

Nova Law Review

Volume 36, Issue 1

2011

Article 1

Nova Law Review 36, #1

*

*

Copyright ©2011 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

NOVA LAW REVIEW



ARTICLES

A Plea for Legislative Reform: The Adoption of *Daubert* to Ensure the Reliability of Expert Evidence in Florida Courts

*Kenneth W. Waterway
Robert C. Weill*

2010-2011 Survey of Florida Law Affecting Business Owners

Barbara Landau

Act Deux: Confidentiality After the Florida Mediation Confidentiality and Privilege Act

Fran L. Tetunic

Commercial or Advertising Purpose Under *Florida Statutes* Section 540.08 Demystified

Michael L. Richmond

Avoiding Statutory Restrictions on Appointment of Personal Representatives in Florida

Jani Maurer

2011 Survey of Juvenile Law

Michael J. Dale

Something Smells Afoul: An Analysis of the End of a District Court Split

Abigail Brown

The Effects the Bank Secrecy Act Has Had on the South Florida Banking Industry and Economy, and How the Newly Proposed IRS Regulation Would Compound Those Effects

Ashley L. Fernald

Florida's Suspicionless Drug Testing of Welfare Applicants

Jeffrey Widelitz

VOLUME 36

FALL 2011

NUMBER 1

NOVA LAW REVIEW

VOLUME 36

FALL 2011

NUMBER 1

ARTICLES

- A Plea for Legislative Reform: The Adoption of
Daubert to Ensure the Reliability of Expert
Evidence in Florida Courts *Kenneth W. Waterway*
Robert C. Weill 1
- 2010-2011 Survey of Florida Law Affecting
Business Owners *Barbara Landau* 35
- Act Deux: Confidentiality After the Florida
Mediation Confidentiality and Privacy Act *Fran L. Tetunic* 79
- Commercial or Advertising Purpose Under
Florida Statutes Section 540.08 Demystified *Michael L. Richmond* 115
- Avoiding Statutory Restrictions on Appointment
of Personal Representatives in Florida *Jani Maurer* 141
- 2011 Survey of Juvenile Law *Michael J. Dale* 179
- Something Smells Afoul: An Analysis of the
End of a District Court Split *Abigail Brown* 201
- The Effects the Bank Secrecy Act Has Had on the
South Florida Banking Industry and Economy, and
How the Newly Proposed IRS Regulation Would
Compound Those Effects *Ashley L. Fernald* 227
- Florida's Suspicionless Drug Testing of
Welfare Applicants *Jeffrey WidELITZ* 253

A PLEA FOR LEGISLATIVE REFORM: THE ADOPTION OF DAUBERT TO ENSURE THE RELIABILITY OF EXPERT EVIDENCE IN FLORIDA COURTS

KENNETH W. WATERWAY*
ROBERT C. WEILL**

I.	INTRODUCTION.....	1
II.	THE PROBLEM: FLORIDA LACKS ADEQUATE MEANS FOR ENSURING EXPERT EVIDENCE IS TRUSTWORTHY.....	4
	A. <i>Overview</i>	4
	B. <i>Good Science Makes Good Law</i>	6
	C. <i>Florida’s 1923 Frye “General Acceptance” Test</i>	7
	1. Florida’s <i>Frye</i> Rule Does Not Apply to an Expert’s “Pure Opinion”.....	10
	2. Florida’s <i>Frye</i> Rule Does Not Apply to an Expert’s Reasoning or Conclusion.....	11
	3. Florida’s <i>Frye</i> Rule Does Not Apply Unless the Expert’s Testimony Involves “New or Novel Science”.....	12
	D. <i>Life Under Frye—Expert Evidence Seldom Challenged, Rarely Scrutinized</i>	12
	E. <i>The Entrenchment of Frye in the Supreme Court of Florida</i>	14
III.	SOLUTION: BRING DAUBERT TO FLORIDA THROUGH LEGISLATIVE CHANGE.....	15
	A. <i>The Daubert Approach</i>	15
	1. Reliability.....	16
	2. Relevance.....	19
	3. Judge as Gatekeeper.....	20
	4. The Results.....	21
	B. <i>Daubert’s Utility in Professional Liability Cases</i>	27
IV.	CALL TO ACTION: FLORIDA’S ADOPTION OF A STATUTORY DAUBERT STANDARD.....	29
V.	A STEP TOWARDS ACTION: A PROPOSED BILL.....	31
VI.	CONCLUSION.....	34

I. INTRODUCTION

Witnesses called to testify as “experts” are cloaked with prestige and authority, and are positioned to exert heavy influence on juries. This is accentuated in areas of expert testimony that are highly technical or specialized. The Supreme Court of the United States has recognized that “[e]xpert

evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”¹ The Court has therefore given federal trial court judges the important responsibility of ensuring that expert testimony is based on reliable methodology and fits the facts of the case.² Trial judges are instructed to act as “gatekeepers” to prevent juries from being inundated with “junk science.”³

On the other hand, Florida is among a shrinking minority of states still clinging to the antiquated “*Frye* test.”⁴ This test does not provide trial judges with the legal tools for ensuring that “expert” witnesses are qualified and that their testimony is relevant, reliable, and appropriate for a jury.⁵ Instead, the “test” is nothing more than a determination of whether an expert’s methodology is “generally accepted.”⁶ This nebulous standard of “general acceptance” is not an adequate check on the integrity of expert evidence. The problem is compounded by Supreme Court of Florida precedent, holding that the *Frye* test applies only to a minority of cases involving expert testimony—those involving “new science.”⁷ If an expert’s testimony is based on science

* Kenneth W. Waterway is a partner in the Fort Lauderdale, Florida office of Sedgwick LLP. He is a trial lawyer who concentrates his work in the areas of product liability, railroad defense and commercial litigation. Mr. Waterway has a regional practice representing primarily Fortune 100 companies. He has more than eighteen years of experience in front of juries and judges throughout the Southeastern United States, and is frequently engaged in issues relating to the qualifications of experts and the reliability of their testimony. Mr. Waterway is a 1993 graduate of the University of Michigan Law School. He joined the Fort Lauderdale, Florida predecessor of Sedgwick LLP upon graduation from law school and has spent his entire career with the firm.

** Robert C. Weill manages the appellate department in the Fort Lauderdale, Florida office of Sedgwick LLP. He specializes in civil appeals at all levels and civil litigation support. Mr. Weill received his B.A. degree from Cornell University and his J.D. degree from Nova Southeastern University, Shepard Broad Law Center.

The authors express their sincerest gratitude to Kayla Leland Pragid for her tireless efforts in assisting with the researching and writing of this article.

1. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 632 (1991)).

2. *Id.* at 589, 592.

3. *See id.* at 597.

4. *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (per curiam); *see Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), *cert. denied*, 130 S. Ct. 396 (2009); *Marsh v. Valyou*, 977 So. 2d 543, 547 (Fla. 2007) (per curiam).

5. *See Frye*, 293 F. at 1014.

6. *Id.*

7. *Murray*, 3 So. 3d at 1117 (citing *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)); *Marsh*, 977 So. 2d at 547–48 (quoting *U.S. Sugar Corp. v. Henson*, 823 So. 2d

that the court does not deem “new” or derived from a field that is not traditionally “science,” then the test is not even triggered.⁸ So-called “pure opinion” testimony purportedly based on an expert’s overall experience is also beyond the reach of the *Frye* test.⁹

This shortcoming in Florida jurisprudence undermines the integrity of the court system and the quality of justice dispensed by trial courts. It also threatens to diminish the state’s many advantages in attracting business, particularly in light of the fact that most states in the Southeast have already modernized their laws governing the admissibility of expert evidence, including Georgia by legislation enacted in 2005.¹⁰

The Florida Legislature can and should solve this problem by statutorily adopting the “*Daubert* test” to place Florida on equal footing with most other jurisdictions and federal courts.

104, 109 (Fla. 2002)); *Spann*, 857 So. 2d at 852 (citing *Henson*, 823 So. 2d at 109; *Brim v. State*, 695 So. 2d 268, 271–72 (Fla. 1997)).

8. See *Murray*, 3 So. 3d at 1117 (citing *McDonald*, 952 So. 2d at 498); *Marsh*, 977 So. 2d at 547–48 (quoting *Henson*, 823 So. 2d at 109); *Spann*, 857 So. 2d at 852.

9. *Marsh*, 977 So. 2d at 548, 561 (citing *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)); *Hadden v. State*, 690 So. 2d 573, 579–80 (Fla. 1997) (citing *Flanagan*, 625 So. 2d at 828).

10. See *infra* notes 114, 116, 117. The Georgia Legislature first adopted the *Daubert* test of admissibility in 2005. See GA. CODE ANN. § 24-9-67.1(f) (2010); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993). Subsequently, a Georgia trial court found portions of subsections (a) and (b)(1) and subsection (f) of the statute unconstitutional, and severed them from the statute as a whole. *Mason v. Home Depot U.S.A., Inc.* (*Mason I*), No. 97-A-5105-1, 2006 WL 6057895, at *7–9 (Ga. Cobb County State Ct. Oct. 6, 2006), *vacated in part*, 658 S.E.2d 603 (Ga. 2008). On appeal, the Supreme Court of Georgia agreed with the severance of sections (a) and (b)(1), but disagreed with the trial court’s analysis and severance of section (f), *Mason v. Home Depot U.S.A., Inc.* (*Mason II*), 658 S.E.2d 603, 608–09 (Ga. 2008), which referenced *Daubert* and stated:

“It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.”

Mason II, 658 S.E.2d at 605–06 n.1, 608–09 (quoting GA. CODE ANN. § 24-9-67.1(f)). In its holding, the Supreme Court of Georgia concluded that “the trial court was mistaken in declaring subsection (f) unconstitutional.” *Id.* at 609. Most recently, the Georgia Legislature has proposed new legislation to take the place of section 24-9-67.1. See GA. CODE ANN. § 24-7-702 (Supp. 2011) (effective Jan. 1, 2013). Like the previous statute, the proposed legislation incorporates the same *Daubert* standard of admissibility and reaffirms Georgia’s adherence to *Daubert*. *Id.* § 24-7-702(f).

Part II of this article discusses the inherent failings of the *Frye* test as applied and interpreted by Florida courts. Part III of this article focuses on the components of the *Daubert* test and the particular need for the test in professional liability cases. Part IV of this article examines the prior legislative attempts to adopt a statutory *Daubert* standard in Florida. Finally, Part V proposes a bill for the legislature to consider in the upcoming legislative session to implement a *Daubert* standard in Florida state courts.

II. THE PROBLEM: FLORIDA LACKS ADEQUATE MEANS FOR ENSURING EXPERT EVIDENCE IS TRUSTWORTHY

A. Overview

The modern jury trial is likely to feature scientific or technical issues too complex for jurors to understand and decide solely on the basis of personal knowledge and experience. While juries usually function well using their collective memories and assessing credibility, the same cannot be said for understanding and deciding complex scientific or technical issues. Indeed, for this very reason parties are permitted to offer testimony from “experts” on such issues.¹¹ Jurors may place a great deal of reliance on expert witnesses, so it is imperative that an expert witness have true expertise on the issues at hand.¹²

Our legal system has long grappled with the challenge of expert testimony that does not meet minimum thresholds of reliability and relevance.¹³ The federal system and many states have seen excellent progress in this area

11. FLA. STAT. § 90.702 (2011). Section 90.702 of the *Florida Statutes* provides: If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Id.

12. *Flanagan*, 625 So. 2d at 828. In the words of the Supreme Court of Florida, “[t]he jury will naturally assume that the scientific principles underlying the expert’s conclusions are valid.” *Id.*; see, e.g., *Marsh*, 977 So. 2d at 561 (Cantero, J., dissenting) (quoting *Flanagan*, 625 So. 2d at 828); *Ramirez v. State (Ramirez III)*, 810 So. 2d 836, 844 (Fla. 2001) (quoting *Flanagan*, 625 So. 2d at 828); *Hadden*, 690 So. 2d at 578 (quoting *Flanagan*, 625 So. 2d at 828); *Holy Cross Hosp., Inc. v. Marrone*, 816 So. 2d 1113, 1118 (Fla. 4th Dist. Ct. App. 2001) (citing *Flanagan*, 625 So. 2d at 828); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 547 (Fla. 4th Dist. Ct. App. 2001) (quoting *Flanagan*, 625 So. 2d at 828).

13. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam) (applying the *Frye* standard to test the reliability of the foundation of the expert’s testimony); see also *Copolino v. State*, 223 So. 2d 68, 70–71 (Fla. 2d Dist. Ct. App. 1968) (establishing that Florida officially adopted the *Frye* standard as a way to ensure that evidence was “sufficiently reliable to justify [its] admission”).

within current generations of judges and lawyers.¹⁴ A federal circuit judge surveying the situation in 1986 made the following assessment:

[E]xperts whose opinions are available to the highest bidder have no place testifying in a court of law. . . . We will turn to that task with a sharp eye, particularly in those instances . . . where . . . the decision to receive expert testimony was simply tossed off to the jury under a “let it all in” philosophy. Our message to our able trial colleagues: [I]t is time to take hold of expert testimony in federal trials.¹⁵

This call to action was followed by dramatic change at the federal level, both in awareness of the problem and the implementation of solutions.¹⁶ Most states have followed suit.¹⁷ Florida has not.¹⁸

Rather, Florida is increasingly isolated as a jurisdiction yoked to a “test” for expert witness testimony created in 1923.¹⁹ The Supreme Court of Florida continually reaffirms the state’s adherence to the 1923 test,²⁰ and as a result the state’s trial judges are bound to “let it all in” in all but the rarest of cases.²¹

There are demonstrable effects of Florida’s out-dated approach to expert evidence. In 2010, Florida ranked forty-second in the overall fairness of its litigation environment, and ranked thirty-ninth in its treatment of scientific and technical evidence in a poll of state liability systems surveying nearly 1500 general counsel and senior corporate attorneys familiar with the state

14. See, e.g., *Daubert*, 509 U.S. at 589; *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007); *Eymard v. Pan Am. World Airways (In re Air Crash Disaster at New Orleans)*, 795 F.2d 1230, 1234 (5th Cir. 1986); *Taylor v. State*, 889 P.2d 319, 328–29 (Okla. Crim. App. 1995).

15. *In re Air Crash Disaster at New Orleans*, 795 F.2d at 1234.

16. See, e.g., *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Daubert*, 509 U.S. at 589.

17. See *infra* pp. 21–23 and notes 113–45.

18. See, e.g., *Taylor v. State*, 62 So. 3d 1101, 1110–11 (Fla. 2011) (per curiam); *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), cert. denied, 130 S. Ct. 396 (2009) (citing *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)); *Marsh v. Valyou*, 977 So. 2d 543, 546–50 (Fla. 2007) (per curiam); *Spann v. State*, 857 So. 2d 845, 852 (Fla. 2003) (per curiam).

19. *Frye v. United States*, 293 F. 1013, 1013–14 (D.C. Cir. 1923).

20. See, e.g., *Taylor*, 62 So. 3d at 1110; *Murray*, 3 So. 3d at 1117; *Marsh*, 977 So. 2d at 546–50; *Spann*, 857 So. 2d at 852.

21. See, e.g., *Janssen Pharm. Prods., L.P. v. Hodgemire*, 49 So. 3d 767, 771–72 (Fla. 5th Dist. Ct. App. 2010) (per curiam), review denied, 64 So. 3d 1260 (Fla. 2011); *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 509 (Fla. 2d Dist. Ct. App. 2005); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 546 (Fla. 4th Dist. Ct. App. 2001).

litigation environments.²² Florida annually scores well overall in business climate and prospects for growth, but less well in regulatory/legal environment.²³ In *Forbes' 2007 Best States for Business* rankings, for example, Florida placed in the top ten overall but scored lower on regulatory environment and below average on business costs.²⁴ By contrast, Georgia, which passed expert evidence reform legislation in 2005, scored in the top five on regulatory environment.²⁵ Currently, Florida's rank has dropped all the way to number twenty-six.²⁶ Florida—South Florida in particular—routinely appears in business and legal interest rankings of the worst “judicial hellholes” in the nation.²⁷ For 2010–2011, according to the American Tort Reform Foundation, South Florida ranks as one of the top six worst judicial hellholes in the United States.²⁸

B. *Good Science Makes Good Law*

It should not be controversial to suggest that judges and juries will struggle to make fair and accurate decisions if invalid science or technical information distorts their understanding of the facts. On the other hand, reliable expert testimony will increase the quality of justice.²⁹ Good science makes good law. This is a point that should find broad acceptance among the stakeholders in Florida's justice system.

Whether one starts with consideration of the rationale underpinning federal decisions, led by the 1993 opinion of the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,³⁰ or the current state of Florida common law regarding expert testimony, the conclusion is the same: it is imperative that Florida's Legislature adopt progressive legis-

22. HARRIS INTERACTIVE, *2010 U.S. Chamber of Commerce State Liability Systems Ranking Study*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 1, 7, 42 (Mar. 9, 2010), <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/lawsuitclimate2010/2010FullHarrisSurvey.pdf>.

23. Kurt Badenhausen, *The Best States for Business and Careers*, FORBES.COM (Oct. 13, 2010, 6:30 PM), <http://www.forbes.com/2010/10/13/best-states-for-business-business-beltway-best-states-table.html>.

24. Kurt Badenhausen, *The Best States for Business*, FORBES.COM (July 11, 2007, 6:00 AM), http://www.forbes.com/2007/07/10/washington-virginia-utah-biz-cz_kb_0711bizstates-table.html.

25. *Id.*

26. Badenhausen, *supra* note 23.

27. *See, e.g., Judicial Hellholes*, AM. TORT REFORM FOUND. 1, 8–10 (2010), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2010.pdf>.

28. *Id.* at 3.

29. *See, e.g., Taylor v. State*, 889 P.2d 319, 329 (Okla. Crim. App. 1995).

30. 509 U.S. 579 (1993).

lation governing the disclosure, qualifications, and reliability of expert testimony in litigation. Such legislation would equip Florida trial judges with specific benchmarks for evaluating the admissibility of expert testimony. This would vastly improve the level of science and the quality of expert testimony in Florida courts. The Supreme Court of the United States was motivated by a concern for good science in *Daubert*, when it gave federal trial court judges the important responsibility of ensuring that expert testimony presented in court is based on reliable methodology and fits the facts of the case.³¹ Federal trial judges are made “gatekeepers” of expert evidence to prevent juries from being misled by junk science.³² The Supreme Court of Florida has not followed the same path, and Florida trial judges are extremely limited in their ability to keep junk science and unreliable or irrelevant expert evidence out of court.³³

Good science makes good law, and Florida’s lawmakers need to enact legislation that will maximize the likelihood that only good science is factored into the case-by-case law made in Florida’s courts.

C. Florida’s 1923 Frye “General Acceptance” Test

*Frye v. United States*³⁴ dealt with the admissibility of a blood pressure “deception test.”³⁵ In this criminal case, the defendant appealed his conviction for second degree murder based on the trial court’s exclusion of expert testimony on the result of the test on the defendant.³⁶ The defendant attempted to convince the court to allow the expert testimony based on the following:

It is asserted that blood pressure is influenced by change in the emotions of the witness, and that the systolic blood pressure rises

31. *Id.* at 592–93.

32. *See id.* at 597.

33. *See, e.g.*, *State v. Demeniuk*, 888 So. 2d 655, 658 (Fla. 5th Dist. Ct. App. 2004) (citing *Sybers v. State*, 841 So. 2d 532, 542 (Fla. 1st Dist. Ct. App. 2003) (“*Frye* requires that the judge perform the function of gatekeeper. In general terms, the gate of admissibility is not opened unless the proponent of new scientific evidence can demonstrate by the greater weight of the evidence that the scientific principle upon which the evidence is based, and the testing procedures used to apply the principle to the facts of the case, have gained general acceptance for reliability among impartial and disinterested experts within the particular scientific community to which the principle belongs.”)).

34. 293 F. 1013 (D.C. Cir. 1923).

35. *Id.* at 1013.

36. *Id.* at 1013–14. Ostensibly, defendant’s counsel wished to introduce the results of the test to show that the defendant was truthful on questions relating to his commission of the crime. *Id.* at 1014.

are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points in respect of which he is attempting to deceive the examiner.³⁷

The court summarized the defendant's theory as: "[T]ruth is spontaneous, and comes without conscious effort, while the utterance of a falsehood requires a conscious effort, which is reflected in the blood pressure."³⁸ The defendant did not appear to cite to any cases, scientific studies, or medical literature to directly support his theory.³⁹

In ruling that the test results were not admissible, the court fashioned a requirement of "general acceptance" for "the thing from which the [expert's] deduction is made."⁴⁰ The *Frye* court's reasoning was contained in a single paragraph lacking citation to any legal authority:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.⁴¹

Frye is now almost ninety years old.⁴² Its general acceptance test to guide courts in discerning trustworthiness in the "twilight zone" of science seems to have had an appealing simplicity in simpler times.⁴³ Florida

37. *Id.* at 1013–14.

38. *Frye*, 293 F. at 1014.

39. *Id.* The opinion only referenced the fact that "no cases directly [o]n point have been found." *Id.*

40. *Id.*

41. *Id.*

42. *Frye*, 293 F. at 1013.

43. *See id.* at 1014; *infra* notes 44, 113–57 and accompanying text.

adopted the general acceptance test in 1952.⁴⁴ Most other states adhered to *Frye* for much of the twentieth century.⁴⁵

The Supreme Court of Florida imposes four steps on trial judges in its articulation of the *Frye* test:

1) [T]he trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue; 2) the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs;" 3) the trial judge [must] determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue; 4) the [trial] judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.⁴⁶

In the decades since Florida adopted *Frye*, however, its courts have rigidly upheld the general acceptance test in concept, while at the same time narrowing its applicability to a small fraction of the cases involving expert testimony.⁴⁷ The Supreme Court of Florida's 2007 decision in *Marsh v. Valyou*⁴⁸ exemplifies an essentially unbroken line of cases proclaiming that Florida follows the general acceptance test but restricting the test's reach to the point of near non-usability.⁴⁹ The *Frye* test has been rendered an anomaly by scores of Florida decisions embracing the concepts of "pure opinion"

44. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam).

45. See *infra* notes 112–57 and accompanying text. For example, Alaska originally adopted the *Frye* test of admissibility in 1970 in *Pulakis v. State*, 476 P.2d 474, 478–79 (Alaska 1970), *overruled by* *State v. Coon*, 974 P.2d 386 (Alaska 1999), but later found that the *Frye* test was outdated and decided to replace it with the federal *Daubert* test in 1999. See *Coon*, 974 P.2d at 402 (adopting *Daubert*).

46. *Ramirez v. State (Ramirez II)*, 651 So. 2d 1164, 1166–67 (Fla. 1995) (citations omitted).

47. Compare *Kaminski*, 63 So. 2d at 340, with *Marsh v. Valyou*, 977 So. 2d 543, 551 (Fla. 2007) (per curiam).

48. 977 So. 2d 543 (Fla. 2007) (per curiam).

49. See *id.* at 546–51; see also *Taylor v. State*, 62 So. 3d 1101, 1110–11 (Fla. 2011) (per curiam); *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam), *cert. denied*, 130 S. Ct. 396 (2009); *Overton v. State*, 976 So. 2d 536, 550 (Fla. 2007) (per curiam) (quoting *Ramirez II*, 651 So. 2d at 1168); *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006) (per curiam) (quoting *Frye*, 293 F. at 1014); *Zack v. State*, 911 So. 2d 1190, 1197–98 (Fla. 2005) (per curiam) (citing *Frye*, 293 F. at 1014; *Brim v. State*, 695 So. 2d 268, 271 (Fla. 1997)).

and “methodology vs. reasoning and conclusion” and “new or novel science” as touchstones of the applicability of the general acceptance requirement.⁵⁰

1. Florida’s *Frye* Rule Does Not Apply to an Expert’s “Pure Opinion”

Florida courts have held that an expert can testify to his or her “pure opinion” without satisfying any general acceptance test.⁵¹ This begs the question of when an opinion is “pure” as opposed to the alternative—whatever that is—and a leading case offers this explanation: “‘Pure opinion’ refers to expert opinion developed from inductive reasoning based on the experts’ own experience, observation, or research, whereas the *Frye* test applies when an expert witness reaches a conclusion by deduction, from applying new and novel scientific principle, formula, or procedure developed by others.”⁵² As one commentator noted, this “pure opinion” doctrine incentivizes reliance on one’s own “experience” and “personal observation” to the detriment of research of actual scientific endeavor reflected in the published

50. See, e.g., *Murray*, 3 So. 3d at 1117; *Marsh*, 977 So. 2d at 548; *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003).

51. See, e.g., *Marsh*, 977 So. 2d at 548 (“It is well-established that *Frye* is inapplicable to ‘pure opinion’ testimony”); *Hadden v. State*, 690 So. 2d 573, 579 (Fla. 1997) (“[T]he *Frye* standard for admissibility of scientific evidence is not applicable to an expert’s pure opinion testimony” (citing *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)); *Flanagan*, 625 So. 2d at 828 (“[P]ure opinion testimony . . . does not have to meet *Frye*”); see also *Kaminski*, 63 So. 2d at 340; *Torres v. State*, 999 So. 2d 1077, 1079 (Fla. 4th Dist. Ct. App. 2009) (finding “the expert’s testimony to be pure opinion, not subject to *Frye*”); *Burton v. State (In re Commitment of Burton)*, 884 So. 2d 1112, 1113 (Fla. 2d Dist. Ct. App. 2004); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 903 (Fla. 3d Dist. Ct. App. 2003) (citing *Rickgauer v. Sarkar*, 804 So. 2d 502, 504 (Fla. 5th Dist. Ct. App. 2001)); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 997 (Fla. 4th Dist. Ct. App. 1999) (quoting *Flanagan*, 625 So. 2d at 828).

52. *Holy Cross Hosp., Inc. v. Marrone*, 816 So. 2d 1113, 1117 (Fla. 4th Dist. Ct. App. 2001) (citing *Kuhn ex rel. Estate of Bishop v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1179 (Kan. 2000)); *Hadden*, 690 So. 2d at 579–80 (stating that an expert’s testimony is pure opinion when it “is based solely on the expert’s training and experience”); *Flanagan*, 625 So. 2d at 828 (“[P]ure opinion testimony . . . is based on the expert’s personal experience and training.”); *Torres*, 999 So. 2d at 1078–79 (“[T]estimony based entirely on the expert’s professional experience constituted ‘pure opinion’ . . . [because it] did not rely on scientific studies, syndrome evidence, diagnostic criteria, or any other classic scientific test.” The expert “limited the basis for his testimony to his own professional experience.”); *Johnson v. State*, 933 So. 2d 568, 570 (Fla. 1st Dist. Ct. App. 2006) (“An expert opinion based on personal training and experience is not subject to a *Frye* analysis.” (citing *Herlihy v. State*, 927 So. 2d 146, 147 (Fla. 1st Dist. Ct. App. 2006) (per curiam))); *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898 (Fla. 3d Dist. Ct. App. 2001) (admitting expert opinion where the expert testified how to make a dangerous condition safer based solely on his experience).

or reported work of others.⁵³ For example, if an expert uses “scientific literature as a tool in helping form an opinion, then the court can and will scrutinize that opinion under *Frye*,” but if the expert chooses to give an expert opinion without any basis in scientific literature at all, then his opinion is not subjected to the *Frye* test and is likely admissible.⁵⁴ It seems entirely “counterintuitive to permit an expert to ignore scientific literature accepted by the general scientific community in favor of the expert’s personal experience to reach a conclusion not generally recognized in the scientific community and then allow testimony about that conclusion on the basis that it is pure opinion.”⁵⁵ Yet, despite the obvious deficiencies in the *Frye* exception for “pure opinion” testimony, the Supreme Court of Florida continues to affirm allegiance to it.⁵⁶

2. Florida’s *Frye* Rule Does Not Apply to an Expert’s Reasoning or Conclusion

Frye’s application is limited to an expert’s methodology and scientific principles, and a judge is forbidden to apply the general acceptance test to an expert’s reasoning or conclusions.⁵⁷ The Supreme Court of Florida has in fact, more or less, prohibited judges confronted with a challenge to expert testimony from considering the reliability of an expert’s reasoning or the connection between an expert’s conclusions and the underlying principles.⁵⁸

53. See Neil D. Kodsi, *Confronting Experts Whose Opinions Are Neither Supported nor Directly Contradicted by Scientific Literature*, FLA. B.J., June 2006, at 80; see also *Tursi*, 729 So. 2d at 996–97 (allowing a doctor to testify that exposure to a chemical caused a patient’s cataracts despite the fact that the expert used absolutely no scientific data to support the theory).

54. Kodsi, *supra* note 53.

55. *Id.*

56. See, e.g., *Marsh*, 977 So. 2d at 561 (Cantero, J., dissenting); *Hadden*, 690 So. 2d at 580–81; *Flanagan*, 625 So. 2d at 828.

57. See, e.g., *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003) (stating that “*Frye* does not require the court to assess the application of the expert’s raw data in reaching his or her conclusion,” but only requires that the underlying science is generally accepted); *Janssen Pharm. Prods., L.P. v. Hodgemire*, 49 So. 3d 767, 771 (Fla. 5th Dist. Ct. App. 2010) (per curiam), *review denied*, 64 So. 3d 1260 (Fla. 2011); *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 509 (Fla. 2d Dist. Ct. App. 2005); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, 547 (Fla. 4th Dist. Ct. App. 2001).

58. See *Castillo*, 854 So. 2d at 1276 (stating that *Frye* looks only at the validity of the underlying science, and derogating the court below for engaging in essentially a federal analysis that questioned the expert’s methodology and reasoning); see also *Rodgers v. State*, 948 So. 2d 655, 666 (Fla. 2006) (per curiam) (reaffirming the *Castillo* opinion and stating that the *Frye* test only should be applied to the underlying principles or methodology and not to the

3. Florida's *Frye* Rule Does Not Apply Unless the Expert's Testimony Involves "New or Novel Science"

Finally, as applied in Florida, the *Frye* test is only invoked in cases involving "new or novel scientific evidence."⁵⁹ No Florida court has or can reasonably define "new or novel" in the context of science, but courts have found that enhancement of operator visibility on sophisticated construction equipment,⁶⁰ handwriting analysis,⁶¹ footprint analysis,⁶² tire thickness,⁶³ global positioning satellite technology,⁶⁴ and even basic DNA analysis⁶⁵ are not new or novel and are therefore immune from scrutiny under *Frye*.⁶⁶ Indeed, a recent decision of the Supreme Court of Florida declared that "*in the vast majority of cases, no Frye inquiry will be required.*"⁶⁷

D. *Life Under Frye—Expert Evidence Seldom Challenged, Rarely Scrutinized*

A historian might say that the *Frye* general acceptance test was typical Roaring-Twenties hubris. Much closer in vintage to the flight of the Wright brothers than to the Apollo landing, the *Frye* test is a Prohibition-era relic that continues to short-change most of the stakeholders in Florida's judicial system.⁶⁸ In Florida, there is virtually no stopping a lawyer who seeks to

opinion itself because the credibility of the expert opinion does not implicate the *Frye* test, but instead goes to the weight of the evidence).

59. See, e.g., *Murray v. State*, 3 So. 3d 1108, 1117 (Fla.) (per curiam) (quoting *McDonald v. State*, 952 So. 2d 484, 498 (Fla. 2006) (per curiam)), cert. denied, 130 S. Ct. 396 (2009); *Overton v. State*, 976 So. 2d 536, 550 (Fla. 2007) (per curiam); *Rodgers*, 948 So. 2d at 666; *Branch v. State*, 952 So. 2d 470, 483 (Fla. 2006) (per curiam) (citing *Brim v. State*, 695 So. 2d 268, 271–72 (Fla. 1997)); *Ibar v. State*, 938 So. 2d 451, 467 (Fla. 2006) (per curiam); *Zack v. State*, 911 So. 2d 1190, 1198 (Fla. 2005) (per curiam) (citing *Brim*, 695 So. 2d at 271–72); *Still v. State*, 917 So. 2d 250, 251 (Fla. 3d Dist. Ct. App. 2005) (citing *Brim*, 695 So. 2d at 271–72); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 902 (Fla. 3d Dist. Ct. App. 2003) (citing *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002)).

60. *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898–99 (Fla. 3d Dist. Ct. App. 2001).

61. *Spann v. State*, 857 So. 2d 845, 851–52 (Fla. 2003) (per curiam).

62. *Ibar*, 938 So. 2d at 468.

63. *Jones*, 871 So. 2d at 903.

64. *Still*, 917 So. 2d at 251.

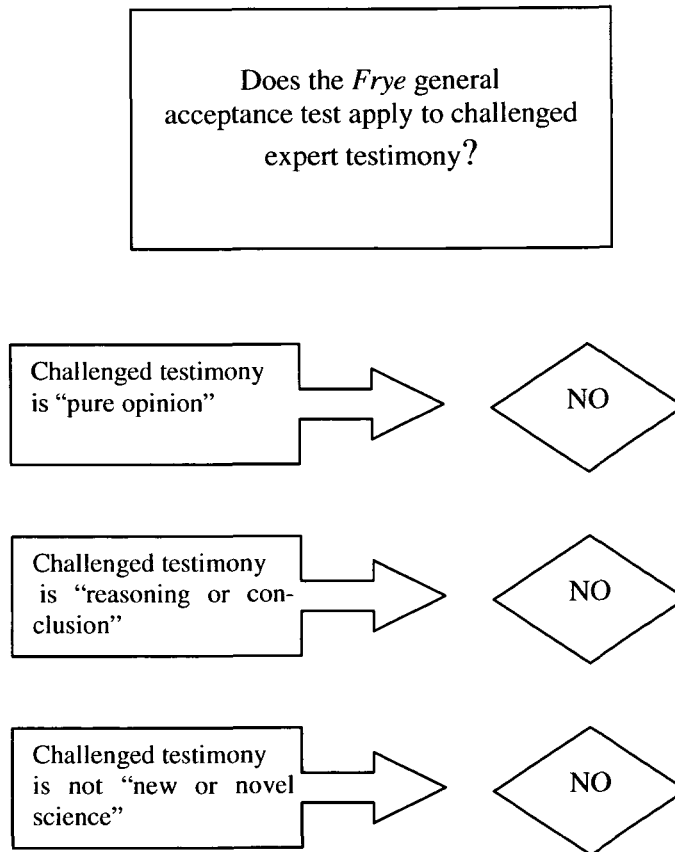
65. *Hayes v. State*, 660 So. 2d 257, 264–65 (Fla. 1995).

66. *Ibar*, 938 So. 2d at 468; *Spann*, 857 So. 2d at 852; *Hayes*, 660 So. 2d at 264–65; *Still*, 917 So. 2d at 251; *Jones*, 871 So. 2d at 903; *Davis v. Caterpillar, Inc.*, 787 So. 2d 894, 898–99 (Fla. 3d Dist. Ct. App. 2001).

67. *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 109 (Fla. 2002) (emphasis added).

68. See *Marsh v. Valyou*, 977 So. 2d 543, 548 (Fla. 2007) (per curiam). The exception might be criminal defendants, for whom *Frye* seems to have provided a fertile appellate field;

influence the jury with a “hired gun” expert espousing junk science—the lawyer merely needs to aim for one of the gaping holes in *Frye*’s applicability.⁶⁹



Even the expert who fails to avoid the application of *Frye* can still satisfy the general acceptance test by purporting to base his or her testimony on the principles of some recognized field.⁷⁰ Such a standard, with so many

some examples in this regard include the Supreme Court of Florida’s rejection under *Frye* of a psychologist’s “sex offender profile,” *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993); a psychologist’s testimony on “child sexual abuse accommodation syndrome,” *Hadden v. State*, 690 So. 2d 573, 575 (Fla. 1997); “hypnotically refreshed testimony,” *Stokes v. State*, 548 So. 2d 188, 195–96 (Fla. 1989); and an expert on the marks made by the blade of a knife, *Ramirez v. State (Ramirez I)*, 542 So. 2d 352, 355 (Fla. 1989) (per curiam).

69. See, e.g., *Marsh*, 977 So. 2d at 560–61 (Cantero, J., dissenting).

70. See *id.* at 546–47 (majority opinion).

exceptions, is really no standard at all and offers trial courts no consistent, objective measure for admitting expert testimony. While the *Frye* test as originally stated was simple, the case law eroding its application in a host of contexts has made it very difficult to apply.⁷¹

The unsurprising result of Florida being a *Frye* jurisdiction is that it is all too rare for expert evidence to be subjected to rigorous scrutiny in Florida courts.⁷² A party has little incentive to challenge an opponent's expert regardless of how questionable the expert's opinions might be.⁷³ Unfortunately, making a *Frye* challenge in Florida is usually roughly equivalent to coaching the challenged expert—and retaining counsel—on his or her vulnerabilities and telegraphing the likely thrust of cross-examination at trial. Most Florida attorneys, therefore, tend to make the pragmatic, but unsatisfying choice of forgoing *Frye* challenges, even when facing an expert who should be challenged and who would be challenged under a better system.⁷⁴

E. *The Entrenchment of Frye in the Supreme Court of Florida*

Florida's appellate courts have had several opportunities to modernize and improve the way expert evidence is dealt with at trial, but their adherence to *Frye* has never wavered.⁷⁵ Instead, as noted above, the test has been consistently honored in name, but construed in a manner that renders it toothless.⁷⁶ Consequently, the harm is compounded—an evidentiary safeguard that is woefully inadequate to begin with, becomes an open floodgate in application.

Supreme Court of Florida decisions reflect that *Frye* is now so entrenched in Florida precedent that it is unrealistic to believe that the judicial system will solve Florida's expert evidence problem from within.⁷⁷ In 2007, the Court decided *Marsh* with five of seven justices reaffirming *Frye* as the law of Florida.⁷⁸ A majority of four ruled that *Frye* does not even apply to expert testimony causally linking trauma to fibromyalgia.⁷⁹ More signifi-

71. See *id.* at 547. “The *Frye* test is simple to state, if not always easy to apply.” *Id.* at 560 (Cantero, J., dissenting).

72. See *id.* at 547, 550 (majority opinion).

73. See *Marsh*, 977 So. 2d at 547–48, 550.

74. See *id.* at 546–47, 549.

75. *Id.* at 547. The Supreme Court of Florida appears to have first adopted *Frye* almost sixty years ago in 1952. See *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952) (per curiam) (applying the *Frye* standard to test the reliability of the foundation of the expert's testimony).

76. See *Marsh*, 977 So. 2d at 547.

77. See *id.*

78. See *id.* at 547, 551.

79. *Id.* at 549–50.

cantly, the majority recognized that the *Frye* test “is inapplicable in the vast majority of cases” because it applies only to “new or novel” science.⁸⁰ The majority also stated that the test is likewise “inapplicable to ‘pure opinion’ testimony,” and in a medical context, for example, this exempts from the test a causation opinion based solely on a purported expert’s “experience and training.”⁸¹

As the dissent recognized, these gaping holes in the *Frye* test’s applicability threaten to swallow the test itself, and in effect, render expert testimony “*always admissible as . . . ‘pure opinion.’*”⁸² But, it was not just the dissent that recognized the flaws in the *Frye* test; the concurring opinion authored by Justice Anstead—and joined by Justice Pariente—expressed the view that *Frye* was superseded by the Federal Rules of Evidence and that the Florida Supreme Court should adopt *Daubert* as consistent with Florida’s Rules of Evidence.⁸³ Justice Anstead also pointed out that the Supreme Court of Florida has “never explained how *Frye* has survived the adoption of the rules of evidence.”⁸⁴

The *Marsh* decision came at a point in time when pro-business interests probably saw the zenith of a favorable composition of the Supreme Court of Florida.⁸⁵ Given this fact and the bulwark of unbroken adherence to *Frye* emanating from the Florida Supreme Court for decades, *Marsh* is likely to be the high-water mark—as close as the court is likely to come to changing this aspect of Florida law.

III. SOLUTION: BRING *DAUBERT* TO FLORIDA THROUGH LEGISLATIVE CHANGE

A. *The Daubert Approach*

In its 1993 *Daubert* decision, the Supreme Court of the United States created a seismic shift in the test for the admissibility of expert testimony.⁸⁶ *Daubert* held that Congress’ adoption of the Federal Rules of Evidence displaces the general acceptance test and requires the federal trial judge to en-

80. *Id.* at 547 (internal quotation marks omitted).

81. *Marsh*, 977 So. 2d at 548 (quoting *Flanagan v. State*, 625 So. 2d 827, 828 (Fla. 1993)).

82. *Id.* at 562 (Cantero, J., dissenting) (emphasis added).

83. *Id.* at 551, 554 (Anstead, J., concurring).

84. *Id.* at 551.

85. The three dissenting justices in *Marsh*—Cantero, Wells, and Bell—are no longer on the Supreme Court of Florida.

86. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

sure that any expert testimony admitted is both reliable *and* relevant.⁸⁷ The Court has also clarified that an expert's conclusions are not beyond the reach of the relevance/reliability test,⁸⁸ and that the relevance/reliability test is not limited to the "scientific" and applies to all expert testimony.⁸⁹

The discussion below focuses on the reliability and relevance prongs of the *Daubert* test, the trial judge's continuing role as "gatekeeper" under this test, and the number of states that have embraced the *Daubert* test.

1. Reliability

Reliability is determined on the basis of flexible factors, which typically include, at a minimum: 1) whether the conclusion or methodology being espoused is subject to being tested; 2) whether the conclusion or methodology has been subjected to peer review and publication, such that substantive flaws will likely have been flushed out; 3) whether there exists standards controlling the methodology's operation, and, if so, the known or potential rate of error; and 4) whether the conclusion or methodology is generally accepted.⁹⁰

Additionally, the *Daubert* approach encourages a trial judge to consider whether an expert is offering opinions that are consistent with the expert's work outside the courtroom.⁹¹ Consistency between what an expert has said on a subject in litigation and non-litigation contexts is an indicator of reliability; in contrast, courts are rightfully suspicious of the expert who opines on a subject only when hired to do so in lawsuits.⁹²

The *Daubert* approach also embraces the notion that given the fluidity and complexity of science and other disciplines giving rise to expertise,

87. *Id.*

88. Although *Daubert* spoke of "theory or technique" as opposed to "conclusion," the Court's holding in *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), recognized that conclusions are properly scrutinized, and that courts should not permit conclusions tied to data only by the expert's *ipse dixit* (i.e., "because I said it").

89. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

90. *Daubert*, 509 U.S. at 593-94.

91. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).

92. *See id.* ("[E]xperts whose findings flow from existing research are less likely to have been biased toward a particular conclusion by the promise of remuneration; when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party's interests."); *see also* *McCorvey v. Baxter Healthcare Corp.*, No. 99-1250-CIV, 2008 WL 8095712, at *3 (S.D. Fla. Feb. 28, 2008); *Haggerty v. UpJohn Co.*, 950 F. Supp. 1160, 1162 (S.D. Fla. 1996); *Reynard ex rel. Estate of Reynard v. NEC Corp.*, 887 F. Supp. 1500, 1507 (M.D. Fla. 1995).

courts should be able to consider a variety of factors in any given case.⁹³ Some of the additional factors expressly recognized include: 1) “[w]hether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;”⁹⁴ 2) “[w]hether the expert has adequately accounted for obvious alternative explanations;”⁹⁵ 3) whether the expert is being as careful

93. See FED. R. EVID. 702 advisory committee’s note (stating that the “standards set forth in the amendment [to Rule 702] are broad enough to require consideration of *any* or *all* of the specific *Daubert* factors where appropriate” and that other factors can and should be applied where necessary (emphasis added)).

94. *Id.*; see, e.g., *Kumho Tire Co.*, 526 U.S. at 157 (quoting *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997)) (following *Daubert* and stating that a trial court is not required to admit “evidence that is connected to [the] data only by the *ipse dixit* of the expert.”); *Joiner*, 522 U.S. at 146 (stating that a trial court may exclude evidence where it finds that “there is simply too great an analytical gap between the data and the opinion proffered” for the evidence to be admissible); *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1194 (11th Cir. 2010) (quoting *Joiner*, 522 U.S. at 146) (finding that there is nothing in either *Daubert* or the Federal Rules of Evidence that requires the trial court to admit an expert’s opinion “that is connected to existing data only by the *ipse dixit* of the expert.”); *Guinn v. AstraZeneca Pharm. L.P.*, 602 F.3d 1245, 1255 (11th Cir. 2010) (per curiam) (upholding the district court’s exclusion of an expert’s testimony because the expert failed to show how her opinions were logically derived from the facts of the case); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1112 (11th Cir. 2005) (affirming the trial court’s exclusion of an expert’s opinion because the opinion was “unsubstantiated by any proffered facts, explanation, or analysis.”); *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1255 (11th Cir. 2005) (“Plaintiffs’ experts took leaps of faith and substituted their own *ipse dixit* for scientific proof on essential points.”); *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1292 (11th Cir. 2005) (explaining that the expert’s opinion “required the kind of scientifically unsupported ‘leap of faith’ which is condemned by *Daubert*.” (citation omitted)); *Fuesting v. Zimmer, Inc.*, 362 F. App’x 560, 562–63 (7th Cir. 2010); *Bland v. Verizon Wireless, (VAW) L.L.C.*, 538 F.3d 893, 898 (8th Cir. 2008); *Smith v. Sears Roebuck & Co.*, 232 F. App’x 780, 782 (10th Cir. 2007); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 263 (4th Cir. 2005); *Ammons v. Aramark Unif. Servs., Inc.*, 368 F.3d 809, 815 (7th Cir. 2004); *Montgomery Cnty. v. Microvote Corp.*, 320 F.3d 440, 448 (3d Cir. 2003) (citing *Joiner*, 522 U.S. at 146); *Phelan v. Synthes (U.S.A.)*, 35 F. App’x 102, 106–07 (4th Cir. 2002) (per curiam); *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001); *Holesapple v. Barrett*, 5 F. App’x 177, 179–80 (4th Cir. 2001) (per curiam); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 158 (3d Cir. 2000) *overruled on other grounds* *Soufflas v. Zimmer, Inc.*, 474 F. Supp. 2d 737 (E.D. Pa. 2007); *Cooper ex rel. Estate of Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008, 1021 (7th Cir. 2000); *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1084 (8th Cir. 1999); *Heller v. Shaw Indus.*, 167 F.3d 146, 153–59 (3d Cir. 1999); *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81–82 (1st Cir. 1998); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 279 (5th Cir. 1998); *Schudel v. Gen. Electric Co.*, 120 F.3d 991, 997 (9th Cir. 1997); *Turpin v. Merrell Dow Pharm., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992); *Washburn v. Merck & Co.*, No. 99-9121, 2000 WL 528649, at *627 (S.D.N.Y. May 1, 2000) (unpublished table decision).

95. FED. R. EVID. 702 advisory committee’s note; see also *Davis v. City of Loganville*, No. 3:04-CV-068 (CAR), 2006 WL 826713, at *11 (M.D. Ga. Mar. 28, 2006) (11th Circuit case); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 694 (8th Cir. 2001) (discussing that an expert must “explain why other conceivable causes are excludable”); *Turner v. Iowa Fire*

in paid litigation consulting as the expert is in work outside of litigation;⁹⁶ and 4) “[w]hether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion” being offered.⁹⁷

Equip. Co., 229 F.3d 1202, 1208 (8th Cir. 2000); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) (“A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation.”); *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997); *Brown v. Se. Pa. Transp. Auth. (In re Paoli R.R. Yard PCB Litig.)*, 35 F.3d 717, 760 (3d Cir. 1994), *rev’d in part sub nom. In re Paoli R.R. Yard PCB Litig.*, 221 F.3d 449 (3d Cir. 2000); *Claar v. Burlington N. R.R.*, 29 F.3d 499, 502–03 (9th Cir. 1994) (rejecting expert testimony where the experts failed “to rule out other possible causes for the injuries plaintiffs complain[ed] of, even though they admitted that this step would be standard procedure before arriving at a diagnosis” (footnote omitted)); Paul M. da Costa & Melinda Harris, *Has Expert Adequately Accounted for Obvious Alternative Explanations?*, in THE DAUBERT COMPENDIUM 301, 303–16 (D.R.I. 2011). *But see Heller v. Shaw Indus.*, 167 F.3d 146, 156 (3d Cir. 1999) (finding that an expert’s testimony “should not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff’s illness,” but should only be ruled out if he or she fails to rule out obvious alternative explanations (emphasis added)).

96. FED. R. EVID. 702 advisory committee’s note; *see Kumho Tire Co.*, 526 U.S. at 152 (finding that the purpose of *Daubert* is to ensure that only reliable and relevant evidence is admissible and that one way of ensuring this is to make sure that the expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”); *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (adopting the exact phraseology of *Kumho Tire Co.*); *Wells v. Smithkline Beecham Corp.*, 601 F.3d 375, 378 (5th Cir. 2010) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 946 (9th Cir. 2009) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Best v. Lowe’s Home Ctrs., Inc.*, 563 F.3d 171, 181 (6th Cir. 2009) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Jenkins ex rel. Estate of Jenkins v. Bartlett*, 487 F.3d 482, 489 (7th Cir. 2007) (citing *Kumho Tire Co.*, 526 U.S. at 152); *Mariposa Farms, L.L.C. v. Westfalia-Surge, Inc.*, 211 F. App’x 760, 762 (10th Cir. 2007) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Burleson v. Tex. Dep’t of Criminal Justice*, 393 F.3d 577, 584 (5th Cir. 2004) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Zaremba v. Gen. Motors Corp.*, 360 F.3d 355, 358 (2d Cir. 2004) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Goebel v. Denver & Rio Grande W. R.R.*, 346 F.3d 987, 992 (10th Cir. 2003) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003) (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002); *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265–66 (2d Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152), *amended by* 319 F.3d 1073 (9th Cir. 2003); *Chapman ex rel. Estate of Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (citing *Cummins v. Lyle Indus.*, 93 F.3d 362, 369 (7th Cir. 1996)); *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1205–06 (10th Cir. 2002) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 203 (4th Cir. 2001) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Jahn v. Equine Servs., P.S.C.*, 233 F.3d 382, 388 (6th Cir. 2000) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Elcock v. Kmart Corp.*, 233 F.3d 734, 746 (3d Cir. 2000) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999) (quoting

2. Relevance

Daubert relevance, in turn, refers to the requisite “fit” between the expert opinions being offered and the issues in the case.⁹⁸ The focus is not the general reasonableness of a particular methodology, but the reasonableness of using that methodology to draw a conclusion regarding the particular subject matter of the case.⁹⁹ Though it has received far less judicial and scholarly attention than the twin requirement of reliability, the requirement of relevance must be satisfied or expert testimony is subject to exclusion on this basis alone.¹⁰⁰ In fact, the Supreme Court of the United States re-emphasized

Kumho Tire Co., 526 U.S. at 152); *Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999) (quoting *Kumho Tire Co.*, 526 U.S. at 152); *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (stating that whether an “expert is being as careful as he would be in his regular professional work outside his paid litigation consulting” may be an important factor (citations omitted)).

97. FED. R. EVID. 702 advisory committee’s note; *see also Kumho Tire Co.*, 526 U.S. at 151 (“*Daubert*’s general acceptance factor [does not] help show that an expert’s testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy.”); *Hendrix ex rel. G.P.*, 609 F.3d at 1195 (“[T]he district court must ensure that . . . the expert’s opinion on general causation is ‘derived from scientifically valid methodology.’” (citations omitted)); *McClain*, 401 F.3d at 1240 (finding that the expert’s testimony was inadmissible because it was based on “questionable principles of pharmacology”); *McEwen v. Balt. Wash. Med. Ctr. Inc.*, 404 F. App’x 789, 791 (4th Cir. 2010) (per curiam); *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 825–26 (7th Cir. 2010); *Best*, 563 F.3d at 178 (citing *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001)); *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir.), *cert. denied*, 130 S. Ct. 54 (2009); *Polski v. Quigley Corp.*, 538 F.3d 836, 840 (8th Cir. 2008) (quoting *Polski v. Quigley Corp.*, No. 04-CV-4199 (PJS/JJG), 2007 WL 2580550, *5 (D. Minn. Sept. 5, 2007); *United States v. Day*, 524 F.3d 1361, 1368 (D.C. Cir. 2008); *Pineda v. Ford Motor Co.*, 520 F.3d 237, 247 (3d Cir. 2008) (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 742); *United States v. Williams*, 506 F.3d 151, 161 (2d Cir. 2007); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 655 (9th Cir. 2006); *United States v. Mahone*, 453 F.3d 68, 71–72 (1st Cir. 2006); *United States v. Fullwood*, 342 F.3d 409, 412 (5th Cir. 2003); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988) (excluding expert testimony based on “clinical ecolog[y]” because the field consists of “an unproven methodology lacking any scientific basis in either fact or theory”).

98. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); *see Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (citing *Daubert*, 509 U.S. at 591).

99. *Kumho Tire Co.*, 526 U.S. at 154.

100. *See Allison*, 184 F.3d at 1312; *United States v. Batiste*, No. 06-20373-CR, 2007 WL 5303052, at *2 (S.D. Fla. Oct. 26, 2007) (citing *Allison*, 184 F.3d at 1312) (explaining that there must be a connection between the evidence and the expert’s testimony for the testimony to be relevant under the second prong of the *Daubert* test); *Covas v. Coleman Co.*, No. 00-8541-CIV, 2005 WL 6166740, at *1–2 (S.D. Fla. June 27, 2005) (citing *Allison*, 184 F.3d at 1312) (explaining that there must be a connection between the evidence and the expert’s testimony for the testimony to be relevant under the second prong of the *Daubert* test); *see also*

the importance of relevance in its post-*Daubert* opinion in *Kumho Tire Co. v. Carmichael*.¹⁰¹ In *Kumho Tire Co.*, the Court reiterated that the Federal Rules of Evidence impose a special obligation on judges to perform the “gatekeeping” function of excluding irrelevant scientific evidence.¹⁰²

Just months after *Kumho Tire Co.*, the Eleventh Circuit followed and reinforced this principle in *Allison v. McGhan Medical Corp.*¹⁰³ There, the court explained that the *Daubert* four-factor test “does not operate in a vacuum,” and that a court’s determination of whether scientific evidence is admissible must be considered against the backdrop of whether the evidence was also relevant under the Federal Rules of Evidence.¹⁰⁴ The court emphasized that the relevance requirement was especially important in the *Daubert* context to ensure that “a barrage of questionable scientific evidence [was not dumped] on a jury.”¹⁰⁵ The court supported its concern by noting that a jury would be ill-equipped, or at least “less equipped than the judge to make [the necessary] . . . relevance determinations.”¹⁰⁶ Thus, it is particularly crucial that the judge keep irrelevant scientific evidence out of the jury’s purview “because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value.”¹⁰⁷

3. Judge as Gatekeeper

The *Daubert* reforms would mean little without a mechanism of enforcement, and here both the Supreme Court of the United States and Congress—by virtue of adoption of the Federal Rules of Evidence—have commissioned trial judges to serve as “gatekeepers” who must exclude expert testimony that is not sufficiently reliable or relevant.¹⁰⁸ A trial judge is em-

Williams v. Michelin N. Am., Inc., 381 F. Supp. 2d 1351, 1360 (M.D. Fla. 2005) (stating that expert testimony “must have a valid scientific connection to the disputed facts in the case” and that a judge has the discretion to exclude evidence that has “too great an analytical gap between the data and the opinion proffered” (citations omitted)).

101. 526 U.S. 137, 141 (1999).

102. *Id.* at 147.

103. 184 F.3d 1300, 1311–12 (11th Cir. 1999).

104. *Id.* at 1309.

105. *Id.* at 1310.

106. *Id.*

107. *Id.* at 1311–12.

108. *See, e.g.*, FED. R. EVID. 702 advisory committee’s note (“In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony”); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 295 (6th Cir. 2007) (“*Daubert* and its progeny have placed

powered with broad discretion in addressing the reliability and relevance of expert testimony, and will be upheld on appeal in the absence of an abuse of that broad discretion.¹⁰⁹ In fact, in *Allison*, the Eleventh Circuit made it a point to specifically state just how deferential the standard of review for *Daubert* rulings is: “After careful but *deferential* review, we AFFIRM the district court’s *Daubert* rulings excluding Allison’s causation experts, finding that Allison has failed to show that the decision [was] *manifestly erroneous*.”¹¹⁰ *Allison* is just one example of how appellate courts generally apply a very deferential standard of review to *Daubert* rulings, even if the exclusion or inclusion of evidence may be outcome-determinative.¹¹¹

4. The Results

The *Daubert* approach has swept the nation and now controls the admissibility of expert testimony in thirty-three states as well as the federal courts in all fifty states.¹¹² Currently, six states have explicitly adopted *Daubert* by statute: Delaware,¹¹³ Georgia,¹¹⁴ Michigan,¹¹⁵ Mississippi,¹¹⁶ North

the district courts in the role of ‘gatekeeper,’ charging them with evaluating the relevance and reliability of proffered expert testimony with heightened care.”); *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) (“[T]he district court acts as a gatekeeper, preventing opinion testimony that does not meet the requirements of qualification, reliability and fit from reaching the jury.”); *Duffee ex rel. Thornton v. Murray Ohio Mfg. Co.*, 91 F.3d 1410, 1411 (10th Cir. 1996) (agreeing with *Daubert* that judges are empowered to “act as gatekeepers to ensure that scientific evidence is both relevant and reliable” before it is admitted into evidence (citing *Daubert*, 509 U.S. at 591–95)).

