 (9th Cir. 1987).

74 *See* ALASKA STAT. ANN. § 09.43.030, ARIZ. REV. STAT. ANN. § 12-1503, ARK. CODE ANN. § 16-108-211, COLO. REV. STAT. ANN. § 13-22-211, D.C. CODE § 16–4411, FLA. STAT. ANN. § 682.04, HAW. REV. STAT. ANN. § 658A-11, MICH. COMP. LAWS ANN. § 691.1691, MINN. STAT. ANN. § 572B.11, NEV. REV. STAT. ANN. § 38.226, N.J. STAT. ANN. § 2A:23B-11, N.M. STAT. ANN. § 44-7A-12, N.C. GEN. STAT. ANN. § 1-569.1, N.D. CENT. CODE ANN. § 32-29.3-11, OKLA. STAT. ANN. TIT. 12, § 1859, OR. REV. STAT. ANN. § 36.645, UTAH CODE ANN. § 78B-11-112, WASH. REV. CODE ANN. § 7.04A.110, W. VA. CODE ANN. § 55-10-13.

75 New Port Richey Med. Inv'rs, LLC v. Stern ex rel. Petscher, 14 So. 3d 1084, 1087 (Fla. 2d DCA 2009).

76 *Id.* at 1086.

77 *Id.*

78 *Id.* at 1087.

79 "If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed unless the method fails. If the parties have not agreed on a method, the agreed method fails or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator." ARIZ. REV. STAT. ANN. § 12-3011(A).

80 "If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator." OKLA. STAT. ANN. TIT. 12, § 1862.

81 FLA. STAT. ANN. § 682.04(2).

3. Appointment of arbitrators under designated ADR provider rules

When the rules of a private alternative dispute resolution provider, such as AAA or JAMS, govern a proceeding, those rules may control how an arbitrator is appointed when the parties disagree.

Pursuant to the AAA's rules, should the parties fail to agree, the AAA will send an identical list of ten arbitrators to each party, and the parties are encouraged to agree on a name.82 If the parties are unable to agree upon an arbitrator, each party to the dispute has fourteen calendar days from the transmittal date to strike names to which the party objects and return the list to the AAA.83 The parties are not required to exchange selection lists.84 If a party does not return the list within the specified timeframe, all arbitrators on the list will be deemed as acceptable to the party.85 The AAA will then choose an arbitrator from the names of possible arbitrators approved on both lists.86 If the parties then fail to agree on any of the persons from the list, the AAA will have the power to appoint an arbitrator from other members of the National Roster.87

Pursuant to the JAM's rules, if the parties fail to agree on an arbitrator, JAMS will attempt to facilitate agreement.88 Should the attempted facilitation fail, JAMS will send a list of five or ten arbitrator candidates, depending on whether the parties are selecting one or three arbitrators.89 The list will briefly describe the candidate's background and experience.90 Within seven calendar days of service of the list of names, each party may strike two names in the case of a sole arbitrator and three names in the case of a tri-panel, and will rank the remaining candidates in order of preference.91 The remaining candidate with the highest composite ranking shall be appointed the arbitrator.92 If that also fails, JAMS will appoint an arbitrator.93

4. Choosing the Number of Arbitrators

Arbitration agreements usually will dictate the number of arbitrators to be used in a particular dispute. Often, smaller cases are handled by one arbitrator, and larger cases by a three-arbitrator panel. A single arbitrator may be the best choice from both an efficiency and a cost standpoint, as one arbitrator should be less expensive than three, and scheduling will likely be easier with one arbitrator versus three.

Beyond cost and time, however, it is important to consider whether the number of arbitrators may affect the quality of the decisions and ultimate outcome of the proceeding. On the one hand, a tri-panel may reduce bias by having multiple backgrounds, experiences, and industries represented. Also, a tri-panel can engage in collaborative decision making. Experienced arbitrators often praise the quality of the decisional process that results from the give and take of multiple arbitrator panels. In a tri-panel, parties generally each choose one arbitrator, and the two

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82 Rule 12(a), AAA Commercial Rules.
83 Rule 12(b), AAA Commercial Rules.
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 Rule 15(a), JAMS Streamlined Arbitration Rules & Procedures.
89 Rule 15(b), JAMS Streamlined Arbitration Rules & Procedures.
90 *Id.*
91 Rule 15(c), JAMS Streamlined Arbitration Rules & Procedures.
92 *Id.*
93 Rule 15(d), JAMS Streamlined Arbitration Rules & Procedures.

party-chosen arbitrators choose the third. It is possible that a party-chosen arbitrator may be perceived to be biased for the party that chose him or her. In theory, this is counteracted by the impartial third arbitrator. On the other hand, a single arbitrator, chosen by agreement of all parties, should have no reason not to be impartial. Thus, when three arbitrators are used, it is recommended that the parties agree that all three should be neutral, rather than having two, redundant and costly "party-arbitrators." Also, to save time and expense, the parties should agree that the chair of a panel be empowered to decide discovery or other procedural motions, unless all parties request the matter be presented to the full tribunal.94 In the event of illness or other inability to serve as to one of the three arbitrators, if it is too late to appoint a replacement, such as when the final hearing is already underway, it often the case that the parties can agree to have remaining two can reach agreement as to the award.

Should the parties fail to specify the number of arbitrators in the arbitration agreement, the rules of the alternative dispute resolution provider may dictate the resolution. The AAA rules state that if the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed.95 JAMS rules state the arbitration shall be conducted by one neutral arbitrator, unless all parties agree otherwise.96

B. Qualities to Look for in an Arbitrator

Many qualities should be weighed in the selection of the right arbitrator for a given arbitration, including the potential arbitrator's experience, reputation, expertise, and availability.

The arbitrator selection process should begin with consideration of whether the arbitration agreement identifies any minimum arbitrator qualifications. It is common for manuscripted arbitration agreements to require that arbitrators have certain experiential or otherwise unique qualifications. It is possible in a three-arbitrator context that the parties may require one panelist with certain technical expertise, while requiring the other panelists have certain arbitral and legal experience.

Additionally, the parties should look for at least the following arbitrator qualifications:

- Impartiality and lack of any disqualifying relationships with any of the parties;
- Experience as a judge or arbitrator in management of cases of the type at issue;
- Intelligence, wisdom, experience in dispute resolution, and a temperament for fair, firm decision making;
- The arbitrator's work ethic and availability to spend the time required in the time frame within which the parties want to resolve the dispute;
- Experience in and appreciation of the legal issues involved;
- Subject matter expertise;
- The costs and benefits of the provider service with which the arbitrator may be affiliated;
- The arbitrators' rates; and
- If the arbitrator is not local to the arbitral venue, the need for and costs of arbitrator travel.

1. Conducting Due Diligence

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94 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 37.

95 Rule 16(a), AAA Commercial Rules.

96 Rule 7(a), JAMS Streamlined Arbitration Rules & Procedures.

It is imperative to conduct due diligence on potential arbitrators to determine their background, experience, reputation, knowledge, effectiveness, and tendencies in handling arbitrations. As with the selection of counsel, a good place to start is to conduct internet/social media investigation via, LexisNexis®, Westlaw®, Martindale-Hubbell®, Google® or LinkedIn®AVVO®, and other types of social media websites. Depending on the forum, publicly rendered awards may be accessible. A review of such awards may provide insight into the arbitrator's experience and apparent tendencies to favor one side or another in a given type of dispute. Of course, parties and counsel should inquire of professional friends and colleagues asking for their knowledge of the candidates.

Such investigation should include contacting counsel who have had arbitrations with the proposed arbitrator, and whose experience may illuminate whether the potential arbitrator has knowledge about the law, insight into the rules of the forum, and whether the arbitrator allows attorneys to present the case without providing too much "rope" to have full blown discovery. Does the potential arbitrator have the ability to control the tempo of the arbitration? The temperament of the arbitrator will play a significant role in the arbitration proceedings, so it is an important consideration.

Applicable law, ethical guidelines and provider rules all require potential arbitrators to disclose any known facts that might reasonably affect the arbitrator's perceived impartiality, any interest in the outcome of the proceeding or any past or present relationships with parties, their counsel, witnesses or other arbitrators.97 The disclosures provided by the arbitrators should be carefully reviewed as well as all resumes provided by them or their provider organizations. The parties must object to any disclosed conflicts in a candidate's background before selection or risk waiving their objections.

Additionally, if not prohibited by the arbitration agreement or applicable provider rules, it often is permissible for a party or its counsel to contact potential arbitrators *ex parte*, to see if the arbitrator is willing to discuss their experience, process management philosophy, and availability.98 Some arbitrators will only do this if all parties have the opportunity to participate with such an interview.99 One of the key purposes of this discussion is to determine whether the arbitrator candidates have the "knowledge, skill, and temperament to manage the arbitration efficiently. .... Counsel should advise the candidates of their client's expectations concerning the cost and length of the arbitration proceedings and should determine whether the candidates are able and willing to meet those expectations."100 In this conversation, the parties may identify the issues in the dispute only to the extent necessary to determine the arbitrator's experience with such matters, but they must not try to discuss the merits of the case.101 They may also ask for references, that is the names of counsel in other matters in which the candidate has served as an arbitrator. These references may be contacted with a view to understanding the arbitrator's management skills, preparation and diligence.102

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97 James H. Carter, et al, *Appointment, Disclosures, and Disqualification of Neutral Arbitrators,* THE COLLEGE OF COMMERCIAL ARBITRATORS' GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 7, 17 (James M. Gaitis, Ed. 3d ed. 2014 [hereinafter GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION].
98 *Id* at 8-9.
99 *Id* at 9.
100 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 63.
101 James H. Carter, et al, *Appointment, Disclosures, and Disqualification of Neutral Arbitrators 7, 9,* GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION *supra* note *97.*
102 Chernick, *The "Managerial" Arbitrator Model, supra* note 13, at 7.

VI. Alternative Billing

Alternative fee arrangements is a subject that has found its way into the arbitration discussion. Specifically, the query becomes how alternative billing fits into the arbitration process, and whether such fee agreements may be better suited for arbitration proceedings as opposed to conventional litigation.

It is imperative to actually identify and understand what alternative fee arrangements are before weighing their potential benefits to the arbitration process. The most common alternative fee arrangements are: (i) flat fees, (ii) retainers; (iii) contingency fees; (iv) reverse contingency; (v) blended rate; and (v) reduced hourly rate with a kicker.

The flat fee arrangement is a fixed sum for a scope of legal services.103 While it may seem straightforward, there can be numerous variations depending upon the common goals and type of matter. For instance, it may entail a group of cases wherein the party wishes to lump cases into one pool for a fixed amount.104 Another variation of the flat fee scenario is where there is one case that the party wants handled for a single fee.105 A hybrid of this single case may occur where the party wishes to have a certain phase conducted for a flat fee (i.e., pleadings, depositions, motions, arbitration preparation or the final hearing).106 These phases can be priced separately, with a predetermined sum for each phase.107 If the phase does not occur, the fee for that portion of the matter would not apply. Yet another variation of the single case flat fee is where the party agrees to a fixed monthly sum, which is paid so long as the matter is active regardless of the amount of work that is completed that month.108

The next alternative fee arrangement is the retainer formula. An example of this approach is when a party pays a standard monthly fee for a defined scope of work. It is common in transactional matters wherein a client wants access to a lawyer for internal issues to address issues such as contracts, and other routine topics.109 In litigation, the retainer model is commonly utilized to offset uncertainty. For example, a large business which finds a benefit in early resolution of certain claims may find it more cost-effective or efficient to have a lawyer on retainer to handle certain initial matters (i.e., to the point of filing written discovery, or to the point of the first settlement meeting).110

The next model under the alternative billing system is the contingency-fee arrangement.111 This may be the most commonly known approach due to its wide-spread use in personal injury matters. It is also becoming more prevalent in commercial litigation cases. Under this approach, a party agrees to pay its counsel a specified percentage of a defined sum.

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103 *See, e.g., What Is, And Is Not, An Alternative Fee Arrangement,* American Bar Association, Law Technology Today, Dec. 10, 2014, http://www.lawtechnologytoday.org/2014/12/what-is-and-is-not-an-alternative-fee-arrangement; *see also Alternative Fee Arrangements: A Primer,* American Bar Association, Section of Litigation, July 23, 2013, https://www.americanbar.org/news/abanews/aba-news-archives/2013/08/alternative_fee_arra.html.

104 *See id.*

105 *See id.*

106 *See id.*

107 *See id.*

108 *See id.*

109 *See id.*

110 *See id.*

111 *See id.*

The next method is the reverse contingency fee model.112 Unlike the traditional contingency fee agreement, the fees are calculated as a percentage of the amount saved for the client who is a defendant in a lawsuit.113 The base amount from which savings are calculated are agreed upon in advance between the party and its counsel.114 This scenario is most commonly implemented when damages are clear but liability is contested.115

Another methodology is the blended rate.116 Under this model, a party calculates the average rate for the time-keeper lawyers on the file and then applies that rate across the board, whether the time spent is by a partner or an associate.117

Finally, there is the approach wherein the law firm charges a reduced hourly rate with a kicker.118 This can have several sub-modifications. One typical modification is where the party pays its counsel the reduced hourly rate with an agreement that the rate will be increased if the matter is resolved within a set time frame (i.e., within 9 months). The premise is that cases become more expensive as time passes so there is an incentive to have matters resolved earlier in the arbitration process.119 Thus, the law firm receives a performance bonus of sorts if it can get the action completed within a certain time limit.

There is no absolute test to determine when alternative billing is better suited for one matter versus another action. However, one thing is for certain. There may be instances when these types of agreements are more efficient or desirable for parties engaged in the arbitration process. By its very nature, arbitration is designed to be a more cost-effective approach to resolving disputes as opposed to litigation. This is accomplished through limited discovery, limited motion practice, as well as overall limited rules of evidence and procedure.

If the goal of arbitration is to provide a mechanism for resolution with hastened pace, surely alternative billing could have a place in this process. For example, utilizing a flat fee may prove beneficial for both the client and its counsel if the matter does not involve overly complex issues, and there is some certainty as to the outer length of time for the final hearing. The flat fee scenario could provide both the client and its attorney with the definiteness of any fees while traversing through the final hearing. Thus, while there may be uncertainty as to the outcome of the hearing, there would be some certainty as to the maximum fees being expended. The hybrid of the flat fee could prove financially more feasible as well. This would entail the arrangement wherein the attorney might agree to conduct pre-hearing matters (witness disclosures, exhibit list preparation, pre-hearing statements) for a fee certain. Thereafter, the final hearing could be conducted on an hourly basis. This would allow the client to have some certainty for various work for budgeting purposes, while at the same time not limiting the attorneys' ability to bill hourly for the final hearing.

Another potentially viable option for arbitration proceedings might be a reverse contingency fee agreement. This type of fee structure would likely come into play when the amount of damages is readily determinable, and is not the contested issue in the arbitration. Instead, the dispute is centered upon liability. In this circumstance, the client and its counsel would determine what percentage of savings would apply in order for the attorney to receive the contingency. The reverse contingency fee agreement provides incentive for counsel in the arbitration proceeding to keep the process efficient while also focusing on attacking liability for

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112 *See id.*
113 *See id.*
114 *See id.*
115 *See id.*
116 *See id.*
117 *See id.*
118 *See id.*
119 *See id.*

the client. This type of agreement would require counsel to work closely in conjunction with the client, which could serve the benefits of the arbitration process.

The reduced hourly rate with a kicker may prove to be the most useful tool for arbitration. This arrangement would benefit the client by permitting it to pay a reduced hourly rate for its legal services during the arbitration process. The client also has an interest in ensuring that the overall arbitration process is resolved within a set reasonable time frame. This model fits with the arbitration premise inasmuch as it incentivizes the party's attorney to keep the process as economical as possible. As its reward of sorts, the law firm receives an increased amount that can be applied to the hourly rate.

VII. How to manage an arbitration to effect savings and expedite the proceedings

There are two inter-related ways to control the cost of arbitration: first, limit the amount of discovery, and number of procedural disputes, motions, and unnecessary hearings or hearing time, and second, shorten the duration of the arbitration from beginning to end. These two approaches have been the subject of considerable study, discussion, and writing. As noted earlier, cooperation by all participants in a proceeding that is intended to balance efficiency, cost and fairness may be the most effective way to realize the goal of making arbitration a better dispute resolution than litigation. But parties to a dispute may not feel particularly cooperative, which is when the arbitration agreement, the arbitral rules, and the arbitrator's management skill and philosophy become important.

A. Time is money

It is logical that the longer an arbitration takes, the more expensive it will be. Very simply, longer arbitrations will generate expenditure of more attorney and arbitrator hours, at greater expense to the parties. In addition, there are other, significant costs that result to the parties the longer a business dispute takes to reach resolution.

Recently, an economic research and consulting firm, Micronomics, compared the length of time it took to resolve disputes in federal courts in 12 states against the duration of commercial arbitrations filed with AAA from 2011 to 2015.120 Its resulting report, *Efficiency and Economic Benefits of Disputer Resolution Through Arbitration Compared with U.S. District Court Proceedings,* concludes that the federal cases took an average of 12 months longer to get to trial than the arbitrations took to get to final hearing.121 Federal cases that went on appeal took at least 21 months longer than did the arbitrations during the same time.122 Such delays should have been of tremendous concern to parties, if they wanted quick, clear resolution of disputes and the ability to move on.123 Additionally, economists have long known that delay in dispute resolution has direct and indirect financial costs to the businesses involved.124 As long as a dispute is unresolved, the resources at issue are "removed from circulation", as neither party

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120 For example, for 2015, they compared 1375 AAA cases with 217,288 cases in the federal courts of California, NY, Texas, Florida, Pennsylvania, Maryland, Georgia, New Jersey, Michigan and Illinois.

121 Roy Weinstein, Cullen Edes, Joe Hale & Nels, Pearsall, *Efficiency and Economic Benefits of Disputer Resolution Through Arbitration Compared with U.S. District Court Proceeding, 2, www.Micronomics.com.*

122 *Id.* at 2.

123 *Id.* at 10.

124 *Id.* at 3-4.

can count on receiving or keeping these resources and putting them to use.125 Delay in resolution of disputes may reduce incentives to start or invest in existing businesses, may deteriorate the security of property rights, and limit the possibilities of obtaining loans and conducting other current and future business activities.126 Delay allows more interest to accrue on any award, thereby increasing the losing party's liability.127 Additionally, the longer a matter is pending, the greater the loss of time, energy and focus of the parties' executives and other employees, at the expense of revenue-generating business opportunities.128

Consequently, the economists at Micronomics estimated that the increased delay in litigation vs. arbitration in the cases they reviewed between 2011 and 2015 resulted in an increase of indirect costs to the businesses involved of at least $10.9 *billion*.129 Additional time for appeals added at least another $20 billion.130 This loss analysis excluded increased direct costs, such as fees for arbitrators, attorneys, experts, additional discovery and other related process costs.

Because the time it takes to resolve a case increases the attendant costs to the parties in so many ways, participants in an arbitration should consider how best to ensure the proceeding is as expeditious and cost effective as possible.

B. Controlling expense and delay

1. Discovery

The expansion of discovery in arbitration is the primary cause of increased cost and a longer arbitration process.131 This is not surprising as the same is true of litigation.132 "Although many arbitrators and some arbitration rules aim to hold the line on discovery, it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employment of standard civil procedural rules."133 The advent of electronic discovery has compounded the cost and time involved in document discovery to the extent advocates seek the type of eDiscovery they usually obtain in litigation. Their business clients may agree with a broad discovery strategy, for a number of reasons, but doing so effectively deprives the process of the cost and time savings that arbitration is supposed to provide. That creates a challenge for arbitrators who want to strike a balance between fairness and efficiency, and yet honor the rule that arbitration is a creature of contract.

While all of the participants to the arbitration process bear responsibility for morphing arbitration into litigation, the advocates are most perfectly situated to stop the process from defaulting into full blown discovery. First, if the arbitration agreement or the referenced rules specify expedited or otherwise limited discovery for a given matter, then, the attorneys should

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125 *Id.* at 3-4.
126 *Id.* at 6.
127 *Id.* at 19-20.
128 *Id.* at 25.
129 *Id* at 4.
130 *Id* at 4.
131 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 6.
132 "According to a 1999 study, document discovery alone accounts for 50% of litigation costs in the average case and 90% in active discovery cases." PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 6.
133 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 6.

give serious consideration to how and whether they can adequately prepare for the ultimate hearing within such constraints, before asking for more discovery than specifically allowed. Not only should counsel seek less document discovery than in litigation, they should plan on fewer depositions and, absent very good reason, not seek to use interrogatories or requests for admission. Moreover, they should consult with their clients before seeking expanded discovery, and in the process of such discussions, they should provide their clients with realistic cost estimates as part of their justification for seeking a strategy at odds with the arbitration model adopted by the governing contract and rules. Similarly, even if there are no contractual or other restraints on discovery, counsel should perform the same analysis and conferral with their clients, and then ask only for what discovery they need, the costs of which are proportionate to the relief sought.

However, unless the arbitration agreement states otherwise, the parties' right to discovery is still subject to arbitrator approval, who is given authority to supervise discovery in most arbitration rules. The arbitrator's supervision of this early stage of the proceedings will reinforce the need for cooperation and make clear that parties who are unreasonable or overreaching may lose credibility.134 "The most valuable role an arbitrator can play is to persuade the parties that discovery proportional to the complexity of the dispute will give counsel what they need without burdening the parties with unnecessary expense of delay."135 The arbitrator should require whenever possible that the parties agree to any expansion of discovery and should always seek to establish limits on discovery. An excellent template for arbitrator control of discovery is provided by the JAMS Recommended Arbitration Discovery Protocols.136 These Protocols list 27 factors which an arbitrator should consider in determining the scope of discovery proper for a given proceeding and, provide, *inter alia* for limited depositions and e-discovery, expedited resolution of discovery disputes.