109. See *Kumho Tire Co.*, 526 U.S. at 152 (“[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”); see also *Gen. Electric Co. v. Joiner*, 522 U.S. 136, 146–147 (1997); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000) (citing *Kumho Tire Co.*, 526 U.S. at 142); *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1999) (“The trial judge is required to inquire into . . . reliability . . . [and has] ‘substantial discretion in deciding how to test an expert’s reliability and whether the expert’s relevant testimony is reliable.’” (quoting *Forklifts of St. Louis, Inc. v. Komatsu Forklift, USA, Inc.*, 178 F.3d 1030, 1035 (8th Cir. 1999))).

110. *Allison*, 184 F.3d at 1322 (emphasis added); see FED. R. EVID. 702 advisory committee’s note (“A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.”).

111. *Allison*, 184 F.3d at 1306 (“Th[e] deferential standard is not relaxed even though a ruling on the admissibility of expert evidence may be outcome-determinative.”).

112. *Daubert*, 509 U.S. at 597; see *infra* notes 113–45.

113. DEL. R. EVID. 702 (identical to FED. R. EVID. 702).

114. *Mason II*, 658 S.E.2d 603, 610 (Ga. 2008) (“Since OCGA § 24–9–67.1(b) was based on Fed. R. Evid. Rule 702, which in its present form is based on the holdings in *Daubert*, . . . the trial court’s application of the standards of *Daubert* was proper.” (citations omitted)).

Carolina,¹¹⁷ and Vermont.¹¹⁸ Similarly, twenty-seven states have adopted *Daubert* via common law: Alabama,¹¹⁹ Alaska,¹²⁰ Arkansas,¹²¹ Colorado,¹²² Connecticut,¹²³ Idaho,¹²⁴ Indiana,¹²⁵ Iowa,¹²⁶ Kentucky,¹²⁷ Louisiana,¹²⁸

115. MICH. R. EVID. 702 (nearly identical to FED. R. EVID. 702). A comment in the Michigan Rules of Evidence states that the:

[A]mendment of MRE 702 . . . conforms the Michigan rule to Rule 702 of the Federal Rules of Evidence, as amended effective December 1, 2000, except that the Michigan rule retains the words “the court determines that” after the word “IF” at the outset of the rule. The new language requires trial judges to act as gatekeepers who must exclude unreliable expert testimony. The retained words emphasize the centrality of the court’s gatekeeping role in excluding unproven expert theories and methodologies from jury consideration.

MICH. R. EVID. 702, staff comment to 2004 amendment (citing *Daubert*, 509 U.S. at 579; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)).

116. MISS. R. EVID. 702 (identical to FED. R. EVID. 702).

117. 2011 N.C. Sess. Laws 283, sec. 1.4 (H.B. 542). The North Carolina statute was signed into law on June 24, 2011, became effective on October 1, 2011, and was codified at N.C. GEN. STAT. § 8C-702(a)(2011). 2011 N.C. Sess. Laws 283, secs. 1.4, 5.2. Prior to the enactment of the statute, North Carolina had adopted its own test of admissibility. See *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 690 (N.C. 2004) (While “North Carolina cases share obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the ‘exacting standards of reliability’ demanded by the federal approach. Moreover, had we ever intended to adopt *Daubert* and supersede this established body of North Carolina case law, we would certainly have referenced the basic *Daubert* factors that have come to define the federal standard. But we did not.” (citations omitted)).

118. VT. R. EVID. 702 (identical to FED. R. EVID. 702).

119. *Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359 (Ala. 1998). Alabama has adopted *Daubert* for certain types of cases, but remains loyal to *Frye* in others, and thus, the state of Alabama is found on both lists. *Id.* at 359, 361 n.7 (“[T]he Legislature chose the more flexible admissibility standard established in *Daubert*” for the admissibility of DNA evidence, but “[w]ith respect to expert scientific testimony on subjects other than DNA techniques governed by § 36-18-30, *Frye* remains the standard of admissibility in Alabama.”).

120. *State v. Coon*, 974 P.2d 386, 402 (Alaska 1999) (adopting the *Daubert* test of admissibility and rejecting *Frye*).

121. *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512, 519 (Ark. 2000) (adopting the *Daubert* test of admissibility).

122. See *People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001) (en banc). The Colorado Supreme Court has held that trial courts must follow Rule 702 of the Colorado Rules of Evidence (CRE), and that when applying CRE 702, trial courts can consider the *Daubert* factors but are not limited by them. *Id.* (“[A] trial court making a CRE 702 reliability determination may, but need not consider any or all of these [*Daubert*] factors, depending on the totality of the circumstances of a given case. A trial court may also consider other factors not listed here, to the extent that it finds them helpful in determining the reliability of the proffered evidence. Our determination that a trial court may, but need not consider the factors listed in *Daubert* is consistent with the United States Supreme Court’s reasoning in *Kumho Tire Co. v. Carmichael*.”).

123. *State v. Porter*, 698 A.2d 739, 742 (Conn. 1997) (adopting the *Daubert* test of admissibility).

Maine,¹²⁹ Massachusetts,¹³⁰ Montana,¹³¹ Nebraska,¹³² Nevada,¹³³ New Hampshire,¹³⁴ New Jersey,¹³⁵ New Mexico,¹³⁶ Ohio,¹³⁷ Oklahoma,¹³⁸ Oregon,¹³⁹

124. *See Weeks v. E. Idaho Health Servs.*, 153 P.3d 1180, 1184 (Idaho 2007) (“The Court has not adopted the *Daubert* standard for admissibility of an expert’s testimony but has used some of *Daubert*’s standards in assessing whether the basis of an expert’s opinion is scientifically valid,” and has also explicitly rejected *Frye*’s general acceptance test of admissibility.).

125. *Steward v. State*, 652 N.E.2d 490, 498 (Ind. 1995) (acknowledging that although Indiana has not explicitly adopted *Daubert*, “[t]he concerns driving *Daubert* coincide with the express requirement of Indiana Rule of Evidence 702(b) . . . [t]hus, although not binding upon the determination of state evidentiary law issues, the federal evidence law of *Daubert* and its progeny is helpful to the bench and bar in applying Indiana Rule of Evidence 702(b).”).

126. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) (en banc) (adopting a modified/limited application of *Daubert*).

127. *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (“After careful review . . . we adopt the reasoning of *Kumho* and hold that *Daubert* and *Mitchell* apply.”); *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995) (adopting the *Daubert* test of admissibility), *overruled on other grounds*, *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), and *abrogated in part* by *Christian v. Commonwealth*, No. 2004-SC-1055-MR, 2005 WL 3500806, at *1 (Ky. Dec. 22, 2005).

128. *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993) (adopting the *Daubert* test of admissibility).

129. *See State v. Williams*, 388 A.2d 500, 504 (Me. 1978). Although Maine has refused to officially adopt *Daubert*, the state’s test of admissibility, called the *Williams* test, is similar to *Daubert*. *See id.* (establishing Maine’s standards for the admissibility of expert evidence and stating that “[t]he controlling criteria regarding the admissibility of expert testimony, so long as the proffered expert is qualified and probative value is not substantially outweighed by the factors mentioned in Rule 403, are whether in the sound judgment of the presiding Justice the testimony to be given is relevant and will assist the trier of fact to understand the evidence or to determine a fact in issue.”).

130. *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994) (“We accept the basic reasoning of the *Daubert* opinion because it is consistent with our test of demonstrated reliability.”).

131. *State v. Bieber*, 170 P.3d 444, 454 (Mont. 2007) (“[T]his Court has consistently held since *Moore* that the *Daubert* factors apply exclusively to *novel* scientific evidence.”); *State v. Moore*, 885 P.2d 457, 470–71 (Mont. 1994), *overruled on other grounds*, 906 P.2d 697 (Mont. 1995) (adopting the *Daubert* test of admissibility and acknowledging that the Supreme Court of Montana had previously rejected the *Frye* test).

132. *City of Lincoln v. Realty Trust Grp., Inc.*, 705 N.W.2d 432, 436–37 (Neb. 2005) (reinforcing Nebraska’s use of *Daubert*); *Schafersman v. Agland Coop*, 631 N.W.2d 862, 876 (Neb. 2001) (adopting the *Daubert* test of admissibility and rejecting *Frye*).

133. *See Hallmark ex rel. Hallmark v. Eldridge*, 189 P.3d 646, 650 (Nev. 2008) (“The statute governing the admissibility of expert testimony in Nevada district courts is NRS 50.275, which, as we have construed it, tracks Federal Rule of Evidence (FRE) 702. To date, however, this court has not adopted the United States Supreme Court’s interpretation of FRE 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* But, as we have stated, *Daubert* and the federal court decisions discussing it may provide persuasive authority in determining whether expert testimony should be admitted in Nevada courts.” (footnotes omitted)).

Rhode Island,¹⁴⁰ South Dakota,¹⁴¹ Tennessee,¹⁴² Texas,¹⁴³ West Virginia,¹⁴⁴ and Wyoming.¹⁴⁵

134. *Baker Valley Lumber, Inc. v. Ingersoll-Rand Co.*, 813 A.2d 409, 415 (N.H. 2002) (“Today, we apply the *Daubert* standard to New Hampshire Rule of Evidence 702.”).

135. *State v. Harvey*, 699 A.2d 596, 621 (N.J. 1997). New Jersey has partially accepted and partially rejected *Daubert* in different types of cases. *See id.* (“Even before the United States Supreme Court decided *Daubert*, this Court had relaxed the test for admissibility of scientific evidence in toxic-tort cases. We have been cautious in expanding the more relaxed standard to other contexts. Thus, the test in criminal cases remains whether the scientific community generally accepts the evidence.” (citations omitted)).

136. *State v. Alberico*, 861 P.2d 192, 203 (N.M. 1993) (rejecting *Frye* and adopting the *Daubert* factors for “assessing the validity of a particular technique to determine if it is ‘scientific knowledge’ under [New Mexico’s evidence] Rule 702” (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 597, 593–95 (1993))).

137. *See Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 741 (Ohio 1998) (citing to *Daubert* when determining the admissibility of expert testimony, but never explicitly adopting the *Daubert* standard); *State v. Williams*, 446 N.E.2d 444, 447 n.5 (Ohio 1983) (acknowledging that Ohio never adopted the *Frye* test and finding that the *Frye* test has been widely criticized and rejected by many commentators and courts).

138. *Christian v. Gray*, 65 P.3d 591, 600 (Okla. 2003) (“Our Court of Criminal Appeals has already adopted *Daubert* for criminal proceedings in Oklahoma Courts. Today we likewise adopt *Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.”); *Taylor v. State*, 889 P.2d 319, 328 (Okla. Crim. App. 1995) (“We . . . believe the time is right for this Court to abandon the *Frye* test and adopt the more structured and yet flexible admissibility standard set forth in *Daubert*.”).

139. *State v. O’Key*, 899 P.2d 663, 680 (Or. 1995) (in banc) (finding that *Daubert* is consistent with Oregon’s leading case, *State v. Brown*, and further finding that *Daubert* should be instructive to Oregon courts); *State v. Brown*, 687 P.2d 751, 759 (Or. 1984) (in banc) (rejecting *Frye* and outlining seven factors courts should consider when determining the admissibility of expert evidence).

140. *Owens v. Silvia*, 838 A.2d 881, 890 (R.I. 2003) (“Although we declined to expressly adopt the standards outlined in the United States Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, we drew guidance from the principles of that case.” (citations omitted)); *Raimbeault v. Takeuchi Mfg. (U.S.)*, 772 A.2d 1056, 1061 (R.I. 2001) (per curiam) (recognizing the applicability of *Daubert* in cases proposing the use of scientific evidence and applying R.I. R. Evid. 702).

141. *See Burley v. Kytac Innovative Sports Equip., Inc.*, 737 N.W.2d 397, 406 (S.D. 2007) (reaffirming South Dakota’s reliance on the *Daubert* test); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994) (adopting the *Daubert* test of admissibility).

142. *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997) (rejecting *Frye*, and although not expressly adopting *Daubert*, noting that the *Daubert* factors are useful in determining the admissibility of expert testimony).

143. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (adopting *Daubert* and stating that “[w]e are persuaded by the reasoning in *Daubert* and *Kelly*”); *Kelly v. State*, 824 S.W.2d 568, 572–73 (Tex. Crim. App. 1992) (en banc) (rejecting the *Frye* test of admissibility and providing a list of relevant factors to be considered when determining the admissibility of expert evidence).

Twelve states and the District of Columbia have refused to adopt the *Daubert* test of admissibility and instead have chosen to follow the outdated *Frye* test: Alabama,¹⁴⁶ Arizona,¹⁴⁷ California,¹⁴⁸ District of Columbia,¹⁴⁹ Florida, Illinois,¹⁵⁰ Kansas,¹⁵¹ Maryland,¹⁵² Minnesota,¹⁵³ New York,¹⁵⁴ North

144. *San Francisco v. Wendy's Int'l, Inc.*, 656 S.E.2d 485, 492–94 (W. Va. 2007) (reaffirming West Virginia's continued use of the *Daubert* test of admissibility); *Gentry v. Mangum*, 466 S.E.2d 171, 179 (W. Va. 1995) (rejecting the *Frye* test of admissibility); *Wilt v. Buracker (In re Estate of Nickelson)*, 443 S.E.2d 196, 203 (W. Va. 1993) (adopting the *Daubert* test of admissibility and concluding "that *Daubert's* analysis of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence").

145. *Cooper v. State*, 174 P.3d 726, 728 (Wyo. 2008) (acknowledging the continued use of the *Daubert* test of admissibility); *Bunting ex rel. Bunting v. Jamieson*, 984 P.2d 467, 471 (Wyo. 1999) (adopting the *Daubert* test of admissibility and stating that "*Daubert* and its progeny [should be] guidance for the Wyoming courts' determination whether to admit or exclude expert testimony").

146. *Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359, 361 n.7 (Ala. 1998) ("[T]he Legislature chose the more flexible admissibility standard established in *Daubert*" for the admissibility of DNA evidence, but "[w]ith respect to expert scientific testimony on subjects other than DNA techniques governed by § 36-18-30, *Frye* remains the standard of admissibility in Alabama.>").

147. *Logerquist v. McVey*, 1 P.3d 113, 125 (Ariz. 2000) (en banc) (continuing to use the *Frye* test of admissibility and stating that "we have left no doubt whether Ariz. R. Evid. 702 was intended to abolish the *Frye* doctrine, for we have continued to apply *Frye*"); *State v. Tankersley*, 956 P.2d 486, 491 (Ariz. 1998) (en banc) (refusing to abandon *Frye*).

148. *People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994) (in bank) (refusing to abandon the *Kelly/Frye* test); *People v. Kelly*, 549 P.2d 1240, 1244 (Cal. 1976) (adopting the *Frye* test of admissibility and altering it slightly).

149. *Jones v. United States*, 990 A.2d 970, 977 (D.C. 2010) (continuing to apply the *Frye* test of admissibility).

150. *People v. McKown*, 875 N.E.2d 1029, 1036 (Ill. 2007) (finding that while "[i]n Illinois, the application of the *Frye* standard is limited to scientific methodology that is considered 'new' or 'novel,'" the test is still very much the standard); *People v. Miller*, 670 N.E.2d 721, 731 (Ill. 1996) ("Illinois follows the *Frye* standard for the admission of novel scientific evidence.>").

151. *Kuhn ex rel. Estate of Bishop v. Sandoz Pharm. Corp.*, 14 P.3d 1170, 1181–82 (Kan. 2000) (listing the long lineage of Kansas cases applying the *Frye* test of admissibility).

152. *Blackwell v. Wyeth*, 971 A.2d 235, 247–48 (Md. 2009) (continuing to apply the *Frye* test); *Reed v. State*, 391 A.2d 364, 372 (Md. 1978) (adopting the *Frye* test of admissibility).

153. *State v. MacLennan*, 702 N.W.2d 219, 230 (Minn. 2005) (continuing to apply the *Frye* standard); *Goeb v. Tharaldson*, 615 N.W.2d 800, 810–14 (Minn. 2000) (thoroughly analyzing the *Frye* standard as compared to the new federal *Daubert* standard and determining that Minnesota still uses the *Frye* test of admissibility).

154. *People v. LeGrand*, 867 N.E.2d 374, 379 (N.Y. 2007) (continuing to apply the *Frye* test of admissibility).

Dakota,¹⁵⁵ Pennsylvania,¹⁵⁶ and Washington.¹⁵⁷ There are also five states that have adopted their own test of admissibility: Hawaii,¹⁵⁸ Missouri,¹⁵⁹ South Carolina,¹⁶⁰ Utah,¹⁶¹ and Virginia.¹⁶² At this point, the only southern state other than Florida that follows *Frye* is Alabama, and even Alabama has recognized the use of *Daubert* in certain contexts.¹⁶³

155. *State v. Hernandez*, 707 N.W.2d 449, 453 (N.D. 2005) (refusing to adopt *Daubert*); *City of Fargo v. McLaughlin*, 512 N.W.2d 700, 704 (N.D. 1994) (finding that the *Frye* test of admissibility applies).

156. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1044 (Pa. 2003) (taking a careful look at *Daubert*, but ultimately deciding to continue to follow *Frye*).

157. *Anderson v. Akzo Nobel Coatings, Inc.*, No. 82264-6, 2011 WL 3930205, at *4 (Wash. Sept. 8, 2011) (en banc) (“In civil cases, we have neither expressly adopted *Frye* nor expressly rejected *Daubert*.”); *State v. Copeland*, 922 P.2d 1304, 1310 (Wash. 1996) (en banc) (adhering to the *Frye* test and declining to adopt *Daubert*); *Reese v. Stroh*, 907 P.2d 282, 286 (Wash. 1995) (en banc) (declining to adopt *Daubert*).

158. *See State v. Vliet*, 19 P.3d 42, 53 (Haw. 2001). Hawaii is unique, in that, it has neither rejected *Frye*, nor adopted *Daubert*, yet it follows both cases in certain types of cases. *See id.* (“[T]his court has not adopted the *Daubert* test, and we expressly refrain from doing so. However, because the HRE are patterned on the Federal Rules of Evidence (FRE), construction of the federal counterparts of the HRE by the federal courts is instructive, but obviously not binding on our courts.” (citations omitted)).

159. *See State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. 2003) (en banc). The Missouri Supreme Court has made it clear that Missouri follows its own unique test of admissibility. *See id.* (stating that the Missouri Supreme Court “expressly holds that to the extent that cases since *Lasky* have suggested that the standard of admissibility of expert testimony in civil cases is that set forth in *Frye* or some other standard, they are no longer to be followed. The relevant standard is that set out in section 490.065.”).

160. *See State v. Council*, 515 S.E.2d 508, 518 (S.C. 1999), *cert. denied*, 129 S. Ct. 2770 (2009) (“While this Court does not adopt *Daubert*, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE. When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. The trial judge should apply the *Jones* factors to determine reliability.”).

161. *See Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 1083 (Utah 2002) (rejecting the exclusive use of *Frye*, and declining to adopt *Daubert*, but instead adopting its own test of admissibility governed by its rules of evidence and the case of *State v. Rimmasch*, 775 P.2d 388, 396–99 (Utah 1989)).

162. *John v. Wong Shik*, 559 S.E.2d 694, 698 (Va. 2002) (“[W]e have not previously considered the question whether the *Daubert* analysis employed by the federal courts should be applied in our trial courts to determine the scientific reliability of expert testimony [and], [t]herefore, we leave this question open for future consideration.”).

163. *See Turner v. State (Ex parte State of Alabama)*, 746 So. 2d 355, 359–61 (Ala. 1998).

B. Daubert's Utility in Professional Liability Cases

The *Daubert* analysis has particular significance in complex medical malpractice cases.¹⁶⁴ As expert evidence becomes increasingly intricate, our judges and juries become increasingly vulnerable to bad science. The *Frye* general acceptance test exacerbates this vulnerability because of its extreme relativism.¹⁶⁵ Under *Frye*, every expert conclusion is worthy of jury consideration as long as it has some underlying link to a generally accepted methodology.¹⁶⁶ *Frye* has even been read by the Supreme Court of Florida as *prohibiting* a trial judge from considering an expert's application of scientific principles to the facts at hand, as long as the expert purports to rely on scientific principles that are generally accepted.¹⁶⁷

Medical causation is one of the areas where the shortcomings of *Frye* are most evident.¹⁶⁸ A causation expert only needs to attribute his or her opinions to the generally accepted methodology of differential diagnosis to avoid an admissibility issue.¹⁶⁹ This can literally be as blatant as an expert testifying that he or she considered other possible causes and simply finds

164. See *Gelsthorpe ex rel. Bacus v. Weinstein*, 897 So. 2d 504, 511 (Fla. 2d Dist. Ct. App. 2005) (finding that in a medical malpractice case that the expert's pure opinion testimony does not even have to be based on his or her experience with patients suffering from the same injuries, but that the opinion can be based on the expert's "experience treating similar patients" (quoting FLA. STAT. § 766.102(5)(a)(1) (2003))).

165. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

166. *Id.*

167. See *Castillo v. E.I. du Pont de Nemours & Co.*, 854 So. 2d 1264, 1276 (Fla. 2003) ("By considering the extrapolation of the data from the admittedly acceptable experiments, the Third District went beyond the requirements of *Frye*, which assesses only the validity of the underlying science. *Frye* does not require the court to assess the application of the expert's raw data in reaching his or her conclusion. *We therefore conclude that the Third District erroneously assessed the Castillos' expert testimony under Frye by considering not just the underlying science, but the application of the data generated from that science in reaching the expert's ultimate conclusion.*" (emphasis added)).

168. See, e.g., *Marsh v. Valyou*, 977 So. 2d 543, 548 (Fla. 2007) (per curiam); *Gelsthorpe ex rel. Bacus*, 897 So. 2d at 510; *Castillo*, 854 So. 2d at 1271.

169. See *Castillo*, 854 So. 2d at 1271 ("It is well-settled that an expert's use of differential diagnosis to arrive at a specific causation opinion is a methodology that is generally accepted in the relevant scientific community." (citations omitted)); see also *Marsh*, 977 So. 2d at 549 (repeating that the Supreme Court of Florida previously held in *Castillo* "that differential diagnosis is a generally accepted method for determining specific causation"); *Gelsthorpe ex rel. Bacus*, 897 So. 2d at 510 ("[U]se of the technique of differential diagnosis by an expert medical witness in determining causation does not raise concerns under *Frye*. Differential diagnosis is an established scientific methodology in which the expert eliminates possible causes of a medical condition to arrive at the conclusion as to the actual cause of the condition." (citations omitted) (internal quotation marks omitted)).

them inapplicable.¹⁷⁰ It is no secret that the medical malpractice litigant who could not otherwise meet the greater weight of the evidence (*i.e.* more-likely-than-not) standard of causation¹⁷¹ can likely evade this proof problem with an expert who cloaks his or her opinions in a differential diagnosis.¹⁷² And if that fails, as the dissent in *Marsh* recognized, an expert only needs to couch testimony as “pure opinion,” which is essentially “always admissible” based merely on a purported expert’s “training and experience.”¹⁷³

As discussed above, the *Daubert* approach would provide a much more rigorous system for ensuring that our judges and juries decide cases involving complex professional liability issues based on good science.¹⁷⁴ One of the fundamental tenets of *Daubert* is the rejection of the *ipse dixit* expert opinion.¹⁷⁵ The phrase “because I said so” may never lose its cherished place in the parenting lexicon, but under *Daubert*, it has rightfully lost any validat-

170. See, e.g., *Castillo*, 854 So. 2d at 1270–71 (ending discussion of the parties’ experts’ “disagree[ments] about the conclusions” from available data and information on the basis that, “[c]learly, the Castillos’ experts did utilize differential diagnosis, and as amici admit, this was a generally accepted method for addressing specific medical causation” (citations omitted)).

171. See, e.g., *Gooding ex rel. Estate of Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984) (“Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff’s injury. Prosser explored this standard of proof as follows: ‘[T]he plaintiff . . . has the burden of proof . . . [and] must introduce evidence . . . that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. A mere possibility of such causation is not enough; and when . . . the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.’” (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* § 41, at 241 (4th ed. 1971)) (emphasis added)); see also *Jackson Cnty. Hosp. Corp. v. Aldrich ex rel. Estate of Roddenberry*, 835 So. 2d 318, 328 (Fla. 1st Dist. Ct. App. 2002) (“The ‘more likely than not’ standard is satisfied . . . if a plaintiff presents evidence that establishes that the decedent had a fifty-one percent or better chance that [a loss] would not have occurred but for the actions or lack thereof of the medical care provider.” (citations omitted)).

172. See, e.g., *Castillo*, 854 So. 2d at 1271, 1277. The problem is further confounded by Florida’s evidence code, which makes it extremely difficult to cross-examine such an expert with external material such as treatises or studies *unless the expert recognizes the source of the contrary material as authoritative*. See FLA. STAT. § 90.706 (2011); see also *Whitfield v. State*, 859 So. 2d 529, 530 (Fla. 1st Dist. Ct. App. 2003) (per curiam) (disallowing the defendant’s use of a medical article to cross-examine the prosecution’s expert witness because although the expert conceded that the medical journal itself was generally accepted in the medical community, the expert refused to recognize that the specific article was generally accepted or authoritative).

173. See *Marsh*, 977 So. 2d at 560, 562 (Cantero, J., dissenting).

174. See *supra* notes 164–73 and accompanying text.

175. See *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1244 (11th Cir. 2005) (rejecting “expert’s assurances . . . [of] utiliz[ing] generally accepted scientific methodology [as] insufficient. [Because] [s]uch statements can spring just as quickly from the *ipse dixit* of the expert . . . [and] nothing in . . . *Daubert* . . . requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert” (citations omitted)).

ing power when uttered by an expert.¹⁷⁶ Without intending to suggest that medical doctors are more prone to resort to “because I said so” than other types of experts, it is nonetheless obvious that the methodology of differential diagnosis has no built-in safeguards to catch the *ipse dixit* opinion and, indeed, almost invites it.¹⁷⁷ The *Daubert* approach corrects this shortcoming and would improve the quality of expert evidence in professional liability cases across the board.¹⁷⁸

IV. CALL TO ACTION: FLORIDA’S ADOPTION OF A STATUTORY *DAUBERT* STANDARD

The Florida Legislature has made two recent attempts in 2008 and 2011 to amend *Florida’s Evidence Code* to adopt a *Daubert* standard.¹⁷⁹ In both years, both houses filed bills which would have empowered Florida’s capable trial judges with the same combination of specific guidance, procedural tools, and gate-keeping discretion that has worked well at the federal level and in the states following *Daubert*.¹⁸⁰ The 2011 legislation would have implemented *Daubert* by amending sections 90.702 and 90.704, *Florida Statutes* in the following respects.¹⁸¹

Section 1 engrafted the essentials of *Daubert* onto section 90.702 of the Florida Evidence Code by requiring as a condition of admissibility that expert evidence be based upon sufficient facts or data, be the product of reliable principles and methods, and that the principles and methods be applied

176. See *id.* (“The trial court’s gatekeeping function requires more than simply ‘taking the expert’s word for it.’” (quoting FED. R. EVID. 702 advisory committee’s note)); see, e.g., *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010); *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004); *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995); FED. R. EVID. 702 advisory committee’s note.

177. See *Castillo*, 854 So. 2d at 1271; cf. *Daubert*, 43 F.3d at 1315.

178. See *McClain*, 401 F.3d at 1244; *Daubert*, 43 F.3d at 1315, 1319.

179. See Fla. SB 822 (2011); Fla. HB 391 (2011); Fla. HB 645 (2008); Fla. SB 1448 (2008). The legislature has also proposed two bills for the 2012 legislative session: Florida House of Representatives Proposed Committee Bill 243 and Florida Senate Proposed Committee Bill 378. Fla. H.R. Comm. on, PCB 243 (draft of Sept. 29, 2011) (proposed FLA. STAT. §§ 90.702, .704); Fla. S. Comm. on, PCB 378 (draft of Sept. 29, 2011) (proposed FLA. STAT. §§ 90.702, .704). These two 2012 bills are substantially similar and are written to take effect on July 1, 2012. Compare Fla. H.R. Comm. on, PCB 243, with Fla. S. Comm. on, PCB 378. The bills contain no provision for a pretrial *Daubert* hearing and do not require written findings and conclusions. See generally Fla. H.R. Comm. on, PCB 243; Fla. S. Comm. on, PCB 378.

180. See Fla. SB 822; Fla. HB 391; Fla. HB 645; Fla. SB 1448.

181. Fla. SB 822; Fla. HB 391.

reliably to the facts of the case.¹⁸² Section 1 expressly adopted *Daubert* and its significant progeny and rejected *Frye* and all of its Florida progeny by adding the following language to section 90.702(2):

The courts of this state shall interpret and apply the requirements of subsection (1) and [section] 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); [and] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or [section] 90.704.¹⁸³

Section 2 addressed the too common use of experts as conduits for evidence that would otherwise be inadmissible, by amending section 90.704 to require that before otherwise inadmissible facts or data are disclosed to a jury through expert evidence, the trial judge must make a finding that the probative value of the facts or data in assisting the jury's evaluation of expert evidence substantially outweighs the prejudicial effect of the facts or data.¹⁸⁴ This is consistent with the *Daubert* conceptualization of the trial judge as gatekeeper and with ensuring the trustworthiness of evidence that reaches a jury through an expert.¹⁸⁵

The 2008 bills, unlike the 2011 legislation, would have also amended sections 90.705 and 90.707, *Florida Statutes*.¹⁸⁶ Section 90.705 would have allowed a party to have a *Daubert* hearing upon a timely motion, to require the trial court to set forth its findings of facts and conclusions of law, and to permit an interlocutory discretionary appeal of the admission or exclusion of

182. Fla. SB 822; Fla. HB 391.

183. Fla. SB 822; Fla. HB 391. This precise language was not in the 2008 legislation. Fla. SB 1448; Fla. HB 645. The 2008 legislation included much broader language:

The courts of this state shall interpret and apply the requirements of [sections] 90.702 and 90.704 in a manner consistent with Rules 702 and 703, Federal Rules of Evidence, and with all United States Supreme Court case law interpreting those rules in effect at the time of enactment of this provision.

Fla. SB 1448; Fla. HB 645.

184. Fla. SB 822; Fla. HB 391.

185. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

186. Compare Fla. SB 1448 (2008) (amending section 90.705 and creating section 90.707 of the *Florida Statutes*), and Fla. HB 645 (2008) (amending section 90.705 and creating section 90.707 of the *Florida Statutes*), with Fla. SB 822 (2011) (disregarding sections 90.705 and 90.707 of the *Florida Statutes*), and Fla. HB 391 (2011) (disregarding sections 90.705 and 90.707 of the *Florida Statutes*).

expert testimony with the criteria for the appellate court to consider in whether to grant such an appeal.¹⁸⁷

The passages of bills similar to those proposed in 2008 and 2011 would immediately put Florida on par with the federal system, where, incidentally, Federal Rules of Evidence 702 and 703 were themselves amended in 2000 to codify *Daubert* and its progeny.¹⁸⁸ The proposed Florida legislation would in effect import the synthesized federal approach, i.e., amended FRE 702 and 703, into Florida law.¹⁸⁹ In the next part, we discuss the provisions of a proposed bill should the 2012 Legislature decide to tackle *Frye*.

V. A STEP TOWARDS ACTION: A PROPOSED BILL

The authors set forth the following proposed bill to implement *Daubert*. Words stricken are deletions; words underlined are additions.

Section 1. Section 90.702, *Florida Statutes*, is amended to read:

90.702 Testimony by experts.—

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion, or otherwise, if:

(a) The testimony is based on sufficient facts or data;

(b) The testimony is the product of reliable principles and methods; and

187. Fla. SB 1448; Fla. HB 645. Sections 4, 6, and 7 of the 2008 legislation were “nuts and bolts” provisions relating to numbering, severability, and the act’s effective date. *Id.* The 2011 legislation did not include severability or numbering provisions and its effective date section—unlike the 2008 bills—was silent on its application to pending cases. *Compare* Fla. SB 822 (2011), *and* Fla. HB 391 (2011), *with* Fla. SB 1448 (2008), *and* Fla. HB 645 (2008).

188. FED. R. EVID. 702 advisory committee’s note; *see* FED. R. EVID. 703 advisory committee’s note.

189. *See* Fla. SB 822; Fla. HB 391; FED. R. EVID. 702 advisory committee’s note; FED. R. EVID. 703 advisory committee’s note.

(c) The witness has applied the principles and methods reliably to the facts of the case; however, the opinion is admissible only if it can be applied to the evidence at trial.¹⁹⁰

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and section 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny as well as in a manner consistent with Federal Rules of Evidence 702 and 703, and all Supreme Court of the United States case law interpreting those rules.¹⁹¹

Section 2. Section 90.704, *Florida Statutes*, is amended to read:

90.704 Basis of opinion testimony by experts. —The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to a jury by the proponent of the opinion or inference unless the court determines that the probative value in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect.¹⁹²

Section 3. Section 90.705, *Florida Statutes*, is amended to read:

90.705 Disclosure of facts or data underlying expert opinion.—

(1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior

190. Fla. SB 822; Fla. HB 391. The 2008 bills—HB 645, SB 1448—included a paragraph which stated: “An expert may only offer expert testimony with respect to a particular field in which the expert is qualified.” Fla. SB 1448; Fla. HB 645. Based on the fact that current Florida common and statutory law still upholds this bedrock principle, this provision was superfluous and has been omitted here. See FLA. STAT. § 90.702 (2011); Fla. SB 822 (2011); Fla. HB 391 (2011). Subparagraphs (a), (b), and (c) mirror the language used in FED. R. EVID. 702. Fla. SB 822; Fla. HB 391; FED. R. EVID. 702.

191. Fla. SB 822. The 2011 bills contained a paragraph explicitly rejecting *Frye* and all Florida decisions applying or implementing *Frye*. See *id.*; Fla. HB 391. In light of the clear language of this paragraph, such language is not necessary and has not been included here. See Fla. SB 822.

192. Fla. SB 1448. This added language mirrors Federal Rule of Evidence 703. FED. R. EVID. 703.

disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.¹⁹³

(2) Upon timely motion of a party, the court shall hold a hearing prior to trial to determine whether an expert's proposed testimony, including pure opinion testimony, satisfies the requirements of sections 90.702 and 90.704.¹⁹⁴ The trial court's ruling shall set forth written findings of fact and conclusions of law upon which the order to admit or exclude expert testimony is based.¹⁹⁵ ~~Prior to the witness giving the opinion, a party against whom the opinion or inference is offered may conduct a voir dire examination of the witness directed to the underlying facts or data for the witness's opinion. If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.~~¹⁹⁶

Section 6. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to

193. Fla. SB 1448.

194. *Id.* Pre-trial *Daubert* hearings will allow judges the time to closely review the relevance and reliability of the proposed testimony and the expert's credentials and to make an informed decision as to its admissibility. *See id.* Allowing the scheduling of a *Daubert* hearing prior to trial reduces the risk of a trial by ambush arising from the late disclosure or non-disclosure of experts. *See Fla. H.R. Comm. on Cts., HB 645 (2008) Staff Analysis 2-4 (Mar. 10, 2008) [hereinafter Comm. on Cts., HB 645 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2008/House/bills/analysis/pdf/h0645.CTS.pdf>.* It also will provide litigants with a preview of the strength of their opponents' cases, which may encourage settlement or support disposition on summary judgment. *See id.*

195. Fla. SB 1448. Written findings will create a sufficient record to enable and facilitate appellate review. *See id.*

196. *Id.* The 2008 bills contained a provision establishing the standard of review on appeal for the court's admission or exclusion of expert testimony (*de novo*), *see e.g.*, *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997), and a new avenue for interlocutory appeal under certain limited circumstances. Fla. SB 1448. While such a provision was certainly forward-thinking, it ignored the current realities of the Florida court system. *See id.* Such a provision could not only potentially extend the life of cases causing additional congestion of trial and appellate court dockets, but it could also delay justice for both plaintiffs and defendants. *See id.* Unless and until there is a proper vetting of this type of provision by the State Courts Administrator, the authors would discourage such a provision. Additionally, because article V, section 4(b)(1) of the Florida Constitution provides that courts may hear interlocutory appeals as provided by rules adopted by the Supreme Court of Florida, such a provision may be an unconstitutional encroachment on the exclusive rulemaking authority of the Supreme Court of the United States. *See FLA. CONST. art. 5, § 4(b)(1).*

this end the provisions of this act are declared severable and shall remain valid and enforceable.¹⁹⁷

Section 7. This act shall take effect July 1, 2012, and shall apply to all actions commenced on or after the effective date.¹⁹⁸

VI. CONCLUSION

It is clear that Florida has spent too long on the outside of the *Daubert* revolution looking in. The divergence between Florida's state court—where *Frye* is still law, and federal courts—where *Daubert* is followed, only makes things worse.¹⁹⁹ In cases where a plaintiff needs the help of “junk science,” it is all too common for a Florida resident—be it an individual or company—to be sued in a matter that chiefly involves an out-of-state defendant *primarily for the reason that the plaintiff's attorney wants to prevent the case from being removed to federal court because of a preference for Frye—which is equivalent to no standard at all—over Daubert.*²⁰⁰ The Florida Evidence Code was statutorily created, and it is the legislature's responsibility to see that the judiciary properly handles expert evidence.²⁰¹ The legislature can fulfill this responsibility, to the benefit of Florida's justice system and all of its citizens, by enacting a statutory *Daubert* standard like the one proposed above.

197. Fla. SB 1448.

198. The 2008 bills contained language which would have applied the *Daubert* standard retroactively “to all pending actions in which trial . . . commences more than [ninety] calendar days after that date.” Fla. SB 1448 (2008); Fla. HB 645 (2011). In order to avoid any argument that this provision would be unconstitutional and to foreclose the floodgate of litigation over this issue, the authors have dropped any language of retroactivity.

199. See Comm. on Cts., HB 645 Staff Analysis, *supra* note 194, at 2–3.

200. See *id.* at 2–4. The federal courts have “diversity jurisdiction” in matters involving citizens of different states only if none of the defendants is a citizen of Florida. See 28 U.S.C. § 1332 (2006).

201. See Comm. on Cts., HB 645 Staff Analysis, *supra* note 194, at 2–3.

2010–2011 SURVEY OF FLORIDA LAW AFFECTING BUSINESS OWNERS

BARBARA LANDAU*

I.	INTRODUCTION	36
II.	AGENCY	36
	A. <i>Authority of Real Estate Closing Agent</i>	36
	B. <i>Liability of General Contractor’s Qualifying Agent</i>	37
	C. <i>Health Care Facility Arbitration Agreements</i>	38
III.	ALTERNATIVE DISPUTE RESOLUTION	40
	A. <i>Third-Party Beneficiary Bound by Arbitration Clause</i>	40
	B. <i>Enforcing Arbitration in Another State</i>	42
IV.	ATTORNEYS’ FEES.....	43
V.	BUSINESS ENTITIES AND AGREEMENTS	44
VI.	CONTRACTS	46
	A. <i>Election of Remedies</i>	46
	B. <i>Subcontractor as Third-Party Beneficiary of a Contract</i>	48
	C. <i>Enforcement of a Contract by or Against an Unlicensed Subcontractor</i>	48
	D. <i>Implied Warranties of Habitability, Fitness, and Merchantability as Applied to Real Estate Improvements to Common Areas</i>	51
VII.	EMPLOYMENT LAW	52
	A. <i>Non-Compete Agreement Enforced with Respect to Unsolicited Customer</i>	52
	B. <i>Temporary Injunction Denied: Grandparent Corporation Could Not Enforce Pre-Existing Non-Compete Agreement Between Newly Acquired (Sub-subsidiary) Corporation and Newly Acquired Corporation’s Former Employee</i>	53
	C. <i>Employer Held Immune from Negligence Action by Borrowed Employee</i>	55
VIII.	FIDUCIARY DUTY AND GOVERNANCE	56
IX.	JURISDICTION AND VENUE	58
	A. <i>Personal Jurisdiction and the Internet</i>	58
	B. <i>Venue-Joint Residency Rule Did Not Apply</i>	61
X.	MORTGAGES	62
	A. <i>Constructive Notice Was Given Despite Property Description Error in Mortgage</i>	62
	B. <i>Florida’s Recording Statute is Still a Notice Statute</i>	62

C.	<i>Municipal Ordinance Creating Lien Priority Violates Priority of Recording Statute</i>	63
D.	<i>Mortgage Documents Could Not Override Requirements of Civil Procedure Rule for Ex Parte Appointment of Receiver</i>	64
E.	<i>Statute of Limitations Applicable to Assignor Applies to Assignee of Mortgage</i>	65
XI.	TAXES.....	66
XII.	TORTS.....	66
A.	<i>Defamation</i>	66
B.	<i>Suit by Former Employee Against Supervisor for Tortious Interference with Business Relationship</i>	67
C.	<i>Negligent Misrepresentation v. Fraudulent Misrepresentation</i>	68
D.	<i>Waiver of Liability and Indemnification for Claim of Minor Child</i>	70
E.	<i>Respondeat Superior</i>	72
XIII.	UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS	72
A.	<i>Prejudgment Writ of Replevin</i>	72
B.	<i>Sale of Collateral</i>	73
C.	<i>Possessory Lien</i>	73
D.	<i>Right of Set-Off</i>	74
E.	<i>Re-recording of Judgment (Debtor-Creditor)</i>	75
F.	<i>Garnishment</i>	75
XIV.	CONCLUSION	77

I. INTRODUCTION

As in prior years, this year's survey reviews Florida appellate court decisions of potential and immediate interest to business owners and their counsel. The cases include matters of first impression and decisions that address conflict between the Florida District Courts of Appeal. In addition, cases that clarify or expand upon existing principles of law or that appear to be of special interest or have unusual facts are discussed.

II. AGENCY

A. Authority of Real Estate Closing Agent

Did a real estate closing agent have apparent authority to bind a seller when the closing agent allowed the buyer to tender the real estate purchase

price a day late?¹ In *Denton v. Good Way Oil 902 Corp.*,² the Fourth District Court of Appeal said no.³ Almost two years after the contract was signed, and having given Good Way Oil 902 Corporation (Buyer) extensions for its investigations, Mr. Denton (Seller), relying on the “time-is-of-the-essence” provision in the contract, set a closing date and “warned that the contract must be fully closed that day.”⁴ The court observed that, “[a] closing agent generally owes a duty to both contracting parties only to supervise the closing in a reasonably prudent manner.”⁵ The agent, “ha[ving] only the authority to conduct the closing,” did not have such apparent authority.⁶ Buyer pointed to no conduct by Seller that would support a finding of apparent authority.⁷ In fact, Seller’s actions were to the contrary.⁸

B. *Liability of General Contractor’s Qualifying Agent*

Section 489.119(2) of the *Florida Statutes* requires general building contractors to have a “qualifying agent” to supervise construction activities of the general contractor.⁹ Mr. Scherer (Qualifying Agent) served in that capacity for Scherer Construction & Engineering LLC (General Contractor).¹⁰ The Villas Del Verde Homeowners Association (Association) sued the developer and General Contractor alleging construction defects and business code violations and sued Qualifying Agent—who was also a “principal” in the developer LLC—under section 553.84 of the *Florida Statutes*, alleging failure to properly supervise the construction of the community’s buildings.¹¹

* Associate Professor of Taxation and Business Law, Master of Taxation and Master of Accounting Programs, H. Wayne Huizenga School of Business and Entrepreneurship, Nova Southeastern University; B.A., New York University; J.D., New York Law School; LL.M. (Tax), New York University School of Law; Florida Supreme Court Certified Appellate, Circuit Civil, and County Court Mediator.

1. *Denton v. Good Way Oil 902 Corp.*, 48 So. 3d 103, 107 (Fla. 4th Dist. Ct. App. 2010).

2. 48 So. 3d 103 (Fla. 4th Dist. Ct. App. 2010).

3. *Id.* at 108.

4. *Id.* at 105.

5. *Id.* at 107.

6. *Id.* at 108.

7. *See Denton*, 48 So. 3d at 108.

8. *Id.*

9. *Scherer v. Villas Del Verde Homeowners Ass’n*, 55 So. 3d 602, 603 (Fla. 2d Dist. Ct. App.), *review denied*, 63 So. 3d 751 (Fla. 2011); *see also* FLA. STAT. § 489.119(2) (2011).

10. *Scherer*, 55 So. 3d at 602.

11. *Id.* at 602–03; *see also* FLA. STAT. § 553.84 (2011). Association sued the developer and General Contractor, both of which were limited liability companies. *Scherer*, 55 So. 3d at 602–03. No appearance was made by the LLCs. *Id.* at 603.

Section 553.84 provides that a civil action for damages caused by building code violations may be brought by “[a]ny person or party, in an individual capacity or on behalf of a class of persons or parties, damaged.”¹² Such person has an action “against the person or party who committed the violation.”¹³ The trial court entered a judgment against Qualifying Agent, individually, relying on section 553.84.¹⁴ The Second District Court of Appeal reversed, noting that the Supreme Court of Florida had previously ruled “that a qualifying agent’s failure to perform his statutory duty does not give rise to a private cause of action against him.”¹⁵ The Second District Court of Appeal, relying on *Murthy v. N. Sinha Corp.*,¹⁶ held that even though General Contractor could do no building without a qualifying agent, Qualifying Agent’s failure to properly supervise the construction “was not a violation of the building code.”¹⁷ Thus, the appellate court concluded that a private action against Qualifying Agent under section 553.84 was not proper, stating that “today we make explicit what is perhaps implicitly stated in *Murthy*: [A] qualifying agent’s breach of the duties imposed by chapter 489 does not give rise to” a building code violation claim under section 553.84 against such qualifying agent.¹⁸

C. Health Care Facility Arbitration Agreements

*Stalley ex rel. Estate of L’Aine v. Transitional Hospitals Corp. of Tampa*¹⁹ and *Lepisto v. Senior Lifestyle Newport Ltd. Partnership*²⁰ involved enforcement of arbitration agreements by health care facilities when sued, in the first case, by the personal representative of the estate of a former patient, and in the second, by a former resident and his spouse.²¹ *Stalley* did not involve a power of attorney, but the hospital patient’s (Patient’s) spouse (Spouse) did, as part of the admission process, sign the admission papers.²² The admission papers contained an arbitration of disputes provision, but the arbitration agreement was separate from the admissions agreement, and the

12. *Id.* at 603 (quoting FLA. STAT. § 553.84).

13. *Id.* (quoting FLA. STAT. § 553.84).

14. *Id.*

15. *Scherer*, 55 So. 3d at 602.

16. 644 So. 2d 983 (Fla. 1994).

17. *Scherer*, 55 So. 3d at 604.

18. *Id.* (citing *Seabridge, Inc. v. Superior Kitchens, Inc.*, 672 So. 2d 848, 850 (Fla. 4th Dist. Ct. App. 1996) (per curiam)); see FLA. STAT. § 553.84.

19. 44 So. 3d 627 (Fla. 2d Dist. Ct. App. 2010).

20. 36 Fla. L. Weekly D1655 (4th Dist. Ct. App. Aug. 3, 2011).

21. *Id.* at D1655; *Stalley*, 44 So. 3d at 629.

22. *Stalley*, 44 So. 3d at 629.

admissions agreement did not incorporate by reference, or even refer to the arbitration agreement.²³ The personal representative of Patient's estate sued the hospital (Hospital) and others alleging wrongful death.²⁴ On motion by Hospital, the trial court stayed the action and ordered arbitration.²⁵ The Second District Court of Appeal reversed and remanded.²⁶ The trial court "seemed to conclude that one spouse is always the agent of the other as a matter of law."²⁷ "[Hospital] failed to present sufficient evidence to establish that [Spouse] was acting as [Patient's] agent when she signed the arbitration agreement or that [Patient] was the intended third-party beneficiary of that agreement."²⁸ Spouse did not have express authority to sign the arbitration agreement.²⁹ Spouse testified that she had authority to sign to get Patient admitted, but the Second District Court of Appeal said that the authority to sign medical consents did not extend to acts not necessary for Patient's care.³⁰ Since the "optional" arbitration agreement was not necessary for treatment, Spouse's right to sign Patient into the hospital was not tantamount to the authority to "waive[] some of [Patient's] constitutional rights."³¹ Nor did Spouse have apparent authority, as there was no conduct on the part of Patient that gave rise to apparent authority.³² Hospital argued that Patient's inaction—that is, his failure to disaffirm Spouse's authority—rather than any actual representation by Patient, "functioned as a representation" of Spouse's authority.³³ The Second District Court of Appeal rejected this argument.³⁴ Hospital's estoppel and ratification arguments were also rejected by the appellate court, as was its third-party beneficiary argument.³⁵ The court distinguished *Alterra Healthcare Corp. v. Graham ex rel. Estate of Linton*³⁶ where the arbitration clause was part of the residency agreement, since the nursing home resident "had accepted the benefits of the residency and the services provided and so was the intended third-party beneficiary of that entire agreement."³⁷

23. *Id.* at 632–33.

24. *Id.* at 629.

25. *Id.*

26. *Id.* at 633.

27. *Stalley*, 44 So. 3d at 632.

28. *Id.* at 633.

29. *Id.* at 630.

30. *Id.*

31. *Id.*

32. *Stalley*, 44 So. 3d at 630–31.

33. *Id.* at 631.

34. *Id.*

35. *Id.* at 631–33.

36. 953 So. 2d 574 (Fla. 1st Dist. Ct. App. 2007) (*per curiam*).

37. *Stalley*, 44 So. 3d at 633 (citing *Alterra Healthcare Corp.*, 953 So. 2d at 579).

In *Lepisto*, the spouse had been given a power of attorney by her husband prior to his admission as a resident.³⁸ However, the appellate court concluded that what the spouse signed was a document regarding her own financial responsibility with respect to her husband's nursing home admission.³⁹ She did not sign the admission agreement that contained the arbitration agreement as her husband's representative, nor did her husband sign the agreement.⁴⁰

III. ALTERNATIVE DISPUTE RESOLUTION

A. *Third-Party Beneficiary Bound by Arbitration Clause*

In *Lion Gables Realty Ltd. v. Randall Mechanical, Inc.*,⁴¹ the Fifth District Court of Appeal addressed two issues; the first, being whether or not the entity against whom arbitration was sought was a third-party beneficiary of the arbitration agreement, and the second, being one of waiver by the movant of its arbitration claim.⁴² The district court held that the status of a person as an intended beneficiary of an arbitration agreement is a "threshold issue" to be decided by the trial court.⁴³ For a third party to be bound by a contract containing an arbitration provision, it must be shown "that the parties clearly express, or the contract itself expresses, an intent to primarily and directly benefit [a] third party."⁴⁴ If such a showing can be made, then the third-party beneficiary will be bound by the contract arbitration provision.⁴⁵

38. *Lepisto v. Senior Lifestyle Newport Ltd. P'ship*, 36 Fla. L. Weekly D1655, D1655 (4th Dist. Ct. App. Aug. 3, 2011). The Fourth District Court of Appeal discussed *Stalley* but noted that the facts were distinguishable because in *Stalley*, the spouse did not have a power of attorney. *Id.* at D1656. In any case, the outcome in both cases was "no arbitration." *Id.* at D1657; *Stalley*, 44 So. 3d at 633.

39. *Lepisto*, 36 Fla. L. Weekly at D1656.

40. *Id.* at D1655.

41. 65 So. 3d 1098 (Fla. 5th Dist. Ct. App. 2011) (per curiam).

42. *Id.* at 1099 (citing *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999)).

43. *Id.* Since the first prong of the three-prong test under *Seifert* requires that the court find that there is a valid agreement *between the parties* before the court can compel the parties to arbitrate, there must first be a finding that the parties agreed to arbitrate, which, when there is a non-party to the contract involved, requires a determination that the non-party is a third party beneficiary of the arbitration agreement. *Id.* at 1099–1100 (citing *Seifert*, 750 So. 2d at 636; *Infinity Design Builders, Inc. v. Hutchinson*, 964 So. 2d 752, 755 (Fla. 5th Dist. Ct. App. 2007); *Fla. Power & Light Co. v. Rd. Rock, Inc.*, 920 So. 2d 201, 203 (Fla. 4th Dist. Ct. App. 2006)).

44. *Id.* at 1099 (quoting *Technical Aid Corp. v. Tomaso*, 814 So. 2d 1259, 1261 (Fla. 5th Dist. Ct. App. 2002)).

45. *Lion Gables Realty Ltd.*, 65 So. 3d at 1099 (citing *Technical Aid Corp.*, 814 So. 2d at 1261).

With respect to the waiver issue, the Fifth District Court of Appeal noted that the second, third, and fourth districts, as well as the fifth district, have “consistently” held that participation, “before moving to compel arbitration,” in discovery related to the merits of the case constitutes a waiver of arbitration rights.⁴⁶ In this case, one of the parties seeking arbitration had sent out two notices to produce copies.⁴⁷ The appellate court noted that “[e]ven if conducting a minimal amount of merits discovery would be insufficient to waive a contractual right to arbitrate, we do not view these discovery requests as minimal.”⁴⁸ The Fifth District Court of Appeal then held that “[t]he law in Florida is clear that a party’s participation in merits discovery constitutes a waiver of arbitration.”⁴⁹

46. *Id.* at 1100 (citing *Gordon v. Shield*, 41 So. 3d 931, 933 (Fla. 4th Dist. Ct. App. 2010); *Green Tree Servicing, L.L.C. v. McLeod ex rel. Estate of McLeod*, 15 So. 3d 682, 688 (Fla. 2d Dist. Ct. App. 2009); *Olsen Electric Co. v. Winter Park Redevelopment Agency*, 987 So. 2d 178, 179 (Fla. 5th Dist. Ct. App. 2008); *Marks ex rel. Estate of Orlanis v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812 (Fla. 3d Dist. Ct. App. 2007)).

47. *Id.* at 1101.

48. *Id.*

49. *Id.* (citing *Gordon*, 41 So. 3d at 933; *Green Tree Servicing, L.L.C.*, 15 So. 3d at 694; *Olsen Electric Co.*, 987 So. 2d at 179; *Marks ex rel. Estate of Orlanis*, 971 So. 2d at 812); see Barbara Landau, 2008–2009 *Survey of Florida Law Affecting Business Owners*, 34 NOVA L. REV. 71, 75–78 (2009) [hereinafter Landau, 2008–2009 *Survey of Florida Law Affecting Business Owners*] (discussing *Green Tree Servicing, L.L.C.*, 15 So. 3d at 682); *DFC Homes of Fla. v. Lawrence*, 8 So. 3d 1281, 1282–84 (Fla. 4th Dist. Ct. App. 2009). Is any amount of merits related discovery participation “inconsistent” with seeking arbitration under the “totality of the circumstances” test? In *Green Tree Servicing, LLC*, the Second District Court of Appeal held that participation in merits related discovery “is generally inconsistent with arbitration” and “considered under the totality of the circumstances—will generally be sufficient to support a finding of a waiver of a party’s right to arbitration.” *Green Tree Servicing, L.L.C.*, 15 So. 3d at 694. In *Green Tree Servicing, LLC*, the discovery occurred after *Green Tree Servicing, LLC* filed the motion to compel arbitration, but before the motion was heard. See *id.* at 686. The Second District Court of Appeal held that “[e]ven where a party has filed a timely motion to compel arbitration,” that party may still waive its claim to arbitration by acting in a manner that is inconsistent with that claim. Landau, 2008–2009 *Survey of Florida Law Affecting Business Owners*, *supra* note 49, at 76 (citing *Green Tree Servicing, L.L.C.*, 15 So. 3d at 688); *Sitarik v. JFK Med. Ctr. Ltd. P’ships*, 11 So. 3d 973, 974 (Fla. 4th Dist. Ct. App. 2009). In *Lawrence*, the court discussed the distinction between participating in court proceedings after the demand has been made for arbitration rather than before, but in finding no waiver, the court noted that the participation was “limited.” *Lawrence*, 8 So. 3d at 1283 (citing *Phillips v. Gen. Accident Ins. Co. of Am.*, 685 So. 2d 27, 29 (Fla. 3d Dist. Ct. App. 1996)). The Fifth District Court of Appeal in *Lion Gables Realty Ltd.* cited *Gordon*, as “recognizing that propounding discovery would waive [the] right to arbitrate.” *Lion Gables Realty Ltd.*, 65 So. 3d at 1100 (citing *Gordon*, 41 So. 3d at 933). However, *Gordon* involved mandatory pre-suit proceedings in an action alleging medical malpractice, and in that case, the Fourth District Court of Appeal found that the doctor’s participation in pre-suit proceedings

B. *Enforcing Arbitration in Another State*

Two clients and two LLCs (Plaintiffs) in *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*⁵⁰ sued their former attorneys (two New York lawyers and their professional corporation) alleging malpractice.⁵¹ The New York law firm asked the Florida trial court to order arbitration in New York under the arbitration clause contained in the law firm's retainer agreement with Plaintiffs.⁵² The trial court declined to do so.⁵³ The Fourth District Court of Appeal did not agree that the trial court lacked the power to "compel arbitration in another state" in this case.⁵⁴ The fourth district quoted *Damora v. Stresscon International, Inc.*⁵⁵ where the Supreme Court of Florida held that "[a]n agreement to arbitrate future disputes in another jurisdiction is outside the authority of the Florida Arbitration Code . . . and . . . renders the agreement to arbitrate voidable at the instance of either party."⁵⁶ However, a Florida court can compel arbitration in another jurisdiction under the Federal Arbitration Act if the underlying transactions involve interstate commerce.⁵⁷ The Fourth District Court of Appeal found that the matter involved interstate commerce, as the parties consisted of an Arizona resident plaintiff, Florida corporations, New York defendants, and a New York plaintiff—involving the creation of a Florida corporation and the acquisition by it of another Florida corporation, and retainer agreement.⁵⁸

In addition, Plaintiffs in *Mintz & Fraade, P.C.* argued that the mandatory fee arbitration provision was against the "strong public policy of Flori-

mandated by statute did not constitute a waiver of the doctor's right to arbitration. *Gordon*, 41 So. 3d at 933–34.