2. *Motion Practice*

It has been suggested that after discovery, motion practice is the second leading cause of cost and delay in commercial arbitrations.137 It is the responsibility of the arbitrator to make clear which kinds of motions are disfavored, such as motions directed to technical "pleading" deficiencies, discovery disputes, evidentiary motions, and dispositive motions with a less than reasonable chance of success. The arbitrator should establish a procedure for processing permissible motions quickly and efficiently, and only in the event of failed conferral among counsel. Motions should only be allowed when necessary to enforce prior rulings or agreements, or when there is a reasonably likelihood of streamlining or focusing the arbitration process. Even then, the arbitrator may require the parties to justify the need for such motions by an exchange of letters, subject to page limitations, and then, if possible, resolve the issue based on this correspondence. The arbitrator should request briefing only when necessary, and, possibly, allow a telephonic hearing. The arbitrator needs to rule promptly on these motions and requests for motions and in doing so, consider the relief requested within the context of the purposes and constraints of arbitration. For example, an early ruling on a partially or fully dispositive legal issue might well be consistent with the need for a quick resolution or for cost savings. On the other hand, rulings on discovery are usually within the arbitrator's discretion, but denial of

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134 Chernick, *The "Managerial" Arbitrator Model, supra*, note 13, at 7.
135 *Id.*
136 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 73.
137 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 73.

discovery to a party may deprive it of the ability to prove its case in a proceeding without appellate review.

3. *Efficient and effective preliminary conference and case management.*

According to the PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, "The single greatest tool for achieving a fair and efficient commercial arbitration is a well conducted preliminary conference.138 As described in Chapter 6 of GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION,139 the arbitrator, the parties, and their counsel should thoroughly prepare to discuss the issues listed on an agenda provided in advance by the arbitrator. The agenda should be tailored to the dispute, and usually cover most of the issues listed in section II.D. of this paper, or in the discussion of the preliminary conference in the aforementioned PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, AND Chapter 6 of the GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION. The parties should try to reach agreement on each issue in advance of the conference, with the arbitrator ruling on issues of dispute, when necessary. One of the most important issues, other than discovery and motion practice, is the establishment of a hearing schedule. The parties and arbitrator should establish hearing dates within any time frame allowed by the contract, the applicable rules, or, as soon as reasonably and practically possible.

Then, the arbitrator should issue a case management order to memorialize the determinations made at the conference. This order and the schedule established thereby, subject to any amendments by the arbitrator, should govern the arbitration thereafter, and the arbitrator should only permit departure for good cause.

4. *Conducting a fair but expeditious final hearing.*

The conduct of the evidentiary hearing offers many opportunities for the parties and arbitrators to effect significant savings of time and expense. As the authors of the PROTOCOLS FOR EXPEDITIOUS, COST EFFECTIVE COMMERCIAL ARBITRATION explain:

> Every day of a hearing, in which one or more lawyers, paralegals, client representatives and witnesses are in attendance, having prepared hours for that day's events, typically costs a client many thousands of dollars. While it is certainly important that the proceedings be fair and contribute to a sound result, it is also important that the proceedings be efficient and respectful of the parties' time and money. Conducting a fair but efficient hearing is almost entirely in the hands of the arbitrators and is the best hallmark of a truly accomplished commercial arbitrator.140

First, unless there is a sound reason for bifurcation of the hearing by subject matter, the hearing days should be set consecutively, and with sufficient time to conclude the hearing in one continuous time period. Second, there are many ways to expedite the introduction of evidence at the hearing that are not available in a court trial. Unless the arbitrator is required by agreement to follow formal rules of evidence, little time should be wasted on evidentiary objections other than privilege. Counsel and the arbitrator should concentrate on the probative nature of evidence, not its admissibility. At the same

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138 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7, at 70.

139 *Supra* note 7, at 87.

140 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION, *supra* note 7 at 75.

time, the arbitrator should make clear that duplicative or cumulative evidence is neither necessary nor will it be given weight. The participants should establish an order of proof that makes sense given the issues and consider whether evidence should be submitted in phases, perhaps allowing for the ruling on threshold issues that may resolve the rest of the case. Joint exhibits should be submitted, and a process for submission of unobjectionable exhibits *en mass* should be established. The parties and arbitrator should consider whether testimony can be submitted in writing, pre-recorded, or whether to take witnesses out of turn, and how testimony can be obtained from witnesses who are not subject to subpoena for the hearing. Expert testimony should be introduced in a way that highlights the areas of disagreement, and possibly should be offered at the same phase of the hearing, one after another, in a process that has been referred to as "hot-tubbing". Finally, any pre and post hearing briefing, if allowed, should be limited both as to the timing and length to only that which the arbitrator needs.

C. *Decisions to save time and money need not sacrifice a fair, well-reasoned decision.*

Undertaken with care, efforts to save time and expense should not imperil fairness of the proceeding or the quality of the arbitrator's decision making. The many decisions that the parties, their counsel and arbitrators can make to alter the current, objectionable trend of arbitration to cost as much and last as long as litigation must be made recognizing that each case may be unique, the parties needs and goals will likely differ, and that a "well run arbitration will at some level be custom-tailored for the particular case."[141] Nevertheless, the example provided by expedited construction adjudication in Britain, and the well-reasoned procedures afforded by the JAMS or AAA expedited rules, discussed above, argue in favor of the conclusion that resolving disputes on an expedited basis, following limited discovery, need not sacrifice quality.

Just as there is no guarantee of a just and fair resolution of a lawsuit, no matter how long it takes to get to trial and how much money is spent in discovery and motion practice, so, there is no guarantee of the quality of an arbitral decision. In both types of dispute resolution, the parties must do their best to effectively prepare and put on their cases. Witnesses must be persuasive, credible and available for hearing. Exhibits must be understandable. But the difference is, that in arbitration, all involved should benefit if they cooperate with the arbitrator(s), who is managing the process in a way that is efficient, cost effective, but fundamentally fair, and so that the arbitrator has only the evidence needed to render a well-reasoned decision, as quickly as reasonably possible.

VIII. The Arbitration Award

A. Monetary and Non-monetary Relief

The flexibility of arbitration proceedings extends to the award that is given. Arbitration awards need not be limited to monetary determinations, although it is important to note that some states will impose limitations on the types of awards that arbitrators can provide. For example, while the FAA permits an arbitrator to award punitive damages, punitive damages are typically not permitted by New York law.[142] Furthermore, JAMS and AAA Rules expressly provide that the relief granted by the arbitrator can include any remedy or relief that the arbitrator deems

141 PROTOCOLS FOR EXPEDITIOUS, COST-EFFECTIVE COMMERCIAL ARBITRATION *supra* note 7, at 23.

142 *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 356

necessary, and within the scope of the agreement of the parties, including, but not limited to, equitable and injunctive relief, and specific performance of a contract.143

B. Costs & Fee shifting provisions

Whether an arbitrator can award costs and fees to one or more parties is a function of both the applicable rules and the arbitration agreement itself. Both JAMS and AAA rules, give the arbitrator broad latitude to require one side or the other to bear the arbitration filing fees and the fees of the arbitrator, or it may divide such fees and expenses unevenly.144 The arbitration agreement or applicable law will typically determine whether the arbitrator may award attorney's fees. The JAMS Comprehensive rules and AAA Rules for Construction Industry disputes currently in effect145 expressly limit the arbitrator's power to make an award of attorney's fees. An award of fees is permitted only if all parties have requested attorney's fees, or if such fees are authorized by statute or by applicable agreement.146

C. Types of Awards

Different disputes may call for different kinds of awards. In some cases, a standard award, which merely states that one party is awarded a specific dollar figure from the other party may be sufficient. But some disputes, and a construction dispute is a good example, may include numerous claims by each party against the other, and a standard award may be inadequate to explain the particulars.

1. Standard

According to the AAA Rules, the Standard award consists of a "concise written financial breakdown of any monetary awards" as well as "a line item disposition of each non-monetary claim or counterclaim."147 The JAMS Rules also provide, "Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award."148 Where the dispute involves only a claim, and no counterclaims, and where the nature of the claims are not complex, such a concise award this may be sufficient for the parties' purposes.

2. Reasoned

Under the AAA rules, and JAMS practice, the parties may opt for "a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law."149 As noted above, the AAA

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143 AAA Commercial Rules 48(a); JAMS Comprehensive Rules 24(c)(e).
144 The arbitrator "may assess and apportion the fees, expenses and compensation related to such award as the arbitrator deems is appropriate." AAA Commercial Rules 48(b). *See also*, JAMS Comprehensive Rule, 24(f); Benedict P. Morelli & Associates, P.C. v. Shainwald, 49 A.D.3d 476 (1st Dep't 2008) (distinguishing arbitrator's award unequally allocating fees from punitive damages).
145 Construction Industry Arbitration Rules of the American Arbitration Association, Effective July 1, 2016 ("AAA Construction Rules")
146 AAA Construction Rules 48(d)(ii); JAMS Comprehensive Rules 24(g).
147 AAA Construction Rules 47(b).
148 JAMS Comprehensive Rules 24(h).
149 AAA Construction Rules 47(c).

Rules require the parties to commit to the form of award at the time of preliminary hearing.150 While a standard award includes not only the relief awarded to each side, the reasoned award adds a detailed explanation, and may include the findings and the law, similar to a court's bench decision which includes findings of fact and conclusions of law. While it would seem that the parties would appreciate as much insight as possible into the Arbitrator's reasoning, such awards are not always looked upon with favor by arbitrators and parties alike for similar reasons. First, the reasoned award could require a more detailed final submission by counsel, which may involve greater expense. In addition, the parties will have to bear the expense of the arbitrator's work preparing a reasoned award, which takes far more time to craft by the arbitrator or arbitration panel than a standard award, and since arbitrators typically charge by the hour, this can drive up the expenses in the post-hearing period. Arbitrators may wish to avoid more detailed awards, especially where there is no stenographic record, because capturing the specific testimony which supports particular findings can be challenging. In addition, while the bases to challenge awards are narrow, arbitrators will generally worry that the more content to the decision, the greater the possibility that one party or the other will find fault or error in the decision.

3. <u>In Between</u>

Once again, the flexibility of arbitration allows the parties to customize the process. If the arbitrator agrees, both JAMS and AAA Rules permit the parties to fashion the form of award. Since each dispute has a degree of uniqueness, the permutations of a particular case may suggest that a combination of methods is the best. Advocates and parties would be well-advised to conduct an early evaluation of the kind of award which will best suit their needs in a particular dispute.

D. <u>Will aspects of the award impact companion litigation?</u>

Arbitration and litigation are not always compatible. For example, arbitration is a contract right which can be waived, and one way to do so is to engage in litigation.151 However, "[n]ot every foray into the courthouse effects a waiver of the right to arbitrate."152 Construction projects of magnitude will have multiple levels of contract; a prime contract or contracts with the owner, the prime contractor's subcontracts with the subcontractors or trade contractors, sub-subcontracts, supply agreements with subcontractors, and so on. In addition, there may be lateral agreements, such as the owner's agreement with a design professional, or with a construction manager, and there may also be mechanic's liens filed and surety bonds, or even multiple levels of surety bonds. The existence of such external disputes can mean that the arbitration award may have impact beyond the contract dispute which is the genesis of the arbitration.

1. <u>Mechanic's Liens</u>

Because mechanic's liens are a statutory remedy, practitioners may not rely entirely upon arbitration proceedings to preserve the rights of a mechanic's lienor. However, contractual dispute resolution procedures can be dispositive of the rights of the lienor and those with whom

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150 *Id.*
151 Sherrill v. Grayco Builders, 64 N.Y.2d 261, 272 (N.Y. 1985).
152 *Id.* at 273.

the lienor has contractual privity.153 Accordingly, by reason of the concepts of collateral estoppel and *res judicata,* the determination in an arbitration may be relied upon by a court to determine the threshold issue of contractual liability as between lienor and the party contractually upstream. However, to ensure clarity, the advocate may wish to alert the arbitrator or arbitration panel to the existence of the companion lien or lien foreclosure action so that appropriate findings are included in any arbitration award.

2. Surety Bond

Where the bonded contract includes an arbitration provision, and the principal has engaged in arbitration, it historically true that the surety will be bound by the substantive determination concerning the parties' contract rights. However, the surety remains at liberty to litigate the defenses otherwise available to the surety under the applicable bond (such as that the claim is barred by the bond's limitations of actions provision).154 Conversely, where the surety steps into its principal's rights to the underlying agreement, some courts have ruled that the surety is bound to arbitrate.155 But there is a lack of consistency among jurisdictions on this point.156

3. Litigation at other levels (e.g., dispute between owner and GC impacting litigation between GC and sub).

If an alleged scope gap originates at the prime contract level, that gap can have a ripple effect down the contractual chain, and across to the design professional. As a result, construction disputes frequently implicate multiple levels of contract. Unless the project agreements are coordinated, the disputes may be subject to resolution in different fora.157 For example, the 2007 version of American Institute of Architects family of documents provide for the parties to select dispute resolution, and arbitration is among the choices. If arbitration is consistently chosen up and down the chain, then those proceedings could be consolidated. However, in some cases, the owner's agreement with a design professional may contain a non-consolidation

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153 *See, e.g.,* Cava Constr. & Dev., Inc. v DAB Group LLC, 2010 N.Y. Misc. LEXIS 5203 (N.Y. Sup. Ct. Oct. 25, 2010) (staying N.Y. Lien Law §59 demand for foreclosure until completion of pending arbitration proceeding).
154 Fid. & Deposit Co. of Maryland v. Parsons & Whittemore Contractors Corp., 48 N.Y.2d 127, 128 (N.Y. 1979).
155 Matter of Int'l Fidelity Ins. Co. (Saratoga Springs Public Library, 236 A.D.2d 719, 720 (N.Y.A.D. 3d 1997); Liberty Mut. Ins. Co. v. N. Picco & Sons Contracting Co., Inc., 2008 U.S. Dist. LEXIS 4915 (S.D.N.Y. January 16, 2008).
156 Compare Developers Surety and Indemnity Co. v. Carothers Construction, Inc. 2017 U.S. Dist. LEXIS 111021 (D.S.C. July 18, 2017) (holding that surety was bound to arbitrate performance bond dispute by virtue of an arbitration agreement in the underlying contract) with Developers Surety and Indemnity Co. v. Carothers Construction, Inc., 2017 U.S. Dist. LEXIS 135949 (D. Kansas August 24, 2017) (holding that surety was not bound to arbitrate performance bond dispute by virtue of an arbitration agreement in the underlying contract).
157 L.A. Wenger Contracting Co., Inc. v. Kreisler Borg Florman General Const. Co., Inc., 43 A.D.3d 305 (1st Dep't 2007) (subcontractor was not unambiguously bound to dispute resolution provision by virtue of flow-down provision requiring subcontractor to comply with prime contract dispute provisions where submission of dispute by prime contractor to city dispute review board, with which subcontractor had no privity).

provision, which has the effect of preventing any dispute with the design professional to be consolidated with the owner's arbitration with a prime contractor.

IX. Post-Hearing

A. Challenge to Award and Appellate Remedies

To protect the sanctity and finality of arbitration, few bases to challenge arbitration awards are permitted. In general arbitration awards are presumed valid.158 The clear intent of this general rule is to prevent the loser from re-litigating the case in court after an unsatisfactory award is rendered. Orders compelling arbitration are not ordinarily appealable, as the parties must wait until arbitration is complete and an appeal is filed on the judgment.159 However, appellate remedies are available when the parties are denied arbitration or when an order is issued granting stay of arbitration.160 Parties can also appeal an arbitration award if there is a showing of evident partiality on behalf of the arbitrator.161 Similarly, challenges to award may be permitted for instances of arbitrator impropriety or abuse.

When parties decide to arbitrate, they not only give up their right to be heard in a court of law, but also forgo the protections the courts provide. Parties present their disputes to an arbitrator who often is "not bound by substantive law or the rules of evidence."162 Arbitration can be a form of "rough" justice because the arbitrator applies his own interpretation of the law to the facts and determines the outcomes as he sees fits, even if the relief exceeds the parties requested remedy.163

In addition to parties giving up the protections of the courts, they waive the right to appeal, unless they have agreed to consensual appellate procedures, such as the optional appellate procedures allowed by JAMS. Otherwise, appellate remedies for challenging an arbitration award are scarce. A court cannot vacate an arbitrator's award, even if the decision clearly goes against the rules of law.164

As one court165 ruled:

> An arbitration award should not be vacated unless it is violative of a strong public policy, is totally irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power.... An arbitrator is not bound to abide by the principles of substantive law or rules of procedure which govern the traditional litigation process .... Arbitrators do not even have to make findings, specify the formula used in calculating the award, or indicate the bases for the award.... Moreover, arbitrators do not have to justify their awards. It must merely be evident upon a

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158 *Setting aside arbitration award*, 67 A.L.R.5th 179, 2b.

159 Muao v. Grosvenor Props., Ltd., 99 Cal. App. 4th 1085, 1088-89, 122 Cal. Rptr. 2d 131, 134 (2002).

160 David B. Harrison, J.D., Annotation, *Appealability of state court's order or decree compelling or refusing to compel arbitration*, 6 A.L.R.4th 652, 2a.

161 *Setting aside arbitration award*, 67 A.L.R.5th 179, 2b.; *see also* Team Scandia v. Greco, 6 F. Supp. 2d 795, 798 (S.D. Ind. 1998) (finding parties agreeing to binding arbitration waive their right to appeal on the merits, but not their right to appeal based on the arbitrator's bias).

162 Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308, 473 N.Y.S.2d 774, 779, 461 N.E.2d 1261, 1266 (1984) (citation omitted).

163 *Id.*

164 *Id.*

165 Salco Constr. Co. v. Lasberg Constr. Assocs., 249 A.D.2d 309, 309-310 (N.Y. App. Div. 1998)

> reading of the record that there exists a rational basis for the award .... On the record before us, we find no basis to vacate the award. [internal cites omitted]

As a result, often the only appellate relief parties can seek is to claim violation of §10 of the FAA, for violations of public policy, or when the award is arbitrary and capricious.166

B. Enforcement Considerations (FAA and State acts)

The enforcement of arbitration awards has generated judicial controversy, based on the apparently discretionary and mandatory language used in section 9 of the FAA:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11.167 (emphasis added).

The issue among the circuits is whether the statute imposes a discretionary or mandatory one-year statute of limitations on parties seeking to confirm arbitration awards.168 The Fourth and Eighth Circuits implemented a discretionary interpretation, but the Second Circuit implemented a mandatory interpretation.169

Under the discretionary interpretation, the word "may" calls for permissive action unless it conflicts with legislative intent, history, or purpose.170 The language of the statute states, "any party 'may apply' for a confirmation order, but the court 'must grant' the order absent a modification or vacation under § § 10 or 11."171 The Fourth Circuit found Congress intended "may" to be discretionary since both discretionary and mandatory wording was used throughout section 9.172

The mandatory interpretation, as adopted by the Second Circuit, holds all summary confirmation awards filed after one-year are time-barred due to a firm one-year statute of limitation.173 This interpretation is based on the Supreme Court's conclusion that "may" could be read as discretionary but was not "necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." 174 Further, a party seeking to alter the arbitration award must, within three months of the award being filed or delivered, provide notice to the adverse party or his attorney that a motion has been made to vacate, modify, or correct an award.175

If the arbitration agreement is not governed by the FAA, then parties can turn to the

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166 *Id.;* Amalgamated Transit Union v. Green Bus Lines, Inc., 50 N.Y.2d 1007, 1008, 431 N.Y.S.2d 680, 680-81, 409 N.E.2d 1354, 1354-55 (1980); Rochester City Sch. Dist. v. Rochester Teachers Ass'n, 41 N.Y.2d 578, 582, 394 N.Y.S.2d 179, 182, 362 N.E.2d 977, 980 (1977).
167 *A Sure and Expedited Resolution*, at 890; 9 U.S.C. § 9.
168*A Sure and Expedited Resolution*, at 891.
169 *Id.*
170 *Id.* at 895.
171 *Id.*
172 *Id.*
173 *Id.* at 898.
174 Cortez Byrd Chips v. Bill Harbert Constr. Co., 529 U.S. 193, 198 (2000); see also United States v. Rodgers, 461 U.S. 677, 706 (1983) (finding "may" implies discretionary action but can be overcome if it conflicts with legislative intent or the structure and purpose of the statute.)
175 9 U.S.C. § 12.

enforcement provisions of their state's arbitration statute.[176] Eleven states comport with the FAA's one-year statute of limitation to confirm awards.[177] The remaining thirty-nine states and the District of Columbia have different statutes of limitations for confirming an award, or look to their state's general statute for execution of a judgment.[178]

In order to advance the validity of arbitration, Congress and the states need to ensure arbitration statutes provide clear language and legislative intent, whether mandatory or permissive, to ensure parties cannot find loopholes to delay or vacate an arbitration award.

X. Conclusion

Sureties and other participants in construction disputes can improve the effectiveness of the arbitration process by planning on the front end before a dispute arises. Drafting a well-written agreement can help the parties and the arbitrator maintain control over costs, scheduling and procedures. The Travelers Performance Bond Form appended hereto illustrates such an effective agreement.

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176 *A Sure and Expedited Resolution of Disputes*, *supra* at 915-16.
177 *Id.*
178 *Id.* at 916.

APPENDIX A

TRAVELERS PERFORMANCE BOND FORM

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Lawyer snapshot: Bryan Rendzio

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by: Daily Record Staff | Reporter

Name: Bryan Rendzio

Age: 39

Family: Wife, Stacy, and our two boys, Aiden, 5, and Lucas, 2.

Pets: Gator (black Labrador) and Bailey (yellow lab mix)

Education: Florida State University, B.A., and Florida Coastal School of Law, J.D.

Admitted to the Bar: Sept. 11, 2001

Employed by: Franson, Iseley & Rendzio

Field of practice: Business litigation, construction litigation (board certified in construction law) and mediation services (Florida Supreme Court certified circuit civil mediator)

Professional organizations: The Florida Bar Association (Construction Law Certification Review Course Committee co-chair and Construction Law Institute Committee); The Jacksonville Bar Association (Construction Law Committee, chair); Northeast Florida Builders Association; St. Johns Builders Council; the Florida Academy of Professional Mediators; AV Preeminent rating by Martindale-Hubbell; and Florida Super Lawyers "Rising Star" (construction litigation), 2010–present.