50. 59 So. 3d 1173 (Fla. 4th Dist. Ct. App. 2011). Earlier proceedings in this case were reported in Landau, *2008–2009 Survey of Florida Law Affecting Business Owners*, *supra* note 49, at 125 (discussing *Beta Drywall Acquisition, L.L.C. v. Mintz & Fraade, P.C.*, 9 So. 3d 651, 652–53 (Fla. 4th Dist. Ct. App.), *review denied*, 22 So. 3d 538 (Fla. 2009)). Those proceedings challenged the trial court's exercise of personal jurisdiction over the New York lawyers. *Beta Drywall Acquisition, L.L.C.*, 9 So. 3d at 652. The Fourth District Court of Appeal held that the trial court erred when it dismissed the action for lack of personal jurisdiction. *Id.*

51. *Mintz & Fraade, P.C.*, 59 So. 3d at 1174.

52. *Id.*

53. *Id.* at 1174–75.

54. *Id.* at 1175–76.

55. 324 So. 2d 80 (Fla. 1975).

56. *Mintz & Fraade, P.C.*, 59 So. 3d at 1175 (alteration in original) (quoting *Damora*, 324 So. 2d at 82).

57. *Id.* (citing *Default Proof Credit Card Sys., Inc. v. Friedland*, 992 So. 2d 442, 444–45 (Fla. 3d Dist. Ct. App. 2008)).

58. *Id.* at 1175–76.

da.”⁵⁹ The district court acknowledged that special requirements are imposed by rules of the Florida Bar when it comes to enforcing arbitration agreements regarding legal fee disputes, but concluded that New York’s rules are similar to Florida’s and held that the agreement was enforceable.⁶⁰

IV. ATTORNEYS’ FEES

Mr. Mady (Lessee) exhausted all of the non-judicial procedures required by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA)—a condition precedent to bringing suit against DaimlerChrysler Corporation (Manufacturer)—and then sued Manufacturer under the MMWA,⁶¹ alleging breach of warranty.⁶² Manufacturer made a first and then a second offer of judgment to Lessee, “pursuant to section 768.79 [of the *Florida Statutes*] and Florida Rule of Civil Procedure 1.442” in the amount of \$8500.⁶³ Lessee accepted the second offer, the terms of which provided for the payment to Lessee of \$8500 but did not include attorneys’ fees, did not include an admission by Manufacturer of liability, did “acknowledge[] that [Lessee] might seek attorneys’ fees,” did require that Lessee sign a release, and stated that the lawsuit be dismissed with prejudice.⁶⁴ Approximately six months later, Lessee asked the trial court for an award of costs as well as attorneys’ fees.⁶⁵ The trial court denied the request finding that Lessee had not met the “finally prevailed” test under the MMWA, and Lessee appealed.⁶⁶ In 2008, the Fourth District Court of Appeal, in *Mady v. DaimlerChrysler Corp. (Mady I)*⁶⁷ affirmed the trial court’s decision, but certified to the Supreme Court of Florida conflict between its decision and *Dufresne v. DaimlerChrysler Corp.*,⁶⁸ decided in 2008 by the Second District Court of Appeal.⁶⁹ The question before the Supreme Court of Florida was whether or not

59. *Id.* at 1176 (quoting *Friedland*, 992 So. 2d at 444).

60. *Id.*

61. 15 U.S.C. §§ 2301–2312 (2006).

62. *Mady v. DaimlerChrysler Corp. (Mady II)*, 59 So. 3d 1129, 1130–31, 1133 (Fla. 2011).

63. *Id.* at 1130–31; FLA. STAT. § 768.79(2) (2011); FLA. R. CIV. P. 1.442.

64. *Mady II*, 59 So. 3d at 1131.

65. *Id.*

66. *Id.* (alteration in original).

67. 976 So. 2d 1212, 1216 (Fla. 4th Dist. Ct. App. 2008), *quashed by* 59 So. 3d 1129 (Fla. 2011).

68. 975 So. 2d 555 (Fla. 2d Dist. Ct. App. 2008).

69. *Mady II*, 59 So. 3d at 1130.

[a] consumer who has exhausted all non-judicial [pre-litigation conditions of the MMWA and then] secures a favorable formal settlement offer of judgment from a defendant which is accepted in a Florida legal action filed under the MMWA . . . ‘finally prevails’ [under the MMWA and thus] may be entitled to . . . costs [and] fees under the MMWA.⁷⁰

Thus far, the Fourth District Court of Appeal said no,⁷¹ the Second District Court of Appeal said yes,⁷² and shortly after the Fourth District Court of Appeal’s decision in *Mady I*, the Third District Court of Appeal, in *San Martin v. DaimlerChrysler Corp.*,⁷³ “aligned itself with the [s]econd [d]istrict.”⁷⁴ Siding with the second district—and the third district—the Supreme Court of Florida held that for the purposes of the MMWA, an accepted offer of judgment “is the ‘functional equivalent of a consent decree’” and “bears the imprimatur of the court.”⁷⁵ Justice Canady dissented and would have denied attorneys fees under the MMWA.⁷⁶

V. BUSINESS ENTITIES AND AGREEMENTS

Mr. Berlin and Mr. Pecora each owned a fifty percent interest in several entities, which the Third District Court of Appeal referred to as the “Signature Entities,” which included Grand Partners, Inc.⁷⁷ They had entered into a distribution agreement that, among other things, gave the survivor a preemptive option—a right of first refusal—to purchase the assets of the Signature Entities, if the personal representative of the decedent’s estate found a buyer with respect to any assets of the entities, or the shares or partnership interests of the decedent.⁷⁸ Also, if the survivor found a buyer, the personal representative of the decedent’s estate would have a right of first refusal.⁷⁹ Mr. Berlin

70. *Id.* at 1131.

71. *Mady I*, 976 So. 2d at 1215.

72. *Dufresne*, 975 So. 2d at 557.

73. 983 So. 2d 620, 625 (Fla. 3d Dist. Ct. App. 2008).

74. *Mady II*, 59 So. 3d at 1131.

75. *Id.* at 1133–34. How would the Supreme Court of Florida have ruled, had the parties, without resort to the offer of judgment procedure with the court retaining jurisdiction, merely settled the dispute and dismissed the action—a situation not before the court? The court did note a distinction between the offer of judgment situation with the court retaining jurisdiction, on the one hand, and a settlement by the parties prior to the filing suit, on the other. *Id.* at 1133.

76. *Id.* at 1137 (Canady, J., dissenting).

77. *Pecora v. Berlin*, 62 So. 3d 28, 29 (Fla. 3d Dist. Ct. App. 2011).

78. *Id.* at 31.

79. *Id.*

and Mr. Pecora “died on the same day, within hours of each other,” and although the opinion does not state who died first, Mrs. Pecora, “as the surviving spouse of Mr. Pecora, became the owner” of his ownership interest in the Signature Entities.⁸⁰ Mr. Berlin’s ownership interests passed to his estate, and his personal representative requested that a receiver be appointed to dispose of the Signature Entities’ assets and dissolve the entities.⁸¹ Eventually, after one receiver had been appointed to replace several temporary receivers to manage and sell the assets of the Signature Entities, Mrs. Pecora asserted the right of first refusal set out in the distribution agreement when that receiver sought to sell Signature Grand.⁸² Mrs. Pecora had already lost on a similar claim with respect to Signature Gardens Ltd., the trial court holding that she did not have a right of first refusal under the circumstances presented, and she had not appealed any of the orders related to that ruling.⁸³ The receiver opposed her present claim to a right of first refusal, moved for summary judgment, and the trial court granted summary judgment in favor of the receiver, again ruling that Mrs. Pecora did not have a right of first refusal with respect to a sale by a receiver.⁸⁴ The issue presented to the court was whether the right of first refusal as set out in the distribution agreement remained effective in the face of a court-supervised sale by a court appointed receiver.⁸⁵ Describing the issue as one of first impression in Florida, the Third District Court of Appeal, after citing numerous analogous cases in other jurisdictions, decided that the right of first refusal did not apply.⁸⁶ “The plain language of the Distribution Agreement compels a conclusion that the right of first refusal does not apply in a dissolution action where the court-appointed receiver is procuring the sale of corporate assets. The receiver, not the survivor or the personal representative, is the procuring party”⁸⁷ If the parties wanted the right of first refusal to apply in the event of a dissolution of the corporation or to other involuntary proceedings, or where a third party has found a buyer, the “[a]greement could have so provided.”⁸⁸

80. *Id.* at 29, 34.

81. *See id.* at 29.

82. *Pecora*, 62 So. 3d at 29–30.

83. *See id.* at 30.

84. *Id.* at 31.

85. *Id.*

86. *See id.* at 31–35 (citations omitted).

87. *Pecora*, 62 So. 3d at 35.

88. *Id.*

VI. CONTRACTS

A. *Election of Remedies*

Mr. Pakalski (Seller) and CFC Pasadena Golf, LLC (Buyer) entered into a real estate contract.⁸⁹ The “preprinted form” contract provided that Buyer was to make a pre-closing first deposit of \$5000 plus—as provided in a section for additional terms—another deposit of \$150,000.⁹⁰ The additional terms section described the \$150,000 payment as a nonrefundable additional deposit that was to be immediately released to Seller.⁹¹ After having made both deposits, Buyer breached the contract.⁹² The contract provided that in the event of breach by Buyer, Seller had the option of collecting and retaining all deposits, “as liquidated damages,” or could sue for specific performance.⁹³ Seller, having left the original \$5000 of the deposit in escrow, sued Buyer for specific performance.⁹⁴ Buyer sought dismissal of the action, and the trial court dismissed the action, with prejudice, agreeing with Buyer that Seller’s retention of the \$150,000 deposit amounted to an election of remedies that prevented Seller’s suit for specific performance.⁹⁵ Seller appealed, and the Second District Court of Appeal, relying on *Bilow v. Benoit*,⁹⁶ reversed and remanded.⁹⁷ Seller did not make an election to waive its right to specific performance “simply by accepting and retaining the [\$150,000 additional] deposit as contemplated in the provision added to . . . the parties’ contract.”⁹⁸

In *Plumbing Service Co. v. Progressive Plumbing, Inc.*,⁹⁹ another election of remedies case, The Plumbing Service Company (Sub-subcontractor) sued Progressive Plumbing, Incorporated, (Subcontractor), alleging that Subcontractor prevented Sub-subcontractor from completing work on a condominium project, allowing Sub-subcontractor to finish only 15 of 230 units

89. Pakalski v. CFC Pasadena Golf, L.L.C., 42 So. 3d 869, 869 (Fla. 2d Dist. Ct. App. 2010).

90. *Id.*

91. *Id.* at 870.

92. *Id.*

93. *Id.*

94. Pakalski, 42 So. 3d at 870.

95. See *id.* at 870. The trial court, in dismissing the second amended complaint with prejudice, pointed out that based on the contract there was no point in trying to amend the complaint. See *id.*

96. 519 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1988).

97. Pakalski, 42 So. 3d at 870–71.

98. *Id.* at 870.

99. 46 So. 3d 144 (Fla. 5th Dist. Ct. App. 2010).

contemplated by their agreement.¹⁰⁰ Sub-subcontractor collected in full from Subcontractor's surety—in an action brought under chapter 713 of the *Florida Statutes*—for Sub-subcontractor's work on the fifteen completed units.¹⁰¹ In this regard, Subcontractor did not dispute that the work subject to the chapter 713 action was completed by Sub-subcontractor.¹⁰² Subcontractor did, however, in Sub-subcontractor's suit against Subcontractor seeking to recover lost profits on the remaining units, dispute “the existence of a binding contract” and, in addition, contended that Sub-subcontractor was barred from collecting lost profits from Subcontractor under “[t]he election of remedies doctrine.”¹⁰³ The trial court granted summary judgment in favor of Subcontractor on the election of remedies theory and it was this order that was before the Fifth District Court of Appeal.¹⁰⁴ What the trial court ruled, was that Sub-subcontractor, by collecting “the reasonable value” of its services and materials from the surety, had elected its remedy and could not attempt to collect from Subcontractor.¹⁰⁵ The Fifth District Court of Appeal reversed.¹⁰⁶ Pursuing one remedy does not necessarily prevent the pursuance of others.¹⁰⁷ There were two scenarios under which the election of remedies doctrine could have been invoked, but neither applied here.¹⁰⁸ If a plaintiff receives complete satisfaction in an earlier action, then the plaintiff cannot get a double recovery in a later action.¹⁰⁹ Here, Sub-subcontractor could not have recovered, under chapter 713, for lost profits from the surety, so that scenario was inapplicable.¹¹⁰ The other scenario would have required Sub-subcontractor to have sued Subcontractor for the reasonable value of the services or materials provided by Sub-subcontractor; that is, sued in quantum meruit.¹¹¹ Had that been the case, the action against Subcontractor would have been barred since Sub-subcontractor would have, under the election of remedies doctrine, waived its right to lost profits and Sub-subcontractor could not again have recovered what it had already recovered from the surety.¹¹²

100. *See id.* at 145.

101. *Id.*

102. *Id.*

103. *Id.* (quoting *Barbe v. Villeneuve*, 505 So. 2d 1331, 1332 (Fla. 1987)).

104. *Plumbing Serv. Co.*, 46 So. 3d at 145.

105. *Id.*

106. *Id.* at 146.

107. *Id.*

108. *See id.*

109. *Plumbing Serv. Co.*, 46 So. 3d at 146.

110. *Id.*

111. *Id.*

112. *Id.*

B. *Subcontractor as Third-Party Beneficiary of a Contract*

Mustapick Companies, Incorporated (General Contractor) and Mr. and Mrs. Esposito (Property Owners) were parties to a contract (Primary Contract) for the construction of a home.¹¹³ General Contractor in turn engaged True Color Enterprises Construction, Incorporated (Subcontractor) to do the painting work on the house.¹¹⁴ Property Owners sued Subcontractor alleging that Subcontractor's negligence enabled an arsonist to enter the premises "during the night and set fires" to the home causing damage to the premises.¹¹⁵ The trial court dismissed the action, agreeing with Subcontractor's argument that it was the "third-party beneficiary" of the particular provision contained in the Primary Contract under which Subcontractor "claimed protection" from the allegations against it.¹¹⁶ Property Owners appealed and Subcontractor cited *Mullray v. Aire-Lok Co.*¹¹⁷ in support of its position that it was an intended third-party beneficiary of the Primary Contract.¹¹⁸ The Fourth District Court of Appeal found this case to be of no help to Subcontractor.¹¹⁹ Although *Mullray* can stand for the proposition that the owners of property can sustain an action for negligence against subcontractors, that does not mean that subcontractors become third-party beneficiaries of the main contract.¹²⁰ Subcontractor failed the intended third-party beneficiary test, which requires a clearly expressed intent to that effect on the part of both parties to the contract.¹²¹

C. *Enforcement of a Contract by or Against an Unlicensed Subcontractor*

The numerous amendments over the past decade to several statutes dealing with enforcement of contracts by or against unlicensed contractors do not appear to have reduced the uncertainty in this area. For example, in one case involving a subcontractor, the trial court declined to enforce a build-

113. *Esposito v. True Color Enters. Constr., Inc.*, 45 So. 3d 554, 555 (Fla. 4th Dist. Ct. App. 2010).

114. *Id.*

115. *Id.*

116. *Id.* The opinion does not specify what the terms of the contract were on which Subcontractor relied and sought to have applied to itself as a third-party beneficiary. *See id.* at 556.

117. 216 So. 2d 801 (Fla. 3d Dist. Ct. App. 1968).

118. *Esposito*, 45 So. 3d at 555-56.

119. *Id.* at 556.

120. *Compare id.* at 557, with *Mullray*, 216 So. 2d at 801, 803.

121. *Esposito*, 45 So. 3d at 555-56.

ing subcontractor's contract against its contractor.¹²² The Third District Court of Appeal reversed.¹²³ The subcontractor did not have "a specialty contractor's license as required by the Miami-Dade County Code of Ordinances (MDCO)."¹²⁴ Failure to have the license subjected the subcontractor to various monetary and other penalties under the MDCO, but denial of enforceability of contracts was not among them.¹²⁵ Although the Third District Court of Appeal quoted the Supreme Court of Florida as stating that "[w]here a statute pronounces a penalty for an act, a contract founded upon such act is void, although the statute does not pronounce it void or expressly prohibit it,"¹²⁶ the Third District Court of Appeal, relying mainly on *Corbin on Contracts*¹²⁷ and the *Restatement (Second) of Contracts*,¹²⁸ decided that a contractual party who is unlicensed—in violation of an ordinance that provides penalties but is silent as to the violation's effect on the enforceability of the underlying contract—is not automatically precluded from a remedy for breach of contract.¹²⁹ In those cases, the trial court must engage in fact finding—as detailed in this opinion—to determine if the unlicensed plaintiff should be allowed to proceed.¹³⁰

In another case, T & G Corporation (Contractor) sued an unlicensed contractor, Earth Trades, Incorporated (Subcontractor), for breach of contract.¹³¹ The trial judge ruled in favor of Contractor.¹³² Subcontractor appealed, claiming that the trial judge should have allowed it to raise, as an affirmative defense to enforcement of the contract by Contractor, knowledge on the part of Contractor of Subcontractor's "lack of a license."¹³³ The Fifth District Court of Appeal noted that Contractor's knowledge of the lack of a license was in dispute, but under the pertinent statute, section 489.128 of the *Florida Statutes*, as amended effective June 25, 2003, "a contract with an unlicensed contractor was unenforceable only by the unlicensed contractor."¹³⁴

122. *MGM Constr. Servs. Corp. v. Travelers Cas. & Sur. Co. of Am.*, 57 So. 3d 884, 885 (Fla. 3d Dist. Ct. App. 2011).

123. *Id.*

124. *Id.*

125. *Id.* at 886.

126. *Id.* at 887 (quoting *Town of Boca Raton v. Raulerson*, 146 So. 576, 577 (Fla. 1933)).

127. 15 *GRACE MCLANE GIESEL, CORBIN ON CONTRACTS* § 88.3 (rev. ed. 2003).

128. *RESTATEMENT (SECOND) OF CONTRACTS* § 181 (1981).

129. *MGM Constr. Servs. Corp.*, 57 So. 3d at 889.

130. *See id.* at 890.

131. *Earth Trades, Inc. v. T & G Corp.*, 42 So. 3d 929, 930 (Fla. 5th Dist. Ct. App. 2010).

132. *Id.*

133. *Id.*

134. *Id.*; *see also* FLA. STAT. § 489.128 (2011).

However, the Third District Court of Appeal, in a case where the contractor and the subcontractor each defended against claims by the other on the ground “that the other was an unlicensed contractor under section 489.128,” concluded that summary judgment was improper because of “genuine issues of material fact,” and included among the list of disputed facts was “the parties’ knowledge of each other’s lack of licensure.”¹³⁵

In yet another case, the contractor-vendor (MMII) contracted with the Silvesters (Buyers) for the purchase and installation of an audio entertainment system in Buyers’ home.¹³⁶ After the installation was completed, Buyers refused to pay claiming that “MMII was an unlicensed contractor” and the contract was thus unenforceable.¹³⁷ The trial court agreed with Buyers.¹³⁸ The Fourth District Court of Appeal reversed.¹³⁹ “[T]here is no licensure requirement for selling and installing entertainment systems.”¹⁴⁰ The trial court misinterpreted sections 489.105(3) and 489.505(12) of the *Florida Statutes*.¹⁴¹ MMII was neither a contractor nor an electrical contractor in the statutory sense.¹⁴² The limited electrical work performed by MMII was incidental to its entertainment system sales and installation.¹⁴³

However, in another case involving electrical work, the Third District Court of Appeal affirmed the trial court’s determination that the subcontractor, an installer of a digital satellite system, did need a license and thus could not enforce its contract against the contractor.¹⁴⁴ It should be noted that this was an appeal of a summary judgment and in affirming the trial court’s decision, the district court agreed that the subcontractor had failed to demonstrate there were disputed issues of material fact.¹⁴⁵ Judge Salter dissented, relying

135. *Austin Bldg. Co. v. Rago, Ltd.*, 63 So. 3d 31, 33 (Fla. 3d Dist. Ct. App. 2011).

136. *MMII, Inc. v. Silvester*, 42 So. 3d 876, 877 (Fla. 4th Dist. Ct. App. 2010) (per curiam). This case differed from the other cases reported in this Survey in that the dispute was not between the contractor and the subcontractor, but rather, was between the buyer and the contractor. Compare *id.*, with *Austin Bldg. Co.*, 63 So. 3d at 33. It is submitted that whether or not this is a distinction without a difference is not entirely clear. See *Master Tech Satellite, Inc. v. Mastec N. Am., Inc.*, 49 So. 3d 789, 795 (Fla. 3d Dist. Ct. App. 2010) (Salter, J., dissenting) (per curiam).

137. *MMII, Inc.*, 42 So. 3d at 877.

138. *Id.*

139. *Id.* at 878.

140. *Id.* at 877.

141. *Id.*; FLA. STAT. §§ 489.105(3), 505(12) (2011).

142. *MMII, Inc.*, 42 So. 3d at 877.

143. *Id.*

144. *Master Tech Satellite, Inc. v. Mastec N. Am., Inc.*, 49 So. 3d 789, 790–91 (Fla. 3d Dist. Ct. App. 2010) (per curiam).

145. *Id.* at 791.

in part on the Fourth District Court of Appeal decision¹⁴⁶ in *MMII, Inc. v. Silvester*.¹⁴⁷

D. *Implied Warranties of Habitability, Fitness, and Merchantability as Applied to Real Estate Improvements to Common Areas*

In *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*,¹⁴⁸ Lakeview Reserve Homeowners Association, Incorporated (Association) sued Maronda Homes, Incorporated (Developer) alleging certain defects in Developer's construction of a water drainage system, private roadways, retention ponds, and pipes located underground.¹⁴⁹ The theory supporting Association's suit was "breach of the common law implied warranties of fitness and merchantability, also referred to as a warranty of habitability."¹⁵⁰ The trial court granted summary judgment in favor of Developer, relying on *Conklin v. Hurley*¹⁵¹ and *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Federal Savings & Loan Ass'n of Martin County*,¹⁵² and Association appealed.¹⁵³ Amicus curiae briefs were filed on behalf of Developer by Florida Home Builders Association and on behalf of Association by Community Associations Institute.¹⁵⁴ Developer contended that the water drainage system, private roadways, retention ponds, and pipes located underground did "not immediately support the residences" and that the common law implied warranties of fitness and merchantability did not apply to structures "not immediately support[ing] the residences."¹⁵⁵ After reviewing the evolving application of the rule of caveat emptor to home construction, and considering the facts and holdings of *Conklin* and *Port Sewall Harbor & Tennis Club Owners Ass'n*, the Fifth District Court of Appeal announced its test for determining if the common law implied warranty of habitability would apply under the facts presented in this case as to whether "in the absence of the

146. *Id.* at 795 (Salter, J., dissenting).

147. 42 So. 3d 876 (Fla. 4th Dist. Ct. App. 2010) (per curiam).

148. 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011).

149. *Id.* at 904.

150. *Id.* at 903–04.

151. 428 So. 2d 654 (Fla. 1983).

152. 463 So. 2d 530 (Fla. 4th Dist. Ct. App. 1985).

153. *Lakeview*, 48 So. 3d at 903–04.

154. Brief for Florida Home Builders Ass'n as Amici Curiae Supporting Appellee, *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011); Brief for Community Ass'ns Institute as Amici Curiae Supporting Appellant, *Lakeview Reserve Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902 (Fla. 5th Dist. Ct. App. 2010), *review granted*, 58 So. 3d 261 (Fla. 2011).

155. *Lakeview*, 48 So. 3d at 904.

service, is the home inhabitable, that is, is it an improvement providing a service essential to the habitability of the home? If it is, then the implied warranties apply.”¹⁵⁶ The court went on to hold that the “warranties of fitness for a particular purpose, habitability, and merchantability apply to structures in [the] common areas . . . [if they] immediately support the residence in the form of essential services.”¹⁵⁷ Thus, the Fifth District Court of Appeal interpreted the Supreme Court of Florida’s classification of improvements “immediately supporting the residence” as stated in *Conklin*, as including those “services essential to . . . habitability” such as a water drainage system, private roadways, retention ponds, and pipes located underground.¹⁵⁸ The Fifth District Court of Appeal certified conflict with the Fourth District Court of Appeal in *Port Sewall Harbor & Tennis Club Owners Ass’n*.¹⁵⁹ The Supreme Court of Florida accepted jurisdiction and several briefs on the merits have been filed by the parties and amicus curiae.¹⁶⁰

VII. EMPLOYMENT LAW

A. *Non-Compete Agreement Enforced with Respect to Unsolicited Customer*

In *Hilb Rogal & Hobbs of Florida, Inc. v. Grimmel*,¹⁶¹ the Fourth District Court of Appeal reinstated a temporary injunction that had been dissolved by the trial court.¹⁶² The case makes it clear that a former employee may be prohibited by the terms of a valid non-compete agreement from “accepting an invitation from” an unsolicited customer of the former employer to do work for the customer.¹⁶³ The Fourth District Court of Appeal held that the general magistrate’s “finding of no legitimate business interest [under section 542.335 of the *Florida Statutes* was] clearly erroneous.”¹⁶⁴ This finding was adopted by the trial court initially, and reaffirmed in its decision after a hearing held after remand from an appeal to the Fourth District Court of Appeal.¹⁶⁵ In addition, the public interest requirement for granting of a

156. *Id.* at 907–09.

157. *Id.* at 909.

158. *Conklin v. Hurley*, 428 So. 2d. 654, 655 (Fla. 1983); *Lakeview*, 48 So. 3d at 909.

159. *Lakeview*, 48 So. 3d at 909.

160. *See Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass’n*, Nos. SC10-2292, SC10-2336, 2011 WL 1537263, at *1 (Fla. Apr. 20, 2011) (unpublished table decision).

161. 48 So. 3d 957 (Fla. 4th Dist. Ct. App. 2010).

162. *Id.* at 962.

163. *Id.* at 961.

164. *Id.* at 959, 961; FLA. STAT. § 542.335 (2011).

165. *Grimmel*, 48 So. 3d at 959, 962.

temporary injunction was satisfied because “the public has a cognizable interest in the protection and enforcement of contractual rights.”¹⁶⁶ Thus, the former employee would have to have shown that public policy considerations against enforcement substantially outweighed the interests established by the former employer who sought to enforce the covenant.¹⁶⁷ The district court held that “[t]he fact that the customers will have to use a different insurance broker does not make the enforcement of this agreement against public policy.”¹⁶⁸

B. *Temporary Injunction Denied: Grandparent Corporation Could Not Enforce Pre-Existing Non-Compete Agreement Between Newly Acquired (Sub-subsidiary) Corporation and Newly Acquired Corporation's Former Employee*

Mr. Kimbler (Former Alltel Employee) was employed by Alltel Corporation (Alltel) and in 2002, signed a “nondisclosure and nonsolicitation agreement” (Non-Compete Agreement) with “Alltel or any of its affiliated companies.”¹⁶⁹ While Alltel and Cellco Partnership (Cellco) “were competitors, not affiliated companies,” when the Non-Compete Agreement was signed in 2002, in 2008, Alltel and Cellco entered into what was described as a “merger transaction” pursuant to a “plan of merger (reverse merger plan).”¹⁷⁰ As a result of the “merger” in 2009, Former Alltel Employee briefly became a Verizon employee, but within six months, went to work for Sprint/Nextel (New Employer).¹⁷¹ Within a short time thereafter, Cellco instituted its action against Former Alltel Employee, alleging that Former Alltel Employee provided New Employer with valuable Alltel customer information, and Cellco sought an injunction against Former Alltel Employee based on the agreement with Alltel.¹⁷² The trial court denied the request, and

166. *Id.* at 962 (quoting *Pitney Bowes, Inc. v. Acevedo*, No. 08-21808-CIV, 2008 WL 2940667, at *6 (S.D. Fla. July 28, 2008)). The Fourth District Court of Appeal stated that to uphold a temporary injunction, the former employer would have to prove “(1) the likelihood of irreparable harm, (2) the unavailability of an adequate remedy at law, (3) a substantial likelihood of success on the merits, and (4) that a temporary injunction will serve the public interest.” *Id.* at 959 (quoting *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. 5th Dist. Ct. App. 2009)).

167. *See id.* at 962 (citing *Pitney Bowes, Inc.*, 2008 WL 2940667, at *6).

168. *Id.*

169. *Cellco P’ship v. Kimbler*, 68 So. 3d 914, 916 (Fla. 2d Dist. Ct. App. 2011).

170. *Id.* at 915–16.

171. *Id.*

172. *Id.* at 916.

the second district court affirmed.¹⁷³ The Non-Compete Agreement was not assigned by Alltel to Cellco and did not contain an assignment clause.¹⁷⁴ Alltel still held the rights under the agreement with Former Alltel Employee.¹⁷⁵ The second district upheld the trial court's findings that Alltel no longer had a Florida retail cell phone business or Florida customer accounts, and concluded that "Alltel assigned its Florida customer contracts to Cellco."¹⁷⁶ Alltel's going out of the retail cell phone business in Florida was a defense to the alleged breach of the restrictive covenant, there no longer being a legitimate business interest to protect.¹⁷⁷ Cellco could not enforce the Non-Compete Agreement because Cellco could not have been an affiliate of Alltel when the agreement was signed because they were in fact then competitors.¹⁷⁸

The Second District Court of Appeal acknowledged that section 542.335(1)(f) of the *Florida Statutes* does permit a nonparty to enforce a covenant in certain circumstances.¹⁷⁹ A third party may enforce a restrictive covenant when the "third-party beneficiary of the contract or an assignee or successor . . . is expressly named and authorized to enforce the [contract]."¹⁸⁰ The district court continued, "[a]nd here, the undisputed evidence was that Alltel and Cellco did not merge and that Alltel did not assign the restrictive covenant rights to Cellco. . . . Further, Cellco and Alltel are separate legal entities, and as such, Cellco—the parent corporation—cannot 'exercise the rights of its subsidiary.'"¹⁸¹

Although the mechanics and details of the transaction were not set forth in the opinion, the Second District Court of Appeal said that at the time the "merger" became effective in 2009, "Alltel assigned its Florida customer contracts to Cellco."¹⁸² However, at the conclusion of its opinion, the Second District Court of Appeal held that Cellco was not an "assignee, or successor in interest to the Alltel [former employee]" and, as noted, that "Alltel and Cellco did not merge."¹⁸³ In order to fully appreciate the court's holding, it is important to emphasize what the district court noted in a footnote: "Cellco

173. *Id.* at 916, 918.

174. *Cellco P'ship*, 68 So. 3d at 916.

175. *Id.* at 917.

176. *Id.* at 916.

177. *Id.* at 917.

178. *Id.*

179. *Cellco P'ship*, 68 So. 3d at 917; FLA. STAT. § 542.335(1)(f) (2011).

180. *Cellco P'ship*, 68 So. 3d at 917 (citing FLA. STAT. § 542.335(1)(f)).

181. *Id.* at 917–18 (quoting *Am. Int'l Grp., Inc. v. Cornerstone Buss.*, 872 So. 2d 333, 336 (Fla. 2d Dist. Ct. App. 2004)).

182. *Id.* at 916.

183. *Id.* at 917–18.

owns AirTouch Cellular, a nonparty to this action. In turn, AirTouch is the 100% owner of Alltel. But Cellco and Alltel remain separate legal entities.”¹⁸⁴ With that in mind, the reason the district court affirmed the trial court’s denial of the injunction becomes clearer.

C. *Employer Held Immune from Negligence Action by Borrowed Employee*

In *Fossett v. Southeast Toyota Distributors, LLC*,¹⁸⁵ Ivy Fossett (Employee) was employed by Adecco, a help supply services company.¹⁸⁶ Adecco contracted with Southeast Toyota Distributors, LLC (SET) for Employee’s services.¹⁸⁷ Employee was seriously injured while on the job at SET.¹⁸⁸ Although Employee settled her workers’ compensation claim against Adecco, she also sued SET, alleging negligence.¹⁸⁹ The trial court granted SET’s motion for summary judgment, and Employee appealed.¹⁹⁰ SET, relying on section 440.11 of the *Florida Statutes*, claimed immunity “from liability for simple negligence [with respect] to any Adecco employee injured doing SET’s work,” that is, immunity by virtue of the workers’ compensation statute.¹⁹¹ In order to be shielded from liability, SET had to show that Employee was subject to its general supervision.¹⁹² Employee claimed that no one at SET supervised her, that is, that “she never received instruction from SET on how to do her job.”¹⁹³ She also testified that she worked at SET under the supervision of another Adecco employee.¹⁹⁴ However, SET

184. *Id.* at 916 n.1.

185. 60 So. 3d 1155 (Fla. 1st Dist. Ct. App. 2011).

186. *Id.* at 1156.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Fossett*, 60 So. 3d at 1156.

191. *Id.* (citing FLA. STAT. § 440.11(2) (2011)).

192. *Id.* at 1157–58 (citing FLA. STAT. § 440.11(2)).

193. *Id.* at 1158.

194. *Id.* The First District Court of Appeal referred to the help supplied as being paid by the company supplying the help “but is under the direct or general supervision of the business to whom the help is furnished.” *Fossett*, 60 So. 3d at 1157 (quoting *St. Lucie Falls Prop. Owners Ass’n v. Morelli*, 956 So. 2d 1283, 1285 (Fla. 4th Dist. Ct. App. 2007)). The district court noted that “[t]he ‘general supervision’ section 440.11(2) contemplates, in incorporating OSHA Standard Industry Code Industry Number 7363, is the legal power to direct.” *Id.* at 1158. Thus, the First District Court of Appeal made it clear that the determination in the case before it did not turn on who was in direct supervision “of the work of the help supply services company employee,” as argued by Employee, but rather who had the “power to control” and supervise the work of the Employee. *Id.* As stated by the district court, “[t]he present case turns on ‘general supervision,’ not ‘direct supervision.’” *Id.*

had the right to supervise and to control—and that controlled.¹⁹⁵ The extent of the exercise of that right was “immaterial” and the district court affirmed.¹⁹⁶

VIII. FIDUCIARY DUTY AND GOVERNANCE

The litigation that gave rise to the matter before the Supreme Court of Florida in *Wendt v. La Costa Beach Resort Condominium Ass’n, Inc. (Wendt II)*,¹⁹⁷ was La Costa Beach Resort Condominium Association, Incorporated’s (Association’s) lawsuit that alleged breach of fiduciary duty on the part of certain directors of Association.¹⁹⁸ After a verdict was rendered in Association’s breach of fiduciary case, “the directors moved for a new trial,” and they also filed a separate action against Association seeking indemnification—under section 607.0850 of the *Florida Statutes*—for expenses the directors had incurred in defending against Association’s breach of fiduciary claims.¹⁹⁹ The trial court dismissed the indemnification complaint with prejudice, the directors appealed, and the trial court’s dismissal was upheld by the Fourth District Court of Appeal.²⁰⁰ However, the Fourth District Court of Appeal had noted conflict²⁰¹ between its decision in *Wendt v. La Costa Beach Resort Condominium Ass’n, Inc. (Wendt I)*²⁰² and the decision of the First District Court of Appeal in *Turkey Creek Master Owners Ass’n. v. Hope*.²⁰³ Section 607.0850 of the *Florida Statutes* directs corporations, under certain circumstances, to indemnify its officers’ and directors’ expenses incurred in legal proceedings arising from their positions.²⁰⁴ The issue was whether section 607.0850 covers the situation where the corporation sues its own directors.²⁰⁵ The Supreme Court of Florida agreed with the First District Court of Appeal which had answered the question in the affirmative, and the Supreme Court of Florida thus quashed the opinion of the fourth district.²⁰⁶ The plain language of the statute does not forbid indemnification in such cases.²⁰⁷

195. *Id.*

196. *Fossett*, 60 So. 3d at 1158.

197. 64 So. 3d 1288 (Fla. 2011) (per curiam).

198. *Id.* at 1229.

199. *Id.* (citing FLA. STAT. § 607.0850 (2011)).

200. *Id.*

201. *See id.*

202. 14 So. 3d 1179 (Fla. 4th Dist. Ct. App. 2009), *quashed by* 64 So. 3d 1228 (Fla. 2011).

203. 766 So. 2d 1245, 1247 (Fla. 1st Dist. Ct. App. 2000) (per curiam).

204. FLA. STAT. § 607.0850.

205. *Wendt II*, 64 So. 3d 1228, 1229 (Fla. 2011) (per curiam).

206. *Id.* at 1231.

207. *Id.*

However, the court “expressly [did] not reach the merits of whether indemnification is applicable under the facts of [the] case.”²⁰⁸ Justice Quince dissented.²⁰⁹

On June 9, 2011, the same day as the Supreme Court of Florida issued its opinion in *Wendt II*,²¹⁰ the court rendered its decision in *Banco Industrial de Venezuela C.A. v. de Saad*.²¹¹ The decision of the Third District Court of Appeal, discussed in the *2009–2010 Survey of Florida Law Affecting Business Owners*, in some detail, was quashed.²¹² There were two main issues involved; one, the indemnification issue, and the other, a breach of contract issue.²¹³ With respect to the indemnification claim by de Saad (Officer/Employee)—as she was referred to in the *2009–2010 Survey of Florida Law Affecting Business Owners*—the Supreme Court of Florida set forth several reasons why the indemnification by Banco Industrial De Venezuela C.A., Miami Agency (Bank) was not available to Officer/Employee.²¹⁴ First, the court held that section 607.0850 of the *Florida Statutes* did not apply to the corporate entity against which Officer/Employee made the claim since Bank was a foreign corporation—a Venezuelan bank that had been authorized to do business in the state of Florida.²¹⁵ The court pointed out that even though foreign corporations authorized to do business in Florida have substantially the same rights and obligations as domestic corporations, there are exceptions, and one exception is that under section 607.1505(3) of the *Florida Statutes*, Florida may not regulate the “internal affairs of a foreign corporation” even though the corporation has been authorized to do business in Florida.²¹⁶ The Supreme Court of Florida held that “[c]orporate indemnification is one such matter of internal affairs.”²¹⁷ Officer/Employee argued that

208. *Id.*

209. *Id.* (Quince, J., dissenting).

210. *Wendt II*, 64 So. 3d at 1228.

211. 68 So. 3d 895, 901 (Fla. 2011).

212. *Id.* at 901; see Barbara Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*, 35 NOVA L. REV. 1, 9–11 (2010) [hereinafter Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*].

213. *Banco*, 68 So. 3d at 897. The summary judgment awarding Officer/Employee \$1,058,023.82 was quashed, and the Supreme Court of Florida held that Bank “did not breach the employment contract by keeping [Officer/Employer] on unpaid suspension.” *Id.* at 901. The court quashed the third district’s decision, and remanded “for entry of final judgment in favor of [Bank].” *Id.*

214. *Id.* at 898–900; see Landau, *2009–2010 Survey of Florida Law Affecting Business Owners*, *supra* note 212, at 9–11.

215. *Banco*, 68 So. 3d at 898–99.

216. *Id.* at 898 (quoting FLA. STAT. § 607.1505(3) (2011)).

217. *Id.* (citing *Chatlos Found., Inc. v. D’Arata*, 882 So. 2d 1021, 1023 (Fla. 5th Dist. Ct. App. 2004)).

Bank made section 607.0850 applicable to itself when it entered into an employment agreement with Officer/Employee that contained a Florida choice of law provision.²¹⁸ The Supreme Court of Florida dealt with that argument by pointing out that in making Florida law the applicable law, Bank, as a foreign corporation was under the express language of the Florida statute and “not subject to regulation” by Florida with respect to its internal affairs.²¹⁹ The court did not end its analysis of the indemnification issue there, however.²²⁰ Rather, the court held that even if the foreign corporation was subject to the indemnification statute, Officer/Employee did not satisfy the statutory requirements for indemnification.²²¹ The court emphasized the “by reason of the fact” language of section 607.0850(1); that is, that the person must have been a party “by reason of the fact” of his status as an officer or employee.²²² The court noted that Officer/Employee “was not prosecuted ‘by reason of the fact’ that she was a corporate officer [S]he was prosecuted for her conduct, not on account of her position. This conduct was not required by her position as a corporate officer and was, in fact, contrary to corporate policy.”²²³

IX. JURISDICTION AND VENUE

A. *Personal Jurisdiction and the Internet*

Two Worlds United (Plaintiff) had its principal place of business in Tampa.²²⁴ Plaintiff sued a California resident, Mr. Zylstra (Defendant), and others, claiming that Defendant “posted defamatory statements [about Plaintiff] on a website owned and operated by [Defendant].”²²⁵ Defendant contested the Florida court’s personal jurisdiction over him by filing an affidavit stating that his solely owned corporation owned the website and that he did not personally post anything on the website regarding Plaintiff.²²⁶ Plaintiff did not rebut Defendant’s affidavit, and Defendant was thus protected by the corporate shield doctrine.²²⁷ Plaintiff relied on *Internet Solutions Corp. v.*

218. *Id.*

219. *Id.* at 898–99.

220. *Banco*, 68 So. 3d at 899.

221. *Id.*

222. *Id.*; FLA. STAT. § 607.0850(1) (2011).

223. *Banco*, 68 So. 3d at 900 (citations omitted).

224. *Two Worlds United v. Zylstra*, 46 So. 3d 1175, 1176 (Fla. 2d Dist. Ct. App. 2010).

225. *Id.*

226. *Id.* at 1177–78.

227. *Id.* at 1178 (citing *Doe v. Thompson*, 620 So. 2d 1004, 1006 (Fla. 1993)).

Marshall,²²⁸ but the Second District Court of Appeal found Plaintiff's reliance on *Internet Solutions Corp.* misplaced because there, "the nonresident owner and operator of the website personally posted defamatory statements regarding the plaintiff" in that case.²²⁹ In addition, the district court pointed out that the corporate shield doctrine was not addressed in the *Internet Solutions Corp.* decision.²³⁰ Plaintiff also lost on the issue regarding section 48.193(2) "substantial and not isolated activity" in Florida because Defendant "testified that he ha[d] not lived in Florida since 1994" and visited "only a few times a year to [see] family and friends."²³¹ These, under *Radcliffe v. Gyves*,²³² the court said, were insufficient contacts to satisfy personal jurisdiction requirements under section 48.193(2).²³³ Finally, Defendant's attempt to recover his attorney fees under section 57.105 of the *Florida Statutes* did not amount to a waiver of the defense of lack of personal jurisdiction.²³⁴ The motion for fees "was defensive and did not seek affirmative relief."²³⁵

In a case involving a complaint for violation of the Florida Securities and Investor Protection Act,²³⁶ Mr. Elias (Plaintiff) alleged that Enzyme Environmental Solutions, Inc. (Defendant Corporation) was "a Nevada corporation, located in . . . Indiana, [but] conducting business in . . . Florida."²³⁷ The individual defendants were officers of the Defendant Corporation.²³⁸ One of the individual defendants stated "that he live[d] in Indiana and ha[d] never resided, worked, or operated a business in Florida."²³⁹ He also stated that "[h]e [did] not have a telephone, post office box, or office in Florida."²⁴⁰ The other individual defendant's declaration was similar, but, "he lived in Florida from 1988 until 1990."²⁴¹ Plaintiff alleged that he was the victim of a securities "pump and dump" fraud perpetrated via the Internet.²⁴² The individual

228. 39 So. 3d 1201 (Fla. 2010).

229. *Two Worlds United*, 46 So. 3d at 1178.

230. *Id.*

231. *Id.* (quoting FLA. STAT. § 48.193 (2) (2011)).

232. 902 So. 2d 968 (Fla. 4th Dist. Ct. App. 2005).

233. *Two Worlds United*, 46 So. 3d at 1178 (citing *Radcliffe*, 902 So. 2d at 972 n.4).

234. *Id.* at 1177; FLA. STAT. § 57.105 (2005); see *Heineken v. Heineken*, 683 So. 2d 194, 197–98 (Fla. 1st Dist. Ct. App. 1996).

235. *Two Worlds United*, 46 So. 3d at 1177.

236. FLA. STAT. § 517.011 (2011).

237. *Enzyme Env'tl. Solutions, Inc. v. Elias*, 60 So. 3d 1158, 1159 (Fla. 4th Dist. Ct. App. 2011).

238. *Id.* at 1159–60.

239. *Id.* at 1160.

240. *Id.*

241. *Id.*

242. *Elias*, 60 So. 3d at 1160.

defendants argued that they did not have sufficient minimum contacts with Florida “to comport with due process,” and the appellate court agreed with them.²⁴³

In the instant case, there is no evidence that the false statements were purposefully directed toward the residents of Florida. Assuming the defendants were actually trying to “pump and dump” their stock, they were targeting anyone and everyone who might go on the Internet to read about stocks on websites that publish information about stocks.²⁴⁴

The two cases just discussed involved jurisdiction and the Internet.²⁴⁵ The next case also involved the Internet, and even though the appellant had “filed a notice of voluntary dismissal,” the Fourth District Court of Appeal stated it decided not to dismiss “[b]ecause we believe that this case involves an issue of great public importance.”²⁴⁶ Instead of dismissing, the Fourth District Court of Appeal, in *Caiazza v. American Royal Arts Corp.*,²⁴⁷ reviewed the subject of personal jurisdiction under Florida law and then discussed the application of the law to the Internet.²⁴⁸ The court cited *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*,²⁴⁹ as a leading case dealing with how an internet site affects personal jurisdiction.²⁵⁰ *Zippo Manufacturing Co.*’s analysis placed the site owner on a spectrum of commercial interactivity ranging from passive to active and/or clearly doing business.²⁵¹ However, the Fourth District Court of Appeal, while acknowledging that “a clear majority of federal courts ha[ve] adopted the *Zippo* [*Manufacturing Co.*] analytical framework,” rejected it as controlling in Florida.²⁵² The district court concluded that doing business over the Internet did not fundamentally change Florida’s analysis under section 48.193(1)—as to specific jurisdiction—and section 48.193(2)—as to general jurisdiction—in determining the existence of minimum contacts for due process purposes as applied to specific jurisdiction determinations or in determining the existence of minimum

243. *Id.* at 1161.

244. *Id.* at 1162.

245. *See* *Two Worlds United v. Zylstra*, 46 So. 3d 1175, 1176 (Fla. 2d Dist. Ct. App. 2010); *Elias*, 60 So. 3d at 1160.

246. *Caiazza v. Am. Royal Arts Corp.*, 36 Fla. L. Weekly D1174, D1174 (4th Dist. Ct. App. June 1, 2011) (per curiam).

247. 36 Fla. L. Weekly D1174 (4th Dist. Ct. App. June 1, 2011) (per curiam).

248. *See id.* at D1174-77.

249. 952 F. Supp. 1119 (W.D. Pa. 1997).

250. *Caiazza*, 36 Fla. L. Weekly at D1176 (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

251. *Id.* (citing *Zippo Mfg. Co.*, 952 F. Supp. at 1124).

252. *Id.*

contacts in the general jurisdiction context.²⁵³ The district court stated that with respect to minimum contacts, “we choose to continue to apply a traditional minimum contacts analysis in personal jurisdiction questions, whether or not the [I]nternet is involved.”²⁵⁴

B. *Venue-Joint Residency Rule Did Not Apply*

In *Pill ex rel. Estate of Bassali v. Merco Group of the Palm Beaches, Inc.*,²⁵⁵ there were corporate and individual defendants located in Miami-Dade County.²⁵⁶ The defendants were sued in Palm Beach County where the cause of action accrued.²⁵⁷ The defendants successfully moved the trial court to transfer venue to Miami-Dade County citing the joint residency venue rule.²⁵⁸ The Fourth District Court of Appeal reversed, holding that venue was properly laid in Palm Beach County.²⁵⁹ Section 47.011 of the *Florida Statutes* allows the plaintiff to choose as venue “the county where the defendant resides, where the cause of action accrued, or where the property [subject to] litigation is located.”²⁶⁰ The joint residency rule requires venue “in the county where . . . individual . . . and corporate defendant[s] share a residence, [provided that it] is also the [county] where the cause of action accrued.”²⁶¹ In other words, “the joint residency rule applies only when venue is based upon residency.”²⁶² In this case, the cause of action accrued in Palm Beach County, which the plaintiff was permitted to choose as the venue under section 47.011, notwithstanding the joint residency of the defendants.²⁶³

253. See *id.* (citing FLA. STAT. § 48.193 (2011); *Internet Solutions Corp. v. Marshall*, 39 So. 3d 1201, 1216 n.11 (Fla. 2010); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989); *Renaissance Health Publ’g, L.L.C. v. Resveratrol Partners, L.L.C.*, 982 So. 2d 739, 742 (Fla. 4th Dist. Ct. App. 2008)).

254. *Id.* at D1177.

255. 56 So. 3d 890 (Fla. 4th Dist. Ct. App. 2011).

256. *Id.* at 891.

257. *Id.*

258. *Id.*

259. *Id.* at 892.

260. *Pill ex rel. Estate of Bassali*, 56 So. 3d at 891 (emphasis omitted) (quoting FLA. STAT. § 47.011 (2011)).

261. *Id.* at 892 (emphasis omitted) (quoting *Brown v. Nagelhout*, 33 So. 3d 83, 84 (Fla. 4th Dist. Ct. App.), review granted, 48 So. 3d 835 (Fla. 2010)).

262. *Id.* at 891.

263. *Id.* at 891–92; FLA. STAT. § 47.011.

X. MORTGAGES

A. *Constructive Notice Was Given Despite Property Description Error in Mortgage*

Fidelity Bank of Florida (Bank) took back a first mortgage on certain real estate.²⁶⁴ This mortgage document, the “first-recorded mortgage,” was correct as to the identity of the owner of the property, and the lot and subdivision were correctly stated.²⁶⁵ While the plat book was also correctly described, the mortgage incorrectly stated the plat book page as page three; the correct page, however, was page eight.²⁶⁶ Bank filed a foreclosure action and joined another mortgagee (Other Mortgagee) as a defendant.²⁶⁷ On motion for summary judgment, the trial court agreed with Other Mortgagee that Bank’s error put Other Mortgagee in a superior position.²⁶⁸ The Fifth District Court of Appeal reversed the trial court’s entry of summary judgment in favor of Other Mortgagee, holding that notwithstanding Bank’s error, Other Mortgagee had constructive notice of Bank’s earlier recorded mortgage.²⁶⁹ The district court “direct[ed] the trial court to enter summary judgment” in favor of Bank which judgment was to declare the superior position of Bank.²⁷⁰

B. *Florida’s Recording Statute is Still a Notice Statute*

Mr. and Mrs. Burkes (Borrowers) owed money to Argent Mortgage Company, LLC (Argent) and Wachovia Bank, N.A. (Wachovia) on notes and mortgages they had given to each lender.²⁷¹ The Wachovia mortgage was signed on August 31, 2004, but was not recorded until January 5, 2005.²⁷² The Argent mortgage was signed on December 10, 2004, and the date of recording was January 31, 2005.²⁷³ Borrowers defaulted on the mort-

264. *Fid. Bank of Fla. v. Nguyen*, 44 So. 3d 1238, 1239 (Fla. 5th Dist. Ct. App. 2010), review denied, 57 So. 3d 846 (Fla. 2011).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Fid. Bank of Fla.*, 44 So. 3d at 1239 (citing *Sickler v. Melbourne State Bank*, 159 So. 678, 679 (Fla. 1935); *Merrell v. Ridgely*, 57 So. 352, 353 (Fla. 1912)).

270. *Id.*

271. *Argent Mortg. Co. v. Wachovia Bank, N.A.*, 52 So. 3d 796, 798 (Fla. 5th Dist. Ct. App. 2010).

272. *Id.*

273. *Id.*

gages and in consolidated foreclosure actions²⁷⁴ the issue became which lender had priority.²⁷⁵ The trial court ruled for Wachovia, but the Fifth District Court of Appeal reversed.²⁷⁶ The trial court accepted Wachovia's argument that Florida's recording statute, section 695.01 of the *Florida Statutes*, had to be read together with section 695.11 of the *Florida Statutes*, which deals with the sequence of recording, and "determining the time at which an instrument [is] deemed to be recorded," which the argument went, made Florida's statute a statute of the race-notice variety rather than a notice statute.²⁷⁷ The Fifth District Court of Appeal summarized the differences between a notice statute, a race statute, and a race-notice statute.²⁷⁸ The district court noted that commentators and a long line of cases in Florida have concluded that section 695.01 is a notice statute, so that a lender taking for value and without notice takes priority over an earlier lender for value who fails to record loan documents prior to the loan by the second lender, even if the second lender's recording took place after the first lender's recording, that is, regardless of the order of recording.²⁷⁹ In order for Wachovia to have prevailed, it would have been necessary to prove that Argent had actual notice of Wachovia's loan at the time it loaned money to Borrowers, and "the trial court [had] made findings on facts not in dispute, including . . . Argent's lack of actual or constructive notice" of the Wachovia mortgage when the Argent mortgage was executed.²⁸⁰

C. *Municipal Ordinance Creating Lien Priority Violates Priority of Recording Statute*

The next case, *City of Palm Bay v. Wells Fargo Bank, N.A.*²⁸¹ involves section 695.11 of the *Florida Statutes*.²⁸² The Fifth District Court of Appeal held that a local ordinance that gave the city's code enforcement liens priority over all other nongovernmental liens, regardless of the order of recording in accordance with the provisions of section 695.11, was in violation of that statute, and thus, the statute controlled.²⁸³ The district court referred to "the common law principle of first in time, first in right" noting that "instruments

274. *Id.* at 798 n.1.

275. *Id.* at 798.

276. *Argent Mortg. Co.*, 52 So. 3d at 797, 801.

277. *Id.* at 798, 800; *see also* FLA. STAT. §§ 695.01, 695.11 (2011).

278. *Argent Mortg. Co.*, 52 So. 3d at 798–99.

279. *Id.* at 799–801 (citations omitted); FLA. STAT. § 695.01.

280. *Argent Mortg. Co.*, 52 So. 3d at 798.

281. 57 So. 3d 226 (Fla. 5th Dist. Ct. App.), *review granted*, 61 So. 3d 410 (Fla. 2011).

282. *Id.* at 227; FLA. STAT. § 695.11.

283. *City of Palm Bay*, 57 So. 3d at 227; FLA. STAT. § 695.11.

such as mortgages and liens will generally follow the first in time rule.”²⁸⁴ The district court concluded that “[t]he only way ordinance 97–07 can be effective is by violating [the Florida statute].”²⁸⁵ Thus, the Fifth District Court of Appeal ruled in favor of the holder of a prior recorded mortgage.²⁸⁶ It should be noted that unlike the situation in *Argent Mortgage Co. v. Wachovia Bank, N.A.*,²⁸⁷ this was not a “notice” case.²⁸⁸ This was a case of a city enacting an ordinance that created priority for certain liens.²⁸⁹ The Fifth District Court of Appeal granted the City of Palm Bay’s motion to certify the following question to the Supreme Court of Florida:

Whether, under Article VIII, section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?²⁹⁰

D. *Mortgage Documents Could Not Override Requirements of Civil Procedure Rule for Ex Parte Appointment of Receiver*

In *DeSilva v. First Community Bank of America*,²⁹¹ First Community Bank of America (Lender) began proceedings to foreclose the mortgage it owned on Mr. DeSilva’s (Borrower’s) property.²⁹² As part of the proceedings, the trial court, ex parte, upon request of Lender for expedited appointment, appointed a receiver for the property.²⁹³ This was accomplished by Lender filing “an unverified motion to appoint a receiver on an expedited basis.”²⁹⁴ Lender alleged in the motion that a receiver could “avoid complaints from neighbors, and . . . possible code violations,” that a receiver would facilitate the eventual sale of the property to “unidentified potential buyers,” and that the loan documents called for a receiver if Borrower de-

284. *City of Palm Bay*, 57 So. 3d at 227.