Community involvement: Ponte Vedra Palm Valley Athletic Association youth baseball, Palms Presbyterian Church and St. Johns Builders Council, board of directors, 2013-present.

How did you get involved?

Somewhat selfishly, my primary involvement and focus have been on my two young boys. I want to capture every moment that I can before the time is gone. I cherish family dinners even if the response from my boys is a shrug of the shoulders when I ask how their day was. My involvement with other civic organizations has been primarily through my trade groups wherein I have contributed donations and have spent time assisting with such great organizations as St. Augustine Youth Services. My goals for 2015 going forward include becoming more active by undertaking responsibilities as a director for a local charitable organization focusing on underprivileged children.

PREV ARTICLE

NEXT ARTICLE

How can someone else get involved?

I believe that the Northeast Florida area showcases professionals who exemplify a balance of work and community involvement. I am always amazed when reading the achievements of fellow lawyers who not only lead by example, but also push for others to join. The best way to get involved is to be proactive by contacting those professionals or groups who are reaching out and finding out how to help. Be proactive, not reactive.

What have you learned/achieved through the experience?

That life is a balance that requires equal parts work, family and community involvement.

What was the last book you read or are reading?

"Fox in Socks" (to my 5-year-old). By the way, thank you Dr. Seuss for filling my head with such tongue-twisting phrases as "when beetles fight these battles in a bottle with their paddles

and the bottle's on a poodle and the poodle's eating noodles" after a day of analyzing legal briefs. Kidding, of course.

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TAB

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ITEM NO. 54 (REFERENCES)

Number	Name	Address	Telephone Number
1	Judge R. Lee Smith	P.O. Box 758 Palatka, FL 32178	(386) 329-0471
2	Judge Joseph Poblick	West Pasco Judicial Center 7530 Little Rd New Port Richey, FL 34654-5598	(727) 847-8173
3	Judge Wesley Poole	76347 Veterans Way Yulee, FL 32097-5404	(904) 491-7275
4	Rob T. Cook, Esq.	Rob Cook Attorney At Law, P.A. 904 Anastasia Blvd., Ste. A St. Augustine, FL 32080-4663	(904) 471-4560
5	Robert E. Doan, Esq.	Cobb Cole 231 N. Woodland Blvd. Deland, FL 32720-4248	(386) 736-7700
6	Christopher M. Cobb, Esq.	Jimerson & Cobb, P.A. 1 Independent Dr., Ste. 1 Jacksonville, FL 32202-5039	(904) 389-0050
7	Yekaterina ("Kate") Mesic, Esq.	Law Offices of Kate Mesic, P.A. 6550 Saint Augustine Rd., Ste. 305 Jacksonville, FL 32217-2847	(904) 619-2510
8	Bruce G. Alexander, Esq.	Ciklin Lubitz & O'Connell 515 N Flagler Dr., Fl 20 West Palm Beach, FL 33401-4330	(561) 832-5900
9	Frederick ("Fred") J. Lotterhos, III, Esq.	Holland & Knight LLP 50 N Laura St Ste 3900 Jacksonville, FL 32202-3622	(904) 798-5445
10	Henry ("Chip") G. Bachara, Jr., Esq.	Bachara Construction Law Group 1 Independent Dr., Ste 1800 Jacksonville, FL 32202-5049	(904) 562-1060

TAB

TAX RETURN

EMPLOYEE W-2 WAGES SUMMARY

2017

Copy C, for employees records

Form W-2 Wage and Tax Statement 2017

Field	Value
d Control number	0042-0042N258 0000000008-
Void	
b Employer's identification number	26-4405459
a Employee's social security number	[redacted]
13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
12 See Instrs. for Box 12	S 6736.83
14 Other	
c Employer's name, address, and ZIP code	ALBERT T FRANSON A PROFESSIONA 1650 PRUDENTIAL DR STE 100 JACKSONVILLE FL 32207
e Employee's name, address, and ZIP code	BRYAN R RENDZIO 205 ODOMS MILL BLVD PONTE VEDRA BEACH FL 32082
Department of the Treasury - Internal Revenue Service	OMB No. 1545-0008
1 Wages, tips, other compensation	209269.73
2 Federal income tax withheld	46753.74
3 Social security wages	127200.00
4 Social security tax withheld	7886.40
5 Medicare wages and tips	216006.56
6 Medicare tax withheld	3276.15
7 Social security tips	
8 Allocated tips	
10 Dependent care benefits	
11 Nonqualified plans	
9 Verification Code	e160-057f-32b5-1ccf

15 State	Employer's state ID No.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

Copy B, to be filed with employees FEDERAL tax return

Form W-2 Wage and Tax Statement 2017

Field	Value
d Control number	0042-0042N258 0000000008-
Void	
b Employer's identification number	26-4405459
a Employee's social security number	[redacted]
13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
12 See Instrs. for Box 12	S 6736.83
14 Other	
c Employer's name, address, and ZIP code	ALBERT T FRANSON A PROFESSIONA 1650 PRUDENTIAL DR STE 100 JACKSONVILLE FL 32207
e Employee's name, address, and ZIP code	BRYAN R RENDZIO 205 ODOMS MILL BLVD PONTE VEDRA BEACH FL 32082
Department of the Treasury - Internal Revenue Service	OMB No. 1545-0008
1 Wages, tips, other compensation	209269.73
2 Federal income tax withheld	46753.74
3 Social security wages	127200.00
4 Social security tax withheld	7886.40
5 Medicare wages and tips	216006.56
6 Medicare tax withheld	3276.15
7 Social security tips	
8 Allocated tips	
10 Dependent care benefits	
11 Nonqualified plans	
9 Verification Code	e160-057f-32b5-1ccf

15 State	Employer's state ID No.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

Form W-2 Wage and Tax Statement 2017

Field	Value
d Control number	
Void	X
b Employer's identification number	
a Employee's social security number	
13 Statutory employee / Retirement plan / Third-party sick pay	
12 See Instrs. for Box 12	
14 Other	
c Employer's name, address, and ZIP code	
e Employee's name, address, and ZIP code	
Department of the Treasury - Internal Revenue Service	OMB No. 1545-0008
1 Wages, tips, other compensation	
2 Federal income tax withheld	
3 Social security wages	
4 Social security tax withheld	
5 Medicare wages and tips	
6 Medicare tax withheld	
7 Social security tips	
8 Allocated tips	
10 Dependent care benefits	
11 Nonqualified plans	
9 Verification Code	

15 State	Employer's state ID No.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

This information is being furnished to the Internal Revenue Service. If you are required to file a tax return, a negligence penalty or other sanction may be imposed on you if this income is taxable and you fail to report it.

Form W-2 Wage and Tax Statement 2017

Field	Value
d Control number	
Void	X
b Employer's identification number	
a Employee's social security number	
13 Statutory employee / Retirement plan / Third-party sick pay	
12 See Instrs. for Box 12	
14 Other	
c Employer's name, address, and ZIP code	
e Employee's name, address, and ZIP code	
Department of the Treasury - Internal Revenue Service	OMB No. 1545-0008
1 Wages, tips, other compensation	
2 Federal income tax withheld	
3 Social security wages	
4 Social security tax withheld	
5 Medicare wages and tips	
6 Medicare tax withheld	
7 Social security tips	
8 Allocated tips	
10 Dependent care benefits	
11 Nonqualified plans	
9 Verification Code	

15 State	Employer's state ID No.	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name

TAX RETURN (E-FILED)

2017

Form **8879**

Department of the Treasury
Internal Revenue Service

IRS *e-file* Signature Authorization

▶ Return completed Form 8879 to your ERO. (Do not send to IRS.)

▶ Go to *www.irs.gov/Form8879* for the latest information.

OMB No. 1545-0074

2017

Submission Identification Number (SID) ▶

Taxpayer's name	Social security number
Bryan R Rendzio	595-60-1783
Spouse's name	Spouse's social security number
Stacy O Rendzio	250-73-8531

Part I Tax Return Information - Tax Year Ending December 31, 2017 (Whole dollars only)

1	Adjusted gross income (Form 1040, line 38; Form 1040A, line 22; Form 1040EZ, line 4; Form 1040NR, line 37)	1	290,600
2	Total tax (Form 1040, line 63; Form 1040A, line 39; Form 1040EZ, line 12; Form 1040NR, line 61)	2	59,722
3	Federal income tax withheld from Forms W-2 and 1099 (Form 1040, line 64; Form 1040A, line 40; Form 1040EZ, line 7; Form 1040NR, line 62a)	3	62,541
4	Refund (Form 1040, line 76a; Form 1040A, line 48a; Form 1040EZ, line 13a; Form 1040-SS, Part I, line 13a; Form 1040NR, line 73a)	4	2,819
5	Amount you owe (Form 1040, line 78; Form 1040A, line 50; Form 1040EZ, line 14; Form 1040NR, line 75)	5	

Part II Taxpayer Declaration and Signature Authorization (Be sure you get and keep a copy of your return)

Under penalties of perjury, I declare that I have examined a copy of my electronic individual income tax return and accompanying schedules and statements for the tax year ending December 31, 2017, and to the best of my knowledge and belief, it is true, correct, and accurately lists all amounts and sources of income I received during the tax year. I further declare that the amounts in Part I above are the amounts from my electronic income tax return. I consent to allow my intermediate service provider, transmitter, or electronic return originator (ERO) to send my return to the IRS and to receive from the IRS **(a)** an acknowledgement of receipt or reason for rejection of the transmission, **(b)** the reason for any delay in processing the return or refund, and **(c)** the date of any refund. If applicable, I authorize the U.S. Treasury and its designated Financial Agent to initiate an ACH electronic funds withdrawal (direct debit) entry to the financial institution account indicated in the tax preparation software for payment of my federal taxes owed on this return and/or a payment of estimated tax, and the financial institution to debit the entry to this account. This authorization is to remain in full force and effect until I notify the U.S. Treasury Financial Agent to terminate the authorization. To revoke (cancel) a payment, I must contact the U.S. Treasury Financial Agent at **1-888-353-4537.** Payment cancellation requests must be received no later than 2 business days prior to the payment (settlement) date. I also authorize the financial institutions involved in the processing of the electronic payment of taxes to receive confidential information necessary to answer inquiries and resolve issues related to the payment. I further acknowledge that the personal identification number (PIN) below is my signature for my electronic income tax return and, if applicable, my Electronic Funds Withdrawal Consent.

Taxpayer's PIN: check one box only RTN=063107513 Acct=5481363223

[X] I authorize SIMONIC SIMONIC RATNECHT to enter or generate my PIN 09091
ERO firm name — **Enter five digits, but don't enter all zeros**
as my signature on my tax year 2017 electronically filed income tax return.

[ ] I will enter my PIN as my signature on my tax year 2017 electronically filed income tax return. Check this box **only** if you are entering your own PIN **and** your return is filed using the Practitioner PIN method. The ERO must complete Part III below.

Your signature ▶ ________ Date ▶ ________

Spouse's PIN: check one box only

[X] I authorize SIMONIC SIMONIC RATNECHT to enter or generate my PIN 44973
ERO firm name — **Enter five digits, but don't enter all zeros**
as my signature on my tax year 2017 electronically filed income tax return.

[ ] I will enter my PIN as my signature on my tax year 2017 electronically filed income tax return. Check this box **only** if you are entering your own PIN **and** your return is filed using the Practitioner PIN method. The ERO must complete Part III below.

Spouse's signature ▶ ________ Date ▶ ________

Practitioner PIN Method Returns Only - continue below

Part III Certification and Authentication - Practitioner PIN Method Only

ERO's EFIN/PIN. Enter your six-digit EFIN followed by your five-digit self-selected PIN. 592264-81161
Don't enter all zeros

I certify that the above numeric entry is my PIN, which is my signature for the tax year 2017 electronically filed income tax return for the taxpayer(s) indicated above. I confirm that I am submitting this return in accordance with the requirements of the Practitioner PIN method and **Pub.1345,** Handbook for Authorized IRS *e-file* Providers of Individual Income Tax Returns.

ERO's signature ▶ Joanne F Ratnecht Date ▶ 02-20-2018

ERO Must Retain This Form - See Instructions
Don't Submit This Form to the IRS Unless Requested To Do So

Form **1040** Department of the Treasury - Internal Revenue Service (99)
U.S. Individual Income Tax Return 2017

OMB No. 1545-0074 | IRS Use Only-Do not write or staple in this space.

For the year Jan. 1-Dec. 31, 2017, or other tax year beginning , 2017, ending , 20 | See separate instructions.

Your first name and initial	Last name	Your social security number
Bryan R	Rendzio	XXX-XX-XXXX
If a joint return, spouse's first name and initial	Last name	Spouse's social security number
Stacy O	Rendzio	XXX-XX-XXXX

Home address (number and street). If you have a P.O. box, see instructions. Apt. no.
205 Odoms Mill Blvd

▲ Make sure the SSN(s) above and on line 6c are correct.

City, town or post office, state, and ZIP code. If you have a foreign address, also complete spaces below (see instructions).
Ponte Vedra Beach FL 32082

Foreign country name | Foreign province/state/county | Foreign postal code

Presidential Election Campaign
Check here if you, or your spouse if filing jointly, want $3 to go to this fund. Checking a box below will not change your tax or refund. ☐ You ☐ Spouse

Filing Status

Check only one box.

1 ☐ Single
2 ☒ Married filing jointly (even if only one had income)
3 ☐ Married filing separately. Enter spouse's SSN above and full name here. ▶
4 ☐ Head of household (with qualifying person). (See instructions.) If the qualifying person is a child but not your dependent, enter this child's name here. ▶
5 ☐ Qualifying widow(er) (see instructions)

Exemptions

6a ☒ **Yourself.** If someone can claim you as a dependent, **do not** check box 6a
b ☒ **Spouse**
Boxes checked on 6a and 6b: 2

c **Dependents:**

(1) First name	Last name	(2) Dependent's social security number	(3) Dependent's relationship to you	(4) Chk if child under age 17 qualifying for child tax credit (see instructions)
Aiden B	Rendzio	XXX-XX-XXXX	Son	X
Lucas P	Rendzio	XXX-XX-XXXX	Son	X
				☐
				☐

If more than four dependents, see instructions and check here ▶☐

No. of children on 6c who:
- lived with you: 2
- did not live with you due to divorce or separation (see instructions)

Dependents on 6c not entered above

d Total number of exemptions claimed — Add numbers on lines above ▶ 4

Income

Attach Form(s) W-2 here. Also attach Forms W-2G and 1099-R if tax was withheld.

If you did not get a W-2, see instructions.

Line	Description		Amount
7	Wages, salaries, tips, etc. Attach Form(s) W-2	7	291,200
8a	**Taxable** interest. Attach Schedule B if required	8a	
b	**Tax-exempt** interest. **Do not** include on line 8a — 8b		
9a	Ordinary dividends. Attach Schedule B if required	9a	
b	Qualified dividends — 9b		
10	Taxable refunds, credits, or offsets of state and local income taxes	10	
11	Alimony received	11	
12	Business income or (loss). Attach Schedule C or C-EZ	12	
13	Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶ ☐	13	
14	Other gains or (losses). Attach Form 4797	14	
15a	IRA distributions — 15a; b Taxable amount	15b	
16a	Pensions and annuities — 16a; b Taxable amount	16b	
17	Rental real estate, royalties, partnerships, S corporations, trusts, etc. Attach Schedule E	17	
18	Farm income or (loss). Attach Schedule F	18	
19	Unemployment compensation	19	
20a	Social security benefits — 20a; b Taxable amount	20b	
21	Other income	21	
22	Combine the amounts in the far right column for lines 7 through 21. This is your **total income** ▶	22	291,200

Adjusted Gross Income

Line	Description		Amount		
23	Educator expenses	23			
24	Certain business expenses of reservists, performing artists, and fee-basis government officials. Attach Form 2106 or 2106-EZ	24			
25	Health savings account deduction. Attach Form 8889	25	600		
26	Moving expenses. Attach Form 3903	26			
27	Deductible part of self-employment tax. Attach Schedule SE	27			
28	Self-employed SEP, SIMPLE, and qualified plans	28			
29	Self-employed health insurance deduction	29			
30	Penalty on early withdrawal of savings	30			
31a	Alimony paid b Recipient's SSN ▶	31a			
32	IRA deduction	32			
33	Student loan interest deduction	33			
34	Tuition and fees. Attach Form 8917	34			
35	Domestic production activities deduction. Attach Form 8903	35			
36	Add lines 23 through 35			36	600
37	Subtract line 36 from line 22. This is your **adjusted gross income** ▶			37	290,600

Client Copy

Tax and Credits

Line	Description		Amount
38	Amount from line 37 (adjusted gross income)	38	290,600
39a	Check if: ☐ You were born before January 2, 1953, ☐ Blind. ☐ Spouse was born before January 2, 1953, ☐ Blind. Total boxes checked ▶ 39a		
b	If your spouse itemizes on a separate return or you were a dual-status alien, check here ▶ 39b ☐		
40	**Itemized deductions** (from Schedule A) **or** your **standard deduction** (see left margin)	40	19,726
41	Subtract line 40 from line 38	41	270,874
42	**Exemptions.** If line 38 is $156,900 or less, multiply $4,050 by the number on line 6d. Otherwise, see instructions	42	16,200
43	**Taxable income.** Subtract line 42 from line 41. If line 42 is more than line 41, enter -0-	43	254,674
44	**Tax** (see instructions). Check if any from: a ☐ Form(s) 8814 b ☐ Form 4972 c ☐	44	59,259
45	**Alternative minimum tax** (see instructions). Attach Form 6251	45	
46	Excess advance premium tax credit repayment. Attach Form 8962	46	
47	Add lines 44, 45, and 46 ▶	47	59,259
48	Foreign tax credit. Attach Form 1116 if required	48	
49	Credit for child and dependent care expenses. Attach Form 2441	49	
50	Education credits from Form 8863, line 19	50	
51	Retirement savings contributions credit. Attach Form 8880	51	
52	Child tax credit. Attach Schedule 8812, if required	52	
53	Residential energy credit. Attach Form 5695	53	
54	Other credits from Form: a ☐ 3800 b ☐ 8801 c ☐	54	
55	Add lines 48 through 54. These are your **total credits**	55	0
56	Subtract line 55 from line 47. If line 55 is more than line 47, enter -0- ▶	56	59,259

Standard Deduction for -
- People who check any box on line 39a or 39b **or** who can be claimed as a dependent, see instructions.
- All others:

Single or Married filing separately, $6,350

Married filing jointly or Qualifying widow(er), $12,700

Head of household, $9,350

Other Taxes

Line	Description		Amount
57	Self-employment tax. Attach Schedule SE	57	
58	Unreported social security and Medicare tax from Form: a ☐ 4137 b ☐ 8919	58	
59	Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required	59	
60a	Household employment taxes from Schedule H	60a	
b	First-time homebuyer credit repayment. Attach Form 5405 if required	60b	
61	Health care: individual responsibility (see instructions) Full-year coverage ☒	61	
62	Taxes from: a ☒ Form 8959 b ☐ Form 8960 c ☐ Instructions; enter code(s)	62	463
63	Add lines 56 through 62. This is your **total tax** ▶	63	59,722

Payments

If you have a qualifying child, attach Schedule EIC.

Line	Description		Amount
64	Federal income tax withheld from Forms W-2 and 1099	64	62,541
65	2017 estimated tax payments and amount applied from 2016 return	65	
66a	**Earned income credit (EIC)**	66a	
b	Nontaxable combat pay election	66b	
67	Additional child tax credit. Attach Schedule 8812	67	
68	American opportunity credit from Form 8863, line 8	68	
69	Net premium tax credit. Attach Form 8962	69	
70	Amount paid with request for extension to file	70	
71	Excess social security and tier 1 RRTA tax withheld	71	
72	Credit for federal tax on fuels. Attach Form 4136	72	
73	Credits from Form: a ☐ 2439 b ☐ Reserved c ☐ 8885 d ☐	73	
74	Add lines 64, 65, 66a, and 67 through 73. These are your **total payments** ▶	74	62,541

Refund

Line	Description		Amount
75	If line 74 is more than line 63, subtract line 63 from line 74. This is the amount you **overpaid**	75	2,819
76a	Amount of line 75 you want **refunded to you.** If Form 8888 is attached, check here ▶ ☐	76a	2,819
b	Routing number 063107513 ▶ c Type: ☒ Checking ☐ Savings		
d	Account number 5481363223		
77	Amount of line 75 you want **applied to your 2018 estimated tax** ▶	77	

Direct deposit? See instructions.

Amount You Owe

Line	Description		Amount
78	**Amount you owe.** Subtract line 74 from line 63. For details on how to pay, see instructions ▶	78	
79	Estimated tax penalty (see instructions)	79	

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see instructions)? ☐ **Yes.** Complete below. ☒ **No**

Designee's name ▶ Phone no. ▶ Personal identification number (PIN) ▶

Sign Here

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and accurately list all amount and sources of income I received during the tax year. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Joint return? See instructions. Keep a copy for your records.

Your signature	Date	Your occupation	Daytime phone number
09091	02-20-2018	Attorney	904-396-1800
Spouse's signature. If a joint return, **both** must sign.	Date	Spouse's occupation	Identity Protection PIN (see inst.)
44973	02-20-2018	Homemaker	

Paid Preparer Use Only

Preparer's signature	Date	Check ☐ if self-employed	PTIN
Joanne F Ratnecht	02-20-2018		XXXXXXXXX

Print/Type preparer's name: Joanne F Ratnecht

Firm's name ▶ SIMONIC SIMONIC RATNECHT ASSOC — Firm's EIN ▶ 59-3347988

Firm's address ▶ 8750 PERIMETER PARK BLVD, Jacksonville, FL 32216 — Phone no. 904-928-1040

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SCHEDULE A (Form 1040)

Department of the Treasury Internal Revenue Service (99)

Itemized Deductions

▶ Go to *www.irs.gov/ScheduleA* for instructions and the latest information.

▶ Attach to Form 1040.

Caution: If you are claiming a net qualified disaster loss on Form 4684, see the instructions for line 28.

OMB No. 1545-0074

2017

Attachment Sequence No. **07**

Name(s) shown on Form 1040: Bryan R & Stacy O Rendzio

Your social security number: XXX-XX-XXXX

Section	Line	Description	Box	Amount	Box	Amount
Medical and Dental Expenses		**Caution:** Do not include expenses reimbursed or paid by others.				
	1	Medical and dental expenses (see instructions)	1			
	2	Enter amount from Form 1040, line 38 [2]				
	3	Multiply line 2 by 7.5% (0.075)	3			
	4	Subtract line 3 from line 1. If line 3 is more than line 1, enter -0-			4	
Taxes You Paid	5	State and local (**check only one box**): a ☐ Income taxes, **or** b ☒ General sales taxes	5	1,947		
	6	Real estate taxes (see instructions)	6	4,849		
	7	Personal property taxes	7			
	8	Other taxes. List type and amount ▶	8			
	9	Add lines 5 through 8			9	6,796
Interest You Paid	10	Home mortgage interest and points reported to you on Form 1098	10	12,491		
Note: Your mortgage interest deduction may be limited (see instructions).	11	Home mortgage interest not reported to you on Form 1098. If paid to the person from whom you bought the home, see instructions and show that person's name, identifying no., and address ▶	11			
	12	Points not reported to you on Form 1098. See instructions for special rules	12			
	13	Mortgage insurance premiums (see instructions)	13			
	14	Investment interest. Attach Form 4952 if required. See instructions.	14			
	15	Add lines 10 through 14			15	12,491
Gifts to Charity	16	Gifts by cash or check. If you made any gift of $250 or more, see instructions	16	190		
If you made a gift and got a benefit for it, see instructions.	17	Other than by cash or check. If any gift of $250 or more, see instructions. You **must** attach Form 8283 if over $500	17	249		
	18	Carryover from prior year	18			
	19	Add lines 16 through 18			19	439
Casualty and Theft Losses	20	Casualty or theft loss(es) other than net qualified disaster losses. Attach Form 4684 and enter the amount from line 18 of that form. See instructions			20	
Job Expenses and Certain Miscellaneous Deductions	21	Unreimbursed employee expenses - job travel, union dues, job education, etc. Attach Form 2106 or 2106-EZ if required. See instr. ▶FORM 2106-EZ 5,170	21	5,170		
	22	Tax preparation fees	22	428		
	23	Other expenses - investment, safe deposit box, etc. List type and amount ▶	23			
	24	Add lines 21 through 23	24	5,598		
	25	Enter amount from Form 1040, line 38 [25] 290,600				
	26	Multiply line 25 by 2% (0.02)	26	5,812		
	27	Subtract line 26 from line 24. If line 26 is more than line 24, enter -0-			27	0
Other Miscellaneous Deductions	28	Other - from list in instructions. List type and amount ▶			28	
Total Itemized Deductions	29	Is Form 1040, line 38, over $156,900? ☐ **No.** Your deduction is not limited. Add the amounts in the far right column for lines 4 through 28. Also, enter this amount on Form 1040, line 40. ☒ **Yes.** Your deduction may be limited. See the Itemized Deductions Worksheet in the instructions to figure the amount to enter.			29	19,726
	30	If you elect to itemize deductions even though they are less than your standard deduction, check here ▶ ☐				

Client Copy

Form **8889**

Department of the Treasury
Internal Revenue Service

Health Savings Accounts (HSAs)

▶ Attach to Form 1040 or Form 1040NR.
▶ Go to *www.irs.gov/Form8889* for instructions and the latest information.

OMB No. 1545-0074
2017
Attachment Sequence No. **52**

Name(s) shown on Form 1040 or Form 1040NR	Social security number of HSA beneficiary. If both spouses have HSAs, see instructions ▶
Bryan R & Stacy O Rendzio	XXX-XX-XXXX

Before you begin: Complete Form 8853, Archer MSAs and Long-Term Care Insurance Contracts, if required.

Part I — HSA Contributions and Deduction.
See the instructions before completing this part. If you are filing jointly and both you and your spouse each have separate HSAs, complete a separate Part I for each spouse.

Line	Description	Box	Amount
1	Check the box to indicate your coverage under a high-deductible health plan (HDHP) during 2017 (see instructions) ▶	[X] Self-only	[ ] Family
2	HSA contributions you made for 2017 (or those made on your behalf), including those made from January 1, 2018, through April 17, 2018, that were for 2017. **Do not** include employer contributions, contributions through a cafeteria plan, or rollovers (see instructions)	2	600
3	If you were under age 55 at the end of 2017, and on the first day of **every** month during 2017, you were, or were considered, an eligible individual with the **same** coverage, enter $3,400 ($6,750 for family coverage). **All others,** see the instructions for the amount to enter	3	3,400
4	Enter the amount you and your employer contributed to your Archer MSAs for 2017 from Form 8853, lines 1 and 2. If you or your spouse had family coverage under an HDHP at any time during 2017, also include any amount contributed to your spouse's Archer MSAs	4	
5	Subtract line 4 from line 3. If zero or less, enter -0-	5	3,400
6	Enter the amount from line 5. But if you and your spouse each have separate HSAs and had family coverage under an HDHP at any time during 2017, see the instructions for the amount to enter	6	3,400
7	If you were age 55 or older at the end of 2017, married, and you or your spouse had family coverage under an HDHP at any time during 2017, enter your additional contribution amount (see instructions)	7	
8	Add lines 6 and 7	8	3,400
9	Employer contributions made to your HSAs for 2017 — 9		
10	Qualified HSA funding distributions — 10		
11	Add lines 9 and 10	11	
12	Subtract line 11 from line 8. If zero or less, enter -0-	12	3,400
13	**HSA deduction.** Enter the **smaller** of line 2 or line 12 here and on Form 1040, line 25, or Form 1040NR, line 25	13	600

Caution: *If line 2 is more than line 13, you may have to pay an additional tax (see instructions).*

Part II — HSA Distributions.
If you are filing jointly and both you and your spouse each have separate HSAs, complete a separate Part II for each spouse.

Line	Description	Box	Amount
14a	Total distributions you received in 2017 from all HSAs (see instructions)	14a	844
b	Distributions included on line 14a that you rolled over to another HSA. Also include any excess contributions (and the earnings on those excess contributions) included on line 14a that were withdrawn by the due date of your return (see instructions)	14b	
c	Subtract line 14b from line 14a	14c	844
15	Qualified medical expenses paid using HSA distributions (see instructions)	15	844
16	**Taxable HSA distributions.** Subtract line 15 from line 14c. If zero or less, enter -0-. Also, include this amount in the total on Form 1040, line 21, or Form 1040NR, line 21. On the dotted line next to line 21, enter "HSA" and the amount	16	0
17a	If any of the distributions included on line 16 meet any of the **Exceptions to the Additional 20% Tax** (see instructions), check here ▶ [ ]		
b	**Additional 20% tax** (see instructions). Enter 20% (0.20) of the distributions included on line 16 that are subject to the additional 20% tax. Also include this amount in the total on Form 1040, line 62, or Form 1040NR, line 60. Check box c on Form 1040, line 62, or box b on Form 1040NR, line 60. Enter "HSA" and the amount on the line next to the box	17b	

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Part III **Income and Additional Tax for Failure To Maintain HDHP Coverage.** See the instructions before completing this part. If you are filing jointly and both you and your spouse each have separate HSAs, complete a separate Part III for each spouse.

18	Last-month rule	18	
19	Qualified HSA funding distribution	19	
20	**Total income.** Add lines 18 and 19. Include this amount on Form 1040, line 21, or Form 1040NR, line 21. On the dotted line next to Form 1040, line 21, or Form 1040NR, line 21, enter "HSA" and the amount	20	
21	**Additional tax.** Multiply line 20 by 10% (0.10). Include this amount in the total on Form 1040, line 62, or Form 1040NR, line 60. Check box c on Form 1040, line 62, or box b on Form 1040NR, line 60. Enter "HDHP" and the amount on the line next to the box	21	

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Form **8959**

Department of the Treasury
Internal Revenue Service

Additional Medicare Tax

▶ If any line does not apply to you, leave it blank. See separate instructions.
▶ Attach to Form 1040, 1040NR, 1040-PR, or 1040-SS.
▶ Go to *www.irs.gov/Form8959* for instructions and the latest information.

OMB No. 1545-0074
2017
Attachment Sequence No. **71**

Name(s) shown on return: Bryan R & Stacy O Rendzio
Your social security number: XXX-XX-XXXX

Part I Additional Medicare Tax on Medicare Wages

1	Medicare wages and tips from Form W-2, box 5. If you have more than one Form W-2, enter the total of the amounts from box 5	1	301,425		
2	Unreported tips from Form 4137, line 6	2			
3	Wages from Form 8919, line 6	3			
4	Add lines 1 through 3	4	301,425		
5	Enter the following amount for your filing status: Married filing jointly $250,000; Married filing separately $125,000; Single, Head of household, or Qualifying widow(er) $200,000	5	250,000		
6	Subtract line 5 from line 4. If zero or less, enter -0-			6	51,425
7	Additional Medicare Tax on Medicare wages. Multiply line 6 by 0.9% (0.009). Enter here and go to Part II			7	463

Part II Additional Medicare Tax on Self-Employment Income

8	Self-employment income from Schedule SE (Form 1040), Section A, line 4, or Section B, line 6. If you had a loss, enter -0- (Form 1040-PR and Form 1040-SS filers, see instructions.)	8			
9	Enter the following amount for your filing status: Married filing jointly $250,000; Married filing separately $125,000; Singe, Head of household, or Qualifying widow(er) $200,000	9			
10	Enter the amount from line 4	10			
11	Subtract line 10 from line 9. If zero or less, enter -0-	11			
12	Subtract line 11 from line 8. If zero or less, enter -0-			12	
13	Additional Medicare Tax on self-employment income. Multiply line 12 by 0.9% (0.009). Enter here and go to Part III			13	

Part III Additional Medicare Tax on Railroad Retirement Tax Act (RRTA) Compensation

14	Railroad retirement (RRTA) compensation and tips from Form(s) W-2, box 14 (see instructions)	14			
15	Enter the following amount for your filing status: Married filing jointly $250,000; Married filing separately $125,000; Single, Head of household, or Qualifying widow(er) $200,000	15			
16	Subtract line 15 from line 14. If zero or less, enter -0-			16	
17	Additional Medicare Tax on railroad retirement (RRTA) compensation. Multiply line 16 by 0.9% (0.009). Enter here and go to Part IV			17	

Part IV Total Additional Medicare Tax

18	Add lines 7, 13, and 17. Also include this amount on Form 1040, line 62, (Form 1040NR, 1040-PR, and 1040-SS filers, see instructions) and go to Part V	18	463

Part V Withholding Reconciliation

19	Medicare tax withheld from Form W-2, box 6. If you have more than one Form W-2, enter the total of the amounts from box 6	19	4,515		
20	Enter the amount from line 1	20	301,425		
21	Multiply line 20 by 1.45% (0.0145). This is your regular Medicare tax withholding on Medicare wages	21	4,371		
22	Subtract line 21 from line 19. If zero or less, enter -0-. This is your Additional Medicare Tax withholding on Medicare wages			22	144
23	Additional Medicare Tax withholding on railroad retirement (RRTA) compensation from Form W-2, box 14 (see instructions)			23	
24	**Total Additional Medicare Tax withholding.** Add lines 22 and 23. Also include this amount with federal income tax withholding on Form 1040, line 64 (Form 1040NR, 1040-PR, and 1040-SS filers, see instructions)			24	144

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Form **2106-EZ**

Department of the Treasury
Internal Revenue Service (99)

Unreimbursed Employee Business Expenses

▶ Attach to Form 1040 or Form 1040NR.

▶ Go to *www.irs.gov/Form2106EZ* for the latest information.

OMB No. 1545-0074

2017

Attachment Sequence No. **129A**

Your name	Occupation in which you incurred expenses	Social security number
Bryan R Rendzio	Attorney	XXX-XX-XXXX

You Can Use This Form Only if All of the Following Apply.

- You are an employee deducting ordinary and necessary expenses attributable to your job. An ordinary expense is one that is common and accepted in your field of trade, business, or profession. A necessary expense is one that is helpful and appropriate for your business. An expense doesn't have to be required to be considered necessary.
- You **don't** get reimbursed by your employer for any expenses (amounts your employer included in box 1 of your Form W-2 aren't considered reimbursements for this purpose).
- If you are claiming vehicle expense, you are using the standard mileage rate for 2017.

Caution: You can use the standard mileage rate for 2017 **only if: (a)** you owned the vehicle and used the standard mileage rate for the first year you placed the vehicle in service, **or (b)** you leased the vehicle and used the standard mileage rate for the portion of the lease period after 1997.

Part I Figure Your Expenses

1	Complete Part II. Multiply line 8a by 53.5 cents (0.535). Enter the result here	1	5,170
2	Parking fees, tolls, and transportation, including train, bus, etc., that **didn't** involve overnight travel or commuting to and from work	2	
3	Travel expense while away from home overnight, including lodging, airplane, car rental, etc. **Don't** include meals and entertainment	3	
4	Business expenses not included on lines 1 through 3. **Don't** include meals and entertainment	4	
5	Meals and entertainment expenses: $ ________ x 50% (0.50). (Employees subject to Department of Transportation (DOT) hours of service limits: Multiply meal expenses incurred while away from home on business by 80% (0.80) instead of 50%. For details, see instructions.)	5	
6	**Total expenses.** Add lines 1 through 5. Enter here and on **Schedule A (Form 1040), line 21** (or on **Schedule A (Form 1040NR), line 7**). (Armed Forces reservists, fee-basis state or local government officials, qualified performing artists, and individuals with disabilities: See the instructions for special rules on where to enter this amount.)	6	5,170

Part II Information on Your Vehicle. Complete this part **only** if you are claiming vehicle expense on line 1.

7 When did you place your vehicle in service for business use? (month, day, year) ▶ 01-01-2016

8 Of the total number of miles you drove your vehicle during 2017, enter the number of miles you used your vehicle for:

a Business 9,663 **b** Commuting (see instructions) ________ **c** Other 14,337

9 Was your vehicle available for personal use during off-duty hours? ☒ Yes ☐ No

10 Do you (or your spouse) have another vehicle available for personal use? ☒ Yes ☐ No

11a Do you have evidence to support your deduction? ☒ Yes ☐ No

b If "Yes," is the evidence written? ☒ Yes ☐ No

For Paperwork Reduction Act Notice, see your tax return instructions. Form **2106-EZ** (2017)

EEA

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Form **8879**

Department of the Treasury
Internal Revenue Service

...S *e-file* Signature Authorization

▶ Return completed Form 8879 to your ERO. (Do not send to IRS.)

▶ Go to *www.irs.gov/Form8879* for the latest information.

OMB No. 1545-0074

2017

Submission Identification Number (SID) ▶

Taxpayer's name	Social security number
Bryan R Rendzio	XXX-XX-XXXX
Spouse's name	Spouse's social security number
Stacy O Rendzio	XXX-XX-XXXX

Part I **Tax Return Information - Tax Year Ending December 31, 2017** (Whole dollars only)

1	Adjusted gross income (Form 1040, line 38; Form 1040A, line 22; Form 1040EZ, line 4; Form 1040NR, line 37)	1	290,600
2	Total tax (Form 1040, line 63; Form 1040A, line 39; Form 1040EZ, line 12; Form 1040NR, line 61)	2	59,722
3	Federal income tax withheld from Forms W-2 and 1099 (Form 1040, line 64; Form 1040A, line 40; Form 1040EZ, line 7; Form 1040NR, line 62a)	3	62,541
4	Refund (Form 1040, line 76a; Form 1040A, line 48a; Form 1040EZ, line 13a; Form 1040-SS, Part I, line 13a; Form 1040NR, line 73a)	4	2,819
5	Amount you owe (Form 1040, line 78; Form 1040A, line 50; Form 1040EZ, line 14; Form 1040NR, line 75)	5	

Part II **Taxpayer Declaration and Signature Authorization (Be sure you get and keep a copy of your return)**

Under penalties of perjury, I declare that I have examined a copy of my electronic individual income tax return and accompanying schedules and statements for the tax year ending December 31, 2017, and to the best of my knowledge and belief, it is true, correct, and accurately lists all amounts and sources of income I received during the tax year. I further declare that the amounts in Part I above are the amounts from my electronic income tax return. I consent to allow my intermediate service provider, transmitter, or electronic return originator (ERO) to send my return to the IRS and to receive from the IRS **(a)** an acknowledgement of receipt or reason for rejection of the transmission, **(b)** the reason for any delay in processing the return or refund, and **(c)** the date of any refund. If applicable, I authorize the U.S. Treasury and its designated Financial Agent to initiate an ACH electronic funds withdrawal (direct debit) entry to the financial institution account indicated in the tax preparation software for payment of my federal taxes owed on this return and/or a payment of estimated tax, and the financial institution to debit the entry to this account. This authorization is to remain in full force and effect until I notify the U.S. Treasury Financial Agent to terminate the authorization. To revoke (cancel) a payment, I must contact the U.S. Treasury Financial Agent at **1-888-353-4537.** Payment cancellation requests must be received no later than 2 business days prior to the payment (settlement) date. I also authorize the financial institutions involved in the processing of the electronic payment of taxes to receive confidential information necessary to answer inquiries and resolve issues related to the payment. I further acknowledge that the personal identification number (PIN) below is my signature for my electronic income tax return and, if applicable, my Electronic Funds Withdrawal Consent.

Taxpayer's PIN: check one box only RTN=063107513 Acct=5481363223

[X] I authorize SIMONIC SIMONIC RATNECHT (**ERO firm name**) to enter or generate my PIN 09091 (**Enter five digits, but don't enter all zeros**) as my signature on my tax year 2017 electronically filed income tax return.

[ ] I will enter my PIN as my signature on my tax year 2017 electronically filed income tax return. Check this box **only** if you are entering your own PIN **and** your return is filed using the Practitioner PIN method. The ERO must complete Part III below.

Your signature ▶ Date ▶

Spouse's PIN: check one box only

[X] I authorize SIMONIC SIMONIC RATNECHT (**ERO firm name**) to enter or generate my PIN 44973 (**Enter five digits, but don't enter all zeros**) as my signature on my tax year 2017 electronically filed income tax return.

[ ] I will enter my PIN as my signature on my tax year 2017 electronically filed income tax return. Check this box **only** if you are entering your own PIN **and** your return is filed using the Practitioner PIN method. The ERO must complete Part III below.

Spouse's signature ▶ Date ▶

Practitioner PIN Method Returns Only - continue below

Part III **Certification and Authentication - Practitioner PIN Method Only**

ERO's EFIN/PIN. Enter your six-digit EFIN followed by your five-digit self-selected PIN. XXXXXX-81161 **Don't enter all zeros**

I certify that the above numeric entry is my PIN, which is my signature for the tax year 2017 electronically filed income tax return for the taxpayer(s) indicated above. I confirm that I am submitting this return in accordance with the requirements of the Practitioner PIN method and **Pub.1345,** Handbook for Authorized IRS *e-file* Providers of Individual Income Tax Returns.

ERO's signature ▶ Joanne F Ratnecht Date ▶ 02-20-2018

ERO Must Retain This Form - See Instructions
Don't Submit This Form to the IRS Unless Requested To Do So

For Paperwork Reduction Act Notice, see your tax return instructions.

EEA

Client Copy

1040

Overflow Statement

2017
Page 1

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Your Social Security Number: XXX-XX-XXXX

Schedule A, Line 10 - Home mtg interest and points on Form 1

Description	Amount
Fidelity Bank	$ 12,165
Fidelity Bank - Home equity	326
Total:	**$ 12,491**

Client Copy

Federal Income Tax Withheld

2017 PG01

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Your Social Security Number: XXX-XX-XXXX

Description	Amount
W2 - Albert T Franson A Professional	46,754
W2 - Brown & Brown Inc	15,643
Form 8959	144
Total Withholdings	**62,541**

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Computation of Regular Tax

(Keep for your records)

2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Tax ID Number: XXX-XX-XXXX

Statement for line 44 of Form 1040

Tax Rate Schedule for Married Filing Joint Filing Status

If taxable income is over	but not over	pay	plus	% on excess	of the amount over
0	18,650	0.00		10%	0
18,650	75,900	1,865.00		15%	18,650
75,900	153,100	10,452.50		25%	75,900
153,100	233,350	29,752.50		28%	153,100
233,350	**416,700**	**52,222.50**		**33%**	**233,350**
416,700	470,700	112,728.00		35%	416,700
470,700	. . . . .	131,628.00		39.6%	470,700

$52,222.50 + (($254,674.00 - $233,350.00) x 33.0%) = $59,259

Tax from Tax Rate Schedule $ 59,259

$ 59,259 Tax computed using only available method

Client Copy

State ‚ıd Local General Sales Tax Dedu ‚ion Worksheet - Line 5b

(Keep for your records)

2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Tax ID Number: XXX-XX-XXXX

Before you begin: See the instructions for line 1 of the worksheet if you:

- Lived in more than one state during 2017, or
- Had any **nontaxable** income in 2017.

1. Enter your **state** general sales taxes from the 2017 Optional State Sales Tax Table 1. 1,797

Next. If, for all of 2017, you lived only in Connecticut, the District of Columbia, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, or Rhode Island, skip lines 2 through 5, enter -0- on line 6, and go to line 7. Otherwise, go to line 2.

2. Did you live in Alaska, Arizona, Arkansas, Colorado, Georgia, Illinois, Louisiana, Mississippi, Missouri, New York, North Carolina, South Carolina, Tennessee, Utah, or Virginia in 2017?

   ☒ **No.** Enter -0-
   ☐ **Yes.** Enter your base **local** general sales taxes from the 2017 Optional Local Sales Tax Tables . . . . . 2. ______

3. Did your locality impose a **local** general sales tax in 2017? Residents of California and Nevada, see the instructions for line 3 of the worksheet.