285. *Id.*

286. *Id.* at 228.

287. 52 So. 3d 796 (Fla. 5th Dist. Ct. App. 2010).

288. Compare *id.* at 799, with *City of Palm Bay*, 57 So. 3d at 227.

289. *City of Palm Bay*, 57 So. 3d at 227.

290. *City of Palm Bay v. Wells Fargo Bank N.A.*, 67 So. 3d 271, 271 (Fla. 5th Dist. Ct. App.) (per curiam), review granted, 61 So. 3d 410 (Fla. 2011).

291. 42 So. 3d 285 (Fla. 2d Dist. Ct. App. 2010).

292. *Id.* at 287.

293. *Id.*

294. *Id.*

faulted.²⁹⁵ The Second District Court of Appeal reversed and remanded.²⁹⁶ Lender failed to comply with Florida Rule of Civil Procedure 1.610 so as to allow the trial court to appoint a receiver without notice or hearing on its motion.²⁹⁷ That rule requires, among other things, that the movant show in an affidavit or a verified pleading by “‘*specific facts* . . . that immediate and irreparable injury, loss, or damage *will* result to the movant before the adverse party can be heard in opposition.’”²⁹⁸ That was not done here.²⁹⁹ Lender failed to “affirmatively assert[] that the actual value of the property [is] insufficient to cover the debt,” and there was “no evidence that this was the case.”³⁰⁰ The case also reminds us that even if the mortgage documents provide for the appointment of a receiver in the event of default, that does not mean that the requirements of the procedural rule do not apply.³⁰¹

E. *Statute of Limitations Applicable to Assignor Applies to Assignee of Mortgage*

Ms. Tucker (Guarantor) guaranteed mortgage loans made by the U.S. Small Business Association to some companies.³⁰² LPP Mortgage Ltd. (Assignee) was the assignee of the loans.³⁰³ When the companies defaulted, Assignee sued to foreclose, apparently against Guarantor’s property.³⁰⁴ The trial court ruled that the foreclosure action was barred by the six-year statute of limitations.³⁰⁵ Assignee appealed, and the Third District Court of Appeal reversed.³⁰⁶ An assignee enjoys “the rights and benefits” of the assignor, including “the benefit of the statute of limitations applicable to the assignor’s

295. *Id.* at 287–88.

296. *DeSilva*, 42 So. 3d at 287.

297. *Id.* at 288 (citing FLA. R. CIV. P. 1.610).

298. *Id.* (quoting FLA. R. CIV. P. 1.610(a)(1)(A)). The other requirements of the rule include “the movant’s attorney certifies in writing [as to] why notice should not be required” and the court’s inclusion in its order its findings and reasons as to what the irreparable harm may be, and why the receiver was appointed *ex parte*. *Id.* (quoting FLA. R. CIV. P. 1.610(a)(1)(B)).

299. *Id.*

300. *DeSilva*, 42 So. 3d at 288.

301. *Id.* (citing *Seasons P’ship I v. Kraus–Anderson, Inc.*, 700 So. 2d 60, 61 (Fla. 2d Dist. Ct. App. 1997)).

302. *LPP Mortg. Ltd. v. Tucker*, 48 So. 3d 115, 116 (Fla. 3d Dist. Ct. App. 2010) (*per curiam*), *review denied*, 60 So. 3d 1055 (Fla. 2011).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 116–17.

foreclosure action.”³⁰⁷ Under section 2415 of the *United States Code*³⁰⁸ and *United States v. Thornburg*,³⁰⁹ the federal government has an unlimited time to foreclose on mortgaged property.³¹⁰ Assignee stepped into the shoes of the federal government with respect to unlimited time to foreclose.³¹¹

XI. TAXES

In *Boca Airport, Inc. v. Florida Department of Revenue*,³¹² Boca Airport, Inc., Galaxy Aviation, Inc., and Aviation Center, Inc. (Companies) were fixed base operators (FBOs).³¹³ They “lease[d] government-owned airport properties” and “provide[d] goods and services to the general aviation public.”³¹⁴ “In 2008, the [Florida] Department of Revenue issued notices of its intent to [levy] intangible personal property taxes on the leasehold interest [of each company].”³¹⁵ Companies claimed “exempt[ion] from [the] intangible . . . tax under sections 196.199(2)(a) and 196.012(6) [of the] *Florida Statutes*.”³¹⁶ The Fourth District Court of Appeal acknowledged that Companies, as FBOs, were exempt from ad valorem taxation under those sections, but Companies were not exempt from intangible taxation under section 199.023(1)(d) of the *Florida Statutes*.³¹⁷

XII. TORTS

A. Defamation

NITV, LLC and Mr. Baker were competitors in the voice stress analysis business whereby they distributed the software and provided training to law enforcement agencies on the use of these programs.³¹⁸ In 2005, “NITV prepared two documents entitled ‘Law Enforcement Alert’ and ‘Law Enforce-

307. *Tucker*, 48 So. 3d. at 116 (citations omitted).

308. 28 U.S.C. § 2415 (2006).

309. 82 F.3d 886 (9th Cir. 1996).

310. *Tucker*, 48 So. 3d at 117; *Thornburg*, 82 F.3d at 894; 28 U.S.C. § 2415(c).

311. *Tucker*, 48 So. 3d at 117.

312. 56 So. 3d 140 (Fla. 4th Dist. Ct. App. 2011).

313. *Id.* at 140–41.

314. *Id.* at 141.

315. *Id.* The years involved were 1998 through 2007 for one company, 1994 through 2007 for another, and 1985 through 2007 for another. *Id.*

316. *Boca Airport, Inc.*, 56 So. 3d at 142; see FLA. STAT. §§ 196.199(2)(a), 196.012(6) (2011).

317. *Boca Airport, Inc.*, 56 So. 3d at 144; see FLA. STAT. § 199.023(1)(d) (2005) (repealed 2006).

318. *NITV, L.L.C. v. Baker*, 61 So. 3d 1249, 1250–51 (Fla. 4th Dist. Ct. App. 2011).

ment Scam Alert.”³¹⁹ These documents were published to more than 300 law enforcement agencies in Illinois “and as many as 8500 other departments” in the United States.³²⁰ Mr. Baker sued NITV, LLC alleging defamation, and the jury returned a verdict in his favor in the amount of \$575,000, consisting of \$225,000 for “loss of ability to earn money in the past,” \$100,000 for “loss of ability to earn money in the future,” and \$250,000 for damage to reputation.³²¹ The Fourth District Court of Appeal affirmed in part and reversed in part.³²² Mr. Baker did not submit competent substantial evidence to support the jury’s verdict with respect to damages for past and future loss of ability to earn money, and the appellate court found that Mr. Baker’s testimony was “vague and ill defined.”³²³ In addition, in 2006, his business income increased substantially.³²⁴ The appellate court vacated the judgment as to \$325,000 in damages.³²⁵ However, the \$250,000 award for damage to reputation was not disturbed.³²⁶ “Words which are actionable in themselves, or per se, necessarily import general damages and need not be pleaded or proved but are conclusively presumed to result.”³²⁷

B. Suit by Former Employee Against Supervisor for Tortious Interference with Business Relationship

After her employment was terminated, a former employee (Employee) sued her former supervisor (Supervisor) “for tortious interference with an advantageous business relationship.”³²⁸ Employee alleged that Supervisor’s “hostile statements and . . . hostile acts” directed against Employee led to her job termination.³²⁹ Supervisor’s motion to dismiss on the ground that she and Employee were co-employees of the business was granted.³³⁰ Employee appealed.³³¹ The Third District Court of Appeal noted that it was necessary for Employee to allege: 1) “a relationship between [Employee] and her em-

319. *Id.* at 1251.

320. *Id.*

321. *Id.* at 1250.

322. *Id.*

323. *NITV, L.L.C.*, 61 So. 3d at 1253.

324. *Id.*

325. *Id.* at 1254.

326. *Id.*

327. *Id.* (quoting *Bobenhausen v. Cassat Ave. Mobile Homes, Inc.*, 344 So. 2d 279, 281 (Fla. 1st Dist. Ct. App. 1977)).

328. *Alexis v. Ventura*, 66 So. 3d 986, 987 (Fla. 3d Dist. Ct. App. 2011).

329. *Id.*

330. *Id.*

331. *Id.*

ployer, under which [she] ha[d] legal rights;" 2) that Supervisor had "knowledge of the relationship;" 3) "intentional and unjustified interference with that relationship;" 4) "[b]y a third party;" and 5) that Employee suffered damages that were "caused by the [Supervisor's] interference."³³² The appellate court said the appeal turned on whether Supervisor was a "third party" under the circumstances.³³³ The appellate court also said the general rule is that an employee's action against a supervisor/co-employee for tortious interference will not lie because the supervisor/co-employee is not considered a third party but rather "is considered a party to the employment relationship."³³⁴ However, there is an exception, and the third party requirement is satisfied if it is alleged that the supervisor/co-employee "was not acting on the employer's behalf or was acting to its detriment."³³⁵ The court explained that "an allegation" of "malicious motivation" does not automatically mean that the co-employee is acting beyond the scope of employment.³³⁶ "However, the privileged interference enjoyed by a party . . . to [a] business relationship is not absolute. The privilege is divested when [a party to the relationship] 'acts solely with ulterior purposes and . . . not in the principal's best interest.'"³³⁷ In this case, "the allegation that [Supervisor] acted with the *sole ulterior purpose*" of causing Employee's job to be terminated—thus not acting on the employer's behalf—kept Employee's complaint from being dismissed.³³⁸

C. *Negligent Misrepresentation v. Fraudulent Misrepresentation*

Specialty Marine & Industrial Supplies (Purchaser) was considering entering into a contract with Venus (Seller) and others to purchase certain real estate.³³⁹ Purchaser learned of a boundary dispute concerning the property, but when questioned, Seller assured Purchaser that the boundary issue "was 'not a big deal' and that there was a survey [to] support[] [Seller's] position."³⁴⁰ The contract was signed, and Purchaser hired a surveyor who con-

332. *Id.*

333. *Alexis*, 66 So. 3d at 987.

334. *Id.* at 988 (quoting *Rudnick v. Sears, Roebuck & Co.*, 358 F. Supp. 2d 1201, 1206 (S.D. Fla. 2005)).

335. *Id.*

336. *Id.*

337. *Id.* at 988 (quoting *O.E. Smith's Sons, Inc. v. George*, 545 So. 2d 298, 299 (Fla. 1st Dist. Ct. App. 1989)).

338. *Alexis*, 66 So. 3d at 988.

339. *Specialty Marine & Indus. Supplies, Inc. v. Venus*, 66 So. 3d 306, 308 (Fla. 1st Dist. Ct. App. 2011).

340. *Id.*

firmed Seller's statement about the property's boundary.³⁴¹ The deal closed for \$450,000, but it turned out that the property boundary was in fact not as represented and the actual boundary made the property unsuitable for use by Purchaser for the purpose intended.³⁴² Purchaser sued Seller for damages, alleging among other things, that Seller was liable for its negligent misrepresentation of the property boundary.³⁴³ The jury, on a comparative negligence basis, found that Seller was the cause of ninety percent of Purchaser's damages and awarded Purchaser \$360,000, that is, the cause of ninety percent of the \$400,000 claimed damages.³⁴⁴ The trial court ruled for Seller on its motion for judgment notwithstanding the jury verdict.³⁴⁵ Purchaser appealed, Seller cross-appealed,³⁴⁶ and the First District Court of Appeal reversed in part, reinstating the jury verdict in favor of Purchaser and ruling that Purchaser was entitled to an award of prejudgment interest.³⁴⁷ The First District Court of Appeal discussed the differences between negligent misrepresentation alleged by Purchaser and fraudulent misrepresentation.³⁴⁸ With respect to negligent misrepresentation, a plaintiff must allege that:

“1) the defendant made a misrepresentation of material fact that he believed to be true but which was in fact false; 2) the defendant was negligent in making the statement because he should have known the representation was false; 3) the defendant intended to induce the plaintiff to rely and [sic] on the misrepresentation; and 4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation.”³⁴⁹

On the other hand, a fraudulent misrepresentation claim will be sustained only if the plaintiff can show: “1) a false statement concerning a material

341. *Id.*

342. *Id.*

343. *Id.* Purchaser also sued the surveyor for negligence and that claim was settled before trial. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 308.

344. *Id.* at 308, 311.

345. *Id.* at 309.

346. *Id.* at 307. There was an award to Purchaser on another ground, a ground not raised by Purchaser. *Id.* at 309. The trial court awarded Purchaser damages of \$35,000 for breach of warranty, but when Purchaser asked for prejudgment interest on this award, the trial court said no. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 309. The cross-appeal of the breach of warranty holding was apparently one of “[t]he remaining issues raised on appeal and cross-appeal [that was] rendered moot by [the court’s] reversal of the judgment under review.” *See id.* at 312.

347. *See id.* at 309–10.

348. *Id.* at 309.

349. *Id.* (quoting *Simon v. Celebration Co.*, 883 So. 2d 826, 832 (Fla. 5th Dist. Ct. App. 2004)).

fact; 2) the representor's [sic] knowledge that the representation is false; 3) an intention that the representation induce another to act on it; and 4) consequent injury by the party acting in reliance on the representation."³⁵⁰ An important difference between negligent misrepresentation and fraudulent misrepresentation is that the former requires proof of *justifiable* reliance while the latter does not.³⁵¹ The trial court found that Purchaser did not justifiably rely on Seller's reliance, thus improperly usurping the jury findings and verdict to the contrary, which were sustained by competent substantial evidence.³⁵² Even though the surveyor was also at fault, "there [was] no requirement that [Purchaser's] reliance on [Seller's] misrepresentations be the sole or even the predominant cause of [Purchaser's] decision to purchase the property" as long as the "reliance [was] a substantial factor in determining the course of conduct that result[ed] in [Purchaser's] loss."³⁵³ Comparative negligence applies to claims of negligent misrepresentation, and the element of justifiable reliance does not, under Florida law, fail as a matter of law, just because, as argued by Seller, Purchaser undertakes an investigation.³⁵⁴

D. *Waiver of Liability and Indemnification for Claim of Minor Child*

A mother (Mother) took her thirteen-year-old daughter (Daughter), to a boutique (Defendant) to have Daughter's ears pierced.³⁵⁵ As part of the procedure, Mother signed "a release from liability" on behalf of herself and her minor Daughter and agreed to indemnify Defendant and its employees from liability for "negligent acts or omissions."³⁵⁶ After the procedure, Daughter developed an infection in one ear that "required hospitalization and extensive medical treatment" and resulted in permanent damage.³⁵⁷ Mother, as parent and natural guardian of her child, sued Defendant for negligence resulting in a jury verdict and judgment amount of \$69,740.³⁵⁸ Defendant, nevertheless, then obtained a judgment from the trial court against Mother individually,

350. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 310 (emphasis omitted) (quoting *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (per curiam)); *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985).

351. *Specialty Marine & Indus. Supplies, Inc.*, 66 So. 3d at 310.

352. *Id.* at 310–11.

353. *Id.* at 311 (quoting *Stev-Mar, Inc. v. Matvejs*, 678 So. 2d 834, 838 (Fla. 3d Dist. Ct. App. 1996)).

354. *Id.* at 310–11.

355. *Claire's Boutiques, Inc. v. Locastro*, 36 Fla. L. Weekly D1001, D1001 (4th Dist. Ct. App. May 11, 2011).

356. *Id.*

357. *Id.*

358. *Id.*

“but not in her capacity as [Daughter’s] mother,” that was based on the release of liability/indemnity agreement for more than \$200,000, which included Defendant’s attorney fees and the judgment against it.³⁵⁹ The Fourth District Court of Appeal upheld the judgment against Defendant for negligence, but reversed the judgment against Mother on the indemnification claim.³⁶⁰ The appellate court, based on the rationale of *Kirton v. Fields*,³⁶¹ ruled the release of liability/indemnification agreement to be in violation of public policy.³⁶² In *Kirton*, the Supreme Court of Florida determined that public policy prevented the enforcement of a pre-injury release executed by a minor’s parents on behalf of the minor, for a tort arising from the minor’s injuries suffered while participating in a commercial activity.³⁶³ The court found that there was even more reason in this case to cite public policy concerns³⁶⁴ and quoted *Johnson ex rel. Estate of Gillespie v. New River Scenic Whitewater Tours, Inc.*:³⁶⁵ “[A]llowing a parent to indemnify a third party for its tortious conduct towards the parent’s minor child would result in a serious affront to the doctrine of parental immunity.”³⁶⁶ The Fourth District Court of Appeal held that indemnification agreements by a guardian create a conflict between parent and child.³⁶⁷ Quoting the Court of Appeals of New York in *Valdimer ex rel. Valdimer v. Mount Vernon Hebrew Camps, Inc.*,³⁶⁸ the Fourth District Court of Appeal said “[c]learly, a parent who has placed himself in the position of indemnitor will be a dubious champion of his infant child’s rights.”³⁶⁹ Judge Levine concurred as to the affirmation on the negligence award, but dissented on the indemnification issue.³⁷⁰

359. *Id.*

360. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1003.

361. 997 So. 2d 349 (Fla. 2008).

362. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002–03 (citing *Kirton v. Fields*, 997 So. 2d 349, 357–58 (Fla. 2008)).

363. *Kirton*, 997 So. 2d at 358.

364. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002–03.

365. 313 F. Supp. 2d 621 (S.D. W. Va. 2004).

366. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1002 (alteration in original) (quoting *Johnson ex rel. Estate of Gillespie*, 313 F. Supp. 2d at 632).

367. *See id.* at D1003 (citing *Childress ex rel. Childress v. Madison Cnty.*, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989)).

368. 172 N.E.2d 283 (N.Y. 1961).

369. *Claire’s Boutiques, Inc.*, 36 Fla. L. Weekly at D1003 (quoting *Valdimer ex rel. Valdimer*, 172 N.E.2d at 285).

370. *Id.* (Levine, J., concurring in part and dissenting in part).

E. *Respondeat Superior*

Mr. Graf (Employee) worked as a driver for a limousine service (Employer).³⁷¹ On the date in question, Employee drove his car to work, parked it on a ramp outside the business office while he went inside to turn in his paperwork for the day, but left his keys in the ignition.³⁷² A thief stole Employee's car, and while driving the car, injured Mr. Allan (Plaintiff) in an auto accident.³⁷³ Plaintiff sued Employee for negligence and also sued Employer under the theory of respondeat superior.³⁷⁴ Employer prevailed on a motion for summary judgment.³⁷⁵ The Fourth District Court of Appeal affirmed.³⁷⁶ The appellate court held that Employer could not be held vicariously liable for Employee's negligence in leaving keys in the ignition of his own car.³⁷⁷ Although the car owner, that is Employee, could be held responsible, the court refused to extend the law to cover the owner's employer.³⁷⁸

XIII. UNIFORM COMMERCIAL CODE AND DEBTOR/CREDITOR RIGHTS

A. *Prejudgment Writ of Replevin*

*PNCEF, LLC v. South Aviation, Inc.*³⁷⁹ is a prejudgment writ of replevin case under section 78.055 of the *Florida Statutes*.³⁸⁰ The underlying action was brought by PNCEF, LLC (Lender) against the borrowers (Borrowers) in Illinois to recover a certain aircraft.³⁸¹ Borrowers responded by alleging that the aircraft had been leased to a Florida lessee (Lessee), and the aircraft was located in Broward County.³⁸² In addition, Borrowers alleged that "[L]essee [had] filed liens against the aircraft and [was] refus[ing] to return the aircraft because of the liens."³⁸³ Lender then sued Lessee in Broward County for replevin seeking a prejudgment writ of replevin.³⁸⁴ Lessee raised several

371. *Allan v. Graf*, 43 So. 3d 151, 152 (Fla. 4th Dist. Ct. App. 2010).

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Allan*, 43 So. 3d at 152.

377. *Id.*

378. *Id.* at 153.

379. 60 So. 3d 1120 (Fla. 4th Dist. Ct. App. 2011).

380. *Id.* at 1121; FLA. STAT. § 78.055 (2011).

381. *PNCEF, L.L.C.*, 60 So. 3d at 1121.

382. *Id.*

383. *Id.*

384. *Id.* The verified complaint contained allegations of conversion and sought injunctive relief. *Id.*

defenses, including lack of jurisdiction over three of the aircrafts because of their absence from Broward County during all or part of the day that Lender filed its verified complaint, and that since Illinois had already asserted its jurisdiction over the aircraft, it was improper for the Florida court to also exercise jurisdiction over the planes.³⁸⁵ The Fourth District Court of Appeal held that none of these alleged jurisdictional issues would constitute an impediment to the issuance of a writ of replevin as long as the court had in personam jurisdiction over the possessor or person entitled to possession of the item to be replevied, that is, Lessee.³⁸⁶ Having in personam jurisdiction gave the court the authority to order the possessor to return the item to Florida.³⁸⁷ However, the appellate court noted that the lower court could not issue further orders that act directly on the aircraft until its physical location in Florida was confirmed.³⁸⁸

B. *Sale of Collateral*

*Southern Developers & Earthmoving, Inc. v. Caterpillar Financial Services Corp.*³⁸⁹ addresses the necessity and methods of proving the “commercial reasonableness” of the sale of collateral by the lender in order to obtain a deficiency judgment against the defaulting debtor on the debtor’s promissory note under section 679.610(2) of the *Florida Statutes*.³⁹⁰ If the debtor raises the issue of commercial reasonableness, then the secured party must show “that every aspect of [the] disposition was commercially reasonable.”³⁹¹ If the debtor can prove that the “sale of [its] collateral [was] commercially unreasonable, a presumption arises that ‘the fair market value of the collateral at the time of repossession was equal to the [full] amount of the . . . debt.’”³⁹²

C. *Possessory Lien*

The next case deals with a possessory lien under section 713.58 of the *Florida Statutes*.³⁹³ Commercial Jet, Inc. (Commercial) made repairs and did

385. *PNCEF, L.L.C.*, 60 So. 3d at 1122.

386. *Id.* at 1125.

387. *Id.*

388. *Id.*

389. 56 So. 3d 56 (Fla. 2d Dist. Ct. App. 2011).

390. *Id.* at 60; FLA. STAT. § 679.610(2) (2011).

391. *S. Developers & Earthmoving, Inc.*, 56 So. 3d at 60 (citing *Weiner v. Am. Petrofina Mktg., Inc.*, 482 So. 2d 1362, 1364–65 (Fla. 1986)).

392. *Id.* at 61 (quoting *Weiner*, 482 So. 2d at 1365).

393. *Commercial Jet, Inc. v. U.S. Bank, N.A.*, 45 So. 3d 887, 887 (Fla. 3d Dist. Ct. App. 2010), *review granted*, 61 So. 3d 410 (Fla. 2011); FLA. STAT. § 713.58(3) (2011).

maintenance work on a jet owned by U.S. Bank, N.A. (Owner) and operated by Silver Jet.³⁹⁴ However, before Commercial had been paid the balance claimed to be due,³⁹⁵ Commercial returned the airplane to Silver Jet.³⁹⁶ Commercial recorded a claim of lien—under both section 713.58 and section 329.51 of the *Florida Statutes*—and brought suit to foreclose its purported lien.³⁹⁷ Owner moved for summary judgment on the grounds that Commercial did not have possession of the plane when it filed its claim of lien.³⁹⁸ Owner successfully argued that the claim to a section 713.58 lien was lost when possession was given up.³⁹⁹ Commercial contended that section 329.51 amended section 713.58 and that a valid lien could “be created simply by recording a claim of lien within ninety days” after the services are provided.⁴⁰⁰ The Third District Court of Appeal rejected Commercial’s argument and concluded that section 329.51 was only “a notice statute” and “[did] not create any new lien rights.”⁴⁰¹ Judge Schwartz dissented, concluding that section 329.51, which deals with repairs to aircraft, was more than a notice statute.⁴⁰²

D. *Right of Set-Off*

*BankAtlantic v. Estate of Glatzer*⁴⁰³ presented an unusual issue. Dr. Glatzer’s 100% owned professional association (Borrower) owed BankAtlantic (Bank) money as evidenced by a promissory note and mortgage.⁴⁰⁴ Dr. Glatzer (Decedent) guaranteed the debt.⁴⁰⁵ In addition to the note, mortgage, and Decedent’s personal guarantee, the promissory note contained “a right of setoff” that allowed Bank to collect its debt by taking funds from—and even freezing—any accounts that Borrower maintained at Bank.⁴⁰⁶ Decedent died, and his death was “an event of default under [the] note.”⁴⁰⁷ Borrower’s account at Bank apparently was not frozen by Bank at the time of, or after De-

394. *Commercial Jet, Inc.*, 45 So. 3d at 887–88.

395. *See id.* at 887. The opinion does not indicate if Owner or Silver Jet contested that there were monies due, or the amount thereof. *Id.* at 887–88.

396. *Id.* at 887.

397. *Id.*; FLA. STAT. § 713.58(3); *Id.* § 329.51(2009).

398. *Commercial Jet, Inc.*, 45 So. 3d at 888.

399. *Id.*; § 713.58(3) (2011).

400. *Commercial Jet, Inc.*, 45 So. 3d at 888.

401. *Id.* (construing FLA. STAT. § 329.51 (2009)).

402. *See id.* at 889 (Schwartz, J., dissenting) (construing FLA. STAT. § 329.51).

403. 61 So. 3d 1222 (Fla. 3d Dist. Ct. App. 2011).

404. *Id.* at 1222.

405. *Id.* at 1223.

406. *Id.* at 1222–23.

407. *Id.* at 1223.

cedent's death, and the personal representative of Decedent's estate obtained probate court orders allowing the transfer by the personal representative of funds in Borrower's accounts to an estate depository account.⁴⁰⁸ Bank appealed, and the Third District Court of Appeal reversed and remanded.⁴⁰⁹ Bank's "possessory and contractual rights to set-off [were] impaired" when funds were transferred to the estate depository account at another bank.⁴¹⁰ Decedent's stock was an estate asset, but Borrower's bank accounts, being assets of the corporate Borrower, were "a step removed from the Estate."⁴¹¹ The Third District Court of Appeal concluded that the estate "essentially ignored the separate corporate existence of the professional association and that entity's obligations to its own creditors."⁴¹²

E. *Re-recording of Judgment (Debtor-Creditor)*

The holding in *Sun Glow Construction, Inc. v. Cypress Recovery Corp.*⁴¹³ is straightforward and to the point. The Fifth District Court of Appeal held "that the re-recording of a certified copy of a judgment after the expiration of the original judgment lien imposes a new lien on real property held by the judgment debtor" even though "[t]he statute is silent" on the issue.⁴¹⁴ The holding applies when the judgment creditor fails to affect an extension of the judgment lien under section 55.10(1) of the *Florida Statutes* prior to the expiration of the lien.⁴¹⁵ The Fifth District Court of Appeal quoted the Fourth District Court of Appeal's decision in *Franklin Financial, Inc. v. White*,⁴¹⁶ saying "[l]ike a child that wanders out of a queue, the newly rerecorded judgment lien has lost its place and must go to the back and stand behind all previously recorded judgment liens."⁴¹⁷

F. *Garnishment*

Caproc Third Avenue, LLC (Judgment Creditor) obtained a writ of garnishment against Donisi Insurance's (Judgment Debtor's) account with Bank

408. See *Estate of Glatzer*, 61 So. 3d at 1222–23.

409. *Id.* at 1223.

410. *Id.*

411. *Id.*

412. *Id.*

413. 47 So. 3d 371 (Fla. 5th Dist. Ct. App. 2010).

414. *Id.* at 372–74.

415. FLA. STAT. § 55.10(1) (2011); *Sun Glow Constr., Inc.*, 47 So. 3d at 372, 374.

416. 932 So. 2d 434 (Fla. 4th Dist. Ct. App. 2006).

417. *Sun Glow Constr., Inc.*, 47 So. 3d at 373 (quoting *Franklin Fin., Inc.*, 932 So. 2d at 437).

of America.⁴¹⁸ Judgment Debtor moved to have the writ dissolved and filed an affidavit claiming the “wages exception” exemption under section 222.12 of the *Florida Statutes* from garnishment.⁴¹⁹ Judgment Creditor’s attorney filed an affidavit in the proceedings contesting Judgment Debtor’s claimed wages exemption.⁴²⁰ The trial court dissolved the writ finding the attorney’s affidavit insufficient.⁴²¹ Judgment Creditor appealed, and the Fourth District Court of Appeal affirmed.⁴²² Section 222.12 of the *Florida Statutes* requires that the affidavit in opposition be made “by the party who sued out the process.”⁴²³ An affidavit by the attorney for that party does not qualify.⁴²⁴

On the other hand, in the next case—which came before the Second District Court of Appeal on a motion for summary judgment and which the appellate court reversed, finding that there was a genuine issue of material fact unresolved—the issue was how much the garnishee, Cortez Community Bank, owed the garnishor pursuant to four writs of garnishment served on the bank on October 2, 2008.⁴²⁵ On the same date, the bank filed responses to the writ in letter form, and the letters were signed by the bank’s senior vice president and chief operating officer.⁴²⁶ It was not until more than four months later, on February 12, 2009, that the bank’s counsel filed answers to the writs.⁴²⁷ Section 77.06(1) of the *Florida Statutes* states that “[s]ervice of the writ shall make garnishee liable for all debts due by him or her to defendant . . . at the time of the service of the writ or at any time between the service and the time of the garnishee’s answer.”⁴²⁸ The writ response letters filed by the bank’s senior vice president and chief operating officer were ignored because a corporation cannot represent itself *pro se*.⁴²⁹ Therefore, the amount owed by the garnishee bank was calculated with liability to the date the bank’s counsel filed answers—February 12, 2009.⁴³⁰

418. *Caproc Third Ave., L.L.C. v. Donisi Ins., Inc.*, 67 So. 3d 312, 312(4th Dist. Ct. App. 2011).

419. *Id.*; see FLA. STAT. § 222.12.

420. *Caproc Third Ave., L.L.C.*, 67 So. 3d at 313.

421. *Id.*

422. *Id.* at 315.

423. *Id.* (quoting FLA. STAT. § 222.12).

424. *Id.*

425. *Cortez Cmty. Bank v. Cobb*, 56 So. 3d 80, 81(Fla. 2d Dist. Ct. App. 2011).

426. *Id.*

427. *Id.*

428. FLA. STAT. § 77.06(1).

429. *Cobb*, 56 So. 3d at 81 (citing *Nicholson Supply Co. v. First Fed. Sav. & Loan Ass’n of Hardee Cnty.*, 184 So. 2d 438, 440 (Fla. 2d Dist. Ct. App. 1966)).

430. *Id.*

In another garnishment case, *Baker v. Storfer*,⁴³¹ the issue was whether or not commissions paid by an employer to “a commissioned employee” constituted “salary or wages” for purposes of the garnishment statute—section 77.0305 of the *Florida Statutes*.⁴³² The Fourth District Court of Appeal ruled “that commissions are ‘wages,’ for purposes of section 77.0305.”⁴³³

XIV. CONCLUSION

Hundreds of Florida appellate opinions issued in the past year might be said to affect the conduct of business by Florida business owners. Of course, this survey deals only with some of those cases. It is not surprising, however, that after several years of difficult economic times, there was a plethora of breach of contract, mortgage foreclosure, and other debtor creditor decisions rendered by Florida’s appellate courts in the past year. Therefore, a greater number of such decisions were included in this year’s survey than in prior years. That, however, should not detract from the other significant appellate decisions in the past year that continued to clarify and refine Florida law in many areas affecting business owners, as reflected in this year’s survey. One particularly important area in which there were substantial developments over the prior few years, as well as in the past year, involves the enforceability of releases signed by parents on behalf of their minor children. Another involves the question of when a Florida court may properly exercise personal jurisdiction over a nonresident whose contacts with Florida are, in whole or in part, through the Internet. While important guidance has been provided in both of these areas, numerous questions remain, and undoubtedly additional guidance will be forthcoming.

431. 51 So. 3d 652 (Fla. 4th Dist. Ct. App. 2011) (per curiam).

432. *Id.* at 652; see FLA. STAT. § 77.0305.

433. *Baker*, 51 So. 3d at 653; see FLA. STAT. § 77.0305.

ACT DEUX: CONFIDENTIALITY AFTER THE FLORIDA MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT

FRAN L. TETUNIC*

I.	INTRODUCTION.....	79
II.	THE MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT.....	81
	A. <i>Scope</i>	81
	B. <i>Parameters of Confidentiality</i>	82
	C. <i>Exceptions to Confidentiality</i>	83
	D. <i>Civil Remedies</i>	84
III.	MEDIATION CASE LAW.....	85
	A. <i>Settled Confidentiality Issues</i>	85
	1. Agreements Must Be in Writing with Required Signatures.....	85
	2. Courts Enforce Established Mediated Agreements as Written.....	87
	3. Courts Overturn or Reform Agreements for Recognized Bases.....	89
	4. Judicial Sanctions for Breach of Confidentiality.....	91
	B. <i>Developing Confidentiality Case Law</i>	92
	1. Mediator Misconduct.....	92
	2. Mutual Mistake.....	95
IV.	CONFIDENTIALITY CONUNDRUMS AFTER THE ACT.....	99
	A. <i>Identifying Mediation Communications</i>	99
	B. <i>Discovery and Admissibility</i>	104
	C. <i>Appearance with Authority to Settle</i>	109
V.	CONCLUSION.....	112

I. INTRODUCTION

Confidentiality is the bedrock of mediation, the firm foundation that supports and sustains the mediation process.¹ “One of the fundamental

* Professor of Law and Director of the Alternative Dispute Resolution Clinic, Shepard Broad Law Center, Nova Southeastern University. Past Chair, Mediator Ethics Advisory Committee, Florida Supreme Court. Member, Committee on Alternative Dispute Resolution Rules and Policy, Florida Supreme Court. B.A., Magna Cum Laude, Hunter College; J.D., Magna Cum Laude, Nova Southeastern University Law Center. The author gratefully thanks Susan Dubow, Kimberly Kosch, Professor Michael Richmond, and Chris Shulman for their kind insightful attention to the manuscript, and Evan Fish, Anupum Grewal, Kendra Stephen, and Kate Vazzana for their research assistance.

axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process.”² “[T]he challenge of communicating with an adversary, the presence of a neutral intermediary, and the potential for information informally reaching a judge all make confidentiality especially important for mediation.”³ The security and predictability of statutory mediation confidentiality and privilege are critical to the efficacy of the mediation process.

Florida has had a statutory mediation privilege for court-ordered mediation since 1987.⁴ In 2004, the Mediation Confidentiality and Privilege Act (the Act) came into effect, broadening the scope of mediation confidentiality, clarifying the privilege, defining covered mediation communications, delineating exceptions, and providing statutory sanctions for breaching the Act.⁵ Additionally, the Act serves to codify the significant body of mediation case law, and provides clearly stated law to guide judges, attorneys, mediators, parties, and mediation participants.⁶

This article will summarize the Act and highlight areas in which case law has been established, as well as areas of emerging case law. It will also identify and discuss current confidentiality conundrums. The term confidentiality will generally be used to reference both confidentiality and privilege, unless privilege is specifically addressed. The exceptions delineated in the Act apply to both mediation confidentiality and privilege.⁷

The author dedicates this article to the Florida Dispute Resolution Center, and thanks its dedicated professionals for their steadfast vision and leadership. The Dispute Resolution Center along with the Alternative Dispute Resolution Policy and Rules Committee, Mediator Ethics Advisory Committee, Mediator Qualifications Board, and Mediation Training Review Board have led Florida’s court-connected alternative dispute resolution programs to a place of well-deserved prominence.

1. Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001).

2. *Id.*

3. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 83–84 (2001) [hereinafter Deason, *The Quest for Uniformity in Mediation Confidentiality*].

4. Act effective Jan. 1, 1988, ch. 87–173, § 2, 1987 Fla. Laws 1202, 1202 (codified at FLA. STAT. §§ 44.301–.306 (1988)).

5. See FLA. STAT. §§ 44.401–.406 (2011).

6. See *id.*

7. FLA. STAT. § 44.405(1)–(4)(a). While the distinction between mediation confidentiality and privilege is often blurred, it is significant. All things confidential are not privileged. See *id.* Privilege prevents testimony of mediation communications at subsequent legal proceedings. *Id.* § 44.405(2). Confidentiality is far broader. See *id.* § 44.405(1). “A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” *Id.*

II. THE MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT

The statutory definition of mediation remains unchanged since 1990:

“Mediation” means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision-making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem-solving, and exploring settlement alternatives.⁸

The description of mediation privilege, as amended, makes clear the privilege covers testimony at subsequent proceedings, and reads: “A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.”⁹

A. *Scope*

Prior to the enactment of the Act in 2004, only court-ordered mediation cases were confidential by statute.¹⁰ Confidentiality coverage has been greatly expanded to include any mediation: 1) conducted by agreement of the parties under the Act;¹¹ 2) facilitated by a Supreme Court of Florida certified mediator, unless the parties agree otherwise;¹² and 3) “[r]equired by statute, court rule, agency rule or order, oral or written case-specific court order, or

8. Compare FLA. STAT. § 44.1011(2) (1990), with FLA. STAT. § 44.1011(2) (2011). The definition is not found in the Act. See FLA. STAT. §§ 44.401–406 (2011). It is located in *Florida Statutes*, chapter 44, Mediation Alternatives to Judicial Action. *Id.* § 44.1011(2).

9. *Id.* § 44.405(2). The prior statutory definition read: “Each party involved in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding.” FLA. STAT. § 44.102(3) (2003).

10. *Id.*

11. FLA. STAT. § 44.402(1)(b) (2011).

12. *Id.* § 44.402(1)(c).

court administrative order.”¹³ However, the parties may agree in writing that selected provisions of the Act will not apply to their mediation.¹⁴

B. *Parameters of Confidentiality*

The Act provides when mediation begins and ends for confidentiality purposes.¹⁵ Court-ordered mediation begins as soon as the court issues a referral to mediation.¹⁶ In all other mediations to which the Act applies, “the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier.”¹⁷ Mediation confidentiality does not necessarily end when the parties and other participants leave the mediation room. If the law requires court approval of the settlement agreement, the mediation—for confidentiality purposes—is considered to end upon the required court approval.¹⁸ Mediation is also properly determined to end when “the mediator declares an impasse,” or “the mediation is terminated.”¹⁹ Nonetheless, the obligation to maintain confidentiality extends beyond the conclusion of the mediation session.²⁰

All mediation communications are confidential unless they fit within an exception delineated in the Act.²¹ Covered communications must occur during the mediation or before the mediation commences “if made in furtherance of [the] mediation.”²² “‘Mediation communication’ means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant”²³ Significantly, the Act specifically excludes “the commission of a crime during . . . mediation” from the definition of mediation communication.²⁴

The mediation parties hold the “privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.”²⁵ Mediation participants are prohibited from

13. *Id.* § 44.402(1)(a).

14. *Id.* § 44.402(2). “Notwithstanding any other provision, the mediation parties may agree in writing that any or all of . . . s[ection] 44.405(2), or s[ection] 44.406 will not apply to all or part of a mediation proceeding.” *Id.*

15. FLA. STAT. § 44.404(1).

16. *Id.*

17. *Id.* § 44.404(2).

18. *Id.* § 44.404(1)(a).

19. *Id.* § 44.404(1)(b)–(c), (2)(b)–(c).

20. *See* FLA. STAT. §§ 44.404(1)–(2), 405(4)(b).

21. *Id.* § 44.405(1).

22. *Id.* § 44.403(1).

23. *Id.*

24. *Id.*

25. FLA. STAT. § 44.405(2).

disclosing communications to anyone other than participants' counsel or other participants.²⁶ In addition to and consistent with the Act, the Florida ethical rules for certified and court-appointed mediators provide, "[a] mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties."²⁷

C. *Exceptions to Confidentiality*

The mediation parties, the only mediation participants who hold the statutory privilege, may waive their privilege.²⁸ By statute, signed mediated agreements are not confidential, unless the parties otherwise agree.²⁹ Significantly and specifically excluded from confidentiality is a mediation communication "[t]hat is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."³⁰

As with any person within Florida, all mediation participants are required to make mandatory reports of abuse and neglect of children and vulnerable adults pursuant to chapter 39 or 415 respectively.³¹ The mandatory reports are solely for the purpose of providing information to the entity that requires the report.³² Reporting abuse and neglect of children and vulnerable adults is the Act's only mandatory reporting requirement.³³ All other exceptions to confidentiality are permissive.³⁴

If professional malpractice or professional misconduct occurs during the mediation, the communication may be "[o]ffered to report, prove, or disprove" the misconduct or malpractice "solely for the purpose of the . . . malpractice [or grievance] proceeding."³⁵ Additionally, parties retain access to the court to seek relief in terms of voiding or reforming a mediated agree-

26. *Id.* § 44.405(1).

27. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.360(a). The Mediator Ethics Advisory Committee advises that when mediators are subpoenaed, they should "file a motion for a protective order or notify the judge" that they are statutorily obligated to "maintain the confidentiality of mediation." Mediator Qualifications Advisory Panel, Advisory Op. 99-012 (2000) (citing Mediator Qualifications Advisory Panel, Advisory Op. 96-005 (1997)).

28. FLA. STAT. § 44.405(4)(a)(1). Unlike the Uniform Mediation Act, mediators do not hold the privilege. *See id.* § 44.405(2); UNIF. MEDIATION ACT § 4(b)(2) (2001) (providing a mediator has a privilege regarding mediation communications made by the mediator).

29. FLA. STAT. § 44.405(4)(a).

30. *Id.* § 44.405(4)(a)(2).

31. *See id.* §§ 39.201(1)(a), 44.405(4)(a)(3), 415.1034(1)(a).

32. *Id.* § 44.405(4)(a)(3).

33. *See id.*

34. FLA. STAT. § 44.405(4)(a)(1)-(2), (4)-(6).

35. *Id.* § 44.405(4)(a)(4), (6).

ment.³⁶ Communications may be “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.”³⁷ Should a party disclose a privileged mediation communication, the party would be deemed to have waived the privilege to allow the other party to respond.³⁸

The Act clarifies the interplay of mediation communications with discovery and admissibility.³⁹ Information disclosed during mediation does not become protected from discovery or inadmissible in court if it is otherwise subject to discovery or admissible.⁴⁰

Additionally, information disclosed pursuant to confidentiality exceptions “remains confidential and is not [otherwise] discoverable or admissible for . . . other purpose[s], unless otherwise permitted by th[e]” Act.⁴¹

D. *Civil Remedies*

A mediation participant may be subject to remedies if the participant “knowingly and willfully discloses a mediation communication in violation of [the Act].”⁴² Remedies include compensatory damages, equitable relief, fees for attorneys and mediators, as well as “costs incurred in the mediation proceeding” and in applying for remedies.⁴³ Application for relief must begin within two years after the date “the party had a reasonable opportunity to discover the [confidentiality breach].”⁴⁴ The application may not be commenced “more than four years after the date of the breach” of confidentiality.⁴⁵ In addition to statutory sanctions, if the mediation is ordered by the court, participants are subject to court sanctions, including fees for attorneys and mediators and costs.⁴⁶

36. *Id.* § 44.405(4)(a)(5).

37. *Id.*

38. *Id.* § 44.405(6).

39. FLA. STAT. § 44.405(5).

40. *Id.*

41. *Id.* § 44.405(4)(b).

42. *Id.* § 44.406(1).

43. *Id.* § 44.406(1)(a)–(d).

44. FLA. STAT. § 44.406(2).

45. *Id.*

46. *Id.* § 44.405(1).

III. MEDIATION CASE LAW

A. Settled Confidentiality Issues

Despite an umbrella of mediation confidentiality and privilege, parties seek court intervention to enforce, interpret, reform, and overturn mediated agreements. Florida has almost two decades of mediation case law, much of which is clearly established.⁴⁷

1. Agreements Must Be in Writing with Required Signatures

A series of cases display parties' attempts to allege that they have mediated agreements that should be enforced by the courts.⁴⁸ By asserting the existence of a mediated agreement, they seek to get information to the court about mediation communications that would otherwise be covered by mediation confidentiality.⁴⁹

The Act provides: "there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise."⁵⁰

Early mediation cases questioned whether courts should admit evidence of the existence of mediated agreements.⁵¹ Dating back to the 1990s, the cases clearly establish that mediated agreements must be in writing.⁵² Courts do not recognize oral agreements purporting to be mediated agreements.⁵³ Nor will the courts hear testimony alleging the existence of oral mediated agreements.⁵⁴ "The confidentiality of the [mediation] negotiations should remain inviolate until a written agreement is executed by the parties."⁵⁵

47. See, e.g., *City of Delray Beach v. Keiser ex rel. Estate of Menachem*, 699 So. 2d 855, 855–56 (Fla. 4th Dist. Ct. App. 1997); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515, 517 (Fla. 3d Dist. Ct. App. 1994) (per curiam); *Cohen v. Cohen*, 609 So. 2d 785, 786 (Fla. 4th Dist. Ct. App. 1992); *Hudson v. Hudson*, 600 So. 2d 7, 9 (Fla. 4th Dist. Ct. App. 1992) (per curiam).

48. See, e.g., *Keiser ex rel. Estate of Menachem*, 699 So. 2d at 855; *Gordon*, 641 So. 2d at 516; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 8.

49. See *Keiser ex rel. Estate of Menachem*, 699 So. 2d at 855; *Gordon*, 641 So. 2d at 516; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 8; see also FLA. STAT. § 44.405(4)(a).

50. FLA. STAT. § 44.405(4)(a).

51. See *Gordon*, 641 So. 2d at 517; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 9.

52. See *Gordon*, 641 So. 2d at 517; *Cohen*, 609 So. 2d at 786; *Hudson*, 600 So. 2d at 9.

53. See, e.g., *Hudson*, 600 So. 2d at 8–9.

54. See, e.g., *id.*

55. *Cohen*, 609 So. 2d at 786 (quoting *Hudson*, 600 So. 2d at 9).

“[T]he reasons for confidentiality are not as compelling” once parties have signed a mediated agreement.⁵⁶

Mediation agreements must also bear the requisite signatures to be recognized by the courts.⁵⁷ Courts consistently have required that parties sign their mediated agreements as directed by the applicable rules of procedure.⁵⁸ In *City of Delray Beach v. Keiser ex rel. Estate of Menachem*,⁵⁹ the court determined there was no mediated agreement to enforce, as neither party had signed the alleged agreement.⁶⁰ The signature of party’s counsel was insufficient to satisfy the signature requirement of Florida Rule of Civil Procedure 1.730.⁶¹ However, in *Jordan v. Adventist Health System/Sunbelt, Inc.*,⁶² the court enforced the mediated agreement signed by the parties, but not their counsel, when the parties had operated under the terms of the agreement.⁶³

Courts continue to decide cases regarding agreements allegedly reached during mediation that are not memorialized in writing and signed by the parties.⁶⁴ In 2008, a defendant in a personal injury lawsuit filed to enforce a settlement agreement allegedly reached during mediation.⁶⁵ “[T]he alleged . . . agreement was [never] reduced to writing and signed by the parties”⁶⁶ Accordingly, the court concluded “that the lack of a written agreement signed by both parties was more than a mere technical deficiency, and that the alleged mediation [agreement] is unenforceable.”⁶⁷ In 2009, a law firm moved for final judgment against a client, attaching a purported mediated agreement.⁶⁸ The trial court erred in granting the attorney’s motion and ordering the client to perform based on the purported agreement that the client never signed.⁶⁹ As in *Gordon v. Royal Caribbean Cruises Ltd.*,⁷⁰ the “attorney’s signature alone . . . is wholly insufficient” to execute a mediated

56. *DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach (DR Lakes I)*, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

57. *City of Delray Beach v. Keiser ex rel. Estate of Menachem*, 699 So. 2d 855, 856 (Fla. 4th Dist. Ct. App. 1997) (citing *Gordon*, 641 So. 2d at 517).

58. *Id.*

59. 699 So. 2d 855 (Fla. 4th Dist. Ct. App. 1997).

60. *Id.* at 856.

61. *Id.* (citing *Gordon*, 641 So. 2d at 517); *see also* FLA. R. CIV. P. 1.730.

62. 656 So. 2d 200 (Fla. 5th Dist. Ct. App. 1995).

63. *Id.* at 201–02.

64. *See, e.g., Mastec, Inc. v. Cue*, 994 So. 2d 494, 495 (Fla. 3d Dist. Ct. App. 2008).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Dean v. Mulhall*, 16 So. 3d 284, 285 (Fla. 4th Dist. Ct. App. 2009).

69. *Id.* at 286.

70. 641 So. 2d 515 (Fla. 3d Dist. Ct. App. 1994) (per curiam).

agreement.⁷¹ “Florida courts consistently have held that a supposed settlement agreement resulting from mediation cannot be enforced absent the signatures of all parties.”⁷²

2. Courts Enforce Established Mediated Agreements as Written

True to contract law, once a mediated agreement is established, courts will enforce it as written.⁷³ Courts are not in the business of rewriting parties’ agreements or relieving them from bad bargains.⁷⁴ Further, “[t]he mediation rules create an environment intended to produce a final settlement of the issues with safeguards against the elements of fraud, overreaching, etc., in the settlement process.”⁷⁵ “The decision to engage in mediation and to settle at mediation means that remedies and options otherwise available through the judicial system are foregone. The finality of it once the parties have set down their agreement in writing is critical.”⁷⁶ To reach such finality, courts routinely enforce the mediated agreements as written by the parties.⁷⁷ Nonetheless, the Act provides an exception to confidentiality to establish or refute recognized grounds for reforming or voiding a mediated agreement.⁷⁸ The mediated agreement would be neither confidential nor privileged, unless the parties specifically decided otherwise.⁷⁹

An agreement in principle reached at mediation is not binding on the parties when one of the express conditions precedent was never met.⁸⁰ “To ignore one term of the agreement, but uphold the others, would be tantamount to the creation of a new contract.”⁸¹ Similarly, a conditional mediated

71. *Dean*, 16 So. 3d at 286 (quoting *Gordon*, 641 So. 2d at 517).

72. *Id.* Rules of Procedure govern who must attend mediation. See FLA. R. JUV. P. 8.290(1)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d). For small claims actions, an attorney who has full authority to settle without consultation may appear on behalf of a party. FLA. R. CIV. P. 1.750(e). A nonlawyer representative, who has the party’s signed authority to appear and has full settlement authority without consultation, may also appear on behalf of a party. *Id.* When an authorized representative appears, the party is not required to appear in person. *Id.*

73. *Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1213–14 (Fla. 3d Dist. Ct. App. 2008).

74. *Id.* at 1214.

75. *Trowbridge v. Trowbridge*, 674 So. 2d 928, 931 (Fla. 4th Dist. Ct. App. 1996).

76. *Sponga v. Warro*, 698 So. 2d 621, 625 (Fla. 5th Dist. Ct. App. 1997).

77. See, e.g., *id.*

78. FLA. STAT. § 44.405(4)(a)(5) (2011).

79. *Id.* § 44.405(4)(a).

80. *Racing Props., L.P. v. Baldwin*, 885 So. 2d 881, 883 (Fla. 3d Dist. Ct. App. 2004).

81. *Id.*

agreement will not be enforced if the condition on which it is based fails to occur.⁸² In a 2011 dissolution of marriage case, the trial court erred in entering a final judgment when it was based on a “void” mediated agreement.⁸³ At mediation, the parties entered into a comprehensive settlement conditioned upon the husband paying the wife \$130,000 from a refinancing described in the agreement.⁸⁴ The agreement further provided that should the husband not pay the wife as described, ““this agreement shall be a nullity and have no force and effect whatsoever.””⁸⁵ Therefore, the appellate court, other than affirming the dissolution of marriage, reversed all other settlement provisions.⁸⁶

Courts continue to enforce clear and unambiguous provisions in mediated agreements.⁸⁷ In *O’Neill v. Scher*,⁸⁸ the court held that the mediated agreement’s language was unambiguous.⁸⁹ Therefore, the trial court did not err when it refused to consider parol evidence.⁹⁰ Similarly, in *Gowni v. Makar*,⁹¹ the court concluded that because the contract, as a whole, was not ambiguous, an evidentiary hearing at which parol evidence⁹² was considered would be inappropriate.⁹³ However, the appellate court reversed the specific portion of the trial court’s order that instructed the appellant to execute a “general release” as it did not reflect the claims or interests released in the agreement, and was overly broad.⁹⁴ Consistently, in *Johnson v. Bezner*,⁹⁵ the appellate court affirmed the enforcement of the mediated agreement, but reversed the portion of the court’s order that exceeded the court’s authority and the scope of the mediated agreement entered into by the parties.⁹⁶ The trial court had erred in requiring the appellant to hire counsel experienced in

82. *Schlifstein v. Schlifstein*, 52 So. 3d 841, 842 (Fla. 2d Dist. Ct. App. 2011).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *See, e.g.*, *O’Neill v. Scher ex rel. Estate of Scher*, 997 So. 2d 1205, 1207 (Fla. 3d Dist. Ct. App. 2008).

88. 997 So. 2d 1205 (Fla. 3d Dist. Ct. App. 2008).

89. *Id.* at 1207.

90. *Id.*

91. 940 So. 2d 1226 (Fla. 5th Dist. Ct. App. 2006).

92. The parol evidence rule is “[t]he common law principal that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.” BLACK’S LAW DICTIONARY 1227 (9th ed. 2009).

93. *Gowni*, 940 So. 2d at 1230.

94. *See id.* at 1228–30.

95. 910 So. 2d 398 (Fla. 4th Dist. Ct. App. 2005).

96. *Id.* at 399, 401.

county zoning law and awarding attorney's fees, when the agreement neither required appellants to hire an attorney, nor provided for the reimbursement of the awarded fees.⁹⁷ "An order enforcing a settlement agreement must conform with the terms of the agreement and may not impose terms that were not included in the agreement."⁹⁸ The court's authority to enforce the terms of the parties' "agreement is circumscribed by the express terms of that agreement."⁹⁹

3. Courts Overturn or Reform Agreements for Recognized Bases

Recognized legal bases to overturn or reform mediated agreements predate the 2004 Act.¹⁰⁰ As with other settlement agreements, parties have access to the courts to seek rescission or reformation.¹⁰¹ "After all, the 'right to go to court to resolve our disputes is one of our fundamental rights.'"¹⁰²

Early cases brought to overturn or reform mediated agreements dealt primarily with party wrongdoing.¹⁰³ These cases would now likely fit within the current statutory exception allowing parties to establish or refute recognized bases to void or reform their mediated agreement.¹⁰⁴ Some cases would also fit within the exclusion for any mediation communication "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."¹⁰⁵ For example, in *Cooper v. Austin*,¹⁰⁶ the court addressed allegations of extortion.¹⁰⁷ The wife in a dissolution of marriage mediation sent a note to her husband reading: "If you can't agree to this, the kids will take what information they have to whomever to have you arrested, etc. Although I would get no money if you were in jail—you wouldn't also be living freely as if you did nothing wrong."¹⁰⁸

97. *Id.* at 401.

98. *Id.*

99. *Garcia v. Rambo Sec. Patrol, Inc.*, No. 08-22303-Civ., 2010 WL 750296, at *2 (S.D. Fla. Mar. 3, 2010) (citing *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 803 (Fla. 2003)).

100. *See DR Lakes, Inc. v. Brandsmart U.S.A. of W. Palm Beach (DR Lakes I)*, 819 So. 2d 971, 974 (Fla. 4th Dist. Ct. App. 2002).

101. *See id.*

102. *Id.* (quoting *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (construing FLA. CONST. art. I, § 21)).

103. *See, e.g., Cooper v. Austin*, 750 So. 2d 711, 711 (Fla. 5th Dist. Ct. App. 2000).

104. FLA. STAT. § 44.405(4)(a)(5) (2011).

105. *Id.* § 44.405(4)(a)(2).

106. 750 So. 2d 711 (Fla. 5th Dist. Ct. App. 2000).

107. *Id.* at 711.