   ☐ **No.** Skip lines 3 through 5, enter -0- on line 6, and go to line 7.
   ☒ **Yes.** Enter your **local** general sales tax rate, but omit the percentage sign. For example, if your local general sales tax rate was 2.5%, enter 2.5. If your local general sales tax rate changed or you lived in more than one locality in the same state during 2017, see the instructions for line 3 of the worksheet 3. 0.500000

4. Did you enter -0- on line 2?

   ☐ **No.** Skip lines 4 and 5 and go to line 6.
   ☒ **Yes.** Enter your **state** general sales tax rate (shown in the table heading for your state), but omit the percentage sign. For example, if your state general sales tax rate is 6%, enter 6.0 . . . . 4. 6.000000

5. Divide line 3 by line 4. Enter the result as a decimal (rounded to at least three places) 5. 0.083333

6. Did you enter -0- on line 2?

   ☐ **No.** Multiply line 2 by line 3
   ☒ **Yes.** Multiply line 1 by line 5. If you lived in more than one locality in the same state during 2017, see the instructions for line 6 of the worksheet 6. 150

7. Enter your state and local general sales taxes paid on specified items, if any. See the instructions for line 7 of the worksheet . . . . 7. ______

8. **Deduction for general sales taxes.** Add lines 1, 6, and 7. Enter the result here and the total from all your state and local general sales tax deduction worksheets, if you completed more than one, on Schedule A, line 5. Be sure to check **box b** on that line 8. 1,947

Optional Sales Tax Table Computation

State: FL

Income:	290,600			
Exemptions:*	4			
Amount from table:	1,797			
Days:	365			
Deduction:	1,797			

* "Over 5" is the maximum number of exemptions in the optional sales tax tables in Schedule A Instructions. Returns with six or more exemptions will display a "6" on this line.

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Forms 1040, 1040A, 1040NR

Child Tax Credit Worksheet

(Keep for your records)

2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Tax ID Number: XXX-XX-XXXX

Before you begin: Figure the amount of any credits you are claiming on Form 5695, Part II, line 30*; Form 8910; Form 8936; or Schedule R.

CAUTION!
- *To be a qualifying child for the child tax credit, the child must be* **under age 17** *at the end of 2017 and meet the other requirements listed earlier under* Qualifying Child. *Also see* Taxpayer identification number needed by due date of return, *earlier.*
- *If you do not have a qualifying child, you cannot claim the child tax credit.*

**See the Form 5695 instructions to see if line 30 (nonbusiness energy property credit) applies for 2017.*

Part 1

1. Number of qualifying children: 2 X $1,000. Enter the result. **1.** 2,000
2. Enter the amount from Form 1040, line 38; Form 1040A, line 22; or Form 1040NR, line 37. **2.** 290,600
3. **1040 Filers.** Enter the total of any -
   - Exclusion of income from Puerto Rico, and
   - Amounts from Form 2555, lines 45 and 50; Form 2555-EZ, line 18; and Form 4563, line 15.

   1040A and 1040NR Filers. Enter -0-. **3.**
4. Add lines 2 and 3. Enter the total. **4.** 290,600
5. Enter the amount shown below for your filing status.
   - Married filing jointly - $110,000
   - Single, head of household, or qualifying widow(er) - $75,000
   - Married filing separately - $55,000

   5. 110,000
6. Is the amount on line 4 more than the amount on line 5?

   ☐ **No.** Leave line 6 blank. Enter -0- on line 7.

   ☒ **Yes.** Subtract line 5 from line 4. **6.** 181,000

   If the result is not a multiple of $1,000, increase it to the next multiple of $1,000. For example, increase $425 to $1,000, increase $1,025 to $2,000, etc.
7. Multiply the amount on line 6 by 5% (.05). Enter the result. **7.** 9,050
8. Is the amount on line 1 more than the amount on line 7?

   ☒ **No. STOP**

   You cannot take the child tax credit on Form 1040, line 52; Form 1040A, line 35; or Form 1040NR, line 49. You also cannot take the additional child tax credit on Form 1040, line 67; Form 1040A, line 43; or Form 1040NR, line 64. Complete the rest of your Form 1040, Form 1040A, or Form 1040NR.

   ☐ **Yes.** Subtract line 7 from line 1. Enter the result. *Go to Part 2 below.* **8.**

Part 2

9. Enter the amount from Form 1040, line 47; Form 1040A, line 30; or Form 1040NR, line 45. **9.** 0
10. Add the following amounts from:

Form 1040	or Form 1040A	or Form 1040NR	
Line 48	-------------	Line 46	+
Line 49	Line 31	Line 47	+
Line 50	Line 33	-------------	+
Line 51	Line 34	Line 48	+
Form 5695, line 30			+
Form 8910, line 15			+
Form 8936, line 23			+
Schedule R, line 22			+

Enter the total. **10.**

11. Are you claiming any of the following credits?
    - Mortgage interest credit, Form 8396.
    - Adoption credit, Form 8839.
    - Residential energy efficient property credit, Form 5695, Part I.
    - District of Columbia first-time homebuyer credit, Form 8859.

    ☐ **No.** Enter the amount from line 10.

    ☐ **Yes.** If you are filing Form 2555 or 2555-EZ, enter the amount from line 10. Otherwise, complete the Line 11 Worksheet, later, to figure the amount to enter here. **11.**
12. Subtract line 11 from line 9. Enter the result. **12.** 0
13. Is the amount on line 8 of this worksheet more than the amount on line 12?

    ☐ **No.** Enter the amount from line 8.

    ☐ **Yes.** Enter the amount from line 12. See the **TIP** below.

    This is your child tax credit. **13.** 0

    Enter this amount on Form 1040, line 52; Form 1040A, line 35; or Form 1040NR, line 49.

TIP You may be able to take the **additional child tax credit** on Form 1040, line 67; Form 1040A, line 43; **or** Form 1040NR, line 64, only if you answered "Yes" on line 13.
- First, complete your Form 1040 through line 66a (also complete line 71), Form 1040A through line 42a, or Form 1040NR through line 63 (also, complete line 67).
- Then, use Parts II - IV of Schedule 8812 to figure any additional child tax credit.

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WK_8812.LD

Potential Tax Cuts and Jobs Act Impact

(For your information)

2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Tax ID Number: XXX-XX-XXXX

	2017 Tax Law	Tax Cuts and Jobs Act	**Difference**
Standard deduction	12,700	24,000	11,300
Personal exemptions	16,200	0	(16,200)
Itemized deduction breakdown			
Medical deduction			
Total taxes	6,796	6,796	0
Interest	12,491	12,491	0
Charitable contributions	439	439	0
Casualty and theft			
Job expenses and certain miscellaneous deductions			
Other miscellaneous deductions			
Total itemized deductions	19,726	19,726	0
Greater of standard deduction or itemized deductions	19,726	24,000	4,274
Taxable income before Qualified Business Income(QBI) deduction	254,674	266,600	11,926
Potential QBI deduction **			
Taxable income after potential QBI deduction	254,674	266,600	11,926
Tax	59,259	52,563	(6,696)
Child Tax Credit - non-refundable portion	0	4,000	4,000
Child Tax Credit - refundable portion	0	0	0
Net change in tax if the Tax Cut and Jobs Act applied to the 2017 return			(10,696)

Final result of 2017 return **before** the Tax Cuts and Jobs Act	Refund:	2,819
Potential final result of 2017 return **after** the Tax Cuts and Jobs Act*	Refund:	13,515

***based on the withholding shown on the 2017 return**

This document is not intended to project total tax due on the 2018 return. It is intended to show some of the more common differences that would have occurred on this tax return had the Tax Cuts and Jobs Act been in place for tax year 2017. Only the changes shown above have been taken into consideration.

** The Qualified Business Income (QBI) deduction was computed as the sum of the following:

- 20% of net Schedule C income
- 20% of net Schedule F income
- 20% of the sum of all 1065 K-1 income and 1120S K-1 income

This may not be an accurate representation of the actual QBI. There may be applicable limits that have not been considered because some necessary information is not available in the return.

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Carryover Worksheet
List of items that will carryover to the 2018 tax return

(Keep for your records)

2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Tax ID Number: XXX-XX-XXXX

Itemized Deductions

Carryover Amount

Contributions subject to 100% of AGI limitations
Contributions subject to 50% of AGI limitations
Contributions subject to 30% of AGI limitations (50% capital gains appreciated property)
Contributions subject to 30% of AGI limitations
Contributions subject to 20% of AGI limitations (30% capital gains appreciated property)
Taxable state and local refunds to Form 1040, line 10
State/local taxes paid in 2018 to flow to the Schedule A
State donations and contributions carryover
State overpayment applied to next year

Expenses

Office in home operating expenses
Office in home excess casualty losses and depreciation
Disallowed investment interest expense — AMT — Reg. Tax
Section 179 expense
Operating expenses, from Form WK_E, Sch E - Rental limitation on deductions when used for personal use
Excess depreciation, from Form WK_E, Sch E - Rental limitation on deductions when used for personal use

Losses

Short-term capital loss — AMT — Reg. Tax
Long-term capital loss — AMT — Reg. Tax
Net operating loss — AMT — Reg. Tax
Nonrecaptured net section 1231 losses from WK_1231C — AMT — Reg. Tax

Credits

Mortgage interest credit
Credit for prior year minimum tax
Foreign Tax credit — AMT — Reg. Tax
District of Columbia first time home owner's credit
Res. energy efficient property credit

Other

Preparer Fee — 427
Overpayment applied to next year's estimates
Estimated Tax Payment 1 — Estimated Tax Payment 2
Estimated Tax Payment 3 — Estimated Tax Payment 4
Federal tax liability for 2210 calculation — 59,722
State tax liability for state 2210 calculation
IRA basis — Taxpayer — Spouse

Passive Activity

At Risk Limitations

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	TAX RETURN COMPARISON 2015 / 2016 /2017	2017

Name(s) as shown on return: Bryan R & Stacy O Rendzio

Identifying number: XXX-XX-XXXX

	2015	2016	2017	Difference 2016-2017
Filing Status			2	
Number of Exemptions	2	2	4	2
Income				
Wages, salaries, tips, etc.	211,679	252,958	291,200	38,242
Taxable interest and dividends	163			
Taxable state and local refunds				
Alimony				
Business income (loss)				
Gains (losses)	(28,039)			
Pensions and IRA distributions				
Rent and royalty income (loss)	(15,426)			
Part, S-corps, trusts income (loss)				
Farm income (loss)				
Unemployment compensation				
Total SS benefits received				
Taxable SS benefits				
Other income (loss)	20,269			
Total Income	188,646	252,958	291,200	38,242
Adjusted Gross Income				
Half of self-employment tax				
IRA deduction				
Other adjustments			600	600
Total Adjusted Gross Income	188,646	252,958	290,600	37,642
Deductions				
Medical deductions				
State and local taxes	8,181	10,173	6,796	(3,377)
Interest	15,212	13,983	12,491	(1,492)
Contributions	631	914	439	(475)
Employee business expenses	1,660	1,163		(1,163)
Standard or other deductions				
Total Itemized or Standard Ded	25,684	26,233	19,726	(6,507)
Exemption Amount	16,000	16,200	16,200	
Tax and Credits				
Taxable Income	146,962	210,525	254,674	44,149
Tax	28,328	45,933	59,259	13,326
Credits	600	574		(574)
Self-employment tax				
Other taxes			463	463
Total Tax	27,728	45,461	59,722	14,261
Payments				
Withholdings	39,970	50,444	62,541	12,097
Estimated tax payments				
Earned income credit				
Other payments and credits				
Overpayment	12,242	4,983	2,819	(2,164)
Overpayment Applied				
Refund	12,242	4,983	2,819	(2,164)
Balance Due				
Resident State				
Taxable income				
Tax				
Refund				
Balance Due				
Marginal tax rate	25.00	28.00	33.00	5.00
Effective tax rate	19.00	22.00	23.27	1.27

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TAB

MISCELLANEOUS REPORTED CASES

Cited
As of: August 9, 2017 6:07 PM Z

Amerisure Ins. Co. v. Southern Waterproofing, Inc.

United States District Court for the Middle District of Florida, Jacksonville Division

September 19, 2014, Decided; September 19, 2014, Filed

Case No. 3:14-cv-154-J-34JRK

Reporter
2014 U.S. Dist. LEXIS 131765 *; 2014 WL 4682898

AMERISURE INSURANCE COMPANY, a foreign corporation authorized to transact business in Florida A/S/O Plantation Housing Corp., Plaintiff, -vs- SOUTHERN WATERPROOFING, INC., a Florida corporation, Defendant.

Counsel: **[*1]** For Amerisure Insurance Company, a foreign corporation authorized to transact business in Florida A/S/O Plantation Housing Corp., Plaintiff: Albert T. Franson, ***Bryan*** Robert ***Rendzio***, Christopher J. Iseley, LEAD ATTORNEYS, Franson & Iseley, PA, Jacksonville, FL.

For Southern Waterproofing, Inc., a Florida corporation, Defendant: Giovanni Stewart, Jeremy M. Paul, LEAD ATTORNEYS, Dawson|Orr, PA, Jacksonville, FL.

Judges: MARCIA MORALES HOWARD, United States District Judge.

Opinion by: MARCIA MORALES HOWARD

Opinion

ORDER

THIS CAUSE is before the Court on Defendant Southern Waterproofing's Motion to Dismiss Counts I, III, and IV of Plaintiff's Complaint and Incorporated Memorandum of Law (Doc. 6; Motion) filed on February 21, 2014. In the Motion, Defendant Southern Waterproofing Inc. (Southern) requests that the Court dismiss Counts I, III, and IV of the Complaint (Doc. 2) pursuant to *Rule 12(b)(6), Federal Rules of Civil Procedure* (Rule(s)), for "failure to state a cause of action." See Motion at 1-2. Southern alternatively argues that the Court should require Plaintiff Amerisure Insurance Company (Amerisure) to provide a more definite statement regarding its causes of action.[1]

Id. at 2. On March 6, 2014, Amerisure filed a response in opposition to the Motion. See Plaintiff **[*2]** Amerisure Insurance Company's Memorandum of Legal Authority in Opposition to Defendant's Motion to Dismiss Counts I, III, and IV of Plaintiff's Complaint (Doc. 11; Response). Accordingly, this matter is ripe for review.

I. Standard of Review

When considering a motion to dismiss under *Rule 12(b)(6), Federal Rules of Civil Procedure* (Rules(s)), the Court must accept all factual allegations in the complaint as true, construing the allegations and drawing all reasonable inferences in the light most favorable to the plaintiff. *Castro v. Sec'y of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006)*; *Hill v. White, 321 F.3d 1334, 1335*

[1] Although it requests a more definite statement generally at the outset of the Motion, Southern includes argument on this request only with respect to Count I, the breach of contract claim.

(11th Cir. 2003). *Rule "8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. Normally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Id. (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. However, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly, 550 U.S. at 555* (internal citations and [*3] quotations omitted). As a result, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*.

Of course, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In considering a motion to dismiss, a court should "1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" *Amer. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010)* (quoting *Iqbal, 556 U.S. at 679*)).

II. Background

This action stems from a residential construction project performed on property owned by Gary Glaser (Owner), and located at 8 Ocean Club Drive, Amelia Island, Florida (the Project). See Complaint ¶¶ 4, 7. "The Project consists of four (4) stories with five (5) balconies on the front and three (3) on the rear." Id. at 7. Plantation Housing Corp. (PHC) was the contractor for the Project, and Southern served as PHC's subcontractor. Id. ¶¶ 8-9. During the construction of the Project, PHC maintained a commercial general liability insurance policy with Amerisure (the Policy), and the Policy was in "full force [*4] and effect" during the relevant time. Id. ¶ 10.

According to the Complaint, Southern's "scope of work on the Project was not constructed in accordance with industry standards, nor was it constructed in accordance with the manufacturer's instructions." Id. ¶ 11. Amerisure alleges that in 2005, after the May 2004 completion of the Project, "the exterior balconies/decks [on the Project] were evidencing water intrusion." Id. ¶ 12. Amerisure contends that although Southern performed remediation to various balconies and decks in 2005, the Project again experienced water intrusion at the balconies and decks in 2011. Id. ¶¶ 13-14. Amerisure hired Construction Solutions, Inc. (CSI), a forensic engineering company, to investigate the water intrusion and damages, and in a January 23, 2012 report, CSI concluded that the cause of the damage to the balconies/decks was the "incorrect installation and subsequent failure of the deck waterproofing." Id. ¶¶ 15-17; Ex. A at 4. According to Amerisure, "[t]he damages that occurred due to the improper installation of the waterproofing membrane not only caused damages to the balconies/decks themselves, but also cause[d] damage to other property, which included, but was [*5] not limited to corrosion of joist hangers/connections, as well as damage to OSB and structural joists." Id. ¶ 18.

The Policy provides insurance coverage for the "other property damage" to the Project. Id. ¶ 19. As such, PHC made a claim to Amerisure under the Policy with respect to these damages, and Amerisure alleges that it "was required to pay PHC the sum of $221,851.45 for damage to other property . . . ." Id. ¶ 20. Amerisure asserts that it is "legally and equitably subrogated to PHC's rights to the extent of said payment." Id. Based on the foregoing, Amerisure, as subrogee of PHC, brings the instant action against Southern and asserts claims for breach of contract, negligence, equitable subrogation, contribution, and a violation of the Florida Building Code. See generally Complaint.

Southern moves for dismissal of the breach of contract, equitable subrogation, and contribution claims. See Motion at 1.

III. Discussion

A. Contribution

Florida's Uniform Contribution Among Tortfeasors Act provides, in pertinent part, that:

> A liability insurer who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer is subrogated [*6] to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

Fla. Stat. § 768.31(2)(e). Significantly, Florida law limits a tortfeasor's right of contribution in that "[a] tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement . . . ." See *Fla. Stat. § 768.31(2)(d)*. Moreover, "[t]o state a claim for contribution, the claimant must allege a common liability to the injured party." See *Mayor's Jewelers, Inc. v. Meyrowitz, No. 12-80055-CIV, 2012 U.S. Dist. LEXIS 85186, 2012 WL 2344609, at *9 (S.D. Fla. June 20, 2012)*.

Southern first contends that the Court should dismiss the contribution claim because "[t]here are no set of facts under which Amerisure (standing in the shoes of PHC) and Southern could be 'jointly and severally liable' for the injuries sustained by Mr. Glaser . . . ." See Motion at 3. Southern relies on *T&S Enters. Handicap Accessibility, Inc. v. Wink Indus. Maint. & Repair, Inc., 11 So. 3d 411, 412 (Fla. 2d Dist. Ct. App. 2009)* to argue that because joint and several liability in Florida has been abolished, judgments in Florida are now entered purely on a party's pro rata allocation of fault, obviating [*7] the need for contribution claims. See Motion at 3. Southern maintains that Amerisure's allegation that it paid more than its share of the common liability is insufficient because it is "unclear" what transpired between Amerisure and the Owner. Id. at 4. Additionally, Southern argues that if PHC was not at fault for the Owner's damages at all, as Amerisure contends, then it had no obligation to pay the Owner's damages. See id.

As an initial matter, the Court notes that Southern's reliance on T&S Enterprises is misplaced. In that case, the court reasoned that, with joint and several liability abolished, courts will enter judgments in negligence actions against each liable party only on the basis of that party's percentage of fault. See *T&S Enters., 11 So. 3d at 412*. As such, a defendant tortfeasor will not be held liable for more than its pro rata share of the damages, and therefore, that defendant has no need to bring a third-party complaint for contribution against a non-party tortfeasor. *Id. at 412-13*; *Maguire v. Demos, No. 2:10-cv-782-FtM-3DNF, 2012 U.S. Dist. LEXIS 32305, 2012 WL 859605, at *2 (M.D. Fla. Mar. 12, 2012)*; *Zurich Am. Ins. Co. v. Hi-Mar Specialty Chems., LLC, No. 08-80255-CIV, 2010 U.S. Dist. LEXIS 3712, 2010 WL 298392, at *4 (S.D. Fla. Jan. 19, 2010)*. This analysis does not address a direct claim for contribution where a tortfeasor alleges that it has already paid more [*8] than its pro rata share. Indeed, the court specifically stated that its decision "does not determine any rights [the tortfeasor] may have if it elects to settle the plaintiffs' claims in exchange for a general release which includes [the non-party tortfeasor]." *T&S Enters., 11 So. 3d at 413*. Because the instant action is not a third-party complaint, but rather a direct action for contribution based on Amerisure's prior payment to remediate the other property damage, the Court finds the T&S Enterprises analysis to be inapplicable.

Although difficult to discern, it appears Southern may also be arguing that Amerisure fails to allege

common liability between PHC and Southern. As set forth above, "[i]n order to state a cause of action for contribution, [Amerisure is] required to plead or allege 'common liability' on the part of both [Southern] and [PHC.]" See *Ins. Co. of N. Am. v. Quality Commercial Grp., Inc., 687 So. 2d 960, 962 (Fla. 5th Dist. Ct. App. 1997)*. Here, Amerisure alleges that "it paid to remediate the other property damage that occurred as a result of the defective waterproofing membrane that Southern Waterproofing furnished and installed on the Project." See Complaint ¶ 41. Moreover, Amerisure asserts that Southern "was primarily liable for the non-conforming workmanship at issue, and to the extent the PHC **[*9]** was a liable tortfeasor, PHC (through Amerisure) paid more than its pro rata share of the common liability." See id. ¶ 43 (emphasis added). Although the facts supporting this assertion are sparse, at this stage of the proceedings, the Court finds that Amerisure has sufficiently alleged common liability. To the extent Amerisure also takes the position that PHC is not liable for any of the damages, this does not warrant dismissal of the contribution claim because Amerisure is permitted to allege alternative or inconsistent positions.[2]

See *Rule 8(d)(2)-(3)*. Thus, the Court will not dismiss the contribution claim on this basis.

Next, Southern argues that even if Amerisure acknowledges that PHC may have **[*10]** some fault, Amerisure nonetheless fails to allege that it obtained a release of Southern as part of its settlement with the Owner. See Motion at 4. However, upon review of the Complaint, the Court finds that this argument is unavailing. In the Complaint, Amerisure asserts that it "paid the remediation costs to protect the interests of its insured, PHC, Southern Waterproofing's interests, as well as Amerisure's own interests, and did not act as a volunteer." See Complaint ¶ 42 (emphasis added). Although not a model of clarity, construing the allegations and drawing all reasonable inferences in the light most favorable to Amerisure, the Court finds that this allegation sufficiently states that Amerisure extinguished the Owner's claims against Southern with respect to the other property damage to the Project. To the extent there is a dispute about whether Amerisure's remediation payment actually extinguishes Southern's liability to the Owner, this is a factual issue which cannot be resolved on a Motion to Dismiss. See *Mayor's Jewelers, Inc., 2012 U.S. Dist. LEXIS 85186, 2012 WL 2344609, at *9*; see also *Columbia Bank v. Turbeville, 143 So. 3d 964, p. 6 (Fla. 1st Dist. Ct. App. 2014)* (reviewing a motion to dismiss an equitable subrogation claim and finding the argument that plaintiff did not obtain a proper **[*11]** release of claims for defendant to be a factual dispute not a basis for dismissal).[3]

Accordingly, the Court will deny Southern's Motion to Dismiss with respect to Count IV of the Complaint.

B. Equitable Subrogation

Next, Southern moves for dismissal of Amerisure's claim for equitable subrogation set forth in Count III of the Complaint. Under Florida law, "[s]ubrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *West American Ins. Co. v. Yellow Cab Co. of Orlando, Inc., 495 So. 2d 204, 206 (Fla. 5th DCA 1986)* (quoting *Boley v. Daniel, 72 Fla. 121, 72 So. 644, 645 (Fla. 1916)*). In relation to insurance, "[s]ubrogation is the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the

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[2] The Court notes that if "'the party against whom contribution is sought is found one hundred percent liable for tortious injuries,'" then the remedy of contribution fails. *Ins. Co. of N. Am., 687 So. 2d at 962* (quoting *McKenzie Tank Lines, Inc. v. Empire Gas Corp., 538 So. 2d 482, 484 (Fla. 1st Dist. Ct. App. 1989)*). "In that event, 'payments made in settlement with injured parties by a non-liable codefendant in return for release of a responsible codefendant, are recoverable under the theory of indemnity or subrogation.'" Id. Accordingly, Amerisure raises an alternative claim for equitable subrogation in the Complaint. See Complaint at 5-6.

[3] Page numbers are not yet available for this case. As such, the Court notes that it cites to the page numbers of the Westlaw document.

insurer." Monte De Oca v. State Farm Fire & Cas. Co., 897 So. 2d 471, 472 n.2 (Fla. 3d DCA 2004) (internal quotation and citation omitted). Equitable subrogation, the particular subrogation doctrine at issue in this action, "is an equitable remedy rooted in the legal consequence of the actions and relationship between the parties." Columbia Bank, *143 So. 3d 964*, p. 5. A plaintiff must allege five elements in order to maintain a claim for equitable subrogation: "(1) that it made the payment at issue to protect **[*12]** its own interests, (2) the payment was non-voluntary, (3) it was not primarily liable for the debt paid, (4) it paid the entire debt, and (5) subrogation would not work any injustice to the rights of a third party." *Nova Info. Sys., Inc. v. Greenwich Ins. Co., 365 F.3d 996, 1005 (11th Cir. 2004)* (citing *Dade Cnty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 646 (Fla. 1999)*); see also *State Farm Mut. Auto. Ins. Co. v. Johnson, 18 So. 3d 1099, 1100-01 (Fla. 2d Dist. Ct. App. 2009)* (stating same and citing *Dade Cnty. Sch. Bd., 731 So. 2d at 646*). Notably,

> "[s]ubrogation in equity is not available to a mere volunteer or stranger who, without any duty or obligation to intervene and without being so requested, pays the debt of another. The right of subrogation is not necessarily confined to those who are legally bound to make payments, but extends as well to persons who pay the debt in self protection, since they might suffer loss if the obligation is not discharged."

Dade Cnty. Sch. Bd., 731 So. 2d at 647 (quoting *Yellow Cab Co. of Orlando, Inc., 495 So. 2d at 207*). "The 'policy behind the doctrine is to prevent unjust enrichment by assuring that the person who in equity and good conscience is responsible for the debt is ultimately answerable for its discharge.'" Columbia Bank, *143 So. 3d 964*, pg. 5 (quoting Kala Inv., Inc. v. Sklar, *538 So. 2d 909, 917 (Fla. 3d Dist. Ct. App. 1989))*.

Southern's sole challenge to the equitable subrogation claim is that Amerisure, via PHC, is primarily liable for the debt and therefore cannot seek subrogation. See Motion at 6. In the Complaint, Amerisure alleges that Southern is primarily responsible for the debt because the damages were **[*13]** caused by the defective waterproofing membrane that Southern furnished and installed. See Complaint ¶¶ 36-39. Nonetheless, Southern contends that, because PHC was the general contractor for the Project, PHC owed a "non-delegable duty to [the Owner] to see to it that due care was used in constructing/repairing the premises," and as such, the debt Amerisure paid "was not a debt for which Southern could have been primarily responsible for [sic]." See Motion at 6 (citing *Mills v. Krauss, 114 So. 2d 817 (Fla. 2d Dist. Ct. App. 1959)*). However, Amerisure's allegations that PHC sub-contracted with Southern to perform the work and that Southern failed to perform the work properly causing damages must be taken as true at this stage of the proceedings. Thus, even accepting Southern's contention that PHC owed a duty to the Owner, Southern cites no authority to suggest that such a duty somehow precludes Southern, as the entity that performed the allegedly defective work, from being primarily liable for the debt. Moreover, rather than undermine Amerisure's claim for subrogation, the proposition that PHC owed a nondelegable duty to the owner supports the claim of equitable subrogation. This is so because such liability is consistent with Amerisure's allegations **[*14]** that its payment was non-voluntary and to protect its own interests, both required elements of a subrogation claim. See Complaint ¶ 37. Indeed, if Amerisure owed no duty and was merely a "volunteer or stranger who, without any duty or obligation to intervene . . . [paid] the debt of another," then it would be unable to seek equitable subrogation. See *Dade Cnty. Sch. Bd., 731 So. 2d at 647*. Accordingly, Southern's request for dismissal of the equitable subrogation claim is also due to be denied.

C. Breach of Contract

Finally, Southern argues that the Court should dismiss Amerisure's breach of contract claim

because Amerisure fails to allege the material breach of any contractual duty that Southern owed to PHC. See Motion at 6-7. Southern maintains that without more specific information regarding the scope of Southern's work on the Project, "Southern is at a loss to determine what contractual duty it may have breached by virtue of its work at the [P]roject, if any." Id. at 7. Alternatively, Southern requests that the Court "require Amerisure to include specific allegations regarding the scope of Southern's work at the [P]roject or attach a complete copy of the subcontract relating to Southern's work at the [Owner's] residence." Id. Upon review, the **[*15]** Court finds Southern's request for dismissal or clarification of the breach of contract claim to be without merit.

To state a claim for breach of contract under Florida law, a plaintiff must allege: "(1) a valid contract; (2) a material breach; and (3) damages." See *Beck v. Lazard Freres & Co., LLC, 175 F.3d 913, 914 (11th Cir. 1999)*. Here, Amerisure alleges that on January 9, 2004, PHC and Southern entered into a Subcontract Base Agreement for Southern to perform work on the Project, and attaches this Agreement to the Complaint. See Complaint ¶¶ 7, 24-25, Ex. B. Amerisure maintains that Southern materially breached the Agreement "by, among other things, incorrectly installing the Project's waterproofing membrane." Id. ¶ 26. According to the Complaint, the incorrect installation of the waterproofing membrane caused damage from water intrusion to seven of the balconies/decks, as well as other property damage. Id. ¶¶ 14-18. In support of these allegations, Amerisure attaches the CSI Report to the Complaint in which CSI provides additional detail regarding the problems with the balconies/decks. See id.; Ex. A. As a result of the other property damage allegedly caused by Southern's purported breach, Amerisure maintains that PHC made a claim under the Policy, **[*16]** and "Amerisure was required to pay PHC the sum of $221,851.45, for damage to other property . . . ." Id. ¶¶ 20, 27.

Based on the foregoing, the Court finds that Amerisure has adequately alleged the essential elements of a breach of contract action: a valid contract, a material breach and resulting damages. Although Southern contends that more specificity is necessary, the Court finds that the foregoing allegations are sufficient to state a plausible claim for relief and to provide Southern with fair notice of the claims against it. See *Romacorp, Inc. v. Prescient, Inc., No. 1:10-cv-22872, 2011 U.S. Dist. LEXIS 40611, 2011 WL 1430277, at *5 (S.D. Fla. Apr. 14, 2011)*; *Batlle v. Wachovia Bank, N.A., No. 10-21782-CIV, 2011 U.S. Dist. LEXIS 28825, 2011 WL 1085579, at *3 (S.D. Fla. Mar. 21, 2011)* ("The Federal Rules of Civil Procedure do not require that Plaintiffs set out in detail the facts upon which their breach of contract claim is based."). "For better or for worse, the Federal Rules of Civil Procedure do not permit district courts to impose upon plaintiffs the burden to plead with the greatest specificity they can." See *Comprehensive Care Corp. v. Katzman, No. 8:09-cv-1375-T-24-TBM, 2010 U.S. Dist. LEXIS 35410, 2010 WL 1433414 (M.D. Fla. Apr. 9, 2010)*.

Moreover, Southern's suggestion that Amerisure must attach the Plans, Purchase Orders, Bid Specifications, and Construction Practices in order for Southern to have **[*17]** adequate notice regarding the "scope of Southern's work at the [P]roject," is unavailing. See Motion at 7. Although *Florida Rule 1.130* provides that "[a]ll bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought . . . shall be incorporated in or attached to the pleading," once this case was removed to federal court, the federal rules of procedure rather than state rules of procedure became applicable. See *Hollis v. Fla. State Univ., 259 F.3d 1295, 1299 (11th Cir. 2001)*. The Federal Rules of Civil Procedure do not contain a complementary rule to *Florida Rule 1.130* requiring contracts and documents to be attached to pleadings. See *D'Alessandris v. Ley, No. 8:07-cv-1975-T-26TGW, 2007 U.S. Dist. LEXIS 82112, 2007 WL 3256459, at * 1 (M.D. Fla. Nov. 2, 2007)*. Instead, the critical issue under the Federal Rules is whether Amerisure

has alleged a "short and plain statement of the claim" pursuant to *Rule 8(a)*, rather than whether the contract or document is incorporated into the Complaint. See *United States v. Vernon, 108 F.R.D. 741, 742 (S.D. Fla. 1986)* ("A reading of the plain language of *Fed.R.Civ.P. 10(c)* indicates that written instruments are not required to be attached to a party's pleading."); see also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1327 (3d ed. 2004) (stating that incorporation of exhibits is permissive and not required). Here, Amerisure has met its burden under **[*18]** *Rule 8*, and as such, the Court will deny Southern's Motion to Dismiss with respect to that claim as well.[4]

In accordance with the foregoing, it is

ORDERED:

Defendant Southern Waterproofing's Motion to Dismiss Counts I, III, and IV of Plaintiff's Complaint and Incorporated Memorandum of Law (Doc. 6) is **DENIED**.

DONE AND ORDERED at Jacksonville, Florida, this 19th day of September, 2014.

/s/ Marcia Morales Howard

MARCIA MORALES HOWARD

United States District Judge

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[4] Southern's request for a more definite statement with respect to the breach of contract claim is also due to be denied. *Rule 12(e)* provides that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." See *Rule 12(e)*. Such motions are disfavored under the law, and are "'not to be used as a substitute for discovery.'" See *United Enter. Fund, LP v. Modern Bus. Assocs., Inc., No. 8:08-cv-1488-T-24-MAP, 2008 U.S. Dist. LEXIS 90905, 2008 WL 4790537, at *1 (M.D. Fla. Oct. 28, 2008)* (quoting *Eye Care Int'l, Inc. v. Underhill, 92 F. Supp. 2d 1310, 1316 (M.D. Fla. 2000))*. Indeed, "the purpose of a more definite statement is to rectify unintelligibility in a complaint, not to provide more details that can reasonably be left to discovery." See *Wells Fargo Bank NA v. BBMJ, LLC, No. 1:11-cv-127-MP-GRJ, 2012 U.S. Dist. LEXIS 16886, 2012 WL 441286, at *1 (N.D. Fla. Feb. 10, 2012)*. As detailed above, the Complaint is not so "vague and ambiguous" that Southern cannot reasonably prepare a response. The Complaint provides Southern with notice of the contract at issue, the Project to which it relates, the manner in which Southern allegedly breached the contract, and the damages that resulted. It cannot be said that the lack of **[*19]** additional details renders the Complaint so ambiguous as to be unintelligible.

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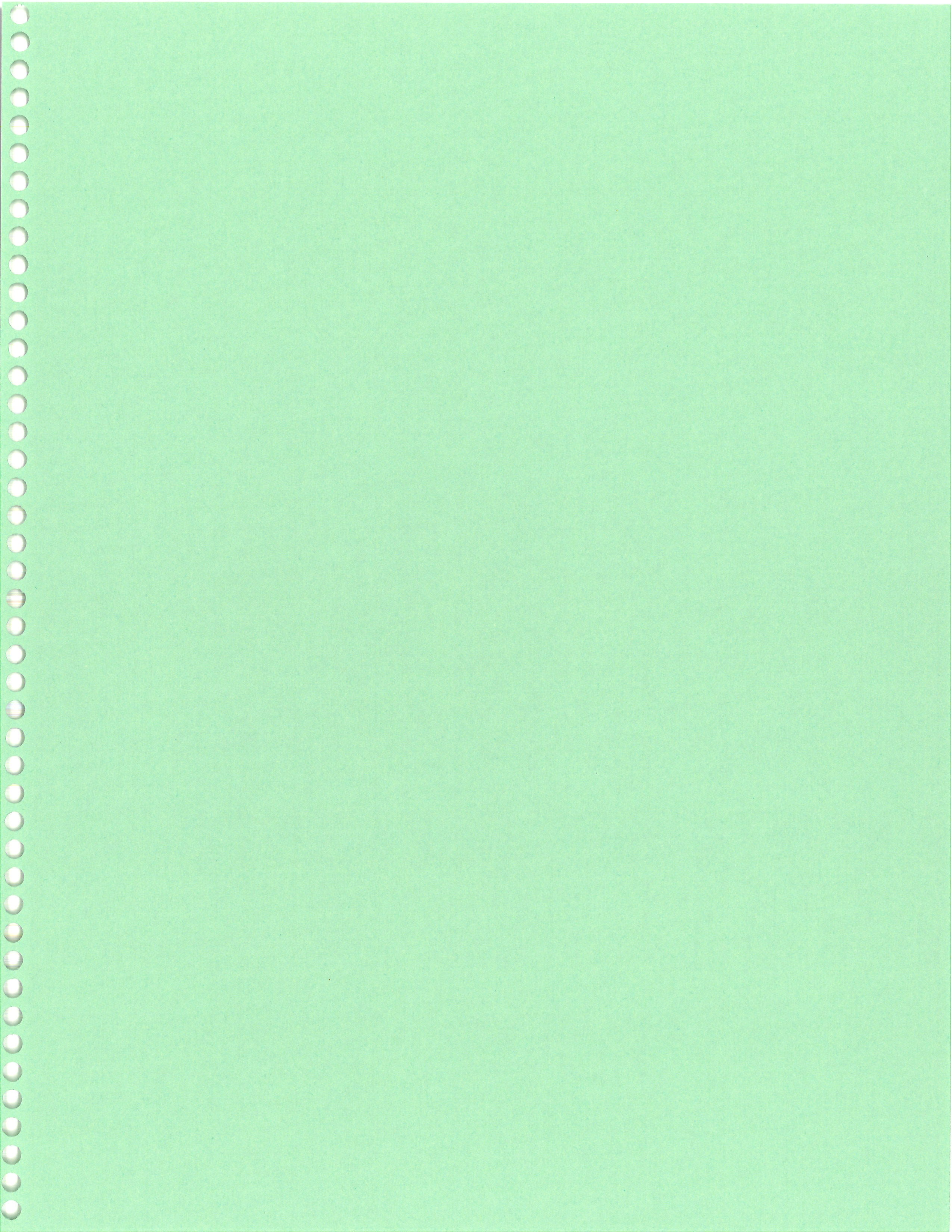

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Demay, Inc. v. Jennings Court, LLC

Court of Appeal of Florida, First District

August 6, 2012, Opinion Filed

CASE NO. 1D11-6123

Reporter
2012 Fla. App. LEXIS 12674 *; 94 So. 3d 585; 2012 WL 3169754

DEMAY, INC., Appellant, v. JENNINGS COURT, LLC, et al., Appellees.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: **[*1]** An appeal from the Circuit Court for Clay County. John H. Skinner, Judge.

Counsel: Michael Fox Orr of Dawson & Orr, P.A., Jacksonville, for Appellant.

Robert Aguilar of Aguilar, Sieron & Yeomans, P.A., Jacksonville, for Appellees Jennings Court, LLC, Keith Pereau, Lydia Pereau, Leonard Ali, and Turner Investment Company, LLC; ***Bryan*** R. ***Rendzio*** andDavid D. Rottmann of Tritt & ***Rendzio***, Jacksonville, for Appellee Paul Andrews.

Judges: PADOVANO, ROBERTS, and ROWE, JJ., CONCUR.

Opinion

PER CURIAM.

AFFIRMED.

PADOVANO, ROBERTS, and ROWE, JJ., CONCUR.

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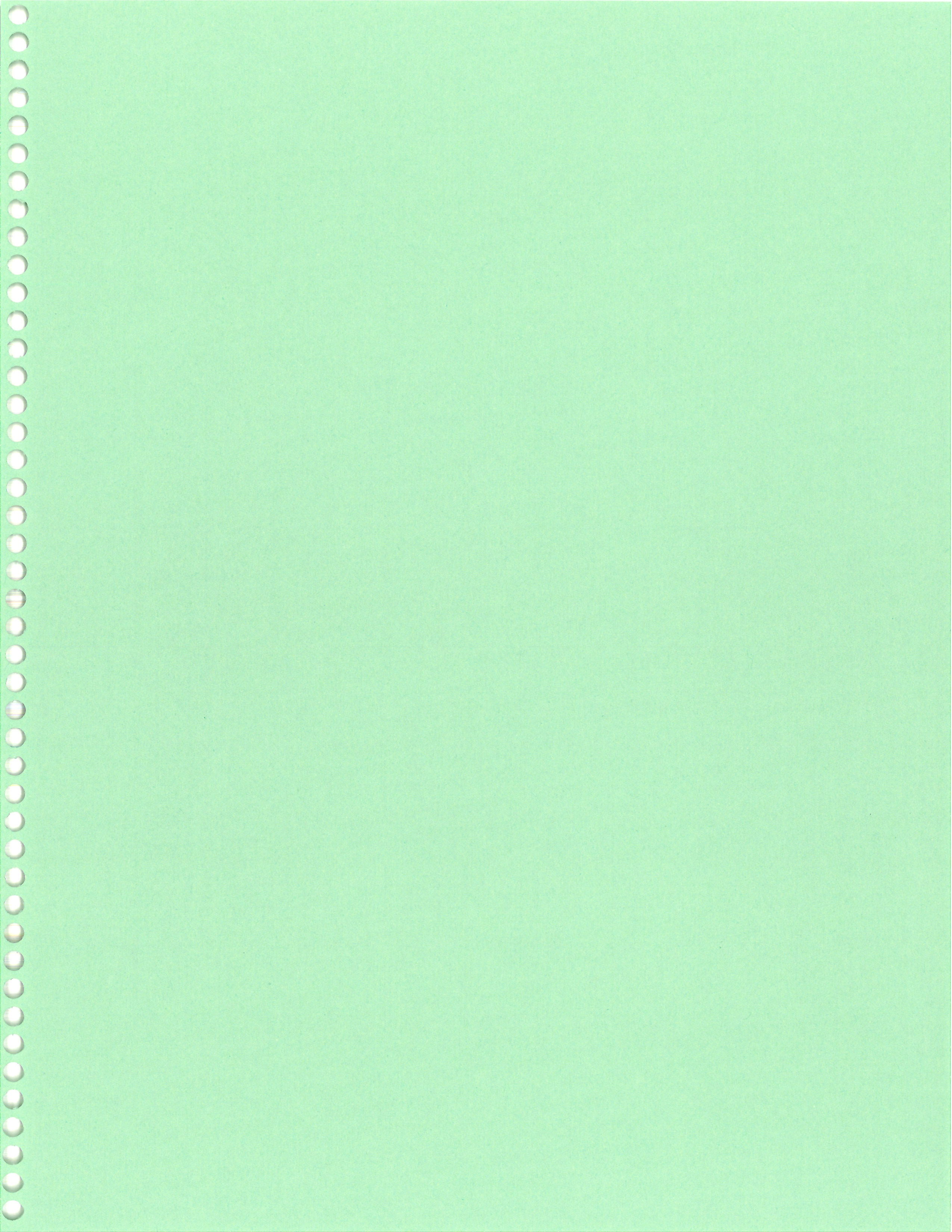

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United States v. Fasttrack Builders, Inc.

United States District Court for the Middle District of Florida, Jacksonville Division

March 6, 2012, Decided; March 6, 2012, Filed

Case No. 3:11-cv-1056-J-32MCR

Reporter
2012 U.S. Dist. LEXIS 94377 *; 2012 WL 2793013

THE UNITED STATES OF AMERICA, Plaintiff, vs. FASTTRACK BUILDERS INCORPORATED, et al, Defendants.

Subsequent History: Adopted by, Motion granted by, Judgment entered by, Costs and fees proceeding at *United States v. Fasttrack Builders Inc., 2012 U.S. Dist. LEXIS 94376 (M.D. Fla., July 9, 2012)*

Counsel: [*1] For The United States of America, a Florida corporation for the use and benefit of National Playground Construction, Inc., Plaintiff: ***Bryan*** Robert ***Rendzio***, LEAD ATTORNEY, Tritt|***Rendzio***, Jacksonville, FL.