108. *Id.*

Shortly after the husband received this note, the parties settled with the wife receiving \$128,000 in marital assets to the husband's \$10,000.¹⁰⁹ The trial court had adopted the mediated agreement in its final judgment and denied the husband relief from final judgment.¹¹⁰ The appellate court held that the note was "extortionate and [the] presentation of the extorted agreement to the court [constituted] a fraud on the court."¹¹¹ Therefore, it could not allow the wife to benefit from her actions and held that the husband was entitled to relief from the agreement.¹¹²

Courts have also set aside agreements based on false statements made with knowledge that the representation was false and with the intention to induce reliance on the representation and the party who relied on the false information was injured by the reliance.¹¹³ Similarly, when a party properly pleads specific allegations of fraud constituting a "colorable entitlement to relief," the party is entitled to an evidentiary hearing.¹¹⁴ An exculpatory clause in a mediated agreement does not bar the court from considering "whether the [a]greement was procured by fraud, duress, or coercion."¹¹⁵

Notably, courts will not enforce mediated agreements that violate the law.¹¹⁶ A key benefit to mediation is the self-determination of the parties who have the opportunity to create resolutions that will specifically address and meet their needs.¹¹⁷ Nonetheless, parties do not have free rein in their decision-making.¹¹⁸ Courts deciding family law matters may set aside agreements, consistent with statutory law, if they are "not in the best interest of the children" and will admit evidence relevant to the best interest standard.¹¹⁹ In these cases, the settlement provisions "must be reviewed and approved by the trial court as being in the best interest of the children."¹²⁰ Ad-

109. *Id.* at 711–12.

110. *Id.* at 711.

111. *Cooper*, 750 So. 2d at 713.

112. *Id.*

113. *See, e.g.*, *Still v. Still*, 835 So. 2d 376, 376 (Fla. 3d Dist. Ct. App. 2003) (citing *Lopez-Infante v. Union Cent. Life Ins. Co.*, 809 So. 2d 13, 15 (Fla. 3d Dist. Ct. App. 2002)).

114. *Hinson v. Hinson*, 985 So. 2d 1120, 1121 (Fla. 3d Dist. Ct. App. 2008) (quoting *Schindler v. Schiavo (In re Guardianship of Schiavo)*, 800 So. 2d 640, 645 (Fla. 2d Dist. Ct. App. 2001)); *see also Gostyla v. Gostyla*, 708 So. 2d 674, 675 (Fla. 2d Dist. Ct. App. 1998).

115. *Marjon v. Lane*, 995 So. 2d 1086, 1087 (Fla. 2d Dist. Ct. App. 2008).

116. *Cooper*, 750 So. 2d at 713.

117. *See* FLA. STAT. § 44.1011(2) (2011).

118. *See* FLA. STAT. § 61.13(2)(c); *Feliciano v. Feliciano*, 674 So. 2d 937, 937 (Fla. 4th Dist. Ct. App. 1996) (per curiam); *see also* FLA. FAM. L. R. P. 12.540; FLA. R. CIV. P. 1.540(b)(3).

119. *Feliciano*, 674 So. 2d at 937; FLA. STAT. § 61.13(2)(c).

120. *Griffith v. Griffith*, 860 So. 2d 1069, 1071 (Fla. 1st Dist. Ct. App. 2003) (citing *Feliciano*, 674 So. 2d at 937); *see also* FLA. STAT. § 61.13(2)(c).

ditionally, parties may neither decide bankruptcy matters based on state contract law,¹²¹ nor decide all the federal income tax exemptions in their marital settlement agreement.¹²²

4. Judicial Sanctions for Breach of Confidentiality

In 1997, seven years before the Act, a trial judge struck a party's pleadings and dismissed her case with prejudice because the party violated mediation confidentiality when she disclosed a settlement offer to a newspaper.¹²³ In the case of *Paranzino v. Barnett Bank of South Florida*,¹²⁴ the trial judge found that the disclosure was a willful and deliberate breach of the confidentiality provision in the Mediation Report and Agreement.¹²⁵ The appellate court affirmed.¹²⁶ The *Paranzino* decision was based on language in the Mediation Report and Agreement, executed by parties and their counsel, which provided in relevant part:

*[T]his report and agreement is the result of a confidential proceeding and all signers agree to be bound by such confidentiality and shall not disclose any discussions unless agreed to in writing by all signators or unless ordered by the court; that this mediation is governed by the provisions of Chapter 44, Florida Statutes and Rule 1.700 et. seq. which shall be binding.*¹²⁷

Eleven years after *Paranzino*, and four years after the Act took effect, the issue of willful and deliberate breach by a mediation party had a different result.¹²⁸ In *Hill v. Greyhound Lines, Inc.*,¹²⁹ a worker's compensation claimant violated confidentiality by questioning his doctor about information defense counsel attributed to the claimant's doctor during mediation.¹³⁰ The Judge of Compensation Claims dismissed the case with prejudice, finding

121. See *In re Ellertson*, 252 B.R. 831, 833 (Bankr. S.D. Fla. 2000); see also *Dehart v. Miller (In re Miller)*, 424 B.R. 171, 174 (Bankr. M.D. Pa. 2010).

122. See *Hoelzle v. Shapiro*, 736 So. 2d 1207, 1209 (Fla. 1st Dist. Ct. App. 1999).

123. *Paranzino v. Barnett Bank of S. Fla., N.A.*, 690 So. 2d 725, 726, 729 (Fla. 4th Dist. Ct. App. 1997).

124. 690 So. 2d 725 (Fla. 4th Dist. Ct. App. 1997).

125. *Id.* at 729.

126. *Id.* at 730.

127. *Id.* at 726.

128. *Hill v. Greyhound Lines, Inc.*, 988 So. 2d 1250, 1252 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

129. 988 So. 2d 1250 (Fla. 1st Dist. Ct. App. 2008) (per curiam).

130. *Id.* at 1251.

that claimant's violation was willful and deliberate.¹³¹ The case was reversed and remanded with a finding that the severe sanction was unwarranted.¹³² This case underscores the importance of attorneys advising their clients about confidentiality and specifically addressing what clients can and cannot communicate to whom.¹³³ Here, the claimant sought information from his treating doctor and clarification as to what was in the doctor's report.¹³⁴ However, by repeating to his physician the statement made by the attorney during mediation, the claimant had breached mediation confidentiality.¹³⁵

With the specter of harsh sanctions, by virtue of the Act's provisions¹³⁶ or court order,¹³⁷ all mediation participants need to keep the boundaries of mediation confidentiality in mind. While mediators have an ethical obligation to include information about confidentiality in their opening statements, they are not obligated to include information about sanctions.¹³⁸ Lawyers seem best suited to discuss in detail the confidentiality requirements and sanctions with their clients to prevent unfortunate results.

B. *Developing Confidentiality Case Law*

1. Mediator Misconduct

In a significant departure from general contract law, the Fourth District Court of Appeal held in 2001 that mediator misconduct in a court-ordered mediation may be the basis for setting aside the parties' mediated agreement.¹³⁹ The trial judge rightly denied the wife's motion to set aside the mediated agreement for, at that time, there was no legal basis to do so premised on duress or coercion exerted by a third party, such as the mediator.¹⁴⁰

131. *Id.* at 1250.

132. *Id.* at 1252.

133. *See id.* at 1251.

134. *Hill*, 988 So. 2d at 1251.

135. *Id.*

136. FLA. STAT. § 44.406(1) (2011). All mediation participants who willingly and knowingly disclose a mediation communication in violation of the Act are subject to sanctions, including attorney's fees, mediator's fees, compensatory damages, and equitable relief. *Id.*

137. FLA. STAT. § 44.405(1). For court-ordered mediation, a participant may be sanctioned by the court, to include attorney's fees, mediator's fees and costs. *Id.*

138. Fla. R. Cert. & Ct.-Apptd. Mediators R. 10.420(a)(3) (2011). The mediator shall advise the mediation participants that "communications made during the process are confidential, except where disclosure is required or permitted by law." *Id.*

139. *Vitakis-Valchine v. Valchine (Vitakis-Valchine I)*, 793 So. 2d 1094, 1099 (Fla. 4th Dist. Ct. App. 2001).

140. *Id.* at 1095.

In *Vitakis-Valchine v. Valchine (Vitakis-Valchine I)*,¹⁴¹ the wife testified that the mediator told her: 1) the couple's frozen embryos were not "lives in being," and the judge would not grant her child support, if after the divorce, she was impregnated with the embryos; 2) the judge would order the embryos destroyed and not give her custody of them; 3) "that's it, I give up" and would tell the judge that she caused the settlement to fail if no agreement was reached at mediation; 4) she was not entitled to the husband's federal pension, and that it was not worth litigating; and 5) she could protest provisions of the agreement she did not like at the final hearing after she signed the mediated agreement.¹⁴² The wife also testified that "time pressure" caused her to sign the agreement, and that the mediator warned her that they only had five minutes to hurry up and get out because his family was more important.¹⁴³

The mediation began at 10:45 a.m. and continued for eight hours.¹⁴⁴ The wife attended with her brother and attorney, and her husband attended with his attorney.¹⁴⁵ The parties' mediation resulted in a comprehensive twenty-three page agreement.¹⁴⁶ Nonetheless, the wife filed a motion to set aside the mediated agreement, in part, based on coercion and duress by the mediator.¹⁴⁷ The appellate court addressed whether the wife's claim of mediator misconduct was an exception to the rule that third party duress and coercion will not invalidate an agreement between two contracting parties.¹⁴⁸ The court believed "it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics utilized by a court-appointed mediator."¹⁴⁹ It held "the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially-prescribed mediation procedures."¹⁵⁰

141. 793 So. 2d 1094 (Fla. 4th Dist. Ct. App. 2001).

142. *Id.* at 1097.

143. *Id.*

144. *Id.* at 1096.

145. *Id.* See information provided by wife's testimony. *Vitakis-Valchine I*, 793 So. 2d at 1096.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1099.

150. *Vitakis-Valchine I*, 793 So. 2d at 1099. The court noted that pursuant to Florida Rules for Certified and Court-Appointed Mediators, Rule 10.500, mediators remain "accountable to the referring court[s] with ultimate authority over the case[s]." *Id.* at 1099 n.3 (quoting FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.500).

Accordingly, the appellate court remanded to the trial court to determine “whether the mediator substantially violated the Rules for Mediators, and whether that misconduct led to the settlement agreement in this case.”¹⁵¹ On remand, the trial judge did not find mediator misconduct, duress, or coercion on the part of the mediator, and therefore, upheld the mediated agreement.¹⁵² The appellate court affirmed that ruling.¹⁵³

Mediator misconduct was also alleged as a basis for setting aside mediated agreements in two more recent cases.¹⁵⁴ In neither case was the agreement overturned.¹⁵⁵ In a probate case questioning whether the mediated agreement determined the property distribution when one party died before the final judgment of dissolution of marriage was entered, the opinion did not state that the conduct of the mediator constituted misconduct.¹⁵⁶

In *Clark v. School Board of Bradford County, Florida*,¹⁵⁷ the plaintiff filed a Motion to Set Aside the Mediated Agreement claiming that she was “pressured, threaten[ed], and coerce[d] into signing the agreement” at mediation.¹⁵⁸ She specifically alleged that the mediator told her she could file a motion with the court, and that this remained her only recourse, as she had already signed the agreement.¹⁵⁹ Interestingly, the plaintiff violated the confidentiality provision in the parties’ agreement when she attached their settlement agreement to her Motion to Set Aside Mediation Agreement.¹⁶⁰ This however, was not an issue before the court, and consequently, breach of confidentiality was not addressed in the opinion.¹⁶¹

The plaintiff did not dispute the terms of the agreement or the existence of an executed valid agreement.¹⁶² The mediator testified that he would never give a party legal advice during mediation, and if a party were showing

151. *Id.* at 1100. The appellate court did not make any findings regarding whether the mediator had committed misconduct. *Id.*

152. *Vitakis v. Valchine (Vitakis-Valchine III)*, 987 So. 2d 171, 171 (Fla. 4th Dist. Ct. App. 2008) (interpreting *Valchine v. Valchine (Vitakis v. Valchine II)*, 923 So. 2d 511, 511 (Fla. 4th. Dist. Ct. App. 2006) (unpublished table decision)).

153. *Vitakis-Valchine III*, 987 So. 2d at 171 (interpreting *Vitakis v. Valchine II*, 923 So. 2d at 511).

154. *Clark v. Sch. Bd. of Bradford Cnty., Fla.*, No. 3:09-cv-901-J-34TEM, 2010 WL 4696063, at *4 (M.D. Fla. Oct. 13, 2010); *Marlowe ex. rel. Estate of Brown v. Brown*, 944 So. 2d 1036, 1038 (Fla. 4th Dist. Ct. App. 2006).

155. *Clark*, 2010 WL 4696063, at *6; see *Brown*, 944 So. 2d at 1038.

156. See *Brown*, 944 So. 2d at 1037–38, 1040.

157. No. 3:09-cv-901-J-34TEM, 2010 WL 4696063 (M.D. Fla. Oct. 13, 2010).

158. *Id.* at *1.

159. *Id.*

160. *Id.* at *2.

161. See *id.* at *3–6.

162. *Clark*, 2010 WL 4696063, at *3.

signs of duress, he would never have the party sign the mediated agreement.¹⁶³ The court did not find any evidence that the mediator coerced or exerted undue pressure on the plaintiff or somehow forced her to sign the mediated agreement.¹⁶⁴ Accordingly, the court dismissed the case with prejudice and ordered the removal of the mediated agreement that the plaintiff had attached to her motion.¹⁶⁵

Not yet a decade old, the law of mediator misconduct is still in its infancy. Case law does not provide the answer to what constitutes mediator misconduct rising to the level required to set aside or reform a mediated agreement. Proving mediator misconduct would likely be challenging. While one party looks to overturn or reform the mediated agreement, the other party seeks to enforce it. The mediator would likely deny violating ethical rules and testify as to facts consistent with the party looking to enforce the mediated agreement. Additionally, counsel who accompanied the parties to mediation will also likely testify that they did not stand idly by as the mediator coerced, threatened, or otherwise violated ethical rules. Yet, alleging mediator misconduct may be attractive as a means to reform or set aside a mediated agreement. Given the limited number of options, it remains a viable cause of action to consider.

2. Mutual Mistake

In 2002, the Fourth District Court of Appeal addressed whether the mediation privilege applies where a mutual mistake was made by the parties in their mediated agreement.¹⁶⁶ The appellant, seller, sought relief from a \$600,000 clerical error he claimed was made in the mediated agreement.¹⁶⁷ The trial court determined that the seller was left without the means to prove the alleged error because the mediation privilege precluded admission of evidence of what transpired at mediation.¹⁶⁸ In this case of first impression, the appellate court held that the statutory mediation privilege did not apply: “Although it may be difficult for [the] seller to prove that [the] mistake was mutual, given the position of the buyer, seller should still have the opportunity to put on all of its evidence. We therefore reverse.”¹⁶⁹

163. *Id.* at *5.

164. *Id.*

165. *Id.* at *6.

166. *DR Lakes I*, 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

167. *Id.* at 972.

168. *Id.*

169. *Id.* at 973–75.

The court reasoned that “the reasons for confidentiality are not as compelling” once the parties have signed a mediated agreement.¹⁷⁰ It did not believe that the Florida Legislature meant to deny a party who reached an agreement at mediation the same access to the courts to correct a mutual mistake, as a party who reached agreement through means other than mediation.¹⁷¹

On remand, at a non-jury trial, the parties “presented conflicting evidence [as to] what occurred [at] mediation.”¹⁷² The trial judge ruled in favor of DR Lakes, the seller, finding that the seller had shown “by clear and convincing evidence that the parties agreed” the seller would receive a \$600,000 credit for its contribution to the construction.¹⁷³ The credit “was implicit in the incorporation of [a section] of the Purchase Agreement into the Stipulation” which dealt with the credit and was read in connection with the changed provision “that DR Lakes [either] construct or pay for [the road] construction.”¹⁷⁴

Following remand, Brandsmart appealed, challenging the trial court’s finding of fact as unsupported by competent substantial evidence.¹⁷⁵ The appellate court affirmed, determining that the seller’s witnesses’ testimony regarding the mediated agreement supported the trial court’s ruling.¹⁷⁶ “The parties’ conflicting stories at trial do not preclude a finding that a mutual mistake was established by clear and convincing evidence.”¹⁷⁷ “A mistake is mutual when the parties agree to one thing and then, due to either a scrivener’s error or inadvertence, express something different in the written instrument.”¹⁷⁸ It results in litigation when the parties do not agree.¹⁷⁹

Mutual mistake was also alleged in a 2011 dissolution of marriage case.¹⁸⁰ In *Moree v. Moree*,¹⁸¹ the husband requested reformation of the me-

170. *Id.* at 974.

171. *DR Lakes I*, 819 So. 2d at 974. “It is well-established in Florida that statutes, even where clear, should not be interpreted to produce absurd results.” *Id.* (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

172. *Brandsmart U.S.A. of W. Palm Beach, Inc. v. DR Lakes, Inc. (DR Lakes II)*, 901 So. 2d 1004, 1005 (Fla. 4th Dist. Ct. App. 2005).

173. *Id.*

174. *Id.*

175. *Id.* at 1006.

176. *Id.*

177. *DR Lakes II*, 901 So. 2d at 1006.

178. *Id.* at 1005–06 (quoting *Circle Mortg. Corp. v. Kline*, 645 So. 2d 75, 78 (Fla. 4th Dist. Ct. App. 1994) (per curiam)).

179. *Id.* at 1006.

180. *Moree v. Moree*, 59 So. 3d 205, 206 (Fla. 2d Dist. Ct. App. 2011).

181. 59 So. 3d 205 (Fla. 2d Dist. Ct. App. 2011).

diated agreement so it would accurately reflect the parties' intentions.¹⁸² He claimed that the mediated settlement agreement contained errors and did not reflect the value of accounts held by the parties due to tax factors.¹⁸³ The trial court denied the husband's motion to reform or set aside the agreement, determining that the husband did not "allege fraud, misrepresentation in discovery, coercion, or allegations sufficient under Florida Family Law Rule of Procedure 12.540."¹⁸⁴ The appellate court reversed and remanded for an evidentiary hearing on the husband's motion, concluding that the trial court erred in determining the husband's motion based on mutual mistake to be facially insufficient.¹⁸⁵

Curiously, in another dissolution of marriage case, the parties agreed there had been a mutual mistake, yet the trial judge did not rescind the parties' mediated agreement.¹⁸⁶ Prior to the entry of an order of dissolution of marriage, the husband filed a "Motion for Reformation of Agreement and Motion for Reconsideration."¹⁸⁷ Although the wife joined in the motion, the trial court denied their joint motion.¹⁸⁸ The appellate court found the "agreement was entered into based [on] mutual mistake . . . [and] the trial court [had] erred in not rescinding the [mediated agreement]."¹⁸⁹

Courts have distinguished mutual mistake from unilateral mistake.¹⁹⁰ In *Feldman v. Kritch*,¹⁹¹ State Farm filed a motion to set aside the mediated agreement, alleging there was a misunderstanding as to whether the \$40,000 it had already paid should be deleted from the \$75,000 referenced in the agreement.¹⁹² "[F]inding that there was no meeting of the minds," the trial court set aside the mediated agreement.¹⁹³ Distinguishing *Brandsmart U.S.A of West Palm Beach, Inc. v. DR Lakes, Inc. (DR Lakes II)*,¹⁹⁴ the appellate court did not find any evidence that an offset of \$40,000 was ever mentioned during the parties' mediation.¹⁹⁵ "Thus, any mistake was a unilateral mistake on the part of State Farm."¹⁹⁶

182. *Id.* at 206.

183. *Id.*

184. *Id.* at 207.

185. *Id.* at 207–08.

186. *Barber v. Barber*, 878 So. 2d 449, 451 (Fla. 3d Dist. Ct. App. 2004) (per curiam).

187. *Id.* at 450–51.

188. *Id.* at 451.

189. *Id.*

190. *Feldman v. Kritch*, 824 So. 2d 274, 277 (Fla. 4th Dist. Ct. App. 2002).

191. 824 So. 2d 274 (Fla. 4th Dist. Ct. App. 2002).

193. *Id.* at 276.

193. *Id.*

194. 901 So. 2d 1004 (Fla. 4th Dist. Ct. App. 2005).

195. *Feldman*, 824 So. 2d at 277.

196. *Id.*

In this case predating the Act, the court cites to *DR Lakes II*'s recognition of mutual mistake as a basis for considering evidence without violating confidentiality.¹⁹⁷ "Because State Farm claimed that there was a mutual mistake, the statutory privilege protecting the confidentiality of all oral and written communications, other than the executed settlement agreement, should not apply."¹⁹⁸

The doctrine of mutual mistake will not apply when parties seek relief from agreements they entered into improvidently.¹⁹⁹ For a party to prevail on the basis of mutual mistake:

[T]he party must . . . show he did not bear the risk of a mistake. A party to an agreement bears the risk of a mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient."²⁰⁰

A plaintiff who reaches agreement at mediation despite not knowing the applicable policy limits may not avoid his or her agreement by claiming mutual mistake.²⁰¹ Similarly, a plaintiff's failure to determine the severity of his or her condition before settling at mediation will not have the agreement set aside based on "mistake."²⁰² "[C]ases settled in mediation are especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake."²⁰³ "[M]ore stringent principles of law apply in setting aside a contract than in setting aside a judgment."²⁰⁴ Mutual mistake is easy to allege, but difficult to prove.²⁰⁵ The burden of proof is clear and convincing evidence.²⁰⁶ Conflicting testimony will be the norm as one party looks to overturn or reform, while the other seeks to en-

197. *Id.*

198. *Id.* at 276. "[T]he court agreed to hear testimony, including that of the mediator himself, regarding the settlement negotiations." *Id.*

199. *Leff v. Ecker*, 972 So. 2d 965, 966 (Fla. 3d Dist. Ct. App. 2007) (per curiam).

200. *Id.* (citation omitted) (quoting *Rawson v. UMLIC VP, L.L.C.*, 933 So. 2d 1206, 1210 (Fla. 1st Dist. Ct. App. 2006)).

201. *See id.*

202. *Sponga v. Warro*, 698 So. 2d 621, 624–25 (Fla. 5th Dist. Ct. App. 1997).

203. *Id.* at 625.

204. *Tilden Groves Holding Corp. v. Orlando/Orange Cnty. Expressway*, 816 So. 2d 658, 660 (Fla. 5th Dist. Ct. App. 2002) (citing *Smiles v. Young ex rel. Estate of McCutcheon*, 271 So. 2d 798, 801 (Fla. 3d Dist. Ct. App. 1973)).

205. *See DR Lakes II*, 901 So. 2d 1004, 1005–06 (Fla. 4th Dist. Ct. App. 2005).

206. *Id.* at 1006.

force.²⁰⁷ Even if the parties were to agree on a mistake,²⁰⁸ chances are good they do not agree on the resolution or they would not be seeking court determination. In *DR Lakes II*, there was a document other than the mediated agreement, which added credibility to DR Lakes's position.²⁰⁹ Proving the case by clear and convincing evidence will likely prove difficult if the only evidence is the mediation participants' conflicting testimony.²¹⁰

Mutual mistake was first considered in the context of mediation less than a decade ago.²¹¹ Although case law does provide guidance distinguishing mutual mistake from unilateral mistake, these cases remain problematic. Mere allegation of mutual mistake allows the party to introduce evidence to attempt to prove the allegation.²¹² The utterance of the allegation serves to open the door to admitting evidence of mediation communications that were expected to be confidential and would otherwise be confidential.²¹³ It destroys the mediation privilege and confidentiality for purposes of proving the mistake.²¹⁴ As courts balance preserving mediation confidentiality with providing parties access to the courts, perhaps there is a way of making a threshold determination of the existence of mutual mistake before holding a full-blown trial. That would serve to preserve mediation confidentiality until there is a determination that a party made a credible allegation.²¹⁵

IV. CONFIDENTIALITY CONUNDRUMS AFTER THE ACT

A. *Identifying Mediation Communications*

The statutory definition is broad and the exceptions are often hazy.²¹⁶ Courts are determining what is and what is not a confidential mediation communication.²¹⁷ They are determining what is discoverable and what is

207. See *id.* (citing *Steffens v. Steffens*, 422 So. 2d 963, 964, n.1 (Fla. 4th Dist. Ct. App. 1982)).

208. See *Barber v. Barber*, 878 So. 2d 449, 451 (Fla. 3d Dist. Ct. App. 2004) (per curiam).

209. *DR Lakes II*, 901 So. 2d at 1005.

210. See *id.* at 1006.

211. *DR Lakes I*, 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

212. See *id.* at 974–75.

213. See *id.* at 972, 974.

214. See *id.* at 974–75.

215. See Deason, *The Quest for Uniformity in Mediation Confidentiality*, *supra* note 3, at 95. Some “states provide a mechanism, such as an in camera hearing, to ensure that confidentiality is maintained while courts decide whether an exception to confidentiality provisions is appropriate.” *Id.*

216. See, e.g., FLA. STAT. §§ 44.403(1), .405 (2011).

217. See, e.g., *Polanco v. McNeil*, No. 09-60448-Civ-COHN, 2010 WL 3027798, at *2 (S.D. Fla. Apr. 19, 2010).

admissible.²¹⁸ Written statements are included within the definition of mediation communication.²¹⁹ In *Chabad House-Lubavitch of Palm Beach County, Inc. v. Banks*,²²⁰ mediation confidentiality and privilege extended to physical evidence that “was a direct product of [the] mediation.”²²¹ Similarly, an apology written during mediation, which was not part of the mediated agreement, would be a mediation communication.²²² Mediation communications may also be in the form of nonverbal assertions made by or to a mediation participant.²²³

In *Polanco v. McNeil*,²²⁴ the United States District Court for the Southern District of Florida distinguished between mediation communications and observations made during mediation.²²⁵ Petitioner, charged with first degree murder, sought to prevent testimony from her divorce mediation at her murder trial.²²⁶ The court permitted testimony of observations made at her divorce mediation, which took place one day before the murder.²²⁷ Both the petitioner’s mediator and attorney testified about the observations they made during the mediation.²²⁸ For instance, the mediator testified that the petitioner was appropriately dressed and spoke properly.²²⁹ The mediation communications, however, were considered confidential and not admitted into evidence.²³⁰ Attorney-client privilege did not prevent the attorney from testifying about observations he made.²³¹

An Indiana civil case sheds additional light on the communication-observation distinction.²³² In *Bridges v. Metromedia Steakhouse Co.*,²³³ the trial judge allowed an insurance adjuster who attended appellant’s mediation

218. See, e.g., *Althem v. Geico Gen. Ins. Co.*, No. 8:10-cv-156-T-24TBM, 2010 WL 5092721, at *1–2 (M.D. Fla. Dec. 8, 2010); *Fluor Intercontinental, Inc. v. IAP Worldwide Servs., Inc.*, No. 5:09CV331/RS-EMT, 2010 WL 2366482, at *1–2 (N.D. Fla. June 14, 2010).

219. FLA. STAT. § 44.403(1).

220. 602 So. 2d 670 (Fla. 4th Dist. Ct. App. 1992).

221. *Id.* at 672.

222. FLA. STAT. § 44.403(1); Mediator Ethics Advisory Comm., Advisory Op. 2004-010 (2005).

223. FLA. STAT. § 44.403(1).

224. No. 09-60448-Civ-COHN, 2010 WL 3027798 (S.D. Fla. Apr. 19, 2010).

225. *Id.* at *26.

226. *Id.* at *2.

227. *Id.* at *26.

228. *Id.*

229. *Polanco*, 2010 WL 3027798, at *5.

230. *Id.* at *2, *26.

231. *Id.* at *26 (citing *Clanton v. United States*, 488 F.2d 1069, 1071 (5th Cir. 1974)).

232. See *Bridges v. Metromedia Steakhouse Co.*, 807 N.E.2d 162, 166–67 (Ind. Ct. App. 2004).

233. 807 N.E.2d 162 (Ind. Ct. App. 2004).

to testify about observations she made during the mediation.²³⁴ The adjuster testified during trial that she did not see scarring, redness, or blisters on Bridges' injured hand.²³⁵ On appeal, "Bridges state[d] that she 'display[ed]' her hand . . . and 'point[ed] to the scars.'"²³⁶ She maintained that the adjuster's testimony was based on "Bridges' 'nonverbal conduct' during mediation," which was privileged, confidential, and inadmissible.²³⁷

Considering this issue of first impression for the Indiana courts, the court of appeals checked the record to see if the adjuster was asked to view Bridges' hand or simply observed her hand.²³⁸ The analysis is critical in determining whether the testimony was based on protected mediation statements or conduct, or simply on observation occurring during the mediation.²³⁹ The court found nothing in the record to support Bridges' assertion that she displayed her hand.²⁴⁰ Therefore, the testimony was deemed to be based on personal observation, and the trial court did not abuse its discretion.²⁴¹ Florida, like Indiana, distinguishes between confidential and privileged mediation communications, and discoverable and admissible observations that take place during mediation.²⁴² The Florida courts' determination would also turn on whether there was "nonverbal conduct [by the party] intended to make an assertion, by or to a mediation participant."²⁴³

A federal judge who had ordered a Florida case to mediation determined that communications during the alleged mediation were not confidential because the "'mediation' was a sham."²⁴⁴ In his Order on Motion to Disqualify or Recuse himself from the case, the judge noted his reasons for deciding that mediation had not occurred, and therefore mediation confidentiality did not apply.²⁴⁵ The case at bar was a suit against Joseph R. Francis and *Girls Gone Wild*, in which the plaintiff alleged that the defendant and the defendant's employee coerced her to expose her breasts for their film.²⁴⁶

234. *Id.* at 164.

235. *Id.* at 164, 166.

236. *Id.* at 166.

237. *Id.* at 165.

238. *Bridges*, 807 N.E.2d at 165–66.

239. *See id.*

240. *Id.*

241. *Id.* at 166–67.

242. *See id.* at 166; *Fisk Electric Co. v. Solo Constr. Corp.*, 417 F. App'x 898, 902 (11th Cir. 2011) (*per curiam*).

243. FLA. STAT. § 44.403(1) (2011).

244. *Pitts v. Francis*, No. 5:07CV169-RS-EMT, 2007 WL 4482168, at *13 (N.D. Fla. Dec. 19, 2007).

245. *See id.* at *11–13.

246. *Id.* at *1.

Sixteen years of age at the time, the plaintiff contended she had not consented to be filmed.²⁴⁷

According to evidence and testimony from an evidentiary hearing, Francis was four hours late for the mediation.²⁴⁸ He proceeded to place his bare and dirty feet on top of the conference table facing plaintiff's counsel and interrupted him when the plaintiff's counsel had only said four words.²⁴⁹ He repeatedly yelled, "Don't expect to get a fucking dime—not one fucking dime!" and shouted, "I hold the purse strings. I will not settle this case at all. I am only here because the court is making me be here!"²⁵⁰ As plaintiff's counsel was leaving, Francis added, "We will bury you and your clients! I'm going to ruin you, your clients, and all of your ambulance-chasing partners!"²⁵¹ Francis then charged at plaintiff's counsel, appearing poised to physically assault him.²⁵² His parting words to plaintiff's counsel were "Suck my dick."²⁵³ Based on this behavior, the judge determined that Francis was not engaged in mediation, and that his behavior was violent.²⁵⁴ Further, the judge found that Francis used the court's mediation order as "a conduit through which he could threaten and assault the other party and its attorneys under the cloak of confidentiality."²⁵⁵

In response to the plaintiff's motion for sanctions against Joe Francis, the judge found Francis in civil contempt for failing to mediate in good faith, and ordered his incarceration.²⁵⁶ The court's order provided that once the mediator certified Francis had mediated in good faith and complied with the court's order, Francis would be released.²⁵⁷ This placed the mediator in the awkward position of reconciling his obligation to obey the court's order with his obligation to abide by the Florida Rules for Certified and Court-Appointed Mediators.²⁵⁸ The Mediator Ethics Advisory Committee (MEAC) has advised mediators that they are "not able to comply with both the Florida

247. *Id.*

248. *Id.* at *11.

249. *Pitts*, 2007 WL 4482168, at *11.

250. *Id.*

251. *Id.*

252. *Id.* "Francis' own attorney had to position himself between Francis and plaintiff's counsel to prevent a brawl." *Id.* at *12.

253. *Pitts*, 2007 WL 4482168 at *12.

254. *Id.* at *11–13.

255. *Id.* at *12. See *Meet Joe Francis*, MEETJOEFrancis.COM, <http://www.meetjoeFrancis.com/> (last visited Nov. 13, 2011) for Francis' position on this and related matters.

256. *Pitts*, 2007 WL 4482168, at *13–16. Plaintiff's motion alleged that Francis' behavior at mediation was threatening and abusive toward the plaintiffs and their attorneys. *Id.* at *10.

257. *Id.* at *15. The judge stayed the order to allow Francis the opportunity to mediate in good faith. *Id.* at *15–16.

258. See Mediator Ethics Advisory Comm., Advisory Op. 2004-006 (2005).

Rules for Certified and Court-Appointed Mediators and a court order to report a party who fails to mediate in good faith.”²⁵⁹ “[M]ediators . . . may not report to a court that a party has failed to negotiate in good faith for the principal reasons that the mediator’s report would: 1) constitute a breach of confidentiality; 2) impair parties’ right to self-determination; and 3) destroy mediator impartiality, in appearance and in reality.”²⁶⁰ Whether the mediator is reporting that the party failed to mediate in good faith or mediated in good faith, the ethical analysis remains the same: the mediator is required to maintain confidentiality except where disclosure is required or permitted by law.²⁶¹ MEAC clarifies the mediator’s obligation by interpreting it in light of the Mediation Confidentiality and Privilege Act, which provides that mediation communications are confidential unless the Act provides otherwise.²⁶² Mediation communications include nonverbal conduct intended to make an assertion by or to a mediation participant, as well as written and oral statements.²⁶³ The Act does not contain an exception for reporting whether a party mediated in good faith.²⁶⁴

Local court rules for the United States District Court for the Northern District of Florida provide that mediators are governed by the ethical rules adopted by the Supreme Court of Florida for circuit civil mediators.²⁶⁵ They also provide that unless the parties settle or agree otherwise, the mediator may only report to the judge that the case settled, was adjourned, continued, or terminated.²⁶⁶ Given the mediator’s ethical obligation to comply with local rules, court rules, administrative orders, and statutes governing mediation, the mediator’s allowable communication to the court regarding mediation is limited.²⁶⁷

Notably, if the parties do not engage in mediation, there would be no mediation communications to be confidential and privileged. Determining whether mediation took place becomes a conundrum—a catch twenty-two.

259. *Id.*

260. *Id.*

261. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.360(a).

262. FLA. STAT. § 44.405(1), (4)(a) (2011).

263. *Id.* § 44.403(1).

264. MEAC Advisory Op. 2004-006, *supra* note 258. MEAC advises that parties are not required to negotiate in good faith. *Id.* (citing *Avril v. Civilmar*, 605 So. 2d 988, 989–90 (Fla. 4th Dist. Ct. App 1992) (quashing order imposing sanctions for failure to negotiate in good faith at mediation as departure from essential requirements of law and stating that “[l]here is no requirement that a party . . . make an offer at mediation, let alone offer what the opposition wants to settle”).

265. N.D. FLA. LOC. R. 16.3(D). The referenced rules are the Florida Rules for Certified and Court-Appointed Mediators. *See id.* 16.3.

266. *Id.* 16.3(A).

267. FLA. R. CERT. & CT.-APPTD. MEDIATORS R. 10.520.

To determine whether mediation occurred, information about what did or did not happen would be necessary. As mediation communications are confidential and privileged, mediators are not permitted to report them to the court, absent a statutory exception or agreement of all parties.²⁶⁸ Consequently, protected mediation communications could not be utilized to determine if mediation took place unless and until there had been a determination that they were not mediation communications because mediation never occurred.

In significant contrast, mediators are permitted to report to the court whether parties and attorneys physically appear for mediation, and other matters based on observation are, likewise, not mediation communications.²⁶⁹ Additionally, the commission of a crime during mediation would not constitute a mediation communication,²⁷⁰ and there is no confidentiality or privilege for a mediation communication “willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.”²⁷¹ Therefore, if Joe Francis’s behavior constituted an exclusion from the definition for mediation communication or a delineated exception within the Act, the behavior would be neither confidential nor privileged.²⁷²

B. *Discovery and Admissibility*

Federal courts in Florida have addressed whether communications arising from mediation are admissible or discoverable.²⁷³ In so doing, they have applied the Act, Federal Rules of Evidence, and local court rules.²⁷⁴ A recent Eleventh Circuit Court of Appeals case reviewed the district court’s application of the Act in its decision to admit testimony of mediation proceedings.²⁷⁵ The district court stated that the appellant, by arguing that it had not been paid and by raising an affirmative defense, opened the door to admission of evidence showing the mediation resulted in payment to the appellant.²⁷⁶ The Act specifically provides that a party who “makes a representa-

268. *Id.* 10.360(a).

269. *See* FLA. STAT. § 44.403(1) (2011); *see also* Mediator Ethics Advisory Comm., Advisory Op. 2006-008 (2007); Mediator Ethics Advisory Comm., Advisory Op. 2007-001 (2007).

270. FLA. STAT. § 44.403(1).

271. *Id.* § 44.405(4)(a)(2).

272. *See* *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at *12 (N.D. Fla. Dec. 19, 2007). This analysis is premised on the applicability of the Mediation Confidentiality and Privilege Act. *See* FLA. STAT. § 44.403.

273. *See, e.g.,* *Fisk Electric Co. v. Solo Constr. Corp.*, 417 F. App’x 898, 902 (11th Cir. 2011) (*per curiam*).

274. *See, e.g., id.* at 902 n.7.

275. *Id.* at 902 n.7.

276. *Id.* at 902.

tion about a privileged mediation communication waives the privilege . . . to the extent [needed] for the other party to respond” properly.²⁷⁷ The appellate court affirmed.²⁷⁸ It did not find error in the district court’s application of the Act.²⁷⁹

In *Altheim v. GEICO General Insurance Co.*,²⁸⁰ the United States District Court for the Middle District of Florida applied the Act to find that the requested discovery was not precluded by the Act.²⁸¹ The plaintiff sought an order compelling GEICO to produce all of the documents on its privilege log for a given period of time.²⁸² The defendant maintained that the mediation privilege applied.²⁸³ The court found it did not.²⁸⁴ “By definition, the privilege contemplates protecting disclosure of communications that were made during mediation to others outside the mediation process.”²⁸⁵ Therefore, since the plaintiff and the defendant were both mediation participants who were not disclosing the communications to persons not mediation participants, the privilege did not apply.²⁸⁶ Further, the privilege could not be invoked for communications occurring outside the mediation process.²⁸⁷

Parties seek to quash protective orders and compel responses to discovery requests regarding otherwise confidential and privileged mediation communications.²⁸⁸ In *In re Denture Cream Products Liability Litigation*,²⁸⁹ the appellant sought production of mediation materials and the mediation agreement from a case with the same defendant, but different plaintiff, to show that the defendant was on notice of claims against its product.²⁹⁰ The plaintiff and plaintiff’s counsel for the other case did not object to the dis-

277. FLA. STAT. § 44.405(6) (2011).

278. *Fisk Electric Co.*, 417 F. App’x at 902.

279. *Id.* at 902 n.7. The court noted that it “generally appl[ies] federal evidentiary rules in diversity cases.” *Id.* (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)). “But state substantive law may provide additional protection for evidence beyond what the federal evidentiary rules provide.” *Id.* (citing *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000)).

280. No. 8:10-cv-156-T-24TBM, 2010 WL 5092721 (M.D. Fla. Dec. 8, 2010).

281. *Id.* at *1.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Altheim*, 2010 WL 5092721, at *1. “[A] mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.” *Id.* at *1 (quoting FLA. STAT. § 44.405(1) (2011)).

286. *Id.*

287. *Id.*

288. *In re Denture Cream Prods. Liab. Litig.* No. 09-2051-MD, 2011 WL 1979666, at *1 (S.D. Fla. May 20, 2011).

289. No. 09-2051-MD, 2011 WL 1979666 (S.D. Fla. May 20, 2011).

290. *Id.* at *2.

covery.²⁹¹ The court ruled that Federal Rule of Evidence 408 did not bar discovery, and the Confidentiality Agreement in the other case did not preclude discovery of its agreement.²⁹² Accordingly, the appellees/defendants were ordered to produce the non-privileged mediation materials in question with the settlement amounts redacted.²⁹³

In contrast, in *Fluor Intercontinental, Inc. v. IAP Worldwide Services, Inc.*,²⁹⁴ another federal case applying Federal Rule of Evidence 408, statements were not found to be discoverable or admissible.²⁹⁵ The statements were communicated at the mediation of a different case that “was part of [the] settlement of a common claim,” which was also at issue in the case at bar.²⁹⁶ During the mediation, Fluor’s attorney gave a PowerPoint presentation.²⁹⁷ RMS, a subsidiary of IAP, sought to compel discovery responses regarding Fluor’s presentation made at the mediation of the other case.²⁹⁸ The district court determined that “any statements made by Fluor during the [other] mediation, including the PowerPoint presentation, [were] not admissible” based on Rule 408.²⁹⁹ “The focus on a lawyer’s statements made while he was in the role of an advocate in mediation is not appropriate or admissible under the Federal Rules of Evidence.”³⁰⁰

291. *Id.* at *3.

292. *Id.* at *5. Federal Rule of Evidence 408, Compromise and Offers to Compromise, provides:

(a) Prohibited Uses.—Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and [when] the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

FED. R. EVID. 408. Please note the Supreme Court of the United States approved amendments to Rule 408, effective December 1, 2011, by order dated April 26, 2011. Order Amending Federal Rules of Evidence, Rules 101–1103 (effective Dec. 1, 2011).

293. *In re Denture Cream Prods. Liab. Litig.*, 2011 WL 1979666 at *5. The opinion does not address the Mediation Confidentiality and Privilege Act. *In re Denture Cream Prods. Liab. Litig.*, 2011 WL 1979666.

294. No. 5:09CV331/RS-EMT, 2010 WL 2366482 (N.D. Fla. June 14, 2010).

295. *Id.* at *1.

296. *Id.* at *2.

297. *Id.* at *1.

298. *Id.*

299. *Fluor Intercontinental, Inc.*, 2010 WL 2366482, at *2. The court noted it would reach the same result applying Federal Rule of Evidence 403. *Id.*

300. *Id.*

In another recent case, *Facebook, Inc. v. Pacific Northwest Software, Inc.*,³⁰¹ the United States Court of Appeals for the Ninth Circuit agreed that the district court was correct in excluding proffered evidence.³⁰² The appellate court based its decision on the parties' signed Confidentiality Agreement that provided:

All statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions . . . and are non-discoverable and inadmissible for any purpose including in any legal proceeding *No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding.*³⁰³

The court noted that “[a] local rule, like any court order, can impose a duty of confidentiality” regarding mediation.³⁰⁴ However, the parties had used a private ADR procedure, which was not subject to the court’s ADR Local Rules.³⁰⁵ Nonetheless, the parties’ clearly worded Confidentiality Agreement precluded the appellants from introducing evidence of “what Facebook said, or did not say, during the mediation.”³⁰⁶ Without this evidence, the appellants’ securities claims failed.³⁰⁷

In addition to rules of evidence and statutory law, courts’ local rules and parties’ confidentiality agreements weigh heavily in the courts’ determination of mediation confidentiality and privilege.³⁰⁸ Carefully drafting confidentiality agreements and keeping track of local rules are essential to protecting both confidentiality and access to the courts. The District Court for the

301. 640 F.3d 1034 (9th Cir. 2011).

302. *Id.* at 1041.

303. *Id.*

304. *Id.* at 1040. On the contrary, “privileges are created by federal common law.” *Id.* at 1041 (referencing FED. R. EVID. 501).

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in . . . light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

305. *Facebook, Inc.*, 640 F.3d at 1041. The district court had reached its decision based on a Local ADR Rule, which the appellate court determined did not apply to this case. *Id.*

306. *Id.*

307. *Id.*

308. *See id.*

Southern District of Florida has a strong local rule restricting the use of information derived during mediation, specifically referencing the Act:

All proceedings of the mediation shall be confidential and are privileged in all respects as provided under federal law and Florida Statutes § 44.405. The proceedings may not be reported, recorded, placed into evidence, made known to the Court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the [mediation] conference, unless a written settlement is reached, in which case only the terms of the settlement are binding.³⁰⁹

The United States Court of Appeals for the Ninth Circuit, applying Oregon law, also excluded evidence that a party needed to prove his case.³¹⁰ In *Fehr v. Kennedy*,³¹¹ the plaintiffs filed a diversity action against Kennedy for legal malpractice alleging they rejected an offer made at mediation because they relied on Kennedy's advice.³¹² Subsequently, they received a less favorable outcome at trial and filed suit in federal court.³¹³ The district court granted Kennedy's summary judgment motion.³¹⁴ Prohibited from disclosing confidential mediation communications, the Fehrs were not able to prove their case.³¹⁵ Although the Oregon Legislature had provided exceptions to the nondisclosure requirement for mediation, it had not provided an exception covering actions between a party to a mediation and the party's attorney.³¹⁶ This case highlights the importance of statutory exceptions specifically drafted to cover intended exceptions to mediation confidentiality and privilege.³¹⁷ The federal court applied Oregon state law, which did not provide an exception for legal malpractice actions.³¹⁸ In contrast, Florida law specifically provides an exception for malpractice and professional misconduct.³¹⁹ In *Nova Casualty Co. v. Santa Lucia*,³²⁰ the plaintiff alleged that his attorney negligently negotiated a High-Low Agreement during mediation,³²¹

309. S.D. FLA. LOC. R. 16.2(g)(2).

310. *Fehr v. Kennedy*, 387 F. App'x 789, 791 (9th Cir. 2010).

311. 387 F. App'x 789 (9th Cir. 2010).

312. *Id.* at 790.

313. *Id.*

314. *Id.*

315. *Id.*

316. *Fehr*, 387 F. App'x at 791.

317. *See id.*

318. *See id.* at 790–91.

319. FLA. STAT. § 44.405(4)(a)(4), (6) (2011).

320. No. 8:09-cv-1351-T-30AEP, 2010 WL 2367208 (M.D. Fla. June 14, 2010).

321. *Id.* at *1.

and in *Shepard v. Florida Power Corp.*,³²² the plaintiff alleged he was coerced into settling at mediation by his attorney.³²³ The statutory exception applies in both cases because the alleged wrongdoing took place during the mediation.³²⁴

C. Appearance with Authority to Settle

The Act and Florida Rules of Procedure for Juvenile,³²⁵ Appellate,³²⁶ Civil,³²⁷ and Family³²⁸ matters that govern required appearance at mediation, have inconsistent and incompatible provisions. The Florida Rules of Procedure and Mediation Referral Orders identify who is required to appear at mediation.³²⁹ Generally, the requirement is to attend the mediation and have full authority to settle.³³⁰ There is no requirement that parties mediate in good faith, for parties have self-determination and may decide not to make an offer and not to settle.³³¹ Nonetheless, party representatives are required to appear with full settlement authority:

[A] party [to a circuit civil mediation] is deemed to appear . . . if the following . . . are physically present:

- (1) The party or its representative having full authority to settle without further consultation.
- (2) The party's counsel of record, if any.
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authori-

322. No. 8:09-cv-2398-T-27TGW, 2011 WL 1465995 (M.D. Fla. Apr. 18, 2011).

323. *Id.* at *2.

324. FLA. STAT. § 44.405(4)(a)(4), (6).

325. FLA. R. JUV. P. 8.290(l)(5).

326. FLA. R. APP. P. 9.720(b).

327. FLA. R. CIV. P. 1.720(b).

328. FLA. FAM. L. R. P. 12.741(b)(2).

329. *See* FLA. R. JUV. P. 8.290(l)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d).

330. *See* FLA. R. JUV. P. 8.290(l)(2); FLA. R. APP. P. 9.720(a); FLA. R. CIV. P. 1.720(b); FLA. R. CIV. P. 1.750(e); FLA. R. CIV. P. 7.090(f); FLA. FAM. L. R. P. 12.740(d).

331. *See* *Avril v. Civilmar*, 605 So. 2d 988, 989–90 (Fla. 4th Dist. Ct. App. 1992); Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, J. DISP. RESOL. 67, 74–75 (2003).

ty to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.³³²

The Act does not provide an exception to confidentiality for reporting lack of authority to settle.³³³ Therefore, if lack of settlement authority is learned during mediation, it is a confidential mediation communication.³³⁴ Consequently, mediation participants are prohibited from communicating it to the judge, unless the parties waive their privilege.³³⁵

Following passage of the Act, the MEAC, a standing committee of the Supreme Court of Florida, advised that if mediators learned of parties' lack of full settlement authority during the mediation proceeding, they were not ethically permitted to report the lack of authority to the judge.³³⁶ Prior to the Act, MEAC had opined that appearance with full authority was required by Rule 1.720(b), and mediators could report failure to appear.³³⁷ However, as the information conveyed during the mediation falls within the statutory definition of mediation communication, mediators are now prohibited from communicating this nonappearance.³³⁸ Mediators may continue to report failure to appear when individuals fail to physically appear.³³⁹ The mediator would be reporting a permitted observation, not a prohibited mediation communication.³⁴⁰

Rules of procedure provide for sanctions should parties fail to appear with the requisite settlement authority.³⁴¹ Yet, lack of authority to settle will not reach the judge if the information is learned in mediation.³⁴² This creates

332. FLA. R. CIV. P. 1.720(b).

333. *See* FLA. STAT. § 44.405 (2011).

334. *See id.*

335. *See id.* § 44.405(1), (4)(a)(1).

336. Mediator Ethics Advisory Comm., Advisory Op. 2006-003 (2006).

337. Mediator Qualifications Advisory Panel, Advisory Op. 99-002 (1999); Mediator Ethics Advisory Comm., Advisory Op. 2001-010 (2002).

338. *See* FLA. STAT. § 44.405(1).

339. MEAC Advisory Op. 2006-008, *supra* note 269; MEAC Advisory Op. 2007-001, *supra* note 269.

340. MEAC Advisory Op. 2006-008, *supra* note 269; MEAC Advisory Op. 2007-001, *supra* note 269.

341. *See* FLA. R. CIV. P. 1.720(b) (providing mandatory sanctions); FLA. R. APP. P. 9.720(b) (providing permissive sanctions).

342. *See* FLA. STAT. § 44.405. Previously, information was reported to judges, and they would sanction parties for failing to appear without full settlement authority. *See, e.g.,* Physicians Protective Trust Fund v. Overman, 636 So. 2d 827, 829 (Fla. 5th Dist. Ct. App. 1994); Western Waste Indus. v. Achord, 632 So. 2d 680, 681-82 (Fla. 5th Dist. Ct. App. 1994).

a conundrum.³⁴³ Parties, parties' counsel, and mediators are prohibited from apprising judges of the information needed to sanction.³⁴⁴ The rule of procedure and statutory provision are undisputedly inconsistent.³⁴⁵

The inconsistency may not have much impact on the vast majority of mediations held throughout the state. Parties may, of course, choose not to settle. Parties' representatives may not state that they do not have full settlement authority. They may also make a phone call to get increased authority based on the mediation discussion.³⁴⁶ Regardless, at this time the rule stands, and information is not coming to the court's attention.³⁴⁷ Judges are unable to sanction and deter failure to appear because the Act prohibits the information from reaching them.³⁴⁸

To address this conundrum, the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy (ADR R&P Committee) petitioned the Supreme Court of Florida to revise the appearance segment of Florida Rule of Civil Procedure 1.720(b).³⁴⁹

Prior to doing so, the ADR R&P Committee studied the problem and devised three possible options to address the inconsistency between the Act and the rule.³⁵⁰ Option one was to amend the Act to extend the scope of the exceptions to mediation confidentiality and privilege.³⁵¹ The ADR R&P Committee rejected this possibility, reasoning "that having mediators assume responsibility for reporting non-compliance would place mediators in a position that could compromise the mediator's impartiality, violate the Act, and inhibit party communication during mediation."³⁵² Option two had parties filing a pre-mediation form with the court identifying the party representatives who would attend the mediation, and confirming that the representa-

343. See, e.g., *In re* Amendments to the Florida Rules of Civil Procedure, Case No. SC10-2329 1, 2 (Fla. filed Dec. 6, 2010) available at http://www.floridasupremecourt.org/decisions/probin/sc10-2329_Petition.pdf.

344. FLA. STAT. § 44.405(1).

345. Compare FLA. R. CIV. P. 1.720, with FLA. STAT. § 44.405(1).

346. E.g., *Achord*, 632 So. 2d at 681.

347. FLA. STAT. § 44.405.

348. *Id.*

349. *In re* Amendments to the Florida Rules of Civil Procedure, Case No. SC10-2329 1, 1 (Fla. filed Dec. 6, 2010) available at http://www.floridasupremecourt.org/decisions/probin/sc10-2329_Petition.pdf.

350. *Id.* at 2–3.

351. *Id.* at 3.

352. *Id.* at 3; see Samara Zimmerman, Note, *Judges Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in "Bad Faith" Should be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353, 368–71 (2009) (discussing the importance of mediator impartiality and the destruction to the mediation process should the mediator's facilitative role become a "quasi-policing" role).

tives had the required settlement authority.³⁵³ Option three would require party representatives to file a post-mediation notice with the court if the mediation resulted in impasse.³⁵⁴ The notice would confirm that the party representatives had full settlement authority while participating in the mediation.³⁵⁵

The committee sought and received public comment on the options.³⁵⁶ The majority of those responding to the survey and proposal drafts preferred the pre-mediation confirmation of settlement authority.³⁵⁷ Pre-mediation filing of confirmation of settlement authority places a document in the court file “unrelated to confidential ‘mediation communications.’”³⁵⁸ This may afford a court the opportunity to later consider the imposition of sanctions based on matters of record, rather than mediation communications.³⁵⁹ Additionally, the advance notice may cause parties and attorneys to more seriously consider mediation in terms of benefits and responsibility.³⁶⁰ The petition before the Supreme Court of Florida represents “a good balance in strengthening the potential of resolution in circuit court civil mediations, without compromising confidentiality or self-determination.”³⁶¹

V. CONCLUSION

Florida has earned its position as a respected leader in the field of mediation. After the Act, attorneys, mediators, parties, and other participants are better able to plan for and participate in meaningful mediation. Additionally, the courts are in a better position to make consistent rulings on questions of mediation confidentiality. The Act provides needed clarity as to the breadth

353. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 3. The Supreme Court of Florida adopted this option after this article was drafted and at the end of the article’s editing process. *In re: Amendments to the Florida Rule of Civil Procedure* 1.720, Case No. SC10-2329 1, 2 (Fla. filed Nov. 3, 2011) (per curiam), available at www.floridasupremecourt.org/decisions/2011/sc10-2329.pdf. The Court adopted “the amendments to rule 1.720 as proposed by the Committee, with the minor modification to new subdivision (e) (Certification of Authority).” *Id.* The amendment provides that the parties serve written notice of the Certification of Authority on all parties attending the mediation. *Id.*

354. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 3.

355. *Id.*

356. *Id.*

357. *Id.* at 4.

358. *Id.*

359. *In re Amendments to the Florida Rules of Civil Procedure*, Case No. SC10-2329, at 4.

360. *Id.* at 4–5.

361. *Id.* at 8.

of mediation confidentiality, as well as the exceptions.³⁶² The progeny of *Vitakis-Valchine I* and *DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach (DR Lakes I)*³⁶³ will serve to clarify the law of mediator misconduct and mutual mistake. Court determination of what constitutes mediation communication will prove key to future discovery requests and determinations as to the admissibility of evidence. The incompatibility of statutory confidentiality and procedural rules requiring parties to “appear” for mediation will, no doubt, be addressed. The state’s honored tradition of serving parties by respectfully giving them an opportunity to structure agreements that meet their needs, and serving the courts by recognizing their heavy caseloads and providing a means to have parties resolve matters without trial, continues. The Florida courts and conflict resolvers should be proud of how far mediation has come, and should look forward to continuing leadership to determine where it has yet to go.

362. See generally FLA. STAT. §§ 44.401–.406 (2011).

363. 819 So. 2d 971, 973 (Fla. 4th Dist. Ct. App. 2002).

COMMERCIAL OR ADVERTISING PURPOSE UNDER *FLORIDA STATUTES SECTION 540.08* DEMYSTIFIED

MICHAEL L. RICHMOND*

I. INTRODUCTION.....	115
II. PUBLIC FIGURES.....	120
III. “PRIVATE PERSONS” IN MATTERS OF PUBLIC CONCERN.....	126
IV. “PRIVATE PERSONS” IN PRIVATE MATTERS.....	134
V. DEFENSES UNDER THE STATUTE OTHER THAN PUBLIC INTEREST	138
VI. CONCLUSION.....	139

I. INTRODUCTION

Golfer John Daly had an exceptional year in 2001.¹ Since 1995, when he won the British Open, Daly had not won a tournament.² In 1999, “Daly’s career was at a low point, when he struggled on the course, returned to drinking and blew a lucrative endorsement deal with Callaway that prohibited him from drinking and gambling.”³ By the end of 2000, free from drinking for a few months, Daly signed a three-year endorsement with Hippo Golf Company (Hippo)⁴ and another with 84 Lumber Company.⁵ In 2001, Daly won the

* Professor of Law, Shepard Broad Law Center of Nova Southeastern University. J.D., Duke University; M.S.L.S., The University of North Carolina at Chapel Hill; A.B., Hamilton College. Portions of this article were prepared for a panel discussion presented by the NSU Sports and Entertainment Law Society.

1. See Gerry Dulac, *Daly’s Buick Win Boosts 84 Classic*, PITTSBURGH POST-GAZETTE, Feb. 17, 2004, at B7 [hereinafter Dulac, *Daly’s Buick Win Boosts 84 Classic*].

2. Jim Gordon, *The Anti-Fan: John Daly Is Only Fooling John Daly*, SANTA FE NEW MEXICAN, July 17, 2000, at B2.

3. Clifton Brown, *Daly’s Swing and His Life Straighten Out*, N.Y. TIMES, Sept. 6, 2001, at D2.

Daly’s drinking has cost him . . . his endorsement with Wilson Golf. It cost him a \$3 million deal with Callaway Golf, more money than his combined earnings on the PGA Tour. It probably didn’t help any of his three marriages, the last of which ended in divorce in 1997 after Daly trashed a hotel room and wound up in a hospital, unsure where he had been or how he had gotten there.

Gordon, *supra* note 2.

4. John Daly Enters., L.L.C. v. Hippo Golf Co., 646 F. Supp. 2d 1347, 1348 (S.D. Fla. 2009). The agreement began on January 1, 2001. *Id.* A 2002 agreement licensed “Daly’s name, likeness, and marks to [Hippo] for use in the sale of golf clubs and related equipment.” *Id.*

5. Gerry Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish For Top-Notch Field*, PITTSBURGH POST-GAZETTE, Sept. 22, 2004, at C1 [hereinafter Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*].

BMW International Open, a tournament on the European Tour.⁶ Daly seemed on his way back from a nightmarish spiral of alcohol and gambling.⁷ Yet, in 2003, another reverse found Daly “carted off the course during the second round of the 84 Lumber Classic because of what was termed dehydration.”⁸

Joe Hardy, founder and owner of 84 Lumber Company, kept faith in Daly and saw him through the hard times of 2003, finally rejoicing when Daly won the 2004 Buick Invitational Tournament—his first win on the PGA tour in nine years.⁹ In contrast, Hippo and Daly did not renew their contract.¹⁰ By September of 2004, Daly’s second recovery had netted him a sponsorship with Dunlop and saw him ranked nineteenth on the tour’s money list.¹¹

Yet Daly’s dramatic turn of fortune had one negative result: Hippo continued using Daly’s name and picture on its website and products well after the end of its contracts with Daly, without Daly’s permission.¹² Needless to say, with Daly promoting Dunlop’s clubs, the continuing use of his name by Hippo created a conflict uncomfortable at best.¹³ To make matters worse, Daly received nothing by way of royalties from Hippo.¹⁴ Daly sued Hippo, seeking damages on several counts, including a violation of *Florida Statutes* section 540.08,¹⁵ alleging that Hippo had used his name and likeness for advertising and commercial purposes.¹⁶

6. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

7. See Brown, *supra* note 3. Fellow golf pro, Hal Sutton, said of Daly: “[W]hen you’re on the way down, you don’t know where rock bottom is until you get there. It takes a lot inside to climb back up. John’s a good guy.” *Id.*

8. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

9. *Id.*; Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*, *supra* note 5.

10. John Daly Enters., L.L.C. v. Hippo Golf Co., 646 F. Supp. 2d 1347, 1349 (S.D. Fla. 2009). “The contract period ended on December 31, 2003, but because [Hippo] had inventory remaining, [Daly] gave it until March 31, 2004, to divest itself of all John Daly-branded merchandise in its possession.” *Id.*

11. Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1; Dulac, *Daly’s Drive Helps Fulfill Hardy’s Wish*, *supra* note 5.

12. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1348–49.

13. See Dulac, *Daly’s Buick Win Boosts 84 Classic*, *supra* note 1.

14. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1349, 1352.

15. FLA. STAT. § 540.08 (2004).

Unauthorized publication of name or likeness:

(1) No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by:

(a) Such person; or

(b) Any other person, firm or corporation authorized in writing by such person to license the commercial use of her or his name or likeness; or

In 1967, the Florida Legislature passed an expansive act¹⁷ dealing with the branch of privacy known as “commercial appropriation.”¹⁸ The statute prohibited non-consensual publication of a natural person’s “name, portrait, photograph or other likeness” “for purposes of trade or for any commercial

(c) If such person is deceased, any person, firm or corporation authorized in writing to license the commercial use of her or his name or likeness, or if no person, firm or corporation is so authorized, then by any one from among a class composed of her or his surviving spouse and surviving children.

(2) In the event the consent required in subsection (1) is not obtained, the person whose name, portrait, photograph, or other likeness is so used, or any person, firm, or corporation authorized by such person in writing to license the commercial use of her or his name or likeness, or, if the person whose likeness is used is deceased, any person, firm, or corporation having the right to give such consent, as provided hereinabove, may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

(3) The provisions of this section shall not apply to:

(a) The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes;

(b) The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof; or

(c) Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.

(4) No action shall be brought under this section by reason of any publication, printing, display, or other public use of the name or likeness of a person occurring after the expiration of 40 years from and after the death of such person.

(5) As used in this section, a person’s “surviving spouse” is the person’s surviving spouse under the law of her or his domicile at the time of her or his death, whether or not the spouse has later remarried; and a person’s “children” are her or his immediate offspring and any children legally adopted by the person. Any consent provided for in subsection (1) shall be given on behalf of a minor by the guardian of her or his person or by either parent.

(6) The remedies provided for in this section shall be in addition to and not in limitation of the remedies and rights of any person under the common law against the invasion of her or his privacy.

Id. Compare FLA. STAT. § 540.08 (2004), with FLA. STAT. § 540.08 (2011).

16. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1348–49. John Daly Enterprises, LLC, also joined Daly as a plaintiff in the suit for claims other than those under *Florida Statutes* section 540.08. *See id.* at 1348. This article will refer only to Daly himself, as the statute only protects natural persons, and the corporation is not a natural person. *Id.* at 1351 (quoting FLA. STAT. § 540.08(1) (2011)).

17. *See generally* Act effective July 1, 1967, ch. 67–57, § 1, 1967 Fla. Laws 135 (codified as amended at FLA. STAT. §§ 540.08–.10 (1967)).

18. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 20, at 851 (5th ed. 1984).

or advertising purpose.”¹⁹ A later amendment in 1997 did nothing more than change certain language to make the statute gender-neutral.²⁰ A second amendment ten years later added the present subsection three relating to the military.²¹ The title of the statute, as originally passed, indicates rather clearly the legislature’s intent to protect natural persons from unwanted commercial exposure: “An act . . . prohibiting the unauthorized publication of . . . name . . . or other likeness; authorizing action to enjoin such unauthorized publication; authorizing action to recover damages; [and] providing limited exemptions from such liability”²²

Daly moved for summary judgment arguing that Hippo’s continued use of his name and likeness beyond the contract date and agreed extension violated the statute.²³ Hippo countered by arguing that its website postings constituted “fair use.”²⁴ Hippo’s website listed several golfers, among them Daly, who had previously endorsed Hippo products.²⁵ However, it posted a picture of Daly accompanied by the following text:

The twice major winner and golfing superstar, John Daly, will continue to be synonymous [sic] with Hippo. Renowned as the longest hitter in the professional game, Daly truly had the power of Hippo behind his game, working closely with the Hippo design teams over the years to produce some of the most technologically advanced woods to hit the golf market.²⁶

19. FLA. STAT. § 540.08(1) (1967); *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351. The statute also provided that the prohibition transcended the death of the person and licensees or the person’s immediate family could assert the rights created by the statute for forty years subsequent to the person’s death. FLA. STAT. §§ 540.08(1)(c), .08(4). It provided for causes of action both legal and equitable, including punitive damages. *Id.* § 540.08(2). It also provided for situations in which the statute would not apply, including newsworthy publications and publications “in connection with the initial sale or distribution” of the otherwise offending use. *Id.* § 540.08(3)(b). Significantly, the statute also provided that it did not curtail the common law right of privacy. *Id.* § 540.08(6).

20. Act effective May 24, 1997, ch. 97–103, §§ 751–52, 1997 Fla. Laws 1756, 2120–21 (amending FLA. STAT. §§ 540.08–.09 (1967)).

21. Act effective July 1, 2007, ch. 2007–164, § 2, 2007 Fla. Laws 1528, 1528 (amending FLA. STAT. § 540.08(3) (1997)); *see also* FLA. STAT. § 540.08(3) (2011).

22. Act effective July 1, 1967, ch. 67–57, § 1, 1967 Fla. Laws 135.

23. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

24. *Id.* The statute does not include “fair use” in its list of exempted uses. FLA. STAT. § 540.08(4). However, as the court found Hippo’s act to fall well outside of any possible “fair use” at common law, it did not discuss whether “fair use” is indeed a common law defense that might apply to causes of action under the statute. *See John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

25. *Id.*

26. *Id.* (citations omitted).

The court rejected Hippo's argument, finding that claiming Daly "will continue to be synonymous with [Hippo] directly promotes [Hippo's] products."²⁷ Thus, the court effectively concluded that the nonconsensual use to promote products constituted a "use for purposes of trade or for any commercial or advertising purpose," and as Hippo had violated the statute, the court granted partial summary judgment to Daly on the issue of liability.²⁸

John Daly's case, only one of several discussing the meaning of "any commercial or advertising purpose," involved a blatant attempt to capitalize on the fame of a well-known and well-liked public person.²⁹ The court had no trouble in rejecting out of hand Hippo's claim that it simply stated the truth—that Daly formerly endorsed its products.³⁰ Other cases involving Florida substantive law, however, found it more difficult to interpret the language of the statute.³¹ This article discusses them and determines when the statute will sustain a cause of action and when courts will reject the statutory action.

The cases seem to fall into clearly defined categories whose boundaries follow closely those governing defamation cases. The first, like that involving Daly, deals with people whose identity commands the interest of consumers.³² These individuals all satisfy the public figure analysis found in *Curtis Publishing Co. v. Butts*³³—whether general purpose or limited purpose, all have become persons of interest.³⁴ The second category of cases deals with everyday people who found themselves embroiled in "public is-

27. *Id.*

28. *Id.* at 1351, 1354 (quoting FLA. STAT. § 540.08(1)). As the court found questions remained regarding the extent of Daly's damages, it did not grant Daly's motion for full summary judgment. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1353. The court also granted partial summary judgment finding liability on Daly's claims of trademark infringement and breach of contract. *Id.* at 1348.

29. *See id.* at 1351. "Even in his darkest days, John Daly was always loved by the galleries." Brown, *supra* note 3.

30. *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351.

31. *See, e.g., Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

32. *Id.* at 154–55.

33. 388 U.S. 130 (1967).

34. *See id.* at 155. One may attain the status of general purpose public figure:

[B]y position alone and [one may attain the status of limited purpose public figure] by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both [must command] sufficient continuing public interest and [have] sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.

Id. (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

sues”, as the concept first appeared in *New York Times Co. v. Sullivan*.³⁵ The final category involves neither persons nor concerns of any particular public interest, much like the litigants in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³⁶ In all cases which resulted in victories for the plaintiffs, the defendants involved the plaintiffs’ names and/or pictures in commercial ventures—whether directly or in a promotional context. The commercial exploitation for profit present in these cases makes the comparison with defamation cases particularly relevant, for these publications, like those in *Dun & Bradstreet, Inc.*, are “solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others.”³⁷

II. PUBLIC FIGURES

Other than John Daly, the most recognizable plaintiff in cases interpreting *Florida Statutes* section 540.08 was Cecil Fielder, the Hall of Fame first baseman for the Detroit Tigers.³⁸ Fielder had sued a former interior designer for using Fielder’s name in advertising materials without his consent.³⁹ Although the designer, Robert Weinstein, agreed to an injunction prohibiting him from using Fielder’s name, an article in *Florida Design* regarding Weinstein mentioned that he had worked for the Fielder family.⁴⁰ Further, Weinstein had brochures printed containing the *Florida Design* article, but never distributed them.⁴¹ At trial, the judge refused Weinstein’s motion for a directed verdict and the jury found for Fielder.⁴² The Fourth District Court of Appeal considered whether, given Weinstein’s admission that he violated the provisions of section 540.08, the jury should have been allowed to consider the article and the brochures in determining the extent of the violation.⁴³

Without question, *Florida Design* as a quarterly trade magazine qualified as a media outlet, and the evidence showed that the article was classified

35. 376 U.S. 254 (1964). “Thus we consider this case against the background of a profound national commitment to the principle that *debate on public issues should be uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Id.* at 270 (emphasis added).

36. 472 U.S. 749 (1985).

37. *Dun & Bradstreet, Inc.*, 472 U.S. at 762.

38. *See Cecil Fielder*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/f/fieldce01.shtml> (last visited Nov. 13, 2011).

39. *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 993 (Fla. 4th Dist. Ct. App. 2004).

40. *Id.* at 993, 998.

41. *Id.* at 996, 999.

42. *Id.* at 993, 999.

43. *See id.* at 993, 998–99. Weinstein did not dispute that other publications of his violated the statute. *Weinstein Design Grp., Inc.*, 884 So. 2d at 996.

as an editorial and written by a *Florida Design* reporter.⁴⁴ On the other hand, Weinstein was given a proof of the article to approve, and “use of Fielder’s name in the article came about exclusively through information supplied by Weinstein, not from any independent research by the article’s author.”⁴⁵ Thus, the court agreed that the trial court properly placed before the jury the question of whether the article represented inappropriate advertising under section 540.08 and thus fell outside the exception of section 540.08(3)(a).⁴⁶ As to the brochures, the court found that even though not a single one had ever left Weinstein’s hands, since they were patently advertising and since the statute prohibits *printing* a person’s name in violation of the statute, the trial court properly allowed “the jury to consider them in determining any damage award.”⁴⁷

*Weinstein Design Group, Inc. v. Fielder*⁴⁸ represents two truly unusual results. At first, the case recognizes that the finder of fact may determine that an article placed in a legitimate media outlet nonetheless constitutes advertising purposes even where the article is of public concern.⁴⁹ Second, merely printing material to be used in advertising will violate section 540.08 even when the material has not reached a single person.⁵⁰ Taken together, these results demonstrate the commitment of the Fourth District Court of Appeal to interpret the statute as protecting individuals from deliberate attempts to improperly cloak advertising material in the garb of newsworthiness.⁵¹

Courts from other jurisdictions have had occasion to interpret Florida law.⁵² A federal district court in Ohio granted a preliminary injunction

44. *See id.* at 998.

45. *Id.*

46. *Id.* at 999. At the time of the case, the language exempting a “bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes” was found in subsection (3)(a). FLA. STAT. § 540.08(3)(a) (2004) (codified as amended at FLA. STAT. § 540.08(4)(a) (2011)).

47. *Weinstein Design Grp., Inc.*, 884 So. 2d at 999.

48. 884 So. 2d 990 (Fla. 4th Dist. Ct. App. 2004).

49. *See id.* at 998–99. The New York Court of Appeals has indicated in dicta that given proper proof, a plaintiff may have a jury consider whether an article nevertheless constitutes advertising. *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 586 (N.Y. 1984). Although the Florida and New York statutes are very similar (“[t]he Florida statute relied upon is quite similar to Sections 50 and 51 of the New York [civil rights law].” *Messenger ex rel. Messenger v. Gruner & Jahr USA Publ'g*, 994 F. Supp. 525, 531 (S.D.N.Y. 1998), *vacated*, 208 F.3d 122 (2d Cir. 2000)) as the New York statute is in derogation of common law, it is strictly construed. *See, e.g., Stephano*, 474 N.E.2d at 584–85.

50. *See Weinstein Design Grp., Inc.*, 884 So. 2d at 999.

51. *See id.* at 998–99.

52. *See, e.g., Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 919 (N.D. Ohio 2004).

against further publication in the case of a well-known television reporter who was filmed engaging in a wet t-shirt competition in Florida.⁵³ Unbeknownst to her, the competition was filmed and her performance found its way to the Internet and into two versions of a video.⁵⁴ The defendants promoted both the websites and the video by “emphasizing the appearance of Catherine Bosley or the ‘naked anchor woman.’”⁵⁵ Bosley’s picture and name appeared on the video’s cover as well as on the website which sold her performance to its subscribers.⁵⁶ The court had little trouble in finding the defendants liable under the Florida statute, which the court found prohibited “using a person’s name or likeness to directly promote a product or service. Indeed, Defendants are using the images of Catherine Bosley to directly promote the sale of videos and memberships.”⁵⁷

The court continued to find that the promotional material did not constitute “expressive works, as they do not contain any creative components or transformative elements.”⁵⁸ The court also discussed the question of Bosley’s consent to the filming of the contest, noting that the defendants introduced evidence which might have cast doubt on her protestation that she had no idea cameras were present and rolling.⁵⁹ However, as the statute requires “express written or oral consent,”⁶⁰ and the defendants introduced no evidence of Bosley having expressly given consent, their argument failed.⁶¹

Sony Music Entertainment Incorporated (Sony) issued eight CD recordings of the music of Harold Melvin and the Blue Notes.⁶² The outside covers of three of the CDs displayed the picture of Jeremiah Cummings.⁶³ Sony had not received Cummings’ consent for the use of his picture, and when Cummings sued Sony, he moved for judgment on the pleadings.⁶⁴ Applying Florida law, the court held “by placing Plaintiff’s likeness on merchandise mar-

53. *Id.* at 917, 936.

54. *Id.* at 917.

55. *Id.*

56. *Id.* at 922.

57. *Bosley*, 310 F. Supp. 2d at 921–22 (citations omitted).

58. *Id.* at 922. Compare *id.*, with *infra* notes 134–44 and accompanying text.

59. *Bosley*, 310 F. Supp. 2d at 931. Signs abounded in the areas of the contest, and some pictures showed Bosley scant feet from the camera looking directly at it. *Id.*

60. FLA. STAT. § 540.08(1) (2011).

61. *Bosley*, 310 F. Supp. 2d at 931.

62. *Cummings v. Sony Music*, No. 01Civ.4375RCCKNF, 2003 WL 22271189, at *1 (S.D.N.Y. Sept. 30, 2003).

63. *Id.* at *3. The court held that the cause of action as it related to five of the CDs was time barred. *Id.* at *1. Cummings was the lead tenor of the Blue Notes and today is a well-known evangelical preacher. Jeremiah Cummings, *For His Glory International*, RIGHT BRAIN MEDIA, <http://wicctv.org> (last visited Nov. 13, 2011).

64. *Cummings*, 2003 WL 22271189, at *1.

keted by Defendant, without Plaintiff's permission, Defendant has publicly used Plaintiff's photograph for commercial purposes."⁶⁵

Thus, *John Daly Enterprises, LLC v. Hippo Golf Co.*,⁶⁶ *Bosley v. Wildwett.com*,⁶⁷ and *Cummings v. Sony Music*⁶⁸ establish that, under the *Florida Statutes*, one cannot seek to capitalize on the associative value of a well-known personality in marketing a product.⁶⁹ Unquestionably, consumers will purchase products based on celebrity endorsements even where the endorser may have no apparent relation to the product itself.⁷⁰ Equally obvious, consumers rush to buy and view pictures and videos of the famous.⁷¹ Clearly, section 540.08 of the *Florida Statutes* in part exists to protect "celebrities and other public figures [who] have come to rely on the right of publicity to protect them from the intrusion of others."⁷² It should come as no surprise that the same protection extends to those who have not achieved substantial pub-

65. *Id.* at *3.

66. 646 F. Supp. 2d 1347 (S.D. Fla. 2009).

67. 310 F. Supp. 2d 914 (N.D. Ohio 2004).

68. No. 01Civ.4375RCCKNF, 2003 WL 22271189, at *1 (S.D.N.Y. Sept. 30, 2003).

69. *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 997–98 (Fla. 4th Dist. Ct. App. 2004); see FLA. STAT. § 540.08; see *John Daly Enters., L.L.C.*, 646 F. Supp. 2d at 1351; see also *Bosley*, 310 F. Supp. 2d at 920; *Cummings*, 2003 WL 22271189, at *3. "[T]he right of publicity is a proprietary right based on the identity of a character or defining trait that becomes associated with a person when he gains notoriety or fame." *McFarland ex rel. Estate of McFarland v. Miller*, 14 F.3d 912, 923 (3d Cir. 1994) (applying New Jersey law). Another suit involving a well-known personality and the *Florida Statutes* was brought by Anna Kournikova, the tennis player, against the publisher of *Penthouse Magazine* for printing a photograph falsely purporting to represent her sunbathing in the nude. *Kournikova v. Gen. Media Commc'ns, Inc.*, No. CV 02-3747 GAF (AJWx), 2002 WL 31628027, at *1 (C.D. Cal. Aug. 9, 2002). Her first amended complaint included a count alleging violation of the *Florida Statutes*. *Id.* at *4. Plaintiff's motion for preliminary injunction was denied. *Id.* at *10. However, a later complaint appeared to have abandoned the Florida claim, and the case proceeded under a theory involving the Lanham Act. *Kournikova v. Gen. Media Commc'ns, Inc.*, 278 F. Supp. 2d 1111, 1114–15 (C.D. Cal. 2003).

70. *Ramson v. Layne*, 668 F. Supp. 1162, 1166 (N.D. Ill. 1987). For example, in *Ramson*, an investor sued movie actors Lloyd Bridges and George Hamilton, who had endorsed the purchase of a mortgage note which she had never received. *Id.* at 1163.

71. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800–01 (Cal. 2001). For instance, well after the demise of the members of the popular film trio, the Three Stooges, litigation proliferated seeking to prohibit the use of their images on various commercial products. *Id.*

72. Fla. S. Comm. on Commerce, CS for SB 116 (2007) Staff Analysis 2 (Mar. 7, 2007) [hereinafter Mar. 7, 2007 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2007/senate/bills/analysis/pdf/2007s0116.cm.pdf> (discussing an amendment to section 540.08 of the *Florida Statutes* to include members of the armed forces in its protection).

lic recognition, but have garnered sufficient notice in their fields to make their name or image influential in marketing products to others.⁷³

Dr. Jey Jeyapalan was the proverbial big fish in a very small pond.⁷⁴ A renowned expert in a very narrow field of engineering, he received offers to consult and speak around the globe.⁷⁵ In 1991, he agreed to work with a Florida engineering firm on designing a specific project for a pipeline system in Florida.⁷⁶ When the firm used his name without his consent as part of a proposal for a different project in Broward County, he sued claiming violation of section 540.08 of the *Florida Statutes* and sought partial summary judgment on the issue of liability.⁷⁷ The court granted his motion, finding that, “‘commercial trade or advertising purposes’ is precisely the type of action in which [the defendant] has engaged here.”⁷⁸ Thus, the court adopted an expansive, albeit logical, interpretation of “advertising purposes” to include bidding to secure a contract.⁷⁹ Dr. Jeyapalan’s name would have enhanced the ability of the firm to win the bid, and so the defendant had sought to capitalize on his professional persona without his consent.⁸⁰

Professional models effectively thrust themselves into the limelight simply by performing their jobs.⁸¹ This does not make them general purpose public figures, nor does it accord them any particular degree of fame.⁸² Nothing points this out more forcefully than the case of Ting Ji, who sued Bose Corporation pursuant to the Florida statute.⁸³ In a preliminary matter, the trial court found:

Ji has provided no direct evidence that she enjoys any fame whatsoever. In support of her claim, she refers to her full-time work as a *professional model* and to the fact that she has appeared on multiple occasions in other advertisements for high-end electronic products. Bose counters that her income from modeling (\$19,500

73. See *Am. Ventures, Inc. v. Post, Buckley, Schuh, & Jernigan, Inc.*, No. C92-1817Z, 1993 WL 468643, at *5–6 (W.D. Wash. May 18, 1993).

74. See *id.* at *4.

75. *Id.*

76. *Id.* at *1.

77. See *id.* at *2–3.

78. *Am. Ventures, Inc.*, 1993 WL 468643, at *8.

79. See *id.*

80. See *id.* at *6.

81. See *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967). The Supreme Court has defined a limited purpose public figure as one who has “thrust himself into the ‘vortex’ of the controversy.” *Id.* at 146.

82. See *Ting Ji v. Bose Corp. (Ting Ji I)*, 538 F. Supp. 2d 349, 351 (D. Mass. 2008), *aff’d*, 626 F. 3d 116 (1st Cir. 2010).

83. See *id.* at 349, 353.

per year) and the dearth of news accounts mentioning her name demonstrate that she has no meaningful public identity.⁸⁴

The plaintiff later won a jury verdict in an action brought pursuant to the Florida statute, but only for a fraction of the damages she had claimed.⁸⁵ Evidently the jury agreed that she had not achieved any particular degree of fame.⁸⁶ On the other hand, her lack of substantial name or face recognition did not bar her action under the statute.⁸⁷ Bose had used her picture beyond the scope of their contract in displaying it on the packaging of one of their products.⁸⁸ In response to an interrogatory verdict, the jury found that Bose had violated her rights under the statute.⁸⁹

In another case involving a model claiming rights under the statute, Anheuser Busch (A-B) continued to use her picture subsequent to the expiration of their agreement.⁹⁰ Although the model, Jennifer Miller, had signed a release until January of 2003, the defendant continued to use her picture after that date.⁹¹ “Regardless of any prior consent Miller granted A-B, therefore, the evidence in the record indicates that A-B did not have Miller’s authorization to use her likeness from and after January 2003, as required by [section 540.08 of the *Florida Statutes*.]”⁹² Both *Ting Ji v. Bose Corp. (Ting Ji I)*⁹³ and *Miller v. Anheuser Busch, Inc.*,⁹⁴ involve plaintiffs whose stock in trade is their picture, and it should come as no surprise that they, like the famous, require the protection of the statute.⁹⁵ Indeed, the use of a model’s likeness will almost inevitably involve advertising purposes.

Sports figures, actors, politicians, and others whose personae can serve as a trigger to convince others to purchase a seller’s product are particularly susceptible to commercial exploitation.⁹⁶ Similarly, advertisers will find models easy prey for commercial abuse, for the very purpose of a model’s career is promotion of the products of another. As a result, the common law

84. *Id.* at 351 (emphasis added).

85. *Ting Ji v. Bose Corp. (Ting Ji II)*, 626 F.3d 116, 120–21 (1st Cir. 2010).

86. *See id.* at 120.

87. *See id.*

88. *Id.* at 119.

89. *Id.* at 120–21.

90. *Miller v. Anheuser Busch, Inc.*, 348 F. App’x 547, 549–50 (11th Cir.2009) (per curiam), *cert. denied*, 130 S. Ct. 2387 (2010).

91. *Id.*

92. *Id.* at 550; *See* FLA. STAT. § 540.08 (2011).

93. 538 F. Supp. 2d 349 (D. Mass. 2008), *aff’d*, 626 F.3d 116 (1st Cir. 2010).

94. 348 F. App’x 547 (11th Cir. 2009) (per curiam), *cert. denied*, 130 S. Ct. 2387 (2010).

95. *See Miller*, 348 F. App’x, at 550–51; *Ting Ji II*, 626 F.3d at 119–21; *Ting Ji I*, 538 F. Supp. 2d at 349–51.

96. *See ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 931 (6th Cir. 2003).

tort cause of action for invasion of publicity developed to protect the commercial value of a person's persona, and the Florida Legislature enacted section 540.08 to clarify and enhance judge-made law.⁹⁷ That said, the legislature also intended the statute to protect those, whose names and images did not command the attention of the buying public.⁹⁸ This article now focuses on those "private persons."

III. "PRIVATE PERSONS" IN MATTERS OF PUBLIC CONCERN

While celebrities seek to prevent others from capitalizing on the reputations they have built over the years, those who have established no such associative monetary values still have a vital concern to protect: the right to privacy.⁹⁹ The Florida Legislature unquestionably intended to protect this right, as evidenced by the Senate Staff Analysis of the 2007 amendment to section 540.08: "The right to privacy is a long cherished American tradition. The Florida Constitution addresses the right of every natural person to be let alone and free from governmental intrusion into the person's private life."¹⁰⁰

On the other hand, just as with the ability to sue for defamation, the right to privacy must yield to the freedom of the press to report on matters of public concern.¹⁰¹ Accordingly, the Florida Legislature incorporated into the publicity statute an exception for:

The publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate

97. See FLA. STAT. § 540.08 (1997). For example, at common law, courts frequently struggled with the question of whether the right of publicity will descend to a person's heirs. See *Loft v. Fuller*, 408 So. 2d 619, 623 (Fla. 4th Dist. Ct. App. 1981). Subsection 1(c) of the statute clearly establishes the right can devolve on the heirs and assigns of a decedent. FLA. STAT. § 540.08(1)(c).

98. Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2. "Florida Statutes explicitly prohibit the last form of an invasion of privacy—appropriation—and provide a civil remedy for a violation of the statute." *Id.*

99. See *id.*

100. Fla. S. Comm. on Commerce, CS for SB 116 (2007) Staff Analysis 1 (Feb. 8, 2007) [hereinafter Feb. 8, 2007 Staff Analysis], available at <http://archive.flsenate.gov/data/session/2007/senate/bills/analysis/pdf/2007s0116.ms.pdf> (discussing an amendment to section 540.08 of the *Florida Statutes* to include members of the armed forces in its protection).

101. Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2–3.

public interest and where such name or likeness is not used for advertising purposes.¹⁰²

Hence, all the cases discussed in the preceding section dealt with whether the defendant had capitalized on the persona of the plaintiff for advertising purposes.¹⁰³ Of necessity, any other mention of a celebrity's name would be a question of interest to the public by definition.¹⁰⁴ Cases involving private persons do not carry with them the automatic cachet of public interest, and thus fall into three categories: those which relate to matters of public concern, those which do not relate to matters of public concern but where the plaintiff has consented to the use by the defendant, and those which do not relate to matters of public concern and where the defendant has failed to secure the plaintiff's consent.¹⁰⁵

A significant difference between defamation cases and cases brought under section 540.08 occurs when dealing with private persons embroiled in matters of public interest.¹⁰⁶ Only where a defendant is at fault for publish-

102. FLA. STAT. § 540.08(4)(a) (2011).

103. See *supra* Part I.

104. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003). It is also possible that the picture of a celebrity can be sold specifically for its commercial value, rather than used for advertising purposes. *Id.* at 918, 938. In a case involving Tiger Woods, an artist painted a portrait of Woods after his first victory at the Masters Golf Tournament. *Id.* at 918. The artist then sought to market prints of the portrait, and the company to which Woods had licensed his right of publicity sued. *Id.* at 918–19. The artist won, but only because the portrait carried sufficient “transformative value” to qualify as a permissive use. *Id.* at 938 (applying Ohio law). The “transformative value” test has not always protected defendants, however. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 811 (Cal. 2001).

105. See *Miami Herald Publ'g Co. v. Ane*, 423 So. 2d 376, 385–86 n.3 (Fla. 3d Dist. Ct. App. 1982); see, e.g., *ETW Corp.*, 332 F.3d at 929–31.

106. See, e.g., *Thomas v. Quintero*, 24 Cal. Rptr. 3d 619, 636 (Cal. Dist. Ct. App. 2005). Perhaps worthy of noting, Florida courts have not squarely confronted the question of what matters might be considered of “public interest.” See, e.g., *Miami Herald Publ'g Co.*, 423 So. 2d at 384 (citing *Firestone v. Time, Inc.*, 271 So. 2d 745, 747 (Fla. 1972), *quashed by* 305 So. 2d 172 (Fla. 1974), *vacated*, 424 U.S. 448 (1976)). Of substantial guidance in this regard is a five-prong test put forward by a California appellate court in a defamation case:

First, “public interest” does not equate with mere curiosity. Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Third, there should be some degree of closeness between the challenged statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient. Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort “to gather ammunition for another round of [private] controversy” Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.

Thomas, 24 Cal. Rptr. 3d at 634–35 (citations omitted).

ing defamatory material relating to a private person¹⁰⁷ may the defamed plaintiff recover damages.¹⁰⁸ In contrast, a plaintiff claiming a violation of section 540.08 need only prove the use of name or likeness for public “use for purposes of trade or for any commercial or advertising purpose”¹⁰⁹ The defendant would bear the burden of raising and proving any statutory defenses.¹¹⁰ For example, the statute provides a defense to the publisher when the use is “part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes.”¹¹¹ Hence, the question of what constitutes a commercial or advertising purpose becomes crucial where the plaintiff is a private person.¹¹²

The leading Supreme Court of Florida case involving a private person and a matter of public interest involved the relatives of Billy Tyne, who was presumed to have died aboard a ship named the *Andrea Gail* in a storm in 1991.¹¹³ The magnitude of the storm received extensive media coverage and in 1997, a book entitled *The Perfect Storm* appeared chronicling the author’s version of what might have happened to Tyne and the rest of the crew.¹¹⁴ Three years later, the Warner Brothers movie, *The Perfect Storm*, was released.¹¹⁵ “Unlike the book, the Picture presented a concededly dramatized

107. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). “[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347.

108. *Id.* at 338–39. Florida has adopted a negligence standard as the test for a defendant’s liability in defamation cases involving private individuals: “The prevailing First Amendment and Florida law . . . is supported by the overwhelming weight of authority in the country on this subject which has followed a . . . standard of negligence in defamation actions where the plaintiff is neither a public official nor a public figure.” *Miami Herald Publ’g Co.*, 423 So. 2d at 385.

109. FLA. STAT. § 540.08(1) (2011).

110. *See id.* § 540.08(4)(a)–(c).

111. *Id.* § 540.08(4)(a).

112. *See Gertz*, 418 U.S. at 334. One might also note that in section 540.08 cases, plaintiffs do not claim the use of name or image did not portray them falsely; in defamation cases, however, an essential element of the plaintiff’s case is the falsity of the publication. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986). “Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.” *Id.*

113. *Tyne v. Time Warner Entm’t Co.*, 901 So. 2d 802, 803 (Fla. 2005).

114. *See SEBASTIAN JUNGER, THE PERFECT STORM: A TRUE STORY OF MEN AGAINST THE SEA* (W.W. Norton & Co., 1997).

115. *THE PERFECT STORM* (Warner Bros. 2000), available at <http://perfectstorm.warnerbros.com/cmp/flash-thefilm-fr.html>.

account of both the storm and the crew of the *Andrea Gail*.¹¹⁶ The movie contained the actual names of the crew, and consequently, Tyne's surviving children, along with family members of the remaining crew, sued Warner Brothers for violation of section 540.08 of the *Florida Statutes*.¹¹⁷ The suit began in the United States District Court for the Middle District of Florida and the plaintiffs appealed that court's granting the defendants' motion for summary judgment.¹¹⁸ The United States Court of Appeals for the Eleventh Circuit certified a question of Florida law to the Supreme Court of Florida.¹¹⁹ The question as rephrased read: "Does the phrase 'for purposes of trade or for any commercial or advertising purpose' in section 540.08(1), *Florida Statutes*, include publications which do not directly promote a product or service?"¹²⁰ After discussing earlier cases from the lower Florida courts, the Supreme Court of Florida answered the question in the negative.¹²¹

The court first reviewed the First District Court of Appeal decision in *Loft v. Fuller*.¹²² *Loft* involved a suit brought under section 540.08 by the survivors of a man who perished in a plane crash—a crash that formed the basis of a later book and motion picture, both of which used the name of the decedent.¹²³ In upholding an order dismissing the complaint, the court reasoned so cogently that the Supreme Court of Florida approved of its opinion from which it quoted extensively:

In our view, section 540.08, by prohibiting the use of one's name or likeness for trade, commercial or advertising purposes, is designed to prevent the unauthorized use of a name to *directly promote the product or service of the publisher*. Thus, the publication is harmful not simply because it is included in a publication that is sold for profit, but rather *because of the way it associates the individual's name or his personality with something else . . .* We simply do not believe that the term "commercial," as employed by [s]ection 540.08, was meant to be construed to bar the use of people's names in [media discussions of public interest].¹²⁴

Significantly, the *Loft* court based its conclusion on whether the name of the plaintiff was directly used to promote the sale of a product, and the

116. *Tyne*, 901 So. 2d at 804.

117. *Id.*; FLA. STAT. § 540.08 (2011).

118. *Tyne*, 901 So. 2d at 804–05.

119. *Id.* at 803.

120. *Id.* at 806 (emphasis omitted).

121. *Tyne*, 901 So. 2d at 810.

122. 408 So. 2d 619, 620 (Fla. 4th Dist. Ct. App. 1981); see *Tyne*, 901 So. 2d at 806.

123. *Tyne*, 901 So. 2d at 806.

124. *Id.* at 806 (second and third emphasis added) (quoting *Loft*, 408 So. 2d at 622–23).

Supreme Court of Florida agreed.¹²⁵ Unlike cases involving celebrities, the use of Loft's name would not make it any more probable that potential viewers would rush to see the movie—the interest of the public lay in the plane crash and its aftermath, not the identity of the individual decedent.¹²⁶

The court next discussed *Valentine v. C.B.S., Inc.*,¹²⁷ in which Patty Valentine's name appeared in Bob Dylan's song about the arrest and conviction of Rubin "Hurricane" Carter.¹²⁸ "[Patty] Valentine testified as a witness at the highly publicized 1967 trial of prizefighter Rubin 'Hurricane' Carter and John Artis."¹²⁹ She sued the producer of the record on which the song appeared for violating the Florida statute.¹³⁰ The Eleventh Circuit affirmed a summary judgment for C.B.S., holding that the Carter trial continued to be of public interest and that "an interpretation that the statute absolutely bars the use of an individual's name without consent for any purpose would raise grave questions as to constitutionality."¹³¹

Finally, the court addressed *Lane v. MRA Holdings, LLC*,¹³² in which a young woman in Panama City consented to receive a strand of beads in time-honored Mardi Gras fashion—by exposing her breasts,¹³³ this time to the lens of a video camera.¹³⁴ The producers of *Girls Gone Wild* then used segments of Lane in their video and advertised it on paid television by showing brief, censored clips of Lane and others.¹³⁵ Lane sued for violation of section

125. *Id.*; *Loft*, 408 So. 2d at 622–23.

126. *See* FLA. STAT. § 540.08 (2011); *Loft*, 408 So. 2d at 621.

127. 698 F.2d 430 (11th Cir. 1983) (per curiam).

128. *Tyne*, 901 So. 2d at 806–07; *Valentine*, 698 F.2d at 431. "Pistol shots ring out in the barroom night. Enter Patty Valentine from the upper hall. She sees the bartender in a pool of blood. Cries out, 'My God, they killed them all!'" *Valentine*, 698 F.2d at 432 n.1.

129. *Id.* at 431.

130. *Id.*

131. *Id.* at 433.

132. 242 F. Supp. 2d 1205 (M.D. Fla. 2002).

133. *Tyne*, 901 So. 2d at 807; *see generally* *Mardi Gras History & Traditions*, MARDI GRAS NEW ORLEANS, <http://www.mardigrasneworleans.com/quartermardi.html#breasts> (last visited Nov. 13, 2011).

134. *Tyne*, 901 So. 2d at 807; *Lane*, 242 F. Supp. 2d at 1209. In point of fact, Lane's companion having received beads in the same manner during Mardi Gras in New Orleans two years previously, recited the encounter to Lane, adding that her photograph from the New Orleans venture later appeared in a men's magazine. *Lane*, 242 F. Supp. 2d at 1209.

135. *Id.* at 1210. "*Girls Gone Wild*, [is] a video that depicts a variety of young women exposing their buttocks and genitals in public places." *Id.* Lane argued that she had consented to the videotaping, but not to its use in *Girls Gone Wild*. *Id.* The trial court found her argument unpersuasive. *Id.* at 1220.

[T]he interactions between Lane and the cameraman were not private in nature. Lane exposed herself on a public street while several pedestrians were in the general vicinity. . . . Lane did not know the cameraman before whom she exposed herself. It is unreasonable to expect that a

540.08, but the trial court granted the defendants' motion for summary judgment, stating:

In this case, it is irrefutable that the *Girls Gone Wild* video is an expressive work created solely for entertainment purposes. Similarly, it is also irrefutable that while Lane's image and likeness were used to sell copies of *Girls Gone Wild*, her image and likeness were never associated with a product or service unrelated to that work. Indeed, in both the video and its commercial advertisements, Lane is never shown endorsing or promoting a product, but rather, as part of an expressive work in which she voluntarily participated.¹³⁶

The point in *Lane* not directly addressed by the Supreme Court of Florida in *Tyne v. Time Warner Entertainment Co.*,¹³⁷ is that an advertisement for a work protected under the First Amendment has the same protection as the work itself.¹³⁸ Thus, the advertisements for the *Girls Gone Wild* movie, which depicted Lane, could not form the basis of an independent cause of action.¹³⁹ *Tyne* does, however, address the issue in relation to a different case involving a movie representing the history of the Black Panther Party.¹⁴⁰ The court in that case held:

Moreover, use of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not ac-

total stranger would limit the viewing of a video with shots of young women publicly exposing themselves to only those persons present at the time of the filming.

Lane, 242 F. Supp. 2d at 1220.

136. *Id.* at 1213. The trial court's conclusion that the video irrefutably constituted an expressive work invited the scorn of a later judge:

Lane is an anomalous case which holds that "it is irrefutable that the *Girls Gone Wild* video is an expressive work created solely for entertainment purposes." This Court cannot similarly hold that the images in question are expressive works, as they do not contain any creative components or transformative elements.

Bosley v. Wildwett.com, 310 F. Supp. 2d 914, 922 (N.D. Ohio 2004) (citation omitted) (quoting *Lane*, 242 F. Supp. 2d at 1213). See also the implicit scathing criticism of the result in *Lane* by the recent Eleventh Circuit case, *Plaintiff B v. Francis*, 631 F.3d 1310, 1317–19 (11th Cir. 2011) (holding that minors in suits against the producers of *Girls Gone Wild* movies should be permitted to proceed anonymously).

137. 901 So. 2d 802 (Fla. 2005).

138. See *Lane*, 242 F. Supp. 2d at 1212–13; see also *Groden v. Random House, Inc.*, 61 F.3d 1045, 1048, 1050 (2d Cir. 1995) (holding no violation of publicity right by the publisher of a book on the assassination of John F. Kennedy, which advertised the book by comparing it to theories of other authors and displaying their pictures).

139. *Lane*, 242 F. Supp. 2d at 1215.

140. *Tyne*, 901 So. 2d at 809 (citing *Seale v. Gramercy Pictures*, 949 F. Supp. 331, 337 (E.D. Pa. 1996)).

tionable as an infringement of the right of publicity. For example, the use of another's name and likeness in the title of a movie does not infringe on the right of publicity since such use "is clearly related to the content of the movie and is not a disguised advertisement for the sale of goods or services or a collateral commercial product."¹⁴¹

Thus, the advertisements in *Lane* did not violate the Florida statute.¹⁴²

Before moving on, it is well to note a problem with the *Tyne* opinion. Surprisingly, the court misinterprets the California case involving the T-shirts with the sketch of the Three Stooges.¹⁴³ The *Tyne* court erroneously stated: "[T]he California Supreme Court held that an artist who sold lithographs and T-shirts bearing the image of the Three Stooges did not violate the plaintiffs' right of publicity because the case did not concern commercial speech."¹⁴⁴ Quite to the contrary, the Supreme Court of California created "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."¹⁴⁵ In accordance with this test, the court then held:

Turning to Saderup's work, we can discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.

Moreover, the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted. While that fact alone does not necessarily mean the work receives no First Amendment protection, we can perceive no transformative elements in Saderup's works that would require such protection.¹⁴⁶

141. *Seale*, 949 F. Supp. at 336 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1004–05 (2d Cir. 1989)).

142. *Lane*, 242 F. Supp. 2d at 1215.

143. *See Tyne*, 901 So. 2d at 809.

144. *Id.*

145. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001).

146. *Id.* at 811.

Accordingly, the Supreme Court of California upheld a judgment for damages, attorney's fees, and costs based on stipulated facts presented at trial.¹⁴⁷

Although Florida courts have not passed directly on the matter, as noted earlier, occasionally the image of a celebrity is marketed for its very commercial value.¹⁴⁸ Although truly unusual, the same can be true of the image of a private person.¹⁴⁹ Should such a case arise, it is likely the court will have to retreat from its present position that: "the term 'commercial purpose' as used in section 540.08(1) does not apply to publications, including motion pictures, which do not directly promote a product or service."¹⁵⁰ Rather, the court will in all probability, have to expand its holding to encompass cases of the direct sale of an image of an individual. That said, as *Tyne* also demonstrates, once people become embroiled in a matter of public concern, the "newsworthiness" provision of section 540.08(4) will continue to bar them from asserting a cause of action based on the right of publicity.¹⁵¹

147. *Id.* at 801, 811.

148. *See supra* note 104 and accompanying text.

149. *Jenkins ex rel. Jenkins v. Dell Publ'g Co.*, 251 F.2d 447, 450 (3d Cir. 1958). The sale of a high-quality print of the very famous Eisenstadt photograph of the "kissing sailor" as a collector's item was held to create a jury issue on violation of the publicity rights of the sailor in the photograph under Rhode Island law. *Mendonsa v. Time, Inc.*, 678 F. Supp. 967, 968, 973 (D.R.I. 1988). The Second Circuit reversed the grant of a defense motion for summary judgment in a case alleging that a publication entitled *Wrestling All-Stars Poster Magazine* violated the publicity rights of the wrestlers. *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 86, 89 (2d Cir. 1989). The publication contained no textual material, and only posters bearing the pictures of the wrestlers stapled together inside the cover à la Playboy playmate pin-ups. *See id.* at 86. In each case, the court held the claim of First Amendment protection would not withstand the blatant use for trade purposes under statutes similar to Florida's. *Id.* at 87, 89; *Mendonsa*, 678 F. Supp. at 971.

150. *Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 810 (Fla. 2005).

151. *Id.* at 808; *see Ewing v. A-1 Mgmt., Inc.*, 481 So. 2d 99, 99 (Fla. 3d Dist. Ct. App. 1986) (per curiam) (holding that the use of a name on a wanted poster is newsworthy); *see, e.g., Sidis v. F-R Publ'g Corp.*, 113 F.2d 806, 807, 809 (2d Cir. 1940) (holding a "where are they now" article regarding a former child prodigy is in the continuing public interest). On the other hand, in construing its own statute, the New York Court of Appeals held that a young girl's picture used to illustrate an article on teenage sex fell within the newsworthiness exception even though the girl had engaged in none of the activity claimed in the article: "Notably, if the newsworthiness exception is forfeited solely because the juxtaposition of a plaintiff's photograph to a newsworthy article creates a false impression about the plaintiff, liability under [the statute] becomes indistinguishable from the common-law tort of false light invasion of privacy." *Messenger ex rel. Messenger v. Gruner & Jahr Printing & Publ'g*, 727 N.E.2d 549, 550, 556 (N.Y.) (per curiam), *vacated*, 208 F.3d 122 (2d Cir. 2000). The common law tort of privacy was not recognized in New York's jurisprudence. *Id.* at 551. However, Judge Bellacosa wrote a scathing dissent:

In sum, the practical and theoretical consequence of the negative answer justifies a too-facile escape valve from the operation of the statute, one that is also unilaterally within the

IV. "PRIVATE PERSONS" IN PRIVATE MATTERS

Where the picture or name of a private person is used outside of a matter involving the public interest, the cases involving section 540.08 do not differ in theory from defamation cases.¹⁵² The delicate balance between the First Amendment and private rights now tips more in favor of the plaintiff.¹⁵³ Typical of these cases is *Baucom v. Haverty*,¹⁵⁴ in which Ms. Baucom had retained attorneys to represent her after a fall at a restaurant.¹⁵⁵ The company that prepared a medical report for her attorneys later used that report when promoting itself to other law firms.¹⁵⁶ The report not only contained her picture, but confidential psychiatric information relating to her.¹⁵⁷ The trial court granted the defendant's motion for summary judgment based on the statute of limitations, but the Second District Court of Appeal reversed, holding that "a new cause of action accrued, and the statute of limitations began to run anew, the first time the report was read or shown to someone at each new potential employer."¹⁵⁸ While *Baucom* deals more with a procedural matter than the substance of the statute,¹⁵⁹ the facts parallel those in *American Ventures, Inc. v. Post, Buckley, Schuh, & Jernigan, Inc.*¹⁶⁰ In this instance, the identity of the plaintiff did not serve as an inducement for law

control of the alleged wrongdoer When an aggrieved person like Messenger reaches for the statutory lifeline, the newsworthiness notion dissipates it into a dry mirage. That is not fair or right.

Id. at 562–63 (Bellacosa, J., dissenting).

152. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 778 (1985) (Brennan, J., dissenting). "[D]efamation law does not differ from state efforts to control obscenity, ensure loyalty, protect consumers, oversee professions, or pursue other public welfare goals through content-based regulation of speech." *Id.* (citations omitted).

153. See, e.g., *Baucom v. Haverty*, 805 So. 2d 959, 960–61 (Fla. 2d Dist. Ct. App. 2001).

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression.

Dun & Bradstreet, Inc., 472 U.S. at 757. As noted earlier, Florida has steadfastly maintained the strong state interest in protecting privacy rights. See Mar. 7, 2007 Staff Analysis, *supra* note 72, at 2.

154. 805 So. 2d 959 (Fla. 2d Dist. Ct. App. 2001).

155. *Id.* at 960.

156. *Id.*

157. *Id.*

158. *Id.* at 960–61.

159. See *Baucom*, 805 So. 2d at 960–61.

160. No. C92-1817Z, 1993 WL 468643, at *1–2 (W.D. Wash. May 18, 1993); see *supra* note 73 and accompanying text.

firms to hire the defendant.¹⁶¹ *Baucom* thus demonstrates that the mere tangential use of a person's name or picture in connection with advertising may serve to violate the statute.¹⁶²

Yet another case found the producer of a *Girls Gone Wild* video defending a lawsuit when he placed a picture of a young woman at Mardi Gras on the cover of and in the advertisements for one of his videotapes.¹⁶³ The court had little trouble denying the defendant's motion to dismiss the complaint: "Plaintiff has squarely alleged that defendant published her photograph in Florida for commercial and advertising purposes—specifically on the package of defendant's videotape and in advertisements therefor[e]—and that defendant did so without her permission. This states a claim under [section] 540.08."¹⁶⁴

Although beyond this article's scope, it is noteworthy that the court also upheld a cause of action under Florida's Deceptive and Unfair Trade Practices Act (DUTPA).¹⁶⁵ Thus, plaintiffs suing under section 540.08 may also be able to raise claims under DUTPA as well as the Federal Lanham Act.¹⁶⁶ For instance, in Florida, the Lanham Act formed a count of the complaint in *Bossem v. Musa Holdings, Inc.*,¹⁶⁷ in which an eye doctor successfully moved for

161. See *Baucom*, 805 So. 2d at 960.

162. See *id.* at 960–61.

163. *Gritzke v. M.R.A. Holding, L.L.C.*, No. 4:01CV495-RH, 2002 WL 32107540, at *1 (N.D. Fla. Mar. 15, 2002). The operating procedure of the producer of the *Girls Gone Wild* videos is described in the Eleventh Circuit's factually accurate yet thinly-veiled contemptuous critique:

Joseph Francis is the creator and effective controlling officer of companies—including the three other named defendants in this case—that maintain the "Girls Gone Wild" franchise. Francis has made millions of dollars by going to places crowded with young, enthusiastic, and often-intoxicated women and filming them exposing their breasts, fondling each other, kissing each other, and sometimes engaging in more explicit sexual acts. Francis and his agents typically have the filmed women sign a release form affirming that they are over the age of eighteen and that the *Girls Gone Wild* franchise can use the footage. He and his companies then edit the films to create short scenes of women in various stages of undress and engaged in different types of sexual activities. Francis and his companies bunch the scenes together on pornographic DVDs that they sell online and through advertisements on television.

Plaintiff B v. Francis, 631 F.3d 1310, 1312 (11th Cir. 2011); see also *Pitts v. Francis*, No. 5:07cv169-RS-EMT, 2007 WL 4482168, at *1, *3, *26 (N.D. Fla. Dec. 19, 2007) (denying motion that judge recuse himself and discussing the *modus operandi* of the *Girls Gone Wild* producer).

164. *Gritzke*, 2002 WL 32107540, at *1.

165. See *id.* at *1, *4; FLA. STAT. § 501.201 (2011).

166. 15 U.S.C. § 1125 (2006); FLA. STAT. § 501.201; see, e.g., *Allen v. Nat'l Video, Inc.*, 610 F. Supp. 612, 617–18 (S.D.N.Y. 1985) (video club using Woody Allen look-alike in its advertising); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (Samsung using a robot dressed like Vanna White in a commercial for a videocassette recorder).

167. 46 So. 3d 42 (Fla. 2010) (per curiam).

partial summary judgment finding the defendant liable for using his name and likeness in its advertising.¹⁶⁸

What may well have proved the most blatant violation of the statute occurred in *Coton v. Televised Visual X-Ography, Inc.*,¹⁶⁹ where a young photographer posted a photograph of herself on a website “which [was] an on-line artistic community where photographers receive[d] feedback about, and s[old], their photographs.”¹⁷⁰ The photograph, still present on-line, shows the photographer fully dressed in a vest, long skirt and top hat, with her left shoulder bare.¹⁷¹ The defendant—or someone associated with the defendant—lifted the picture from the website and, without permission, used the picture on the cover of a pornographic film.¹⁷² The photographer sued for violation of the statute,¹⁷³ and received a default judgment in which the court found: “The undisputed evidence shows that the plaintiff’s self-portrait was placed, without her permission, prominently on the packaging of the Body Magic DVD for the purpose of marketing a pornographic movie with which she had no association. These facts constitute a violation of this statute.”¹⁷⁴ She recovered almost \$130,000 in damages, including compensatory damages of \$100,000 on the defamation claim.¹⁷⁵

Coton should serve as the harbinger of a new breed of cases—those which arise during the computer age.¹⁷⁶ Social networking sites mean photographs, names, and personal information are available to virtually anyone—or anyone virtual, for that matter.¹⁷⁷ We can expect the statute to be tested far more frequently where unscrupulous individuals simply take private personae from the internet and use them for commercial gain.

168. *Id.* at 43, 46 (affirming the trial court’s grant of motion for summary judgment and reinstating the award of prejudgment interest).

169. 740 F. Supp. 2d 1299 (M.D. Fla. 2010).

170. *Id.* at 1303.

171. *No Easy Way Out*, DEVIANTART, available at <http://larafairie.deviantart.com/gallery/?q=no+easy+way+out> (last visited Nov. 13, 2011).

172. *Coton*, 740 F. Supp. 2d at 1303; *Teen Sues Over XXX-Video “Debut”*, THE SMOKING GUN, <http://www.thesmokinggun.com/documents/crime/teen-sues-over-xxx-video-debut> (last visited Nov. 13, 2011).

173. *Coton*, 740 F. Supp. 2d at 1310. She also put forward claims for “copyright infringement . . . defamation, and intentional infliction of emotional distress.” *Id.* at 1302.

174. *Id.* at 1310.

175. *Id.* at 1314, 1316. Although beyond the scope of this article, the court engaged in a meticulous discussion of the damages it awarded for each count of the complaint. *Id.* at 1311–16.

176. See *Coton*, 740 F. Supp. 2d at 1303.

177. See, e.g., SAUL LEVMORE & MARTHA C. NUSSBAUM, *THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION* (2010).

An unusual case spawned by the Internet was *Almeida v. Amazon.com, Inc.*,¹⁷⁸ where the Internet retailer Amazon offered for sale a book entitled *Anjos Proibidos*.¹⁷⁹ A picture of the book's cover appeared together with a description of the book and its price, and the cover featured a picture of Almeida.¹⁸⁰ When she was a minor, Almeida's mother signed a release form permitting the use of Almeida's photograph in a gallery exhibition and in a book of photographs based on the exhibition.¹⁸¹ Nine years later, a second edition of the book appeared, but this time Almeida's photograph was reproduced on the cover of the book, which Amazon then offered for sale.¹⁸² The Eleventh Circuit affirmed the dismissal of Almeida's statutory cause of action against Amazon.¹⁸³

The instant section 540.08 action is brought against Amazon, an internet bookseller that provides services similar to a traditional bookseller. Amazon provides its online customers with a searchable book database with links to product detail pages for each book in its database. Each product detail page provides the book's cover image, the publisher's description of the book, and in many instances editorial and customer content. From the product detail page, customers may link to an order placement page, where they may complete their purchase and specify the shipping method. In this manner, Amazon's role as an internet bookseller closely parallels that of a traditional bookseller. Because internet customers are unable to browse through shelves of books and observe the actual book cover photos and publisher content, Amazon replicates the bookstore experience by providing its customers with online cover images and publisher book descriptions.¹⁸⁴

The court rejected Almeida's suit, for it recognized that the Internet required the rethinking of traditional rules.¹⁸⁵ While Amazon unquestionably sought to sell the book, the display was not of Almeida but instead of the book itself.¹⁸⁶

178. 456 F.3d 1316 (11th Cir. 2006).