Judges: MONTE C. RICHARDSON, UNITED STATES MAGISTRATE JUDGE.

Opinion by: MONTE C. RICHARDSON

Opinion

REPORT AND RECOMMENDATION[1]

THIS CAUSE is before the Court on Plaintiff's Motion for Entry of Default Judgment Against Defendant Fasttrack Builders Inc. (Doc. 12), Plaintiff's Motion for Entry of Default Judgment Against Defendant Asurety Partners, LLLP (Doc. 13), Plaintiff's Motion for Attorneys' Fees and Costs Against Defendant Fasttrack Builders Inc. (Doc. 14), and Plaintiff's Motion for Attorneys' Fees and Costs Against Defendant Asurety Partners, LLLP (Doc. 15). In these pleadings [*2] Plaintiff moves, pursuant to *Fed. R. Civ. P. 54(d)(1)*, *(2)*, and *55(b)*, for Default Judgment and attorneys' fees and costs against Defendants. Defendants failed to file a response, and the time for doing so has passed. The Court, having considered the Motions and their attachments (Docs. 12, 13, 14, 15), the Complaint (Doc. 1), and being otherwise advised in the premises, recommends Plaintiff's Motions be granted.

I. BACKGROUND

Plaintiff, the United States of America for the use and benefit of National Playground Construction, Inc., entered into a contract with Defendant Fasttrack Builders Inc. ("Fasttrack") to perform certain work for the benefit of the Kingsley Plantation National Park, which is located in Duval County, Florida (the "Project"). Defendant Fasttrack, as principal, and Defendant Asurety Partners, LLLP ("Asurety"), as surety, furnished a payment bond pursuant to *40 U.S.C. § 3131, et seq*

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[1] Any party may file and serve specific, written objections hereto within FOURTEEN (14) DAYS after service of this Report and Recommendation. Failure to do so shall bar the party from a de novo determination by a district judge of an issue covered herein and from attacking factual findings on appeal. See ***28 U.S.C. §636(b)(1)***; *Rule 72(b), Fed.R.Civ.P.*; and *Local Rule 6.02(a)*, United States District Court for the Middle District of Florida.

(the "Bond"). (Doc. 1-A). Under the terms of the Bond, Defendants bound themselves jointly and severally for the use and benefit of all persons supplying labor, materials, and equipment for the construction and completion of the Project. (Id.).

On or about December 14, 2010, Plaintiff and **[*3]** Fasttrack executed a written proposal in the amount of $22,432.00 (the "Contract"). On or about February 10, 2011, the parties executed a change order increasing the amount of the Contract to $24,932.00. (Doc. 1-B). Plaintiff complied with the terms of the Contract and sent an invoice to Fasttrack identifying $12,466.00 as the amount due and owing. (Doc. 1-C).

On October 27, 2011, Plaintiff filed a three-count Complaint against Defendants pursuant to *40 U.S.C. § 3131(b)(2)*, seeking recovery against the Bond for non-payment of sums due for materials and labor supplied on the Project. (Doc. 1). Plaintiff served Fasttrack on November 7, 2011 (Doc. 5) and Asurety on December 28, 2011 (Doc. 9). Defendants failed to plead or otherwise defend and, on December 12, 2011, the Clerk of Court entered a default against Fasttrack (Doc. 8) and on January 20, 2012, the Clerk of Court entered a default against Asurety (Doc. 11).

II. ANALYSIS

A. Whether Entry of a Final Judgment by Default is Appropriate

Federal Rule of Civil Procedure 55(a) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact **[*4]** is made to appear by affidavit or otherwise," a default may be entered. Here, on December 12, 2011 and January 20, 2011, the Clerk of Court entered defaults against Defendants for failure to plead. (Docs. 8, 11).

A party's default is deemed an admission of the plaintiffs well-pleaded allegations of fact. *Buchanan v. Bowman, 820 F.2d 359, 361 (11th Cir. 1987)*; see also *Nishimatsu Constr. Co. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975)* ("The defendant, by his default, admits the plaintiffs well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established."). Therefore, the Court will review Plaintiff's allegations to determine if they are sufficient to justify Plaintiff's claims against Defendants.

In Count I, Plaintiff alleges "Breach of Contract" against Defendant Fastttrack. (Doc. 1, pp. 4-5). Plaintiff and Fasttrack entered into a Contract in which Plaintiff agreed to furnish labor and materials for the Project. (Id. at p. 4). Plaintiff performed under the Contract and the materials and labor were accepted and incorporated into the Project. (Id.). Fasttrack has materially breached the Contract **[*5]** by refusing to compensate Plaintiff for the goods and services. (Id. at p. 5).

In Count II, Plaintiff alleges "Quantum Meruit/Contract Implied in Fact" against Defendant Fastttrack. (Doc. 1, pp. 5-6). Fasttrack requested that Plaintiff provide labor and materials pertaining to the Project and Plaintiff complied. (Id. at p. 6). Fasttrack accepted and retained the benefits of Plaintiff's labor and materials but has refused to compensate Plaintiff. (Id.).

In Count III, Plaintiff seeks "Action on Payment Bond" against Defendants Asurety and Fasttrack. (Doc. 1, p. 7). Plaintiff and Fasttrack were in direct privity of contract. Fasttrack was invoiced for a total of $24,932.00 for the labor and materials furnished by Plaintiff. The sum of $12,466.00 is now due and owing, and although demand has been made to Fasttrack and Asurety, both Defendants have failed to pay the same. [2]

Accordingly, the Court finds Plaintiff's allegations, which are deemed true as a matter of law, are

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[2] Plaintiff has timely filed suit within one year of the last furnishing of materials and labor under the Contract in accordance with *40 U.S.C. § 3133(b)(4)*.

sufficient to justify Plaintiff's claims against Defendants.

B. Amount [*6] of Damages

Having found Plaintiff is entitled to a default judgment, the court then conducts an inquiry to ascertain the amount of damages. *Arista Records, Inc. v. Beker Enters., 298 F. Supp. 2d 1310, 1311-12 (S.D. Fla. 2003)*. In making this determination, the court may rely upon affidavits or documentary evidence to establish the proper amount of damages. *Int'l Painters & Allied Trades Indus. Pension Fund v. R.W. Amrine Drywall Co., 239 F. Supp. 2d 26 (D.D.C. 2002)*. As Plaintiff has established the amount of its damages as set forth in its Motion (Docs. 1-A, B, C), the Court is able to establish the amount of the default judgment without the necessity for an evidentiary hearing. See *Directv, Inc. v. Huynh, 318 F.Supp.2d 1122, 1129 (M.D. Ala. 2004)* ("As a general rule, the court may enter a default judgment awarding damages without a hearing only if the amount of damages is a liquidated sum, an amount capable of mathematical calculation, or an amount demonstrated by detailed affidavits."); see also *Adolph Coors Co. v. Movement Against Racism and the Klan, 777 F.2d 1538, 1543-44 (11th Cir. 1985)*; *Directv, Inc. v. Griffin, 290 F.Supp.2d 1340, 1343 (M.D. Fla. 2003)*.

The principle amount [*7] owed by Defendants Fasttrack and Asurety to Plaintiff is $12,466.00. See (Doc. 1-C). Additionally, Plaintiff is entitled to prejudgment interest at the rate of 18%. See (Doc. 1-B). Thus, both Defendants Fasttrack and Asurety owe Plaintiff $12,466.00 in principal and $1,881.17 in prejudgment Interest ($12,466.00 at 18% interest from March 30, 2011 through January 30, 2012) for a total amount of $14,347.17. [3]

C. Attorneys' Fees and Costs

In addition to damages, under the terms of the Contract, Plaintiff is entitled to an award of attorneys' fees and costs as the prevailing party. [4]

See (Doc. 1-B). Plaintiff seeks $494.25 for attorneys' fees and $410.00 in costs. (Docs. 14, 15, p. 3).

In the Eleventh Circuit, attorneys' fees are calculated under a "lodestar" [*8] formula by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Loranger v. Stierheim, 10 F.3d 776, 781 (11th Cir. 1994)*. The Florida Supreme Court has also adopted the lodestar approach for the computation of reasonable attorney's fees. See *Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145, 1150 (Fla. 1985)*. An attorney's reasonable hourly rate is "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988)* (citing *Blum v. Stenson, 465 U.S. 886, 895-96 n. 11, 104 S.Ct. 1541, 1547 n. 11, 79 L. Ed. 2d 891 (1984)*). A reasonable number of hours spent should exclude those hours which are excessive, redundant, or otherwise unnecessary. *Id. at 1301* (citing *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L. Ed. 2d 40 (1983)*). As the Eleventh Circuit noted:

> "the court ... is itself an expert on the question [of attorney's fees] and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as [*9] to value."

Id. at 1303 (quoting *Campbell v. Green, 112 F.2d 143, 144 (5th Cir. 1940)*).

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[3] The prejudgment interest accrued beginning 30 days from the date of the last invoice - i.e., February 28, 2011. Thus, prejudgment interest began to accrue from March 30, 2011.

[4] Under federal law, parties are entitled to recover reasonable prevailing party attorneys' fees when such rights are afforded via the parties' contract. See, e.g., *Textron Financial Corp. v. RV Having Fun Yet, Inc., 2010 U.S. Dist. LEXIS 143510 (M.D. Fla. Dec. 28, 2010)*.

Here, Plaintiff is requesting $494.25 in attorneys' fees (representing an hourly rate of $265.00 for partners and $225.00 for associates). The total time expended by counsel is 7.6 hours, with a total amount billed of $1,977.00. The total time and hours were divided by four since Plaintiff has actions against two defendants in this lawsuit and counsel is prosecuting claims in another lawsuit in the Middle District of Florida against the same two defendants. The matters have mirrored each other and both are in essentially the same stage of litigation. [5]

Because work on both cases was performed simultaneously, Plaintiff has divided its attorneys' fees claim by four in order to prevent a windfall. Plaintiff has offered an affidavit of an independent Florida attorney to further evidence the reasonableness of the fees sought. (Docs. 14, 15, pp. 5-11).

Upon review of the docket and the documents submitted, the undersigned finds the number of hours billed is not excessive, the number of hours spent were reasonably expended on this matter, and the hourly billing rates were also reasonable given the skill, experience, and reputation of Plaintiff's attorneys and the prevailing market rates for this type of legal work. Therefore, under the Eleventh Circuit's lodestar calculation, Plaintiff should be granted an award of attorneys' fees in the amount of $494.25.

In addition to its attorneys' fees, Plaintiff is entitled to costs pursuant to the terms of the Contract. See (Doc. 1-B). Thus, the judgment should include $430.00 in costs against Fasttrack ($350.00 filing fee + $80.00 service of process fee) and $410.00 in costs against Asurety ($350.00 filing fee + $60.00 service of process fee).

Accordingly, after due consideration, it is respectfully

RECOMMENDED:

1. Plaintiff's Motion for Final Judgment by Default against Defendant Fasttrack Builders, Inc. (Doc. 12) be **GRANTED**, and in accordance with *Fed. R. Civ. P. 55(b)*, the Clerk be directed to enter **[*11]** Final Default Judgment in favor of Plaintiff and against Fasttrack declaring that Fasttrack owes Plaintiff $12,466.00 in principal and $1,881.17 in prejudgment interest ($12,466.00 at 18% interest from March 30, 2011 through January 30, 2012) for a total amount of $14,347.17.

2. Plaintiff's Motion for Final Judgment by Default against Defendant Asurety Partners, LLLP (Doc. 13) be **GRANTED** and, in accordance with *Fed. R. Civ. P. 55(b)*, the Clerk be directed to enter Final Default Judgment in favor of Plaintiff and against Asurety Incorporated declaring that Asurety owes Plaintiff $12,466.00 in principal and $1,881.17 in prejudgment interest ($12,466.00 at 18% interest from March 30, 2011 through January 30, 2012) for a total amount of $14,347.17.

3. Plaintiffs Motion for Attorneys' Fees and Costs Against Defendant Fasttrack Builders Inc. (Doc. 14) be **GRANTED** and Plaintiff be awarded the reasonable sum of $924.25 for attorneys' fees and costs against Fasttrack.

4. Plaintiffs Motion for Attorneys' Fees and Costs Against Defendant Asurety Partners, LLLP (Doc. 15) be **GRANTED** and Plaintiff be awarded the reasonable sum of $904.25 for attorneys' fees and costs against Asurety.

DONE AND ORDERED **[*12]** in Chambers in Jacksonville, Florida this 6th day of March, 2012.

/s/ Monte C. Richardson

MONTE C. RICHARDSON

UNITED STATES MAGISTRATE JUDGE

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[5] The United States of America, for the use and benefit of BYO Recreation, Inc. v. Fasttrack Builders, Inc., *et al*, Case No. 3: 11-cv-1055-J-20MCR, is a similar case in which the Court recently entered default judgment and an award of attorneys' fees and costs **[*10]** in favor of Plaintiff and against Defendants Fasttrack Builders, Inc. and Asurety Partners, LLLP.

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Jaguar Builders, Inc. v. Cue & Case Sales, Inc.

Court of Appeal of Florida, First District

January 28, 2009, Opinion Filed

CASE NO. 1D08-0405

Reporter

998 So. 2d 1211 *; 2009 Fla. App. LEXIS 558 **; 34 Fla. L. Weekly D 232

JAGUAR BUILDERS, INC., a Florida Corporation, Appellant, v. CUE & CASE SALES, INC., a Florida Corporation, Appellee.

Subsequent History: Released for Publication February 13, 2009.

Prior History: **[**1]** An appeal from the Circuit Court for Duval County. James L. Harrison, Judge.

Counsel: Albert T. Franson, and ***Bryan*** R. ***Rendzio*** of Tritt & Franson, P.A., Jacksonville, for Appellant.

Thomas R. Ray of Holbrook, Akel, Cold, Stiefel & Ray, P.A., Jacksonville, for Appellee.

Judges: WOLF, BENTON and BROWNING, JJ., CONCUR.

Opinion

[*1211] PER CURIAM.

We affirm the final judgment, but as conceded by Appellee during oral argument, modify the net sum of Appellee's recovery to be $ 123,527.50.

WOLF, BENTON and BROWNING, JJ., CONCUR.

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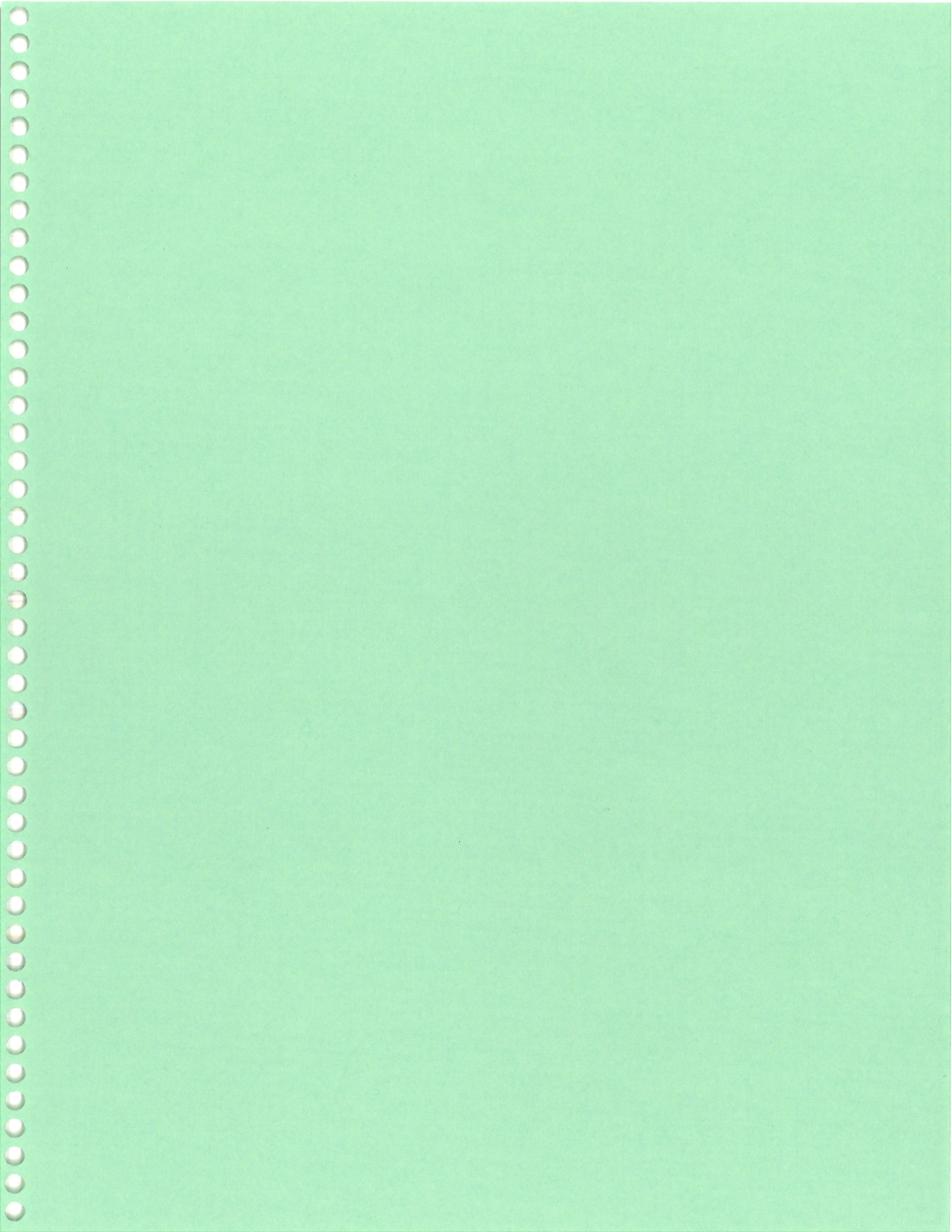

Cited
As of: August 9, 2017 6:06 PM Z

Sears Home Improvement Prods. v. Porterfield

Court of Appeal of Florida, First District

February 21, 2007, Opinion Filed

CASE NO. 1D06-3157

Reporter
949 So. 2d 318 *; 2007 Fla. App. LEXIS 2470 **; 32 Fla. L. Weekly D 521

SEARS HOME IMPROVEMENT PRODUCTS, INC., Appellant, v. SAMUEL D. PORTERFIELD, on behalf of himself and all others similarly situated, Appellee.

Notice: [**1] DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Released for Publication March 9, 2007.

Prior History: An appeal from the Circuit Court for Duval County. John H. Skinner, Judge.

Counsel: John A. DeVault, III and R.H. Farnell, II Bedell, Dittmar, DeVault, Pillans & Coxe, P.A., Jacksonville; Roger L. Longtin, Stephen L. Agin, and Paula D. Friedman of DLA Piper Rudnick Gray Cary Us, LLP, Chicago, Illinois, for Appellant.

Kenneth A. Tomchin, **Bryan** R. **Rendzio**, and Jay B. Watson of Tomchin & Odom, P.A., Jacksonville; R. Duane Westrup and Lawrence R. Cagney of Westrup, Klick & Associates, Long Beach, California; Allan A. Sigel and Christine C. Choi of the Law Office of Allan A. Sigel, P.C., Los Angeles, California, for Appellee.

Judges: ALLEN, PADOVANO, and LEWIS, JJ., CONCUR.

Opinion

[*319] PER CURIAM.

The Order Granting Plaintiff's Motion for Class Certification is affirmed. *See Seven Hills, Inc. v. Bentley, 848 So. 2d 345, 352 (Fla. 1st DCA 2003)* (noting that a trial court's ruling on class certification is reviewed for an abuse of discretion); *see also Chase Manhattan Mortgage Corp. v. Porcher, 898 So. 2d 153, 157 (Fla. 4th DCA 2005)* [**2] (noting that doubts about class certification should be resolved in favor of certification).

AFFIRMED.

ALLEN, PADOVANO, and LEWIS, JJ., CONCUR.

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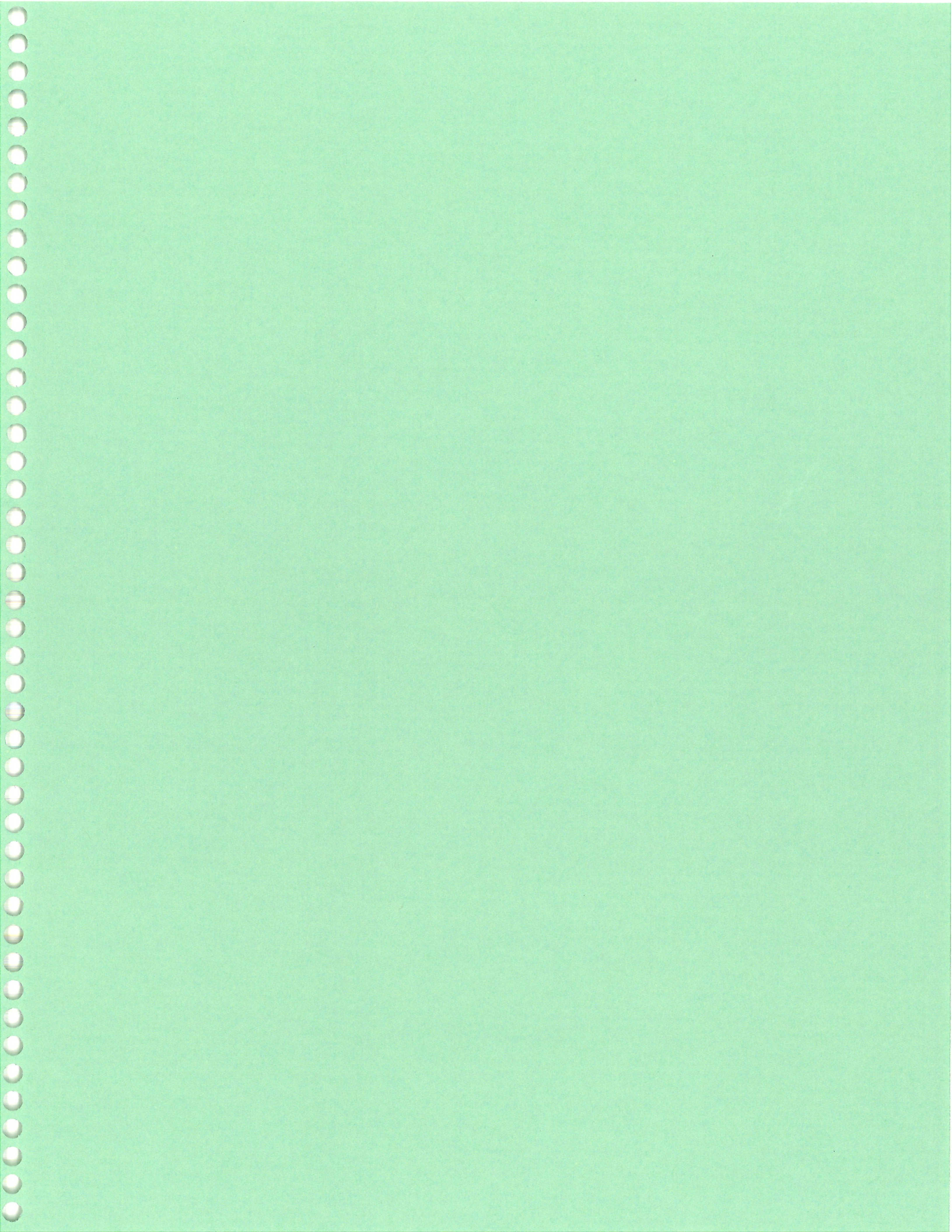

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Jesse v. Commer. Diving Acad. of Jacksonville, Inc.