179. *Id.* at 1319.

180. *Id.*

181. *Id.* at 1318–19.

182. *Id.* at 1319.

183. *Almeida*, 456 F.3d at 1328.

184. *Id.* at 1325.

185. *See id.* at 1326.

186. *See id.* at 1325.

Amazon's use of book cover images is not an endorsement or promotion of any product or service, but is merely incidental to, and customary for, the business of internet book sales.

Under the allegations of Almeida's complaint, we discern no set of facts by which an internet retailer such as Amazon, which functions as the internet equivalent to a traditional bookseller, would be liable for displaying content that is incidental to book sales, such as providing customers with access to a book's cover image and a publisher's description of the book's content. Accordingly, we affirm the district court's grant of summary judgment as to Amazon's right of publicity claim, but we do so on the ground that Amazon did not use Almeida's image for the purpose of directly promoting a product or service in violation of section 540.08.¹⁸⁷

Almeida thus represents an Internet version of *Tyne*: where the underlying product is protected, advertisements for sale of the product will share the protection.¹⁸⁸ We can expect courts to modify law established under traditional rules of commerce for the internet era.

V. DEFENSES UNDER THE STATUTE OTHER THAN PUBLIC INTEREST

Subsection four of the statute provides for three instances in which the statute will not apply: a) legitimate public interest or newsworthiness; b) consent; and c) incidental use of members of the public.¹⁸⁹ The first of these was discussed earlier, where newsworthiness would trump privacy concerns, but not if the defendant used the persona for advertising purposes.¹⁹⁰ As to consent, established case law regarding consent applies to the statute as well.¹⁹¹ For example, when restaurants intercepted private satellite broadcasts of Miami Dolphins football games, the court dismissed the team's claims under the statute.¹⁹² "Even if a prohibited use had occurred, the play-

187. *Id.* at 1326 (citation omitted).

188. *See Almeida*, 456 F.3d at 1324–25; *see also Tyne v. Time Warner Entm't Co.*, 901 So. 2d 802, 808–09 (Fla. 2005).

189. FLA. STAT. § 540.08(4)(a)–(c) (2011).

190. *Id.* § 540.08(4)(a).

191. *See Nat'l Football League v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983).

192. *Id.*

ers' contractual consent to appear in game telecasts constituted waiver of their rights under the Florida statute."¹⁹³

The incidental use provision came into play where a plaintiff in a copyright action used a picture of the defendant in a marketing brochure.¹⁹⁴ The plaintiff had neither used the name of the defendant, nor displayed the picture with such definition that he could readily be recognized from among the three men portrayed.¹⁹⁵ When the defendant filed a cross-claim under the statute, the court granted the plaintiff's motion for summary judgment, holding:

Moreover, this photograph falls within the statutory "member of the public" exception. The three men in the photograph are not named, are not in uniform, and are not otherwise connected with the use of the photograph. Defendant Souliere appearing in the photograph is merely fortuitous. Therefore, this Court finds that no reasonable juror could find that the photograph of defendant Souliere in plaintiff's brochure constituted commercial exploitation or that it does not fall within the member of the public exception.¹⁹⁶

VI. CONCLUSION

Based on cases which have interpreted section 540.08 of the *Florida Statutes*, plaintiffs who live in the public eye cannot expect to recover under the statute for the use of their name or likeness unless the defendant has usurped their personae to promote a product or service. Similarly, private plaintiffs will lose their suits when the defendant has used them in connection with the public interest, when they have consented to the use, or when they happen to be just another "face in the crowd." However, when the defendant uses the plaintiff's name or likeness for promotional purposes, the plaintiff will be able to recover.

Two areas seem ripe for further development. First, we can expect the courts to continue to modify existing law to suit new problems raised by internet, e-marketing, and social networking. Second, it will be interesting to see how firmly the courts are wedded to the promotional language of *Tyne*

193. *Id.* The court also found the defendants protected under the statute as the matter was of legitimate public interest. *Id.* However, the court did find that the defendants had violated section 605 of the Federal Communications Act of 1934. *Id.* at 10–11.

194. *Epic Metals Corp. v. Condec, Inc.*, 867 F. Supp. 1009, 1014–15 (M.D. Fla. 1994).

195. *Id.* at 1016.

196. *Id.* at 1017 (citation omitted).

when confronted with a case involving the actual sale of a person's portrait or likeness.

AVOIDING STATUTORY RESTRICTIONS ON APPOINTMENT OF PERSONAL REPRESENTATIVES IN FLORIDA

JANI MAURER*

I. INTRODUCTION	141
II. STANDARD IN TESTATE ESTATES	141
III. STANDARD IN INTESTATE ESTATES	149
IV. PROCEDURE AND STANDING	152
V. STATUTORY ELIGIBILITY REQUIREMENTS	160
VI. CONCLUSION	178

I. INTRODUCTION

In law, one frequently recited axiom is that a party may not do indirectly that which the party is precluded from doing directly.¹ That may no longer be an accurate statement with respect to the appointment of a personal representative of a Florida decedent's estate. A variety of methods appear to exist to avoid the statutory restrictions under Florida law on appointment of a personal representative of a Florida decedent's estate.² The first two sections of this article review the statutory limitations on priority of appointment of a personal representative in Florida of both a testate and an intestate decedent's estate. The third section of the article addresses the proof required to satisfy the applicable test, standing, and procedural issues that may arise. The fourth section explains the statutory eligibility requirements and possible loopholes providing means to avoid the statutory restrictions.

II. STANDARD IN TESTATE ESTATES

In testate estates, the statute specifies that the personal representative named in the decedent's will is to be appointed if the person is qualified.³ If

* Jani E. Maurer is a professor at the Shepard Broad Law Center at Nova Southeastern University.

1. *E.g.*, Church v. Lee, 136 So. 242, 246 (Fla. 1931).

2. *See* Hill v. Davis (*Hill II*), 70 So. 3d 572, 577 (Fla. 2011); Padgett v. Estate of Gilbert, 676 So. 2d 440, 443-44 (Fla. 1st Dist. Ct. App. 1996).

3. *See* FLA. STAT. § 733.301(1)(a)(1) (2011). To be eligible and qualified to serve as a personal representative of a testate or intestate estate in Florida, an individual must be a competent adult as of decedent's death, *id.* § 733.302, not a convicted felon, *id.* § 733.303(1)(a), mentally and physically able to perform tasks required of a personal representative, *id.* § 733.303(1)(b), and either a Florida resident, *id.* § 733.302, or a relative of decedent described in FLA. STAT. § 733.304, or the spouse of a qualified person. *Id.* § 733.304(4).

the first nominee in the will is not qualified and willing to serve, the alternates named in the will are entitled to preference.⁴ The word “shall” in the statute has been interpreted to mean that preference “must” be given to the personal representative named in the will.⁵ Where no nominee in the will is qualified and willing to serve, the person selected by those entitled to receive a majority of the decedent’s probate estate may be designated as a qualified personal representative.⁶ Should there be no agreement, any beneficiary under the will may be appointed personal representative, and if more than one applies, the court may select the most qualified person.⁷ In addition, the statute allows the guardian of a person who, if competent, would be eligible either to be appointed personal representative or to select the personal representative, to exercise the ward’s right to select the personal representative or to be appointed personal representative.⁸ To illustrate, if a decedent’s surviving spouse is nominated personal representative in the decedent’s will but is incompetent, and a guardian of her property is serving, the guardian may seek appointment if the guardian is otherwise qualified.⁹ If the surviving spouse is entitled to a majority of the decedent’s probate assets, the guardian may also select another qualified person to serve as personal representative.¹⁰ Should the foregoing provisions not yield a personal representative, the court may appoint any qualified person, other than one who works for, is em-

4. See *id.* § 733.301(1)(a)(1).

5. See *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st Dist. Ct. App. 2006); *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988).

6. FLA. STAT. § 733.301(1)(a)(2).

7. *Id.* § 733.301(1)(a)(3).

8. *Id.* § 733.301(2).

9. *Id.* A not-for-profit corporation serving as guardian, which is not a bank or trust company, qualified to serve as a personal representative under *id.* § 733.305 may not appoint itself to serve as personal representative under this provision. *Didiego v. Crockett, Franklin & Chasen, P.A. (In re Estate of Montanez)*, 687 So. 2d 943, 945–46 (Fla. 3d Dist. Ct. App. 1997) (*per curiam*). In *In re Estate of Montanez*, the court held that the appointment as personal representative of a Florida corporation that previously served as guardian of the deceased was a reversible error. *Id.* at 946. The case also illustrates one reason why appointment of a deceased ward’s former guardian as personal representative may be imprudent, even if the guardian is otherwise qualified. See *id.* at 945–46. During the deceased ward’s life, the guardian had a duty to assure the ward’s proper care. *Id.* at 946. After the ward’s death, questions arose about whether he received proper care and whether the nursing home in which he resided should be held liable in damages for neglect of the decedent. *Id.* A settlement entered into by the former guardian—while serving as personal representative—and the nursing home about sums owed to the nursing home for the decedent’s care, purported to protect both the guardian and the nursing home from liability. *In re Estate of Montanez*, 687 So. 2d at 946. The former guardian was removed as personal representative and the settlement was set aside. *Id.*

10. See FLA. STAT. § 733.301(2).

ployed by, or holds office under the court or the judge exercising probate jurisdiction.¹¹

Generally, Florida courts “have no discretion [in a testate estate] but to issue letters [of administration] to the person nominated in [decedent’s] will, unless [the] person is . . . disqualified or such discretion is granted by statute.”¹² In domiciliary and ancillary proceedings in Florida, the initial personal representative nominated in the will, or if he is not qualified, the successor or alternate named in the will, should be appointed.¹³ Since at least 1947, Florida courts recognized the right of a testator to have his choice of a qualified personal representative appointed.¹⁴

Persons given priority to serve as a personal representative under section 733.301 of the *Florida Statutes* do not have an absolute right to serve.¹⁵ Florida courts may decline to appoint the personal representative nominated in a decedent’s will where “exceptional circumstances” exist.¹⁶ Two alternative tests have been enunciated to determine if exceptional circumstance are present.¹⁷ The first test requires circumstances to arise after the testator

11. *Id.* § 733.301(3)(a)–(b). “[A]n employee of the clerk of a circuit court,” including the circuit court in which probate proceedings are commenced, “is not an employee of ‘the court’” within the meaning of FLA. STAT. § 731.301(3)(a). *Long v. Willis ex rel. Estate of Long*, No. 2D10-2104, 2011 WL 3587411, at *6 (Fla. 2d Dist. Ct. App. Aug. 17, 2011). Hence, an employee of the clerk’s office is eligible to serve as a personal representative. *Id.* The court reasoned that “[t]he Florida Probate Code defines ‘court’ as ‘the circuit court.’” *Id.*; FLA. STAT. § 731.201(7). “The clerk of the circuit court is a separate constitutional officer elected by the voters and not selected by the judges of the circuit.” FLA. CONST. art. V, § 16; FLA. CONST. art. VIII, § 1(d).

12. *Kenton v. Kenton (In re Estate of Kenton)*, 423 So. 2d 531, 532 (Fla. 5th Dist. Ct. App. 1982) (citing *State v. North*, 32 So. 2d 14, 18 (Fla. 1947)); *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988) (citing *North*, 32 So. 2d at 18; *In re Estate of Kenton*, 423 So. 2d at 532). In *In re Estate of Kenton*, the court appointed the decedent’s widow as personal representative, even though the decedent and his widow were separated at the decedent’s death, and the decedent and his spouse had signed a separation agreement waiving “all rights and claims of every nature whatsoever to the other’s estate.” *In re Estate of Kenton*, 423 So. 2d at 532. The decedent’s father’s claim that he should be appointed as the alternate personal representative named in the will because the surviving spouse waived her right to serve, was rejected. *Id.* at 532–33.

13. *Jose v. Jose (In re Estate of Jose)*, 164 So. 2d 888, 890 (Fla. 2d Dist. Ct. App. 1964). The court therein stated “unless plainly prohibited by law the courts will honor the wishes of the testator.” *Id.*

14. *See North*, 32 So. 2d at 18.

15. FLA. STAT. § 733.301 (2011); *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254 (Fla. 4th Dist. Ct. App. 2000) (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)).

16. *Hernandez v. Hernandez*, 946 So. 2d 124, 126 (Fla. 5th Dist. Ct. App. 2007) (quoting *Schledier*, 770 So. 2d at 1253).

17. *See, e.g., Schleider*, 770 So. 2d at 1253–54; *Pontrello*, 528 So. 2d at 443.

signed his or her will, which clearly would have caused the testator to change the nominee in his or her will had he or she been aware of the circumstances and “the testator had no reasonable opportunity . . . to change the designation of the personal representative in his will.”¹⁸ As long as the testator remains unaware of the unforeseen circumstances, he or she might lack the chance to change the person nominated as the personal representative in his or her will.¹⁹ This is a very narrow exception.²⁰ The second test purports to allow the court to refuse to appoint the personal representative nominated in the will if the person named by the decedent is unsuitable to administer to the estate.²¹ A person may be unsuitable if the person has an interest adverse to those interested²² in the estate, an interest adverse to the estate, or hostility to persons interested in the estate.²³ While the tests are enunciated, no reported Florida appellate court decision has applied the tests to preclude the appointment of an eligible individual nominated in a decedent’s will.

Courts reserve the right to determine that a person with priority should not be appointed if the nominee’s “character, ability, and experience to serve as personal representative” causes the court to conclude that the nominee does not possess the necessary qualities.²⁴ This authority was previously found in a statute, which prior to 2001, provided in pertinent part, that “[a] person who . . . from sickness, intemperance, or want of understanding, is

18. *Hernandez*, 946 So. 2d at 126 (quoting *Schleider*, 770 So. 2d at 1253–54); *Schleider*, 770 So. 2d at 1253–54 (quoting *Pontrello*, 528 So. 2d at 443); *Pontrello*, 528 So. 2d at 443 (citing *Maxcy v. Citizens Nat’l Bank of Orlando (In re Estate of Maxcy)*, 240 So. 2d 93, 95 (Fla. 2d Dist. Ct. App. 1970)).

19. See *Pontrello*, 528 So. 2d at 443. An example of such a situation is where a nominee in the decedent’s will planned or procured the testator’s demise. *In re Estate of Maxcy*, 240 So. 2d at 95. In *In re Estate of Maxcy*, a dispute arose about payment of legal fees to separate counsel for two co-personal representatives, one of whom was the decedent’s widow. *Id.* at 94. The court opined “that the widow should never have been appointed,” despite her nomination in the will, as she was involved in planning her husband’s death. *Id.* at 95.

20. *Pontrello*, 528 So. 2d at 443.

21. See *Schleider*, 770 So. 2d at 1254 (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)); see also *Hernandez*, 946 So. 2d at 126 (citing *Schleider*, 770 So. 2d at 1254).

22. FLA. STAT. § 731.201(23) (2011) defines interested person to mean “any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved.” Interested persons include beneficiaries under a will, heirs in intestacy, creditors of the decedent and possibly others. *Id.* A beneficiary under a will who has not yet actually received her gift is an interested person, even if the estate is clearly of adequate value to distribute the gift in the future. *Cason v. Hammock*, 908 So. 2d 512, 514 (Fla. 5th Dist. Ct. App. 2005).

23. *Hernandez*, 946 So. 2d at 127 (citing *Schleider*, 770 So. 2d at 1254).

24. *Schleider*, 770 So. 2d at 1254 (quoting *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996)).

incompetent to discharge the duties of a personal representative is not qualified."²⁵ The statute was amended in 2001 to omit this wording.²⁶ What those qualities were has not yet been clearly disclosed in case law. Section 733.303(1)(b) of the *Florida Statutes* currently provides that a person who "[i]s mentally or physically unable to perform the duties" of a personal representative is not qualified to serve and should not be appointed.²⁷ However, the court's discretion is not limited to a situation in which a nominee is physically or mentally unable to attend to tasks required of a personal representative.²⁸ After amendment of section 733.302 of the *Florida Statutes* in 2001, courts continue to recognize that "the probate court has the inherent authority to consider a person's character, ability, and experience to serve as personal representative."²⁹ Reported cases in which the courts rely on this inherent authority to date primarily involve intestate, rather than testate decedents.³⁰ Presumably this test is applicable in a testate estate. Confusion arises because although courts acknowledge that a different standard applies in testate as opposed to intestate estates, when ruling in a testate estate, courts cite cases involving intestate estates without always adequately distinguishing them.³¹ While the court cases set forth the foregoing principles, no Florida case was located in which they were applied in a testate decedent's estate to cause an appellate court to conclude that the nominee in a decedent's will should be denied appointment.

There is a distinction between a court's refusal to appoint a personal representative named in a will, as opposed to a refusal to appoint as personal representative an individual with priority under statute in an intestate estate.³² This difference, acknowledged in some of the reported cases, arises due to the right of a testator to name any eligible, qualified person to serve.³³ "The distinction between [a personal representative] named in a will and [one] appointed by the court is significant because the [former] derives his powers

25. FLA. STAT. § 733.302 (1993). No such provision appears in the current statutes. *See id.* § 733.302 (2011).

26. *Compare* FLA. STAT. § 733.302 (2001), *with* FLA. STAT. § 733.302 (1993).

27. FLA. STAT. § 733.303(1)(b) (2011).

28. *See* *Garcia v. Morrow*, 954 So. 2d 656, 658 (Fla. 3d Dist. Ct. App. 2007) (citing *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1132 (Fla. 5th Dist. Ct. App. 2003)).

29. *DeVaughn*, 840 So. 2d at 1133 (quoting *Padgett*, 676 So. 2d at 443).

30. *See, e.g., id.*

31. *See, e.g.,* *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1254–55 (Fla. 4th Dist. Ct. App. 2000) (involving a testate decedent where the court relied on *Padgett*, 676 So. 2d at 442 (involving an intestate decedent)).

32. *See* *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 442–43 (Fla. 2d Dist. Ct. App. 1988).

33. *Id.* at 442.

from the appointment of the testator and not from appointment by the court.”³⁴ “A judge treads on sacred ground . . . when he overrides the testator’s directions regarding the appointment of the person in whom the decedent placed his trust to administer his estate according to the powers given in the will.”³⁵ Thus, the court in a testate estate may refuse to appoint the personal representative named in the will only in rare and extreme cases.³⁶ The court has greater latitude when refusing to follow the statutory preference in appointment of a personal representative in an intestate estate.³⁷ However, the distinction is difficult to quantify.

Further investigation is warranted to ascertain when circumstances justify a court’s refusal to appoint the qualified personal representative named in a decedent’s will. As the courts in reported cases rarely find that the refusal is justified under the applicable test, it is necessary to examine what facts do not justify a refusal to appoint the personal representative nominated in a decedent’s will.

The fact that a person seeking appointment, other than the nominee named in the will, had extensive knowledge of the decedent’s assets, debts, and estate when the nominee did not possess such knowledge, failed to support a decision not to appoint the nominee in the decedent’s will.³⁸ This is true, although it would be more costly to the estate for the nominee in the will to be appointed.³⁹ The fact that decedent and his spouse were separated and had signed a separation agreement waiving rights to each other’s estate did not prevent the appointment of the widow as personal representative, where she was named by the decedent in his will.⁴⁰ “[I]f feelings, disputes, and strained relationships between” those entitled to the decedent’s estate and the person nominated personal representative in the will do not generally

34. *Id.* at 443; *cf.* *Comerford v. Cherry*, 100 So. 2d 385, 390 (Fla. 1958). Even in cases involving removal of a personal representative, where a different standard applies, the courts acknowledge that the right of a personal representative not named in a will is less than one appointed in a will. *Vaughn v. Batchelder ex rel. Estate of Odem*, 633 So. 2d 526, 529 (Fla. 2d Dist. Ct. App. 1994); *see also* *Murphy v. Pace (In re Estate of Murphy)*, 336 So. 2d 697, 699 (Fla. 4th Dist. Ct. App. 1976). “The removal of a personal representative chosen by the deceased is a drastic action and should only be resorted to when the administration of the estate is endangered.” *In re Estate of Murphy*, 336 So. 2d at 699.

35. *Pontrello*, 528 So. 2d at 443.

36. *Id.*

37. *See id.*

38. *Id.* at 444.

39. *Id.*

40. *In re Estate of Kenton*, 423 So. 2d 531, 532–33 (Fla. 5th Dist. Ct. App. 1982).

justify a court's refusal to appoint the nominee; nor does the fact that estate beneficiaries do not like the nominee.⁴¹

Strained relationships between estate beneficiaries, one of whom is nominated personal representative in the will, do not permit a court to decline to appoint the nominee and do not permit a court to appoint an independent or neutral third party.⁴² Where the decedent's son was an attorney in a state other than Florida, delayed depositing the original will with the court, and it was wrongly claimed that he withdrew sums from the decedent's account, the evidence was insufficient to prevent the son's appointment as personal representative, in conformity with his nomination in the decedent's will.⁴³ For a dispute between the beneficiaries and the nominee to constitute grounds for a court to deny appointment to the decedent's chosen fiduciary, the dispute must at least be one which "will cause unnecessary litigation and impede the estate's administration, and either the person [nominated in the will] lacks the character, ability, and experience to serve or exceptional circumstances exist."⁴⁴

The trial court's conclusion that a nominee in the decedent's will "would not be objective and neutral and would not serve the best interest of the estate" because he previously took sides in estate disputes, did not allow the court to decline to appoint him.⁴⁵ The fact that a decedent's spouse

41. See *Pontrello*, 528 So. 2d at 444. In *Pontrello*, the decedent named his attorney to serve as personal representative of his estate. *Id.* at 442. The decedent's widow, who had served as the decedent's court appointed guardian and was familiar with his financial affairs, and the decedent's adult daughter, both objected to appointment of the attorney as personal representative. *Id.* The hostility between the parties stemming from prior disputes in the decedent's guardianship proceeding, the widow's knowledge of the decedent's finances, the additional expense likely to result from appointment of the attorney as fiduciary necessary for him to become familiar with the decedent's estate and affairs, taken together, did not justify a refusal to appoint the attorney. *Id.* at 444.

42. *Hernandez v. Hernandez*, 946 So. 2d 124, 126 (Fla. 5th Dist. Ct. App. 2007) (quoting *Schleider v. Estate of Schleider*, 770 So. 2d 1252, 1253 (Fla. 4th Dist. Ct. App. 2000)). In *Hernandez*, the decedent's will designated his son, Ruben, to serve as personal representative, and his son, Raul, to serve if Ruben did not survive. *Id.* Ruben was an attorney. *Id.* at 127. Raul sought appointment and was opposed by his brother, Ruben, and their mother, who was the decedent's former spouse. *Id.* at 126. Both of the decedent's sons sought appointment as personal representative. *Id.* The disputes between them arose after their father's death, due to Ruben's actions and inaction. See *Hernandez*, 946 So. 2d at 126–27. The appointment of the decedent's selected nominee was required. *Id.* at 127.

43. *Id.* at 125, 127.

44. *Id.* at 127.

45. *Brake v. Murphy ex rel. Estate of Murphy*, 591 So. 2d 1025, 1026 (Fla. 3d Dist. Ct. App. 1991) (per curiam). In that case, the first person nominated personal representative in the decedent's will was appointed and then removed. *Id.* Upon her removal, the second per-

claimed entitlement to the decedent's estate as a pretermitted spouse did not alone authorize a court to appoint her personal representative rather than the nominee in the decedent's will.⁴⁶ A testator's marriage after he or she executes his or her will is not an unforeseen exceptional circumstance.⁴⁷ The fact that a nominee is alleged to have a conflict of interest with the estate does not alone support a decision declining to appoint the nominee.⁴⁸

It may also be useful to understand what tests have been rejected as not a proper basis for a court to determine if a personal representative named in a will should be denied the position. A refusal to appoint a personal representative named in the decedent's will may not be based solely on cost to the estate.⁴⁹ The test in section 733.504 of the *Florida Statutes* for removal of a personal representative is not the test applicable to determine if a personal representative should be initially appointed.⁵⁰ A court cannot refuse to ap-

son nominated in the decedent's will sought appointment and was held entitled to be appointed. *Id.*

46. *Mindlin v. Mindlin (In re Estate of Mindlin)*, 571 So. 2d 90, 91 (Fla. 2d Dist. Ct. App. 1990) (per curiam). The testator signed a will prior to his marriage. *Id.* at 90. The will named the testator's father to serve as personal representative. *Id.* Absent evidence that the testator's father was not qualified to serve, or of unforeseen circumstances that would have changed the testator's decision about the fiduciary, the father was entitled to appointment as personal representative. *Id.* at 91. The fact that the decedent's widow claimed entitlement to all estate assets did not change the outcome. *Id.*

47. See *In re Estate of Mindlin*, 571 So. 2d at 90-91.

48. *Werner v. Estate of McCloskey*, 943 So. 2d 1007, 1008 (Fla. 1st Dist. Ct. App. 2006). In that case, the decedent's son, named personal representative in his mother's will, sought appointment. *Id.* His sister, who was named alternate personal representative in the will, opposed his petition and sought the position based on an alleged conflict of interest between the son and the estate. *Id.* The details of the alleged conflict were not disclosed. *Id.* The appellate court reversed the trial judge's appointment of the testatrix's daughter as personal representative. *Id.* The appellate court's decision was based on both the absence of proof that a conflict existed, and the law that a conflict was not legally sufficient to prevent appointment of the testatrix's selected fiduciary. *Werner*, 943 So. 2d at 1008.

49. See *Pontrello v. Estate of Kepler*, 528 So. 2d 441, 444 (Fla. 2d Dist. Ct. App. 1988), where the trial court erroneously denied appointment of the personal representative named in the will, based principally on the trial judge's finding that there would be added expense to the estate if the nominee was appointed.

50. See *Hunter v. Johnson (In re Estate of Bell)*, 573 So. 2d 57, 60 (Fla. 1st Dist. Ct. App. 1990). A personal representative already serving may be removed if she has or develops a conflict between her personal interests and the estate. FLA. STAT. § 733.504(9) (2011); *In re Estate of Bell*, 573 So. 2d at 60. In *In re Estate of Bell*, the personal representative used the decedent's durable power of attorney during the decedent's life to open accounts for the personal representative's personal benefit, despite the absence of the express right to do so in the power of attorney. *Id.* at 58, 60. The dispute, which developed when she personally claimed the rights to funds in the accounts after her appointment as personal representative, was a conflict requiring her removal. *Id.* at 60. The conflict did not, however, prevent her initial appointment as personal representative in conformity with the decedent's will. *Id.* at 58;

point the personal representative nominated in a decedent's will based on speculation that he or she may be subject to removal in the future.⁵¹

III. STANDARD IN INTESTATE ESTATES

In an intestate estate, the decedent's surviving spouse has the best right to serve as personal representative.⁵² Where the decedent is not survived by a spouse, or where the spouse is not eligible and willing to serve as personal representative, the person selected by the heirs entitled to receive a majority of the decedent's probate estate has priority under statute.⁵³ Where heirs

accord Vaughn v. Batchelder ex rel. Estate of Odem, 633 So. 2d 526, 527 (Fla. 2d Dist. Ct. App. 1994); *Duncan v. Davis (In re Estate of Gainer)*, 579 So. 2d 739, 740 (Fla. 1st Dist. Ct. App. 1991) (per curiam); *Pontrello*, 528 So. 2d at 442. But see *Werner*, 943 So. 2d at 1008, where the appellate court remanded the case and suggested that if a conflict existed between the personal representative named in the decedent's will and the estate the trial court could consider FLA. STAT. § 733.504(9) pertaining to removal. It is not clear from the opinion if the court was suggesting that the grounds for removal would or would not be relevant to initial appointment of a personal representative. See *Werner*, 943 So. 2d at 1008.

51. *Pontrello*, 528 So. 2d at 444.

52. FLA. STAT. § 733.301(1)(b)(1).

53. *Id.* § 733.301(1)(b)(2). Where a court appointed guardian of the property of minor heirs is in place when intestate estate administration is commenced, the guardian's nominee must be appointed, unless he or she is ineligible or lacks "the qualities and characteristics necessary to properly perform the duties" of a personal representative. *Stalley v. Williford ex rel. Estate of Williford*, 50 So. 3d 680, 681 (Fla. 2d Dist. Ct. App. 2010). Unless this test is satisfied, the court lacks discretion to avoid the preferences in appointment set forth in the statute. *Id.* Where a majority of the heirs of an intestate decedent are minors, attention needs to be paid to who has the authority to represent them, in both objecting to a petition for administration and in seeking appointment of a personal representative nominated on behalf of the minor heirs. *Long v. Willis ex rel. Estate of Long*, No. 2D10-2104, 2011 WL 3587411, at *3-4 (Fla. 2d Dist. Ct. App. Aug. 17, 2011). The parent of the minor child may have limited authority, on behalf of a minor child, to object to a petition for administration seeking appointment of a personal representative. *Id.* However, only a court appointed guardian of the minor's property has authority to select a personal representative in an intestate estate on behalf of a minor heir. *Id.* In *Long*, a father died intestate and single, survived by two adult children born of his first marriage and three minor children born of his second marriage. *Id.* at *1. The decedent's sister filed a petition for administration seeking her own appointment as personal representative. *Id.* Her petition and formal notice were served on Ms. Long, the mother of the three minor heirs. *Long*, 2011 WL 3587411, at *1. After the twenty day time limit specified in the formal notice expired, Ms. Long filed an objection to the sister's petition and appointment. *Id.* at *2. Ms. Long thereafter also filed pleadings seeking her own appointment as personal representative. *Id.* The parent of a minor heir does not, as natural guardian, have the right to select a personal representative under FLA. STAT. § 733.301 on behalf of the minor heir. Only a court appointed guardian of the property of the minor child has this right. *Long*, 2011 WL 3587411, at *3-4. The probate court may extend the twenty day time limit for filing a response to a petition for administration to enable a guardian of the property of a minor heir to be appointed. *Id.* at *3-5. In this case, the appellate court held

entitled to a majority of the decedent's probate estate do not agree on a personal representative, the heir having the closest blood relationship to decedent is entitled to be appointed.⁵⁴ Should two heirs with the same degree of relationship to decedent seek appointment as personal representative, "the court may select the one best qualified."⁵⁵ Where none of the foregoing persons are willing, able and qualified to serve as personal representative, the same preferences apply as in a testate estate.⁵⁶

Courts have recognized in intestate estates that an otherwise qualified person, who has the best right to serve as personal representative of an intestate decedent's estate under statute, does not have an absolute right to appointment.⁵⁷ "[A]ppointment [by the court] of a personal representative [of] an intestate [decedent's] estate is a discretionary act of the probate courts."⁵⁸ If a court determines that the person with the best right to serve as personal representative in an intestate estate is not fit to serve, the record must expressly reflect that the person lacks the necessary characteristics.⁵⁹ To avoid appointing as personal representative of an intestate estate the person with priority under the statute, the court must find that the individual is not fit to serve based on the person's "character, ability, and experience."⁶⁰

In intestate estates as in testate estates, the courts continue to refer to and rely on the circuit court's

that the probate court should have afforded a reasonable opportunity for a guardian of the property of the minor children to be appointed so the children were not denied their statutory right to a say in who was to serve as personal representative. *Id.* at *6.

54. FLA. STAT. § 733.301(1)(b)(3). In one case, the decedent died intestate and the former daughter-in-law sought appointment as personal representative. *Garcia v. Morrow*, 954 So. 2d 656, 657 (Fla. 3d Dist. Ct. App. 2007). However, decedent's adult grandson also sought to be appointed as personal representative and filed a disclaimer of interest executed by his incarcerated father. *Id.* The former daughter-in-law claimed that the adult grandson tried to "work a fraud on the court by securing and filing [his father's] disclaimer of interest." *Id.* Therefore, the trial court, without an evidentiary hearing, appointed the former daughter-in-law as personal representative. *Id.* The appellate court reversed the determination based on FLA. STAT. 733.301 which provides that the heir nearest in degree to the decedent is the preferred representative. *Garcia*, 954 So. 2d at 657–58.

55. FLA. STAT. § 733.301(1)(b)(3).

56. *Id.* § 733.301(3).

57. *Garcia*, 954 So. 2d at 658 (citing *In re Estate of Snyder*, 333 So. 2d 519, 520 (Fla. 2d Dist. Ct. App. 1976)).

58. *Id.* (quoting *DeVaughn v. DeVaughn*, 840 So. 2d 1128, 1132 (Fla. 5th Dist. Ct. App. 2003)); *In re Estate of Snyder*, 333 So. 2d at 520.

59. *Garcia*, 954 So. 2d at 658; *DeVaughn*, 840 So. 2d at 1133.

60. *Garcia*, 954 So. 2d at 658; *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996) (quoting *DeVaughn*, 840 So. 2d at 1133).

inherent authority to consider a person's character, ability and experience to serve as personal representative and, if the record supports the conclusion that the person lacks the necessary qualities and characteristics, the discretion to refuse to appoint even a person . . . of statutory preference who is not specifically disqualified by the statute.⁶¹

The question which arises is what facts would justify a court in determining that a person with priority is not entitled to appointment in an intestate estate. A review of case law reflects repeated recitation by the courts of the standard, but no explanation or examples of facts which would prevent appointment.⁶² Instead, cases demonstrate a variety of facts asserted by those opposing appointment of the personal representative with priority under statute, all of which were eventually held to be inadequate to prevent appointment.⁶³ As in testate estates, each case is dependent on its own facts and circumstances.

Ill feelings, strained relationships and disputes between heirs, even between the heirs closest to the decedent and presumptively entitled to appointment as personal representative, do not authorize the court to appoint a neutral party rather than a person with priority under the statute.⁶⁴ Merely submitting another heir's disclaimer to the court where that disclaimer might

61. *Padgett*, 676 So. 2d at 443 (citing *In re Estate of Snyder*, 333 So. 2d at 521). Prior to the change in the statute, the court stated its reasoning as follows:

Where the record supports the conclusion that a person occupying the position of statutory preference does not have the qualities and characteristics necessary to properly perform the duties of an administrator, it would be an anomaly to hold that a probate court, which has historically applied equitable principles in making its judgments, does not have the discretion to refuse to appoint him simply because he did not fall within the enumerated list of statutory disqualifications.

In re Estate of Snyder, 333 So. 2d at 521. Therein, the decedent died intestate. *Id.* at 519. Her spouse sought appointment as personal representative, having met all eligibility requirements. *Id.* at 519–20. Her children opposed his appointment, presumably because his conduct, the details of which were not disclosed in the opinion, gave rise to an estoppel. *See id.* at 519–20. Without disclosing the pertinent facts, the appellate court held that there was sufficient evidence to support the trial court's decision that decedent's "husband was not qualified by character, ability and experience to serve." *Id.* at 520. This case was decided under a prior version of FLA. STAT. § 733.302. *See In re Estate of Snyder*, 333 So. 2d at 519; Act effective July 1, 1975, ch. 74–106, § 1, 1974 Fla. Laws 212, 212–13, 243–44 (repealing FLA. STAT. § 732.45 (1973)).

62. *See DeVaughn*, 840 So. 2d at 1133; *Padgett*, 676 So. 2d at 443; *In re Estate of Snyder*, 333 So. 2d at 520.

63. *See DeVaughn*, 840 So. 2d at 1134; *see also Padgett*, 676 So. 2d at 443; *In re Estate of Snyder*, 333 So. 2d at 520.

64. *Harper v. Estate of Harper*, 271 So. 2d 40, 42 (Fla. 1st Dist. Ct. App. 1973). In *Harper*, the decedent died intestate survived by no spouse and by four adult children. *Id.* at 41. One child, with the consent of a second, sought appointment as personal representative without notice to the other two children. *Id.*

be invalid is alone insufficient to prevent appointment in an intestate estate of the personal representative with priority under section 733.301(1)(b) of the *Florida Statutes*.⁶⁵

Where a decedent died intestate, his mother was entitled to appointment as personal representative, in preference to his uncle who raised him and with whom the decedent resided, where the mother was qualified to serve.⁶⁶ That the uncle was allegedly more bereaved by the decedent's death or was found more "morally worthy" by the court did not alter the outcome.⁶⁷ Even a convicted felon whose civil rights were restored after the governor granted clemency was not automatically precluded from serving as personal representative when he had priority under the statute.⁶⁸

The courts' rulings in cases involving contests about appointment of personal representatives in intestate estates cite to and rely on cases involving similar disputes in testate estates.⁶⁹ They adopt tests applicable in testate estates while acknowledging the difference between avoiding appointment of a personal representative named by the decedent and avoiding appointment of one selected by the legislature.⁷⁰

IV. PROCEDURE AND STANDING

The procedure to be followed to contest appointment of the personal representative apparently entitled to priority under a will or under statute in an intestate estate depends on the status of the court probate proceeding at the time the contestant raises an objection.⁷¹ If no petition for administration has been filed when the contestant knows he or she will object to appointment of the person with priority, a caveat should be filed.⁷² Absent the filing of a caveat, the person with apparent priority may be appointed personal representative without notice to the contestant.⁷³ Filing of a caveat before a pro-

65. FLA. STAT. § 733.301(1)(b) (2011); *Garcia*, 954 So. 2d at 658.

66. *DeVaughn*, 840 So. 2d at 1132–33.

67. *Id.* at 1133–34.

68. *Padgett*, 676 So. 2d at 443–44.

69. *See, e.g., Garcia*, 954 So. 2d at 657–58.

70. *See, e.g., id.*

71. *See* FLA. STAT. § 733.212 (2011).

72. *See id.* §§ 731.110(1), 733.202.

73. *Id.* §§ 733.201(1), .301(1). *Id.* § 733.201(1) allows a self-proving will to "be admitted to probate without further proof." "Any interested person may [file a] petition for administration." *Id.* § 733.202. A person nominated personal representative in a decedent's will is an interested person for this purpose under FLA. STAT. § 731.201(23). While *id.* § 733.2123 allows a petitioner with priority to serve the Petition for Administration and Formal Notice on interested persons before a personal representative is appointed, it does not require the peti-

bate proceeding is commenced assures the caveator of an opportunity to object to the appointment of a personal representative prior to that appointment.⁷⁴ It is preferable to contest the appointment of a personal representative before that appointment, both to prevent the individual appointed from taking actions the contestant may find objectionable, and to avoid duplication of effort and additional cost to the estate.⁷⁵

If a caveat is filed and ignored so that the caveator is not served with the Petition for Administration and Formal Notice and is denied an opportunity to object to appointment of the personal representative, the appointment may be reversed.⁷⁶ Where no caveat is filed but the Petition for Administration and Formal Notice are nevertheless served on the contestant, the contestant needs to timely file an objection to the appointment of the personal representative.⁷⁷ Failure to do so may bar the contestant from contesting thereafter.⁷⁸ Where the contestant is not served with a Petition for Administration and Formal Notice prior to the appointment of the personal representative, and was not entitled to notice,⁷⁹ a petition to revoke the letters of administration should be filed promptly.⁸⁰ The deadline for objecting to the appointment of the personal representative is generally three months after the inter-

tioner to do so. However, when a caveat is filed by the contestant, a personal representative cannot be appointed without prior notice to the caveator. *Id.* § 731.110(3).

74. *See id.*; Powell v. Eberhardt (*In re Estate of Hartman*), 836 So. 2d 1038, 1039 (Fla. 2d Dist. Ct. App. 2002); Grooms v. Royce, 638 So. 2d 1019, 1021 (Fla. 5th Dist. Ct. App. 1994).

75. *See, e.g.*, McCormick v. McCormick, 991 So. 2d 437, 438–39 (Fla. 1st Dist. Ct. App. 2008). Where a decedent's will is properly admitted to probate, the personal representative nominated therein (if eligible) is entitled to appointment. *Id.* at 439. In *McCormick*, one son of the decedent filed a petition to commence probate claiming his father died intestate, and he was appointed personal representative. *Id.* at 438. His half-brother thereafter produced a will naming him personal representative. *Id.* Once the initial petitioner stipulated to the admission of the will to probate, the nominee named therein was entitled to appointment as fiduciary. *Id.* at 439.

76. *See* FLA. STAT. § 731.110(3); *In re Estate of Hartman*, 836 So. 2d at 1040.

77. FLA. STAT. §§ 733.212(3), .2123.

78. *Id.* § 733.2123. Section 733.2123 of the *Florida Statutes* provides that no “person who is served with [formal] notice” of the petition for administration prior to the “issuance of letters . . . may . . . challenge the validity of the will, testacy of the decedent, [or] qualifications of the personal representative . . . except in the proceedings before issuance of letters.”

79. A contestant may be entitled to notice prior to issuance of Letters of Administration due to a contestant's filing of a caveat or because a contestant has a better right than a petitioner to serve as personal representative. FLA. STAT. § 731.110(3); FLA. PROB. R. 5.201.

80. *See Hill v. Davis ex rel. Estate of Davis (Hill I)*, 31 So. 3d 921, 924 (Fla. 1st Dist. Ct. App. 2010), *aff'd*, 70 So. 3d 572 (Fla. 2011). Where the personal representative appointed was not initially eligible and qualified to serve under FLA. STAT. §§ 733.302–.304, there may be a time limit on contesting his appointment or removal. *See, e.g., Hill I*, 31 So. 3d at 922–24; *see also* Angelus v. Pass, 868 So. 2d 571, 573 (Fla. 3d Dist. Ct. App. 2004).

ested person is served with a Notice of Administration.⁸¹ The deadline may be extended if, after probate is commenced, a later will or codicil not initially offered for probate is located.⁸² The deadline may also be extended if the personal representative appointed was not qualified and that fact was not disclosed to the court and other interested persons within the three-month period.⁸³ If either a timely Objection to a Petition for Administration seeking appointment of a personal representative or a timely Petition to Revoke Letters of Administration is filed, the court is required to hold an evidentiary hearing prior to appointment of the personal representative, if an objection is filed before any appointment,⁸⁴ or prior to revoking letters.⁸⁵ It is important to have the evidentiary hearing transcribed by a court reporter. Absent a complete record, the trial court's determination is less likely to be reversed on appeal.⁸⁶

There are limitations on who may contest the appointment of a personal representative.⁸⁷ Any interested person may seek or oppose the appointment

81. FLA. STAT. § 733.212(2)(c). That deadline is applicable even if litigation is pending contesting the validity of the will in which the personal representative was nominated, and the pendency of that litigation does not appear to extend the deadline for separately objecting to the appointment of the personal representative. *See Hill I*, 31 So. 3d at 923–24.

82. *Hyland v. DiPietro (In re Estate of DeLuca)*, 748 So. 2d 1086, 1089 (Fla. 4th Dist. Ct. App. 2000) (per curiam). In *In re Estate of DeLuca*, probate of the decedent's estate was commenced based on a will. *Id.* at 1087. After the deadline to file claims or objections to the validity of the will or appointment of a personal representative expired, an addendum to the Petition for Administration was filed offering two codicils signed by the decedent for admission to probate. *Id.* No new Notice of Administration was served. *Id.* Thereafter, revocation of probate of the will and two codicils was sought. *Id.* Because the beneficiaries were not served with another Notice of Administration, they remained entitled to institute a contest based upon the two codicils. *In re Estate of DeLuca*, 748 So. 2d at 1089.

83. *See Hill I*, 31 So. 3d at 924; *Angelus*, 868 So. 2d at 573.

84. *In re Estate of Hartman*, 836 So. 2d 1038, 1040 (Fla. 2d Dist. Ct. App. 2002).

85. *See Garcia v. Morrow*, 954 So. 2d 656, 657, 659 (Fla. 3d Dist. Ct. App. 2007).

86. *See Padgett v. Estate of Gilbert*, 676 So. 2d 440, 442 (Fla. 1st Dist. Ct. App. 1996). In *Padgett*, a minor decedent's mother was removed as personal representative of the intestate estate by the trial court and she appealed the decision. *Id.* The appellate court affirmed her removal, because no record of the trial court hearing was provided to the appellate court. *Id.* Absent a record, the appellate court was unable to determine if the trial court committed reversible error, ruling improperly on the facts or the law. *Id.* *But see Pontrello v. Estate of Kepler*, 528 So. 2d 441, 444 (Fla. 2d Dist. Ct. App. 1988). In *Pontrello*, there was no court reporter at the trial court hearing on the contest about appointment of a personal representative and the record could not be reconstructed. *Id.* The court on appeal accepted the findings of fact in the trial court's order to determine if a reversible error occurred in applying the law. *Id.* The court determined that such an error existed, and reversed the trial court's ruling. *Id.*

87. *Wheeler v. Powers*, 972 So. 2d 285, 287–88 (Fla. 5th Dist. Ct. App. 2008).

of a personal representative.⁸⁸ An interested person is anyone who could “reasonably be expected to be affected by the outcome of [a] . . . proceeding.”⁸⁹ A person contesting appointment of a personal representative must affirmatively allege standing.⁹⁰ Thus, in this context, standing is not an affirmative defense which is waived if not pled.⁹¹

The person seeking appointment as personal representative may claim a right to serve by virtue of the decedent’s will or codicil.⁹² In that situation, a beneficiary under a prior will of the decedent has standing to contest a later will, if a successful contest to the later will would result in financial benefit to the beneficiary under the earlier will.⁹³ Similarly, a person who would be a decedent’s heir in intestacy has standing to challenge the decedent’s will, if a successful contest would result in the decedent dying intestate.⁹⁴ The same standard is applied to determine if a person is interested in the estate, whether the contest is to avoid initial appointment of the personal representative or

88. FLA. STAT. § 733.202 (2011). In other probate disputes, any person who would gain financially from a contest has standing, even if the person was specifically disinherited in the decedent’s will. *Shriners Hosp. for Crippled Children v. Zrillic*, 563 So. 2d 64, 66 (Fla. 1990). *Zrillic* involved a challenge by the decedent’s daughter to a gift to charity set forth in the decedent’s will. *Id.* at 65-66. The daughter asserted that the gift to charity was invalid, as it violated the Mortmain Statute, FLA. STAT. § 732.803 (1989), then in effect. *Zrillic*, 563 So. 2d at 65, 68. Other than a nominal gift of tangible personal property, the will disinherited decedent’s daughter in caustic language. *Id.* at 65. The charitable beneficiary named in the will and the personal representative claimed that the decedent’s daughter lacked standing due to the disinheritance provisions in the will. *Id.* at 66. Because the daughter was the decedent’s lineal descendant who would take in intestacy if the gift to charity was avoided, she had standing. *Id.*

89. FLA. STAT. § 731.201(23) (2011).

90. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1006 (Fla. 5th Dist. Ct. App. 2005).

91. See *id.*, in which the court held that this rule applies in a will contest and in an action to remove the personal representative designated in the decedent’s will. *Id.* While FLA. PROB. R. 5.270 does not apply to an objection to a Petition for Administration, only interested persons may object; hence analogous reasoning should lead to the same conclusion. See *Wehrheim*, 905 So. 2d at 1006.

92. See *id.* at 1006, 1008–10.

93. See *id.* at 1006.

94. See *In re Estate of Ballett*, 426 So. 2d 1196, 1199 (Fla. 4th Dist. Ct. App. 1983). The decedent’s brother, as sole heir, had standing to challenge the appointment of a personal representative nominated in the decedent’s will where he challenged the will based upon undue influence. See *id.* at 1197–99. His challenge sought to revoke probate of the will and appointment of the personal representative nominated therein, even though he previously stipulated to admission of the will and the appointment of personal representative, because he had not expressly waived his right to seek to revoke probate. See *id.* at 1198.

to revoke the letters of administration previously issued.⁹⁵ Whether a contestant has standing to question appointment of the personal representative in a testate or an intestate estate depends on the facts and circumstances, and the contestant's ability to prove his or her interest in the decedent's estate.⁹⁶

Where the personal representative claims to have the best right to serve under intestacy statutes, any heir may have standing to contest the appointment.⁹⁷ Statute and case law recognize that natural persons and fiduciaries may have standing to dispute appointment of a personal representative.⁹⁸ A "trustee of a trust [named a beneficiary under decedent's will] is an interested person" possessing standing.⁹⁹ The contingent beneficiary of a testamentary trust has standing, even if he may never actually receive a financial benefit due to the contingency.¹⁰⁰ An attorney named personal representative and trustee in a decedent's prior will has standing to contest both the validity of the decedent's later will offered for probate and appointment of the fiduciary named in that later will.¹⁰¹ A personal representative nominated in a

95. See *In re Estate of Watkins*, 572 So. 2d 1014, 1015 (Fla. 4th Dist. Ct. App. 1991) (per curiam).

96. See FLA. STAT. § 731.201(23) (2011); *Wehrheim*, 905 So. 2d at 1006.

97. See *In re Estate of Ballett*, 426 So. 2d at 1198–99.

98. See FLA. STAT. § 731.201(23); *Wheeler v. Powers*, 972 So. 2d 285, 287 (Fla. 5th Dist. Ct. App. 2008); *In re Estate of Ballett*, 426 So. 2d at 1199.

99. FLA. STAT. § 731.201(23).

100. *In re Estate of Watkins*, 572 So. 2d at 1015 (quoting *Richardson v. Richardson*, 524 So. 2d 1126, 1127 (Fla. 5th Dist. Ct. App. 1988)). This case involved a petition to revoke probate, rather than a contest filed before admission of the will and appointment of the personal representative. *Id.* The decedent's will nominated his widow to serve as personal representative, and directed that she receive income for her life. *Id.* On the death of the widow, the petitioner, the decedent's son, was a beneficiary. *Id.* The son sought to revoke probate based on undue influence, and despite his mother's claim to the contrary, the court held that he had standing as an "interested person." *Id.*

101. See *Wheeler*, 972 So. 2d at 286. In that case, the attorney, Wheeler, drafted a will for the decedent approximately four years prior to her death. *Id.* The will named Mr. Wheeler to serve as personal representative of the estate and as a trustee of her trust. *Id.* The trust was the beneficiary named in the will. *Id.* at 286 n.1. The following year, Mr. Wheeler drafted a codicil disinheriting the testatrix's stepson, naming her spouse personal representative and naming Mr. Wheeler to serve as alternate personal representative, and a trust amendment naming Mr. Wheeler as a successor co-trustee of her trust to serve on her death. *Id.* at 286. Thereafter, the testatrix went to a different attorney and signed documents revising her will and trust, eliminating any reference to Mr. Wheeler. *Wheeler*, 972 So. 2d at 286. Within two months after signing these documents, the testatrix was involuntarily hospitalized and diagnosed as suffering from late stage Alzheimer's disease. *Id.* After the testatrix's death, Mr. Wheeler contested the appointment of her spouse as personal representative pursuant to her last signed will based on lack of testamentary capacity and undue influence. *Id.* at 287. Because the court clerk failed to honor Mr. Wheeler's caveat, the petition he filed thereafter

decedent's last will, as well as one nominated in a prior will when the last signed will is contested has standing.¹⁰² This does not mean that all persons named personal representative in a decedent's prior wills have standing.¹⁰³ It is only where the nominee in a prior will may be appointed if he or she succeeds in proving a later signed will is invalid that the facts justify a finding of standing.¹⁰⁴

A beneficiary under a decedent's will has standing to contest the appointment of a personal representative, either appointed or seeking appointment, based on a claim that the decedent died intestate.¹⁰⁵ This is true even if counsel for the beneficiary files a petition asserting that the beneficiary seeks, as a beneficiary entitled to a majority of the estate, to designate the attorney to serve as personal representative.¹⁰⁶ If a decedent has no heirs and his or her estate would escheat in the absence of a valid will, the State of Florida has standing to contest the will and the appointment of a personal representative nominated therein.¹⁰⁷

The same person may have standing in one capacity, and lack it in another capacity.¹⁰⁸ For example, a beneficiary who is appointed personal representative under a will generally lacks standing as personal representative to contest provisions in the will, although he or she may have the right to contest a will provision as a beneficiary.¹⁰⁹ As soon as a personal representative contests provisions in the will, he or she is disqualified from continuing

sought revocation of probate. *Id.* The court held that Mr. Wheeler had standing to contest the appointment of the personal representative nominated in the later will. *Id.* at 289.

102. *See Wheeler*, 972 So. 2d at 288; *Engelberg v. Birnbaum*, 580 So. 2d 828, 830 (Fla. 4th Dist. Ct. App. 1991) (per curiam).

103. *See Wheeler*, 972 So. 2d at 288.

104. *See id.*

105. *See Magnolia Manor, Inc. v. Siegel*, 866 So. 2d 142, 143 (Fla. 5th Dist. Ct. App. 2004).

106. *See id.* After a hearing, the court determined that the decedent's last signed will was invalid due to incapacity and undue influence. *Id.* (citing *First Union Nat'l Bank v. Estate of Mizell*, 807 So. 2d 78, 79 (Fla. 5th Dist. Ct. App. 2001)). Thus, the last signed will did not revoke an earlier will under which Magnolia Manor, Inc. was named a beneficiary. *See id.*; *see Estate of Mizell*, 807 So. 2d at 80. Because the trial court erroneously determined that the invalidity of the last signed will caused the decedent to die intestate, the court appointed a personal representative. *See Siegel*, 866 So. 2d at 143 (citing *Estate of Mizell*, 807 So. 2d at 79). Counsel for the beneficiary under the decedent's earlier will was held to have standing, as representative of the beneficiary, to contest appointment of the personal representative. *Id.*

107. *See Hays v. Ernst*, 13 So. 451, 453–54 (Fla. 1893).

108. *See In re Estate of Lewis*, 411 So. 2d 368, 370–71 (Fla. 4th Dist. Ct. App. 1982).

109. *See id.* 369–71. In *In re Estate of Lewis*, the decedent's widow was appointed personal representative in accordance with the decedent's will. *Id.* at 369. She then sought to invalidate a gift set forth in the will to a named beneficiary. *Id.* at 369–70.

to serve as personal representative.¹¹⁰ This rule may bar a personal representative, appointed by virtue of a nomination in a decedent's will admitted to probate, from contesting the appointment of an eligible co-personal representative similarly nominated.¹¹¹ Thus, one nominated personal representative in a will who wishes to contest the validity of provisions in that will may be forced to choose between serving as personal representative and forgoing the contest, or contesting the will provisions and relinquishing the position as personal representative.¹¹² An individual who held a decedent's durable power of attorney and who filed a petition for administration seeking to probate the decedent's will, but was not a personal representative or estate beneficiary, was held to not be an interested person.¹¹³

A person who is not a beneficiary under a decedent's last will, who is also neither a beneficiary under the decedent's prior will claimed to be valid, or if no prior valid will exists, the decedent's heir in intestacy, would generally have no interest in the estate, and thus lacks standing to question appointment of the personal representative.¹¹⁴ For example, a court appointed guardian of a testate decedent who is not named a fiduciary in the will generally lacks standing in the probate proceeding.¹¹⁵ A person who would qualify as an heir at law had the decedent died intestate will not be an heir where the decedent's valid last signed will and prior wills disinherited the would-be-heir, and the disinherited individual cannot establish that the decedent died

110. *Id.* at 370.

111. *See In re Estate of Lewis*, 411 So. 2d at 370.

112. *See id.* at 370.

113. *See Galego v. Robinson*, 695 So. 2d 443, 444 (Fla. 2d Dist. Ct. App. 1997). This case involved an action to recover for alleged mismanagement of the decedent's assets prior to death. *Id.* The holder of the decedent's durable power of attorney claimed he was not an interested person, and thus could not be served by formal notice. *Id.* The court agreed, even though he was nominated personal representative in the decedent's will and actively participated in the will contest. *Id.* This case differs from others cited in that the individual in question was claiming he lacked standing rather than asserting that he was an interested person with standing. *Compare id.*, with *Hays v. Ernst*, 13 So. 451, 453 (Fla. 1893); *Magnolia Manor, Inc. v. Siegel*, 866 So. 2d 142, 143 (Fla. 5th Dist. Ct. App. 2004); *First Union Nat'l Bank v. Estate of Mizell*, 807 So. 2d 78, 80 (Fla. 5th Dist. Ct. App. 2001); *In re Estate of Lewis*, 411 So. 2d at 370. He was successful in persuading the court that the probate court had not acquired personal jurisdiction over him. *See Galego*, 695 So. 2d at 444.

114. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1010 (Fla. 5th Dist. Ct. App. 2005).

115. *See SunTrust Bank v. Guardianship of Nichols*, 701 So. 2d 107, 109–10 (Fla. 5th Dist. Ct. App. 1997). After the decedent's daughter-in-law submitted a will for probate, the decedent's court appointed guardian located a later will and submitted it to the probate court. *Id.* at 109. The guardian's request for attorney's fees for this service was denied on the basis that he lacked standing, and was a mere "interloper" in probate "because neither the guardian nor the ward had an interest in the outcome of the estate case." *Id.* at 109–10.

intestate.¹¹⁶ Where a decedent's last will and prior will do not provide for the heir and "an at least facially valid previous will is before the court, the burden is on the potential heir at law who wishes to contest a will to show that the previous will which excluded the contestant was invalid or that the doctrine of dependent relative revocation did not apply."¹¹⁷ Absent this showing, the disinherited heir lacks standing.¹¹⁸

The same conclusion was reached, that a disinherited heir lacked standing, even where a literal reading of the decedent's will might have led to a contrary conclusion.¹¹⁹ An heir may not institute a contest to challenge the validity of a will and appointment of the personal representative nominated therein merely to cause delay, and then attempt to obtain a benefit from the estate due to that delay.¹²⁰ A prior will leaving an heir one dollar was recognized as equal to a prior will disinheriting the heir.¹²¹

116. See *Newman v. Newman ex rel. Estate of Newman*, 766 So. 2d 1091, 1093–94 (Fla. 5th Dist. Ct. App. 2000); see also *Cates v. Fricker*, 529 So. 2d 1253, 1254–55 (Fla. 2d Dist. Ct. App. 1988).