Court of Appeal of Florida, First District

August 14, 2007, Opinion Filed

CASE NO. 1D06-6260

Reporter
963 So. 2d 308 *; 2007 Fla. App. LEXIS 12638 **; 32 Fla. L. Weekly D 1930

MICHAEL JESSE, Appellant, v. COMMERCIAL DIVING ACADEMY OF JACKSONVILLE, INC., Appellee.

Notice: DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Released for Publication August 30, 2007.

Prior History: [**1] An appeal from the circuit court for Duval County. Brad Stetson, Judge.

Counsel: Michael P. Milton, and C. Ryan Eslinger of Milton, Leach, D'Andrea Charek & Milton, P.A., Jacksonville, for Appellant.

Kenneth A. Tomchin, ***Bryan*** R. ***Rendzio***, and Jay B. Watson of Tomchin & Odom, P.A., Jacksonville, for Appellee.

Judges: WEBSTER, LEWIS, and THOMAS, JJ., CONCUR.

Opinion

[*309] PER CURIAM.

Appellant seeks review of a final order dismissing with prejudice his personal injury action based on a determination that appellant intentionally repeatedly gave false testimony on a material issue during discovery. Our standard of review is abuse of discretion. *See DiStefano v. State Farm Mut. Auto. Ins. Co., 846 So. 2d 572, 574 (Fla. 1st DCA 2003)*; *Baker v. Myers Tractor Servs., Inc., 765 So. 2d 149, 150 (Fla. 1st DCA 2000)*. We have carefully reviewed the record, and conclude that the trial court's findings of fact are supported by competent substantial evidence. Moreover, those findings demonstrate clearly and convincingly that appellant did, in fact, intentionally testify falsely on a material issue. Accordingly, we hold that the trial court did not abuse its discretion when it dismissed appellant's action with prejudice as a sanction [**2] for such conduct.

AFFIRMED.

WEBSTER, LEWIS, and THOMAS, JJ., CONCUR.

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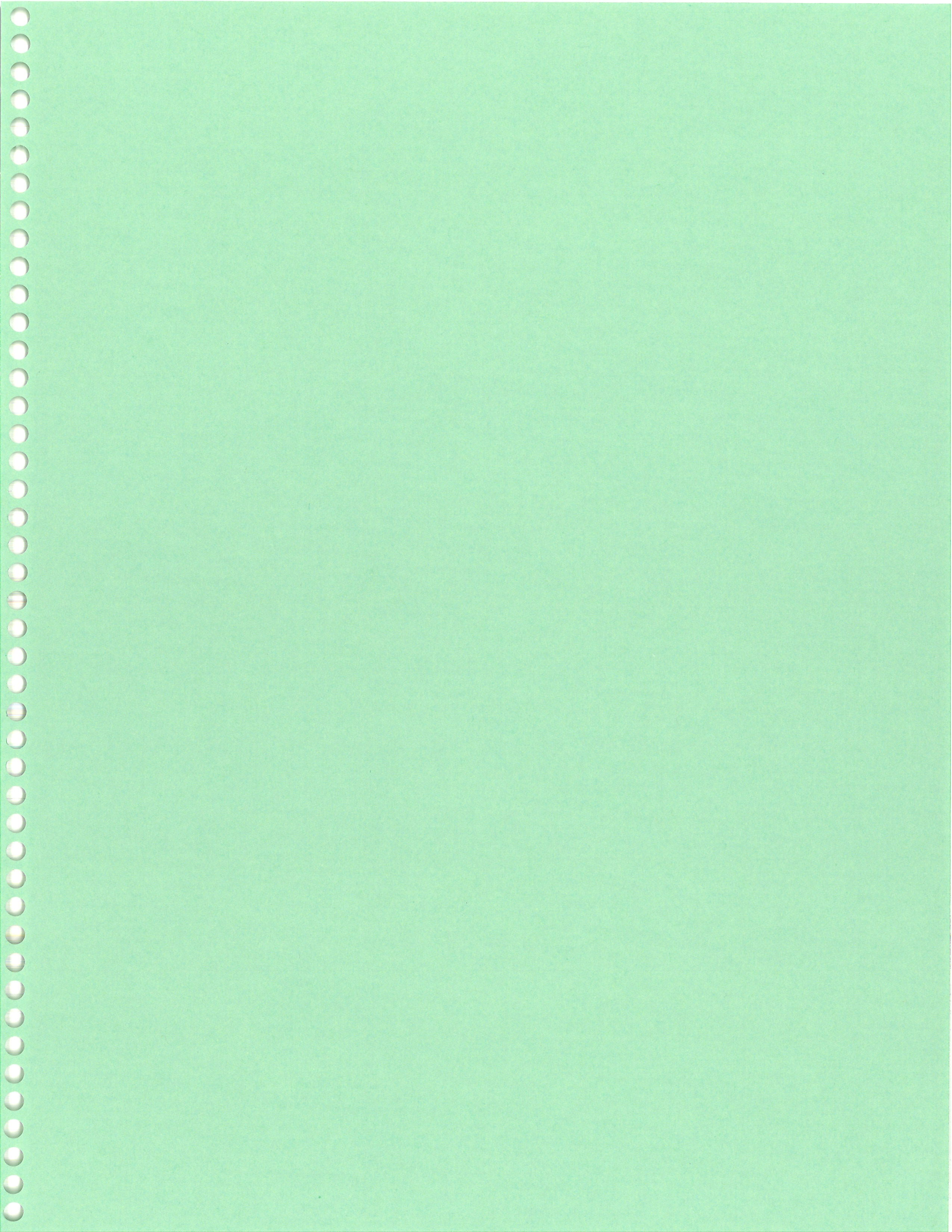

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As of: August 9, 2017 6:12 PM Z

Geoffrey Bodden & Assocs. v. USA Waste Servs.

Court of Appeal of Florida, Fifth District

July 26, 2005, Decision Filed

Case No. 5D04-3884

Reporter
2005 Fla. App. LEXIS 12319 *; 907 So. 2d 544

GEOFFREY BODDEN & ASSOCIATES, INC., ETC., Appellant, v. USA WASTE SERVICES OF FLORIDA, INC., ETC., Appellee.

Notice: **[*1]** DECISION WITHOUT PUBLISHED OPINION

Subsequent History: Released for Publication August 12, 2005.

Prior History: Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge.

Counsel: Kenneth A. Tomchin, ***Bryan*** R. ***Rendzio*** and Jay B. Watson, of Tomchin & Odom, P. A., Jacksonville, for Appellant.

No Appearance for Appellee.

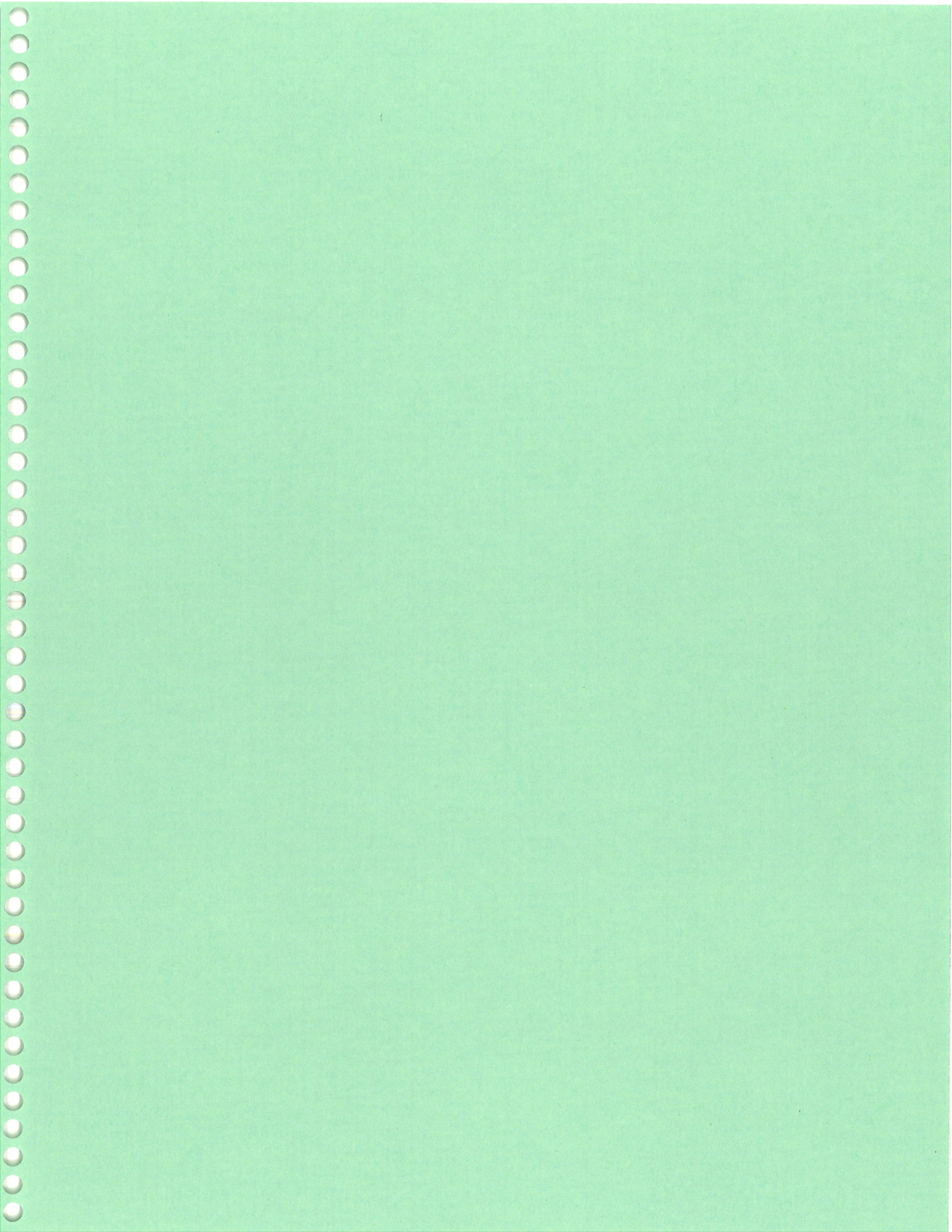
Judges: PLEUS, CJ, MONACO and KENNEDY, P., Associate Judge, concur.

Opinion

PER CURIAM.

AFFIRMED.

PLEUS, CJ, MONACO and KENNEDY, P., Associate Judge, concur.



Neutral
As of: August 9, 2017 6:02 PM Z

Bray & Gillespie, L.L.C. III v. Valiant Ins. Co.

United States District Court for the Middle District of Florida, Orlando Division

March 22, 2003, Decided; March 24, 2003, Filed

Case No. 6:00-cv-1389-Orl-22JGG

Reporter
2003 U.S. Dist. LEXIS 27560 *; 2003 WL 25669169

BRAY & GILLESPIE, L.L.C. III, d/b/a: Plaza Resort and Spa; BRAY & GILLESPIE DELAWARE II, L.P., d/b/a: Acapulco Inn; BRAY & GILLESPIE DELAWARE III, L.P., d/b/a: Beachcomber Oceanfront Inn; BRAY & GILLESPIE DELAWARE I, L.P. d/b/a: Treasure Island Inn; BRAY & GILLESPIE LA PLAYA, L.P., d/b/a: Best Western La Playa, Plaintiffs, -vs- VALIANT INSURANCE COMPANY, Defendant.

Prior History: *Bray & Gillespie, L.L.C. III v. Valiant Ins. Co., 2003 U.S. Dist. LEXIS 750 (M.D. Fla., Jan. 10, 2003)*

Counsel: [*1] For Bray & Gillespie, L.L.C. III, a Georgia Limited Liability Company doing business as Plaza Resort and Spa, Bray & Gillespie Delaware II, L.P., a Delaware Limited Partnership doing business as Acapulco Inn, Bray & Gillespie Delaware III, L.P., a Delaware Limited Partnership doing business as Beachcomer Oceanfront Inn, Bray & Gillespie Delaware III, L.P., a Delaware Limited Partnership doing business as Beachcomer Oceanfront Inn, Bray & Gillespie Delaware III, L.P., a Delaware Limited Partnership doing business as Beachcomer Oceanfront Inn, Plaintiff: ***Bryan*** Robert ***Rendzio***, LEAD ATTORNEY, Tomchin & Odom, PA, Jacksonville, FL; Christopher J. Iseley, LEAD ATTORNEY, Tritt & Franson, PA, Jacksonville, FL; Kenneth Allen Tomchin, LEAD ATTORNEY, Tomchin & Odom, PA, Jacksonville, FL; Norman L. Hull, LEAD ATTORNEY, Orlando, FL.

For Valiant Insurance Company, an Iowa corporation, and a member of the Zurich U.S. Insurance Group, an Illinois corporation, Defendant: Andrew Peter Rock, LEAD ATTORNEY, Kingsford & Rock, PA, Maitland, FL.

For Patrick C. Barthet, Movant: Andrew M. Feldman, LEAD ATTORNEY, Arista & Feldman, PL, Coral Gables, FL.

Jay M. Cohen, Mediator: Jay M. Cohen, Pro Se, Winter Park, [*2] FL.

Judges: ANNE C. CONWAY, United States District Judge.

Opinion by: ANNE C. CONWAY

Opinion

ORDER

I. INTRODUCTION

This cause comes before the Court on Plaintiffs', Bray & Gillespie, L.L.C, III d/b/a Plaza Resort and Spa; et al. ("Plaintiffs"), Motion in Limine to Preclude Testimony and/or Evidence Concerning Particular Acts of Misconduct by and/or Disciplinary Action Against Plaintiffs' Expert Witness, Rajendra U. Patel, P.E (Doc. No. 104).

The Plaintiffs filed their Motion in Limine (Doc. No. 104) on February 20, 2003. The Defendant, Valiant Insurance Company (Defendant), filed a Response (Doc. No. 113) on March 6, 2003. Having reviewed the Motion and memorandum, this Court **GRANTS IN PART** and **DENIES IN PART** the Plaintiffs' Motion in Limine.

II. BACKGROUND

The Plaintiffs are five hotels located in Daytona Beach, Florida. [1]
At all relevant times herein, the Defendant was their insurance company. [2]
This action involves an insurance coverage dispute over hurricane damage sustained by the Plaintiffs in 1999. [3]

At trial over this matter, the Plaintiffs plan on presenting testimony from **[*3]** Rajendra U. Patel ("Mr. Patel"), an expert witness in the field of engineering. [4]
It is anticipated that Mr. Patel will opine on the cause and the measure of damage sustained by the Plaintiffs. [5]

While deposing Mr. Patel, the Defendant discovered that his engineering license was suspended. [6]
According to the Defendant, on March 21,2002, and again on September 5, 2002, administrative complaints were filed against Mr. Patel alleging negligence in the practice of engineering. [7]
After finding that Mr. Patel's plans and calculations contained numerous errors, an administrative board entered an order suspending Mr. Patel's license for one year beginning on September 17, 2002, after which time he will be on probation for 18 months. [8]

In light of this discovery, the Plaintiffs move this Court for an order precluding the Defendant from introducing any testimony and/or evidence concerning the disciplinary action taken against Mr. Patel. The Plaintiffs claim that this evidence should be precluded because: (1) pursuant to *Rule 608(b) of the Federal Rules of Evidence*, specific **[*4]** instances of conduct may not be inquired into for the purpose of attacking or supporting a witness' credibility unless the conduct in question resulted in a conviction as defined by the Federal Rules of Evidence, or alternatively, the conduct is probative of the truthfulness or untruthfulness of the witness; and, (2) any reference to particular acts by and/or disciplinary action against Mr. Patel is irrelevant, or alternatively, if deemed relevant, unfairly prejudicial to the Plaintiffs. [9]

In response, the Defendant argues that the disciplinary action taken against Mr. Patel is admissible because it falls outside the purview of *Fed. R. Evid. 608(b)*, and because it is relevant to his qualifications as an expert, and the quality and bases of his testimony. [10]

This Court will now consider these arguments.

III. LEGAL ANALYSIS

A. IMPEACHMENT WITH SPECIFIC INSTANCES OF CONDUCT

Rule 608(b) of the Federal Rules of Evidence prohibits inquiries into specific instances of past conduct for the purpose of attacking a witness' credibility unless that conduct is probative of the truthfulness or untruthfulness of a witness. **[*5]** [11]

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[1] *See* Doc. No. 105, P1 at 2; *see also* Doc. No. 113, P1 at 2.

[2] *See id.; see also* Doc. No. 113, P1 at 2.

[3] *See id.; see also* Doc. No. 113, P1 at 2.

[4] *See id.; see also* Doc. No. 113, P 2 at 2.

[5] *See* Doc. No. 113, P5 at 3.

[6] *See id.*, PP3-5 at 2.

[7] *See id.*, P 6 at 4.

[8] *See id.*, P 8 at 4.

[9] *See generally* Doc. No. 104; *see also* Doc. No. 105.

[10] *See generally* Doc. No. 113.

[11] *Federal Rule of Evidence 608(b)* provides, in pertinent part:

For this reason, the Court precludes the Defendant from attacking Mr. Patel's credibility by inquiring into facts and circumstances surrounding his suspension. Since the suspension of Mr. Patel's license is not probative of his truthfulness or untruthfulness, such questions would be improper.

However, because nothing in Rule 608(b) proscribes against impeaching the quality and bases of an expert's testimony with specific instances of past conduct, this Court finds that the facts and circumstances surrounding **[*6]** Mr. Patel's suspension are admissible in that regard. Accordingly, insofar as it goes to the weight of his testimony, the Defendant is permitted to cross-examine Dr. Patel about his suspended license. *See* United States v. Rahm, 993 F. 2d 1405,1413 (9th Cir. 1993) (noting that deficits in the qualifications of an expert can be evaluated critically on cross examination because they go to the weight of the testimony); United States v. Bilson, 648 F. 2d 1238, 1239 (9th Cir. 1981) (noting that it was appropriate to allow for cross-examination of an expert about his unlicensed status as a psychologist because it went "to the weight of his testimony insofar as it involved evaluating . . . psychological tests"); Dickerson v. Cushman, Inc., 909 F. Supp. 1467,1472 (M.D. Ala. 1995) (holding that deficiencies in an expert's background should be addressed on cross-examination because "[i]n general, the fact that an expert does not have a degree or license in his or her professed specialty goes to the weight of his or her testimony"); Lappe v. Am. Honda Motor Co., Inc., 857 F. Supp. 222, 226 (N.D.N.Y. 1994) ("a lack of specialization affects the weight of the opinion, not the admissibility").

B. [*7] RELEVANCE

The fact that Mr. Patel is testifying in his capacity as a professional engineer unquestionably renders his discipline and suspension for negligence in the practice of engineering relevant. Accordingly, this Court must determine whether Mr. Patel's unlicensed status should be excluded on other grounds.

Pursuant to Rule 403 of the Federal Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. In the Eleventh Circuit, "[r]ule 403 is an *extraordinary remedy* which the district court should invoke *sparingly*, and the *balance should be struck in favor of admissibility."* United States v. Tinoco, 304 F. 3d 1088, 1120 (11th Cir. 2002) (internal citations and quotations omitted) (emphasis added).

After reviewing the record and the parties' arguments, this Court finds that introducing the facts and circumstances surrounding Mr. Patel's suspension does not present a danger of unfair prejudice. While Mr. Patel's unlicensed status may result in prejudice against the Plaintiffs, it is certainly not unfair. The Plaintiffs have been aware of Mr. Patel's status for some time, and have decided **[*8]** to continue utilizing him as an expert despite his suspension.

Moreover, even if a danger of unfair prejudice existed, it would not substantially outweigh the probative value of introducing Mr. Patel's unlicensed status into evidence.

IV. CONCLUSION

Based on the foregoing, it is **ORDERED** that:

1. The Plaintiffs', Bray & Gillespie, L.L.C., III d/b/a Plaza Resort and Spa; et al. ("Plaintiffs"), February 20,2003 Motion in Limine to Preclude Testimony and/or Evidence Concerning Particular

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Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Acts of Misconduct by and/or Disciplinary Action Against Plaintiffs' Expert Witness, Rajendra U. Patel, P.E (Doc. No. 104) is **GRANTED IN PART** and **DENIED IN PART.**

2. The Defendant is prohibited from inquiring into the facts and circumstances surrounding the suspension of Mr. Patel's engineering license for the purpose of attacking his credibility as a witness.

3. The Defendant is permitted to inquire into the facts and circumstances surrounding the suspension of Mr. Patel's engineering license for the purpose of attacking the quality and bases of his testimony.

DONE and **ORDERED** in Chambers, in Orlando, Florida this 22nd day of March, 2003.

/s/ ANNE C. CONWAY

United States District Judge

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