117. *Cates*, 529 So. 2d at 1254–55. In *Cates*, the decedent's disinherited daughter attempted to contest the validity of his will. *Id.* at 1254. The testator's last will and two prior wills disinherited the decedent's daughter. *Id.* Because she failed to allege or prove that all earlier wills were also invalid, she was denied standing. *Id.* at 1254–55. See also *Coukos-Semmel v. Mitchell (In re Estate of Coukos)*, 947 So. 2d 1290, 1290 (Fla. 2d Dist. Ct. App. 2007), in which the testator's grandchildren and great-grandchildren were not interested persons and lacked standing, because the testator's last will and presumptively valid prior will made no provisions for them. In *Wehrheim*, the testatrix's children contested the validity of the decedent's last signed will and the appointment of the personal representative named therein. *Wehrheim*, 905 So. 2d at 1005. The last signed will left the decedent's estate to the facility in which the decedent resided. *Id.* at 1004–05. The decedent's earlier will likewise named beneficiaries other than the testatrix's children. *Id.* at 1005. The court agreed that, for the children to have standing, they needed to prove that all wills were invalid. See *id.* at 1010. The decedent's children successfully argued that, if only the gifts in the decedent's last signed will, rather than the entire will, were invalid due to undue influence, the revocation clause in that will remained valid. *Id.* at 1008–10. If these assertions were proved, the result would be that the decedent died partly testate, but her will failed to dispose of her wealth, and thus distribution through intestacy was required. *Wehrheim*, 905 So. 2d at 1008, 1010. Hence, that court determined the children were interested persons and had standing. *Id.* at 1010; see *Newman*, 766 So. 2d at 1094.

118. See *Cates*, 529 So. 2d at 1254–55.

119. See *Newman*, 766 So. 2d at 1094.

120. *Id.* In *Newman*, the testator's will left his estate to his surviving spouse and nominated her as personal representative. *Id.* at 1092. The will further provided that if the widow failed to survive distribution of the estate, the decedent's son born of a prior marriage was to receive half of the estate. *Id.* After the testator's death, his son instituted a will contest, alleging that the testator's signature on the will was a forgery. *Id.* The will contest continued until the decedent's widow died. *Newman*, 766 So. 2d at 1092. The son thereafter claimed entitlement to half the estate under the terms of the will he previously opposed. *Id.* Because the decedent's son was not a beneficiary of the decedent's last signed will, and was left one dollar

The appointment of a personal representative may also be questioned in the Florida ancillary probate of the estate of a non-resident decedent.¹²² Beneficiaries under an earlier will, signed by the decedent prior to his alleged last will admitted to probate in another state, have standing to contest the validity of the will and the appointment of a personal representative nominated therein on substantive grounds, even if the will was signed following proper procedure.¹²³

The first three sections of this article might lead one to conclude that there is no way to avoid the outcomes dictated by the applicable statutes. The balance of this article reveals that conclusion to be erroneous.

V. STATUTORY ELIGIBILITY REQUIREMENTS

As noted at the outset, the Florida Probate Code provides that a person must be eligible to serve as personal representative before a court may appoint him or her.¹²⁴ Several requirements determine eligibility.¹²⁵ First, only adults are eligible to serve.¹²⁶ Second, a person must be “mentally or physically [able] to perform the duties” of a personal representative to be eligible to serve.¹²⁷ Third, a person convicted of a felony is, according to statute, not qualified to serve.¹²⁸ Fourth, if the person seeking appointment is not a resident of Florida, the person must bear a certain familial relationship to the

in an earlier will, the validity of which was not questioned, the son lacked standing. *Id.* at 1094.

121. *Id.* at 1093.

122. *See* Baird v. Larson (*In re Estate of Swanson*), 397 So. 2d 465, 465–66 (Fla. 2d Dist. Ct. App. 1981).

123. *Id.* at 466. The decedent’s will was admitted to probate in Georgia. *Id.* at 465. The personal representative nominated in the will was appointed by the court in Georgia. *Id.* at 465–66. The personal representative commenced ancillary administration in Florida, as the decedent owned Florida real property. *Id.* at 465. The beneficiaries under the decedent’s earlier will had standing to object based on allegations that the decedent lacked testamentary capacity when the later will was signed, and that the decedent was unduly influenced to sign the will admitted to probate. *In re Estate of Swanson*, 397 So. 2d at 465–66. The fact that the will was properly executed did not prevent a contest. *Id.* at 466.

124. *See* FLA. STAT. § 733.302 (2011).

125. *Id.* §§ 733.302–303.

126. *Id.* § 733.303(1)(c). An adult for this purpose is anyone who attained age eighteen. *Id.*

127. *Id.* § 733.303(1)(b).

128. FLA. STAT. § 733.303(1)(a). The term felony is defined as “any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or imprisonment in a state penitentiary.” *Id.* § 775.08(1).

decedent to be eligible to serve as personal representative.¹²⁹ These requirements may not be absolute and are considered separately herein.

The first requirement for qualification, that the nominee be an adult, is perhaps the most secure. An individual seeking appointment as personal representative must be age eighteen as of the decedent's death.¹³⁰ Where an individual with priority did not attain the age of eighteen until after the decedent's death and after another person was appointed personal representative, she did not have the right to either remove the personal representative appointed or to assume the position on attaining the age of majority.¹³¹

Where a convicted felon has been granted clemency and his or her civil rights have been restored, he or she may be appointed personal representative despite the apparent bar in section 733.303(1)(a) of the *Florida Statutes*.¹³² It would be an unconstitutional infringement on the governor's right to grant pardons and restore civil rights under article IV, section 8(a) of the Florida Constitution for the statute to be interpreted as an absolute bar preventing a convicted felon who received a pardon from serving as a personal representative.¹³³ When a convicted felon who was pardoned by the governor seeks appointment, the court may consider his "character, ability, and experience to act as a personal representative, . . . any conflicting interests, . . . [and] 'the circumstances surrounding his prior conviction'" to determine if it is appropriate to appoint him.¹³⁴ Section 733.304 of the *Florida Statutes* states that

129. *Id.* § 733.304.

130. *Id.* § 733.303.

131. *Gilmore v. Ragans (In re Estate of Fisher)*, 503 So. 2d 962, 963–64 (Fla. 1st Dist. Ct. App. 1987). In that case, a young adult died intestate and his mother was appointed personal representative of his estate. *Id.* at 963. During the decedent's life he fathered a child. *Id.* Both the decedent's child and the child's mother were under age eighteen as of the decedent's death. *Id.* Two months after the decedent's death, his child's mother attained age eighteen. *Id.* She then sought to remove the decedent's mother as personal representative of the estate and sought her own appointment. *In re Estate of Fisher*, 503 So. 2d at 963. Because the decedent's girlfriend had not attained the age of eighteen as of his death, she was unsuccessful. *Id.* at 964.

132. *Padgett v. Estate of Gilbert*, 676 So. 2d 440, 443 (Fla. 1st Dist. Ct. App. 1996); see also FLA. STAT. § 733.303(1)(a). In that case, a child died intestate. See *Padgett*, 676 So. 2d at 442. Both her mother and her father sought appointment as personal representative of her estate. *Id.* Her father was a convicted felon who had been granted clemency by the governor. *Id.*

133. *Id.* at 442–43; see also FLA. CONST. art. IV, § 8(a); FLA. STAT. § 733.303(1)(a).

134. *Padgett*, 676 So. 2d at 443–44 (quoting *G.W. Liquors of Collier, Inc. v. Dep't of Bus. Regulation*, 556 So. 2d 464, 465 (Fla. 1st Dist. Ct. App. 1990) (per curiam). "[T]he legislature, by statute, may neither preempt nor overrule the clemency rules without violating the separation of powers doctrine expressly set forth in the [Florida] Constitution." 15B FLA. JUR. 2D *Criminal Law-Procedure* § 2942 (2009).

only certain individuals may qualify as personal representatives when they reside outside of Florida.¹³⁵ The eligible persons include a person who is:

- 1) [a] legally adopted child or adoptive parent of the decedent; 2) [r]elated by lineal consanguinity to the decedent; 3) [a] spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person; or 4) [t]he spouse of a person otherwise qualified under this section.¹³⁶

The validity, meaning, and application of these provisions have been questioned.¹³⁷ The wills of Florida domiciliaries at times name ineligible persons to fiduciary positions.¹³⁸ Because those persons frequently desire to serve, there is objection to enforcement of the statute.¹³⁹

Even if the statute is constitutional, disputes exist about whether the phrase “or someone related by lineal consanguinity to any such person” refers only to the decedent’s blood relatives referenced in the statute (brother, sister, etc.) and to the decedent’s surviving spouse, or whether it also authorizes a person related by lineal consanguinity to a decedent’s predeceased spouse to serve.¹⁴⁰ Further, when and how an objection to a disqualified person need be asserted merits investigation. The recent answer from the Supreme Court of Florida about when and how to object may create an avenue for appointments of unqualified persons.

There is authority for the proposition that a person related by blood to the decedent’s predeceased spouse, rather than to the decedent, is not eligible to serve as a personal representative of the decedent’s estate, despite his or her nomination in the decedent’s will, where the nominee is not a Florida resident.¹⁴¹ Where a woman died testate and her will nominated her former spouse’s nephew—a non-Florida resident—as co-personal representative, he had no right to serve.¹⁴² As he had been appointed based on his erroneous representation to the court that he was eligible, having informed the court that he was the decedent’s nephew, his removal was warranted.¹⁴³ The fact

135. FLA. STAT. § 733.304.

136. *Id.*

137. *E.g.*, *In re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla. 1980).

138. *E.g.*, *id.*

139. *E.g.*, *id.*; *see also* *Fain ex rel. Estate of Fain v. Hall*, 463 F. Supp. 661, 665–66 (M.D. Fla. 1979).

140. *E.g.*, *Angelus v. Pass*, 868 So. 2d 571, 572 (Fla. 3d Dist. Ct. App. 2004) (quoting FLA. STAT. § 733.304(3)).

141. *E.g.*, *id.* at 573.

142. *Id.* at 572–73.

143. *Id.* The petitioner failed to inform the court that he was not the decedent’s blood relative but was merely a relative by marriage. *Id.* at 572.

that there was no objection to him serving “filed within the three month time period” specified in section 733.212(3) of the *Florida Statutes* did not alter the outcome.¹⁴⁴ The court recognized that to rule otherwise would render Florida Probate Rule 5.310, which requires notice when a personal representative is or becomes ineligible to serve, a nullity.¹⁴⁵ *Angelus v. Pass*¹⁴⁶ and other precedent¹⁴⁷ recognized that the court had an implicit obligation to assure that the statute was complied with, despite the actions of the parties in the case.¹⁴⁸ Absent an objection to a petitioner’s lack of qualification, the court still would not appoint a personal representative ineligible under section 733.304 of the *Florida Statutes*.¹⁴⁹

Today, in addition to Florida Probate Rule 5.310,¹⁵⁰ section 733.3101 of the *Florida Statutes* requires a personal representative to promptly file and serve a notice any time he or she knows or should know that he or she is no longer qualified to serve as personal representative.¹⁵¹ Absent adherence to the rule, statute, and decision in *Angelus*, the interested parties in an estate could easily conspire to have an unqualified individual appointed personal representative.¹⁵² Such action may now be possible.¹⁵³

In *Hill v. Davis (Hill II)*,¹⁵⁴ a Florida resident died testate, and the will nominated the decedent’s step-son, a New York resident, as personal representative.¹⁵⁵ When he sought appointment, he clearly and accurately disclosed his relationship to the decedent to the court and other persons interested in the estate.¹⁵⁶ The decedent’s husband (the step-son’s father) died before the decedent, and thus was claimed to not be the decedent’s spouse at her death.¹⁵⁷ The decedent’s mother sought to remove the step-son as personal representative of her daughter’s estate.¹⁵⁸ However, despite being served with a Notice of Administration, she did not file the motion within

144. *Angelus*, 868 So. 2d at 572.

145. *Id.* at 572–73.

146. 868 So. 2d 571 (Fla. 3d Dist. Ct. App. 2004).

147. *See In re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla. 1980).

148. *See Angelus*, 868 So. 2d at 573 (citing *In re Estate of Greenberg*, 390 So. 2d at 42).

149. *See id.*; *see also* FLA. STAT. § 733.304 (2011).

150. FLA. PROB. R. 5.310.

151. FLA. STAT. § 733.3101 (2011). *See id.*, enacted before *Angelus* was decided.

152. *See id.*; FLA. PROB. R. 5.310; *Hill II*, 70 So. 3d 572, 574 (Fla. 2011); *Angelus*, 868 So. 2d at 573.

153. *See Hill II*, 70 So. 3d at 578.

154. 70 So. 3d 572 (Fla. 2011).

155. *Id.* at 574.

156. *Id.*

157. *Id.* at 575.

158. *Id.* at 574–75.

three months after service was accomplished.¹⁵⁹ The trial court denied the motion, finding that the son of the decedent's predeceased spouse was qualified to serve under the statute and that the objection was barred due to untimely filing, and the decedent's mother appealed.¹⁶⁰ The district court of appeal affirmed and certified a conflict with *Angelus*.¹⁶¹ The district court of appeal declined to address whether the step-son was qualified to serve under section 733.304(3) of the *Florida Statutes* on the basis that he was related by lineal consanguinity to the decedent's spouse and that the statute did not expressly require decedent's spouse to be living.¹⁶² Instead, the court decided that the step-son was entitled to retain his position as personal representative, solely due to the absence of a timely objection.¹⁶³ The court's stated aim was to give effect to all the words in section 733.212(3) of the *Florida Statutes*, requiring objections to qualifications of a personal representative not filed within three months after service of the Notice of Administration to be "forever barred."¹⁶⁴

The Supreme Court of Florida approved the district court's decision.¹⁶⁵ It too did not rule on the merits of the underlying dispute about whether a

159. *Hill II*, 70 So. 3d at 574 n.3. In *Hill II*, the decedent's mother contested the validity of the will appointing the personal representative. *Id.* Perhaps because that contest was pending, she did not timely file a specific objection to the appointment of the personal representative under the will. *See id.* at 574 n.3. The will contest was ultimately unsuccessful. *Id.* at 578.

160. *Id.* at 575; *see* FLA. STAT. § 733.304(3) (2011).

161. *Hill I*, 31 So. 3d 921, 924 (Fla. 1st Dist. Ct. App. 2010), *aff'd*, 70 So. 3d 572 (Fla. 2011).

162. *Id.*; *see* FLA. STAT. § 733.304(3).

163. *Hill I*, 31 So. 3d at 924.

164. *Id.* at 923.

165. *Hill II*, 70 So. 3d at 574. In *Hill II*, several questions faced the court. *See id.* at 576. One was whether the court should decline to exercise jurisdiction despite the district court's certification of a conflict with *Angelus* on the basis that the cases were not in conflict. *Id.* at 573. The argument favoring the court's exercise of jurisdiction was that in both *Angelus* and *Hill I*, a person not related to the decedent by lineal consanguinity, but related to the decedent's predeceased spouse by lineal consanguinity, was appointed personal representative of the Florida decedents' estates. *Id.* at 576; *Angelus v. Pass*, 868 So. 2d 571, 572 (Fla. 3d Dist. Ct. App. 2004). In both cases, the objection to the unqualified personal representative serving was filed after the time to object to the appointment of the personal representative expired. *Hill II*, 70 So. 3d at 575; *Angelus*, 868 So. 2d at 572. Whereas the court in *Angelus* relied on FLA. STAT. § 733.304(3) and the policy behind the statute, the court in *Hill I* placed greater reliance on FLA. STAT. § 733.212(3). *Hill I*, 31 So. 3d at 923–24; *Angelus*, 868 So. 2d at 573. It was thus argued that the factual similarity in the cases and the different interpretation and application of the law in the two cases warranted the exercise of jurisdiction by the Supreme Court of Florida to resolve the issue. *See Hill II*, 70 So. 3d at 576–77.

In opposition to the exercise of jurisdiction by the Supreme Court of Florida, the argument was advanced that the cases were factually distinguishable and consistent with each

relative of a Florida decedent's predeceased spouse is eligible to serve as a personal representative of a Florida decedent's estate, when that relative by marriage is not a Florida resident although he or she is nominated to serve in the decedent's will.¹⁶⁶ Instead, the sole issue addressed by the court was "whether an objection to the qualifications of a personal representative of an estate is barred by the three-month filing deadline set forth in section 733.212(3) [of the *Florida Statutes* in 2007] . . . when the objection is not filed within that statutory time frame."¹⁶⁷ The question was answered in the affirmative.¹⁶⁸ Exceptions to this general rule exist "where fraud, misrepresentation, or misconduct with regard to the qualifications is not apparent on the face of the petition or discovered within the statutory time frame."¹⁶⁹ Because the personal representative in *Hill II* accurately disclosed his relationship to the decedent in his Petition for Administration, the exception did not apply to bar him from serving or continuing to serve as personal representative.¹⁷⁰ The court declined to follow *Angelus* to the extent of its holding that section 733.212(3) of the *Florida Statutes* did not bar an untimely objection to the qualifications of a personal representative.¹⁷¹ Instead, to give

other, and thus there was no irreconcilable conflict. *See id.* at 576. Emphasis was placed on the fact that in *Angelus* the personal representative stated under oath that he was the decedent's nephew, without disclosing that he was actually the decedent's spouse's nephew and was not related to the decedent by lineal sanguinity. *See id.*; *Angelus*, 868 So. 2d at 572. The implication was that in *Angelus* the interested parties were unaware of the facts supporting the personal representative's lack of eligibility to serve. *See Angelus*, 868 So. 2d at 572. In contrast, in *Hill I*, the exact nature of the personal representative's family relationship to the decedent was disclosed and known to the objecting party from the outset of probate. *Hill I*, 31 So. 3d at 922. Hence, the cases were distinguished as *Angelus* applies only when an unqualified personal representative procures his appointment by concealing his true relationship to the decedent, whereas *Hill II* applies when the true relationship was known to the court and interested parties. *See Hill II*, 70 So. 3d at 577–78. In the former case, the three-month deadline in FLA. STAT. § 733.212(3) would not bar a late petition to remove the personal representative, whereas in the latter case it would. *See Hill II*, 70 So. 3d at 578. Florida law imposes the burden of proving eligibility on the person seeking appointment. *See, e.g.*, *Lander v. Busch (In re Estate of Chadwick)*, 309 So. 2d 587, 588 (Fla. 2d Dist. Ct. App. 1975).

While the court exercised jurisdiction in *Hill II* based on the similarities between the cases, adopting the former argument, it ultimately ruled based on the latter argument, due to the factual distinctions between the cases. *Hill II*, 70 So. 3d at 578.

166. *See id.* at 573–74; *Hill I*, 31 So. 3d at 924; *see also* FLA. STAT. § 733.304(3).

167. *Hill II*, 70 So. 3d at 573 (citing FLA. STAT. § 733.212(3)).

168. *Id.* at 578.

169. *Id.* at 573–74.

170. *Id.* at 578 (citing FLA. STAT. § 733.212(3)). The court distinguished *Angelus* on the basis that *Angelus* involved a situation in which the requisite disclosure of the lack of blood relationship between the personal representative and the decedent was not made. *Id.*; *see also Angelus*, 868 So. 2d at 572–73.

171. *Hill II*, 70 So. 3d at 577–78 (citing FLA. STAT. § 733.212(3)).

meaning to the time limit in section 733.212(3) of the *Florida Statutes* requiring objections to the appointment of a personal representative to be filed within three months, at least where the basis for any objection due to lack of qualifications is known within that time, the court barred an untimely-filed objection.¹⁷² Absent such a ruling, the court feared it would have been improperly creating an exception to section 733.212(3) of the *Florida Statutes* not authorized by the legislature.¹⁷³

One outcome of the court's decision in *Hill II* may be the judicial creation of an exception to section 733.304 of the *Florida Statutes* not authorized by the legislature.¹⁷⁴ A correct interpretation may now be that the statute bars persons living outside of Florida, and not having the requisite relationship to the decedent, from serving as personal representative of a Florida decedent's estate, unless they disclose their lack of eligibility, and no one objects in a timely fashion.¹⁷⁵ In light of the court's decision in *Hill II*, there would appear to be little impediment to all interested parties in an estate consenting to the appointment of a disqualified person as personal representative by failing to file objections.¹⁷⁶ As long as full disclosure of the facts causing the nominated personal representative to be ineligible to serve are disclosed in the petition, both to the court and to all interested parties once the deadline to object to the disqualified person's appointment expired, the parties would have successfully circumvented the Florida statutory requirement.¹⁷⁷ One questions whether that is what the legislature had in mind in drafting the qualifications provisions of the statute, and the effect of the decision in *Hill II* on section 733.3101 of the *Florida Statutes*.¹⁷⁸

Previously, Florida courts have strictly construed the statutory provisions limiting the class of nonresidents eligible to serve as a personal representative of a Florida decedent's estate.¹⁷⁹ A grand-nephew of the dece-

172. *Id.* at 578 (citing FLA. STAT. § 733.212(3)).

173. *Id.* at 577–78 (citing FLA. STAT. § 733.212(3)); see *Angelus*, 868 So. 2d at 573 (citing FLA. STAT. § 733.212(3)). While both *Angelus* and *Hill II* involved personal representatives related to the decedent's predeceased spouse, the same reasoning might apply to a decedent's attorney, accountant, friend, or advisor residing outside Florida. See *Hill II*, 70 So. 3d at 574; *Angelus*, 868 So. 2d at 572. Unless the circuit court will, on its own initiative, scrutinize petitions for administration, inquire into the relationship of the nominee and the decedent, and prevent appointment of ineligible persons despite the absence of an objection from an interested party, conspiratorial appointment of unqualified personal representatives is possible. See *Hill II*, 70 So. 3d at 576–78.

174. *Id.* at 576–77.

175. See *id.* at 576–78.

176. See *id.* at 577.

177. See *id.* at 576–78.

178. See *Hill II*, 70 So. 3d at 576, 578.

179. *Angelus v. Pass*, 868 So. 2d 571, 572–73 (Fla. 3d Dist. Ct. App. 2004).

dent—the decedent’s sister’s grandson—who resided outside of Florida was not qualified to serve as personal representative.¹⁸⁰ The term “nephew” in the statute was held not to include a “grand-nephew.”¹⁸¹ Since the grand-nephew was not related to the decedent by lineal consanguinity he was ineligible to serve, and was removed on the request of a creditor of the estate.¹⁸² Similarly, a nephew of the decedent’s predeceased wife was ineligible to serve as personal representative of the decedent’s estate.¹⁸³ The court again stated that the term “nephew” includes only the decedent’s blood relatives.¹⁸⁴

Historically, in at least one case, the Supreme Court of Florida recognized that an unqualified person should not be removed as personal representative, despite the fact that he was never eligible to serve, when estate administration was nearly concluded at the time his removal was sought, no other improprieties in estate administration were asserted, and the person seeking his removal both had no interest in the estate and had accepted compensation from the personal representative for assisting him.¹⁸⁵

The State of Florida undoubtedly has an interest in assuring that personal representatives of deceased Florida residents’ estates attend to their assigned tasks and administer estates promptly and efficiently.¹⁸⁶ The historical justification for limiting who may serve is amply documented.¹⁸⁷ Yet, at least one Florida court, in upholding literal application of the statute, noted “that the rationale behind the rather expansive statutory scheme of exceptions set out in section 733.304 is difficult to comprehend.”¹⁸⁸

Hill II addressed only a situation involving appointment of a personal representative.¹⁸⁹ Removal of a personal representative, governed by separate statutes, was not a focus of the court’s opinion.¹⁹⁰ Removal of a personal representative is justified when a personal representative moves outside the

180. *In re Estate of Chadwick*, 309 So. 2d 587, 588 (Fla. 2d Dist. Ct. App. 1975).

181. *Id.* (interpreting FLA. STAT. § 732.47(1) (1973)).

182. *Id.*

183. *In re Estate of Angeleri*, 575 So. 2d 794, 794–95 (Fla. 4th Dist. Ct. App. 1991).

184. *Id.* at 794.

185. *Rosenbaum v. Spittler (In re Sherman’s Estate)*, 1 So. 2d 727, 729 (Fla. 1941). The party seeking removal of the personal representative in that case was the alternate personal representative nominated in the decedent’s will. *Id.* at 728. This case was not relied on in *Hill II*. See *Hill II*, 70 So. 3d 572, 573–78 (Fla. 2011).

186. David T. Smith, *The Potential Personal Representative: Ready, Willing, but Perhaps Unable to Act in Florida*, 48 FLA. L. REV. 675, 689 (1996).

187. See, e.g., *In re Estate of Greenberg*, 390 So. 2d 40, 42–46 (Fla. 1980); Smith, *supra* note 186, at 675–89.

188. *In re Estate of Angeleri*, 575 So. 2d at 795.

189. *Hill II*, 70 So. 3d at 573.

190. See *id.* at 574 n.1.

state and thus is no longer qualified to serve,¹⁹¹ or during the probate, at any time he or she would not be entitled to appointment.¹⁹² The statute does not mandate or require removal in these situations, but instead states that a personal representative may be removed.¹⁹³

In addition to the possibility that all interested parties may now secure appointment of an unqualified personal representative in Florida, it is at times possible to probate a testate Florida decedent's estate elsewhere and thus to have the personal representative nominated in the decedent's will appointed, despite her ineligibility to serve in Florida.¹⁹⁴ This opportunity may exist because other states view Florida's statutory restrictions preventing many non-residents from serving as personal representative as discriminatory.¹⁹⁵ One such state is New York.¹⁹⁶

191. FLA. STAT. § 733.504(11) (2011).

192. *Id.* § 733.504(12).

193. *Id.* § 733.504.

194. *See In re Estate of Siegel*, 373 N.Y.S.2d 812, 814 (Sur. Ct. Erie Cnty. 1975).

195. *See id. But see Estate of Nevai*, 788 N.Y.S.2d 843, 844–45 (Sur. Ct. Westchester Cnty. 2005). In *Estate of Nevai*, the testator was a resident of Florida at her death. *Id.* The vast majority (\$28,000,000) of her considerable wealth (\$38,000,000), including New York real estate, was located in New York State. *Id.* Florida counsel drafted the decedent's will. *Id.* However, the will was signed and witnessed in New York, and nearly thirty percent of the beneficiaries named in the will, including two charities, were in New York. *Id.* Four fiduciaries were named in the will to serve as personal representative, only two of whom would qualify in Florida. *Estate of Nevai*, 788 N.Y.S.2d at 844. By the time the two ineligible nominees sought to institute probate administration in New York, a probate proceeding and litigation about the estate were already pending in Florida. *Id.* The two nominees in the will eligible to serve as personal representatives in Florida had been appointed curators by the Florida court, rather than personal representatives. *Id.* In *Estate of Nevai*, the court declined to commence original probate in New York, merely due to the inability of two nominees in the decedent's will to qualify as fiduciaries in Florida. *Id.* at 845. The court set forth the test to be applied to permit original probate under section 1605 subdivision 2(c) of the *New York Surrogate's Court Procedure Act* as follows:

In determining whether to accept an application for original probate of a will of a non-domiciliary which has not yet been admitted to probate in the decedent's domicile, this court should examine the nature of New York's contacts with the decedent and his/her estate, including: (i) the location of decedent's assets; (ii) the residence of the nominated fiduciaries and beneficiaries; (iii) the expense of proving the will in the decedent's domicile; (iv) the decedent's request, if any, for New York probate, and (v) the good faith of the proponents. The court should also consider what weight should be given to the fact that the decedent's domicile has already assumed jurisdiction over the decedent's estate.

Id. (citations omitted); N.Y. SURR. CT. PROC. ACT § 1605(2)(c) (McKinney 1995 & Supp. 2011). Considering these factors the court found that the two persons selected by the testator were eligible to serve as personal representatives in Florida, probate litigation was already instituted in Florida, it would be prejudicial to compel interested parties to litigate in both Florida and New York and inconsistent outcomes might result, and petitioners did not assert how they would be unable to defend the will in Florida. *Estate of Nevai*, 788 N.Y.S.2d at 845. These findings justified the court's decision not to permit original probate in New York. *Id.*

New York law allows the original probate of a non-resident decedent's estate where no probate administration is pending in the state of the decedent's domicile.¹⁹⁷ Even if a Florida probate proceeding is pending for a deceased Florida resident's estate, New York law authorizes original probate in New York Surrogate's Court in three situations.¹⁹⁸ The statute provides:

2. A will which has been admitted to probate or established in the testator's domicile shall not thereafter be admitted to original probate in this state except:

(a) in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances,

See also *In re Estate of Harrison*, 366 N.Y.S.2d 755, 756–57 (Sur. Ct. Bronx Cnty. 1974), wherein the Surrogate stated:

At best, the Florida statute is inequitable. It is the opinion of this court that the residency restrictions it places upon its citizens in naming executors is not only inequitable but is offensive to the spirit and letter of the U.S. Constitution.

...
The understandable desire of the State of Florida to promote its economy by insuring the maximum of business for both its banking institutions and attorneys should not be enhanced by interference with the right of new residents who migrate to seek the benefit of its gentle climate to select the executors of their choice. It is hoped that Legislative wisdom will correct this unfortunate restriction without the necessity for some estate to assume the burden of a search for judicial relief that may extend from the courts of Florida into our Federal system.

Id.

196. *E.g.*, *id.* at 756.

197. N.Y. SURR. CT. PROC. ACT § 1605(1); *see, e.g.*, *In re Estate of Siegel*, 373 N.Y.S.2d at 814. In this case, the testator's will named as fiduciary a New York bank which could not qualify as personal representative in Florida. *Id.* The decedent's widow caused the will to be admitted to probate in Florida and secured her appointment as personal representative. *Id.* at 813. Thereafter, to give effect to the decedent's wishes, she sought and obtained probate of the non-domiciliary testator's estate in New York. *Id.* at 814. The case did not reflect that ancillary administration was otherwise required. *See id.*; *Estate of Brown*, 436 N.Y.S.2d 132, 132–33 (Sur. Ct. N.Y. Cnty. 1981). The decedent, a Florida resident, previously lived in New York. *Estate of Brown*, 436 N.Y.S.2d at 132. When she was a New York resident, she signed a will in New York drafted by a New York attorney. *Id.* The New York attorney was nominated personal representative in the will and was not related to the decedent. *Id.* At her death, half of the testator's wealth was in New York, and she was buried in New York. *Id.* “[N]o probate proceeding [was] commenced in Florida.” *Id.* at 133. The attorney successfully sought original probate in New York, solely on the basis that he would be ineligible to serve as personal representative in Florida. *See Estate of Brown*, 436 N.Y.S.2d at 133. Alleged discrimination under Florida law against non-domiciliary personal representatives was also a factor in *In re Estate of Gadway*, where the primary dispute was about the decedent's domicile. *In re Estate of Gadway*, 510 N.Y.S.2d 737, 739 (App. Div. 1987).

198. N.Y. SURR. CT. PROC. ACT § 1605(2).

(b) where the testator has directed in such will that it shall be offered for a probate in this state or

(c) where the laws of testator's domicile discriminate against domiciliaries of New York either as a beneficiary or a fiduciary.¹⁹⁹

Where Florida statutes deny the nominee in a testator's will the right to serve as personal representative because the nominee is a New York resident, the New York Surrogate has considerable discretion²⁰⁰ under the statute to allow probate and estate administration to occur in New York to effectuate testator's wishes.²⁰¹

Different standards are applied by the New York courts to determine whether original probate administration should be allowed in New York depending on whether estate administration is or is not pending in the state of decedent's domicile or elsewhere.²⁰² The New York courts are more receptive to original probate of a nonresident's estate when administration is not pending elsewhere.²⁰³ This should not cause a rush to the court in New York, as filing there before filing elsewhere does not guaranty a favorable outcome. If after a petition is filed in New York, probate is commenced in the state of the decedent's domicile, the New York courts will consider that fact in determining whether to permit original probate in New York.²⁰⁴

A prerequisite to the original probate of a non-resident's estate in New York is that there be assets owned by the decedent within New York.²⁰⁵ This requirement may not be difficult to satisfy. At least one case held that when the only asset in New York was intangible personal property owned solely by the decedent and brought into the jurisdiction after the decedent's death,

199. *Id.*

200. *See Estate of Nevai*, 788 N.Y.S.2d at 845.

201. *See Wolfe v. Groswald (In re Goldstein's Will)*, 310 N.Y.S.2d 602, 603 (App. Div. 1970) (per curiam). After a Florida resident died, her will was offered for probate in New York. *See id.* The decedent's will was drafted and signed in New York, the drafting attorney was in New York, as were the decedent's assets, and the majority of beneficiaries resided in New York. *Id.* The fiduciaries nominated in the will would have been ineligible to serve in Florida due to the residency and family relation requirements. *See id.* As a consequence, an objection to probate in New York and the jurisdiction of the New York court was denied. *Id.* At the time of the court's ruling, no probate had been commenced in Florida. *See In re Goldstein's Will*, 310 N.Y.S.2d at 603.

202. *In re Estate of Baer*, 849 N.Y.S.2d 143, 145-46 (App. Div. 2007).

203. *See id.* at 146.

204. *See id.* After proceedings were filed in New York, probate was commenced in Vermont, the state of the decedent's domicile at death. *Id.* at 145-46.

205. *Id.* at 145.

the requirement was met.²⁰⁶ As long as estate administration in New York is not sought for fraudulent purposes, the New York Surrogate's Court may exercise jurisdiction where property is brought to New York for the purpose of conferring jurisdiction.²⁰⁷

Assuming a decedent owned wealth in New York and no estate administration is pending elsewhere, various factors are to be taken into account by a surrogate to determine whether original probate of a non-resident's estate is appropriate based on the decedent's contacts with New York State.²⁰⁸ These factors include: "i) the location of decedent's assets; ii) the residence of the nominated fiduciaries and beneficiaries; iii) the expense of proving the will in the decedent's domicile; iv) the decedent's request, if any, for New York probate; and v) the good faith of the proponents."²⁰⁹

In evaluating where a decedent's assets are located, the New York court focuses on probate property.²¹⁰ Where a decedent's only potential probate property in New York consisted of intangible personal property constituting twenty-three percent of the estate, the state of the decedent's domicile did not discriminate against New York domiciliaries as personal representatives or beneficiaries, the executor nominated in the will and one of three beneficiaries lived in New York, and there was no indication that New York probate

206. *Will of Nelson*, 475 N.Y.S.2d 194, 196–97 (Sur. Ct. N.Y. Cnty. 1984). At the decedent's death, he lived in Pennsylvania. *Id.* at 195. There was no indication that he owned anything of value in New York on that date. *See id.* After the testator's death, one executor nominated in his will brought stock, owned by the decedent in a closely held Delaware corporation, into New York. *Id.* at 196. The stock was the estate's primary asset. *Id.* Of relevance were the facts that the decedent and his estranged spouse had entered into a separation agreement in New York conferring jurisdiction on the New York courts in the event of a dispute about the agreement, that the decedent commenced an action for divorce in New York court, that the divorce action remained pending at the decedent's death, and that his widow contested the validity of the separation agreement. *Will of Nelson*, 475 N.Y.S.2d at 196.

207. *Id.* at 196–97.

208. *In re Estate of Baer*, 849 N.Y.S.2d at 145–46 (quoting *Estate of Nevai*, 788 N.Y.S.2d 843, 845 (Sur. Ct. Westchester Cnty. 2005)).

209. *Id.* at 146 (quoting *Estate of Nevai*, 788 N.Y.S.2d at 845).

210. *See id.* Assets in New York trusts created by someone other than the decedent, where the decedent had and exercised a power of appointment in favor of trusts the decedent created, did not constitute New York probate property for this purpose. *Id.* A life insurance policy in New York owned by the decedent on which the named beneficiary survived was also recognized as not constituting probate property and thus not influencing a decision about whether original probate in New York was appropriate. *Estate of Brunner*, 339 N.Y.S.2d 506, 509 (Sur. Ct. N.Y. Cnty. 1973).

would save costs, the court declined to allow original New York probate although the will was drafted and signed in New York.²¹¹

When no probate is instituted in Florida, the decedent owned assets in New York, and the personal representative nominated in the decedent's will would not qualify under section 733.304 of the *Florida Statutes*, original probate of a Florida decedent's estate in New York may be granted.²¹² For example, where a deceased Florida resident was buried in New York, her will was drafted and signed in New York years earlier when she was a New York resident, half of her wealth was in New York at her death, and her will named her New York attorney (not a relative) as personal representative, original probate in New York was permitted on the basis that Florida would not have allowed counsel to be appointed.²¹³ Similarly, New York original probate was permitted over an objection, where a deceased Florida resident's assets were in New York, her will was drafted and signed in New York and stated that the testatrix was a New York resident, the vast majority of beneficiaries resided in or near New York, no Florida probate was commenced, and the personal representative named in the will would not qualify in Florida.²¹⁴

211. *In re Estate of Baer*, 849 N.Y.S.2d at 146–47. The decedent in that case was domiciled in Vermont at death. *Id.* at 145. Her will did not include a request that estate administration occur in New York. *Id.* at 146.

212. *Estate of Brown*, 436 N.Y.S.2d 132, 132–33 (Sur. Ct. N.Y. Cnty. 1981).

213. *Id.* The opinion reflects no objection to original probate in New York by an interested party. *See id.*

214. *In re Goldstein's Will*, 310 N.Y.S.2d 602, 603 (App. Div. 1970) (per curiam); *see also In re Estate of Harrison*, 366 N.Y.S.2d 755, 755–56 (Sur. Ct. Bronx Cnty. 1974). In *In re Estate of Harrison*, original probate of the Florida decedent's estate was not sought. *Id.* at 756. However, the surrogate opined that based on the facts, he would have granted it, had it been sought. *Id.* The decedent moved from New York to Florida, leaving most of her wealth in New York. *Id.* at 755. Her will named her spouse, her attorney, and her accountant as co-executors. *Id.* at 755–56. The attorney and accountant were ineligible to serve under Florida law. *In re Estate of Harrison*, 366 N.Y.S.2d at 756. The surrogate explained his disagreement with Florida law, stating:

It appears that decedent's relationship with both her attorney and her accountant was one of long standing and represented the type of trusted relationship upon which people normally seek to depend for the administration of their estates. The duties of an executor do not involve the practice of any profession that is ordinarily subject to state licensing provisions. It is a personal responsibility which individuals confer on those they trust without regard to any fixed professional training. The only disqualification to serve as executors under the Florida statute imposed upon the attorney and the accountant is their lack of residence in that State, coupled with their lack of required blood relationship to the decedent. The injustice of this restriction to executors who are neither related to a decedent or residents of Florida is exceeded by the inequitable restriction it imposes upon residents of Florida. The right to choose one's own executors represents a fundamental property right of a competent adult having testamentary capacity. There is no logical basis for imposing upon a party seeking to become a resident of the State of Florida a forfeiture of their freedom of choice in naming an executor as a precondition to residence.

Id.

Original probate of a non-domiciliary's estate in New York was allowed, over the objections of the decedent's widow, when the decedent's will referenced New York laws, litigation involving the decedent was pending in New York at his death, one of two executors nominated in the will lived in New York, three of the four attesting witnesses resided in New York, and everyone other than the decedent's estranged wife desired that administration occur in New York.²¹⁵ Similarly, original probate of a non-resident's estate in New York was permitted where ninety percent of the probate assets were in New York, the decedent's will was executed in New York, the will directed that administration occur in New York and that New York law apply, two of the three attesting witnesses were New York residents, as was the attorney who drafted the will and was named an executor, and no probate proceeding was pending elsewhere.²¹⁶ In part this decision reflected the surrogate's determination that, regardless of where decedent was domiciled, it would be overly expensive for the parties if the New York court declined jurisdiction.²¹⁷

In contrast, where the decedent's will was already admitted to probate in the jurisdiction of the testator's domicile before original New York probate is sought, the general rule is that New York original probate will be denied.²¹⁸ It is in this situation that the New York statute creates the three exceptions noted previously.²¹⁹ New York courts will also deny probate "if a court in the testator's domicile has denied probate for a reason which would

215. Will of Nelson, 475 N.Y.S.2d 194, 196–97 (Sur. Ct. N.Y. Cnty. 1984). In that case there was no indication that estate administration was commenced in Pennsylvania, the state of decedent's domicile. *See id.* at 195–96.

216. *In re Estate of Vischer*, 280 N.Y.S.2d 49, 51 (Sur. Ct. N.Y. Cnty. 1967). The decedent in that case resided in New Hampshire at his death, according to his widow who resided in Vermont. *Id.* The widow commenced probate in New York in accordance with decedent's will, despite his ownership of real estate in Vermont and Switzerland. *See id.* The decedent's daughter resided in Spain, and objected to estate administration in New York as she claimed decedent was domiciled in Switzerland. *Id.*

217. *See id.* at 52. The court was not persuaded by arguments of the decedent's daughter that a treaty prevented the New York court from exercising jurisdiction. *In re Estate of Vischer*, 280 N.Y.S.2d at 53–54.

218. Estate of Nevai, 788 N.Y.S.2d 843, 844 (Sur. Ct. Westchester Cnty. 2005). In that situation, ancillary administration in New York is appropriate if the decedent owned real property in New York State. *Id.*

219. N.Y. Surr. Ct. Proc. Act § 1605(2) (McKinney 1995 & Supp. 2011). The statute authorizes a New York original probate, rather than merely ancillary administration, if the New York court determines ancillary administration "would be unduly expensive, inconvenient or impossible" or the testator's will directs that estate administration occur in New York, or "the laws of [the] testator's domicile discriminate against" New York domiciliaries as fiduciaries, beneficiaries, or both. *Id.*

also constitute grounds to deny probate in New York.”²²⁰ It is more difficult to convince a New York surrogate to allow original probate in New York when a proceeding was instituted and remains pending in the state of the decedent’s domicile, particularly where an interested party objects to original probate in New York.²²¹

Although a Florida resident died while in New York, the vast majority of her wealth was in New York,²²² her will was signed in New York, the decedent was buried in New York, the attesting witnesses were in New York, thirty percent of the beneficiaries under the will (including two charities) were in New York, one of four nominated executors lived in New York, and two of the nominated executors would not qualify in Florida, the New York court declined to exercise its discretion to permit original probate in New York.²²³ In reaching its decision, the court was influenced by the fact that Florida counsel drafted the will, the will did not direct probate administration in New York, two of the four persons nominated personal representative would qualify in Florida,²²⁴ probate had already been commenced in Florida, and a will contest was being litigated there.²²⁵ Because the will had not yet been admitted to probate in New York, the court declined to rely on Florida’s discrimination against non-resident personal representatives as a basis for original New York probate.²²⁶ Recognizing that half of a decedent’s nominees were eligible to serve as personal representatives, that original probate in New York could require the parties to litigate the same will contest in two jurisdictions with the possibility of inconsistent results, and having no evi-

220. *Estate of Nevai*, 788 N.Y.S.2d at 845; N.Y. Surr. Ct. Proc. Act § 1605(3). Examples of application of this provision are where a will is not properly executed, where a will was the product of fraud or undue influence, or where a testator lacked testamentary capacity when the will was signed. See Fla. Stat. §§ 732.501–02, .5165 (2011).

221. See *Estate of Nevai*, 788 N.Y.S.2d at 845.

222. *Id.* at 844. Of decedent’s \$38,000,000.00 estate, \$29,500,000.00 in assets, including real estate, were in New York. *Id.*

223. *Id.* at 844–45.

224. *Id.* at 844. The nominees included the decedent’s son, an Arizona resident; the decedent’s accountant, a Florida resident; the decedent’s niece by marriage, a New York resident; and the niece’s son, a New Hampshire resident. *Estate of Nevai*, 788 N.Y.S.2d at 844. The niece and her son, who would not be eligible to serve as personal representatives in Florida, filed the petition seeking New York original probate. *Id.*

225. *Id.* at 845. In Florida, the decedent’s son and accountant were appointed curators due to the institution of a will contest by the decedent’s grandson. *Id.* at 844. The grandson contested the validity of will provisions benefiting the decedent’s niece and her son who sought original probate in New York. *Id.*

226. *Estate of Nevai*, 788 N.Y.S.2d at 845.

dence that petitioners would otherwise be injured by original estate administration in Florida, the New York court denied relief.²²⁷

Similarly, the New York court declined to allow original probate there despite the request of two individuals, who were not beneficiaries, when a decedent's widow objected.²²⁸ The decedent was a U.S. citizen residing in France at his death.²²⁹ He was survived by his widow and minor child, who likewise lived in France.²³⁰ The decedent's will was signed in New York, stated that the testator resided in New York when the will was signed, and named a New York bank to serve as executor.²³¹ The decedent's only assets in New York were bank accounts with less than \$1000 on deposit, but his will requested that probate occur in New York and be governed by New York law.²³² Prior to commencement of proceedings in New York, court action was instituted in France questioning the validity of a deed of donation executed by the decedent in France disposing of wealth at his death.²³³ As the majority of the decedent's assets were in France and Switzerland, a contest pertaining to the estate was being actively litigated in France, it was more convenient and less costly for the beneficiaries to proceed in France, and potential problems were foreseen in enforcing any judgment of a New York court over assets overseas, the petition seeking original probate in New York was denied.²³⁴

Parties are nevertheless at times successful in instituting original probate in New York, even if estate administration was²³⁵ or is pending else-

227. *Id.*

228. *Estate of Brunner*, 339 N.Y.S.2d 506, 507, 511 (Sur. Ct. N.Y. Cnty. 1973).

229. *Id.* at 507.

230. *Id.* at 510.

231. *Id.* at 507.

232. *Id.* at 507–08. In *Estate of Brunner* and other cases referenced in this article, the courts place emphasis on the fact that a will directs estate administration in New York and states that New York law should apply. *Estate of Brunner*, 339 N.Y.S.2d at 508. As the wills were signed while the testator was a New York resident prior to the testator's move to another jurisdiction, these provisions may be boilerplate, rather than indicative of a wish that wherever the testator may reside at death, estate administration occur in New York. *See id.*

233. *Id.* The court explained that a deed of donation "is an instrument which is somewhat akin to an *inter vivos* deed of gift which is to take effect upon death of the donor." *Id.*

234. *Id.* at 509, 511. The deed of donation signed by the decedent was inconsistent with his New York will. *Estate of Brunner*, 339 N.Y.S.2d at 508. Questions also existed about the widow's rights under New York law as opposed to French laws applicable to estates. *Id.* at 508–09. The court concluded: "In times like ours of peripatetic families and multi-national situses for family property, original protective decisions should be left in doubtful cases to the domicile of the living rather than that of the deceased." *Id.* at 510 (citations omitted).

235. *See In re Estate of Siegel*, 373 N.Y.S.2d 812, 814 (Sur. Ct. Erie Cnty. 1975).

where.²³⁶ Thus, even where Florida probate administration was completed, original probate in New York may be available to enable fiduciaries appointed by the testator to serve.²³⁷

Disputes about commencing original probate may involve a determination about where a decedent was domiciled at death.²³⁸ A dispute about whether a decedent's domicile was New York or Florida, or the fact that the decedent was domiciled in Florida, does not preclude original probate in New York.²³⁹ Where original probate in New York and the decedent's domicile were contested and probate had already been commenced in Florida, New York original probate was permitted.²⁴⁰ The testatrix maintained homes and driver's licenses in both New York and Florida, the majority of her probate assets were in New York, her will was drafted in New York by New York counsel, signed by the testatrix and attesting witnesses in New York, the will acknowledged that the testatrix was a New York resident when the will was signed and provided for New York law to apply, beneficiaries entitled to a majority of the estate lived in New York, and the person nominated as executor in the will was not eligible to serve under Florida law.²⁴¹ He was the testatrix's friend and attorney, and a resident of New York.²⁴² Although

236. See *In re Estate of Gadway*, 510 N.Y.S.2d 737, 740 (App. Div. 1987); *Heller v. Matern (In re Will of Heller-Baghero)*, 302 N.Y.S.2d 235, 237 (App. Div. 1969); *Estate of Renard*, 417 N.Y.S.2d 155, 165 (Sur. Ct. N.Y. Cnty. 1979). In *In re Estate of Siegel*, a testate decedent was a Florida resident. *In re Estate of Siegel*, 373 N.Y.S.2d at 813. His widow instituted and completed estate administration in Florida. *Id.* After an order of discharge was entered in Florida, she sought original probate of the will in New York because the decedent's will named a New York bank trustee of a testamentary trust, and the bank could not qualify as trustee in Florida. *Id.* at 813-14. All interested parties consented to original probate in New York. *Id.* at 813. Concluding that Florida law improperly discriminated against the bank, and desiring to give effect to the testator's wishes, original probate in New York was granted. *Id.* at 814.

237. See, e.g., *In re Estate of Siegel*, 373 N.Y.S.2d at 814.

238. See *In re Estate of Donahue*, 692 N.Y.S.2d 225, 226 (App. Div. 1999); *In re Schwarzenberger*, 626 N.Y.S.2d 229, 229 (App. Div. 1995); *In re Estate of Gadway*, 510 N.Y.S.2d 737, 739 (App. Div. 1987). A discussion of a determination of domicile of a decedent is beyond the scope of this article. The foregoing cases all involve decedents initially domiciled in New York, who thereafter were alleged to have maintained homes in Florida. *In re Estate of Donahue*, 692 N.Y.S.2d at 226; *In re Schwarzenberger*, 626 N.Y.S.2d at 229; *In re Estate of Gadway*, 510 N.Y.S.2d at 739. Where a dispute arose about whether a decedent changed her domicile, the party claiming a change occurred has the burden of proving this by clear and convincing evidence. *In re Estate of Gadway*, 510 N.Y.S.2d at 739-40.

239. See *In re Estate of Gadway*, 510 N.Y.S.2d at 740.

240. *Id.*

241. *Id.* at 739-40.

242. *Id.* at 740.

there was objection to original New York probate, beneficiaries entitled to a majority of the estate consented.²⁴³

Similarly, New York original probate was allowed for a non-resident decedent's estate at the request of her attorney, a New York resident nominated personal representative in her will, despite the fact that probate was pending in France where the testatrix was admittedly domiciled.²⁴⁴ In that case, the testatrix was once a New York resident.²⁴⁵ Prior to her death, the testatrix executed a New York will to govern her assets in New York.²⁴⁶ This will was drafted by New York counsel but signed in France.²⁴⁷ The testatrix also executed a French will, ostensibly to dispose of her wealth in France at death.²⁴⁸ At the testatrix's death, the French will was offered for probate in France, before original New York probate was requested.²⁴⁹ Because the testatrix directed in her New York will that estate administration occur in New York, an exception to New York Surrogate Court Procedure Act section 1605(2) allowed original probate to occur there.²⁵⁰ "[T]he fact that jurisdiction has already been asserted at the [decedent's] domicile requires a careful consideration before original probate will be permitted in this [New York] court."²⁵¹ The other facts recited above caused original probate in New York to be authorized.²⁵² New York original probate was also permitted when the testator died a resident of Austria and a will was admitted to probate there before relief was sought in New York.²⁵³ In that case, a later will executed by the decedent in New York, while the testator was a New York resident, was offered for probate there.²⁵⁴ The surrogate's decision was justified, as the majority of the estate was in New York, the will was drafted and signed

243. *Id.* at 738, 740.

244. *Estate of Renard*, 417 N.Y.S.2d 155, 159, 165 (Sur. Ct. N.Y. Cnty. 1979).

245. *Id.* at 156. While residing in New York testatrix worked as secretary to William Nelson Cromwell, Esq., senior partner of the law firm of Sullivan & Cromwell. *Id.*

246. *Id.*

247. *Id.*

248. *Estate of Renard*, 417 N.Y.S.2d at 156.

249. *Id.* at 156–57. The testatrix's adopted son, who lived in California, was engaged in litigation based on his claim that he was entitled under French law to a larger share of the estate than the decedent provided for him. *Id.* The clear implication was that the son contested probate in New York because French law was more favorable to him. *See id.* at 157.

250. *Id.* at 158; N.Y. SURR. CT. PROC. ACT § 1605(2)(b) (McKinney 1995 & Supp. 2011).

251. *Estate of Renard*, 417 N.Y.S.2d at 159.

252. *Id.* at 165. The court analyzed the son's forced heirship claim and conflict of law principles, concluding that they did not preclude the New York court's exercise of jurisdiction. *Id.* at 162–65.

253. *In re Will of Heller-Baghero*, 302 N.Y.S.2d 235, 236–37 (App. Div. 1969).

254. *Id.* at 236.

in New York and recited that the testator was a New York resident, and the principal beneficiary under the will was in New York.²⁵⁵

VI. CONCLUSION

In the current global economic situation, it may be appropriate for the Florida Legislature to reconsider the requirements to be met before a person is eligible to serve as personal representative of a Florida decedent's estate. Attorneys and their clients would benefit from clarification. The legislature may see fit to eliminate the residency requirement. If not, a duty needs to be imposed on the court to assure that ineligible persons are not inadvertently appointed or allowed to retain their fiduciary positions.

255. *Id.* It was not clear in *Heller* whether the court in Austria considered the later New York will and found it invalid, or if the existence of that will was even brought to the attention of that court. *See id.* at 236–37. What was abundantly clear was that inconsistent decisions about the disposition of the decedent's assets were likely. *See id.* at 236.

2011 SURVEY OF JUVENILE LAW

MICHAEL J. DALE*

I. INTRODUCTION	179
II. DEPENDENCY	179
III. TERMINATION OF PARENTAL RIGHTS	186
IV. CRIMINAL CHILD NEGLECT.....	188
V. JUVENILE DELINQUENCY	189
VI. OTHER MATTERS.....	196
VII. STATUS OFFENSES—CHILDREN IN NEED OF SERVICES.....	199
VIII. CONCLUSION	200

I. INTRODUCTION

Atypically, the Supreme Court of Florida was not active during the past year, deciding no cases in the juvenile law field. On the other hand, the intermediate appellate courts were active both in the delinquency area and in the dependency field.¹ As in the past, decisions in the delinquency area involving generic issues of criminal procedure not unique to juvenile delinquency are not covered in this article.

II. DEPENDENCY

“A parent’s right to counsel in a dependency case in Florida is purely statutory.”² The Supreme Court of Florida had held in 1980 in *In re Interest of D.B.*,³ that parents did have the right to appointed counsel if indigent in termination of parental rights (TPR) cases but not as an absolute right in dependency cases⁴ Initially, as a result of the decision in *In re Interest of D.B.*,

* Professor of Law, Nova Southeastern University Shepard Broad Law Center. This survey covers cases decided during the period from July 1, 2010 through June 30, 2011. The author thanks Nikki Dividze for her assistance in the preparation of this article.

1. See, e.g., *K.J.F. v. State*, 44 So. 3d 1204, 1205, 1209–11 (Fla. 1st Dist. Ct. App. 2010); *S.D. v. Dep’t of Children & Family Servs. (In re Interest of J.D.)*, 42 So. 3d 938, 938–40 (Fla. 2d Dist. Ct. App. 2010); *W.S. v. Dep’t of Children & Families (In re Interest of C.S.)*, 41 So. 3d 433, 433 (Fla. 1st Dist. Ct. App. 2010) (per curiam); *W.G. v. S.A. (In re Interest of A.G.)*, 40 So. 3d 908, 909–10 (Fla. 3d Dist. Ct. App. 2010).

2. Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, 35 NOVA L. REV. 305, 336 (2011); see FLA. STAT. § 39.402(5)(b)(2) (2011).

3. 385 So. 2d 83 (Fla. 1980).

4. *Id.* at 90–91.

parents were required to be given counsel in all TPR cases and under certain situations in dependency cases.⁵ Subsequently, the Florida Legislature passed a law codifying the opinion and then, as a result of a series of reversals in the appellate courts for failure to assign counsel in dependency proceedings pursuant to *In re Interest of D.B.*, the Legislature in 1998 amended chapter 39 to provide for the “appointment of counsel for parents in dependency as well as TPR cases.”⁶

The issue of whether a non-offending parent should be appointed counsel in a dependency case came before the Third District Court of Appeal in *W.G. v. S.A. (In re Interest of A.G.)*.⁷ In that case, the father of a child who was the subject of a dependency proceeding sought “certiorari review of an order denying his motion for appointment of counsel.”⁸ The mother, the custodial parent, had been charged in a dependency proceeding with abuse, although no charges were brought against the father.⁹ The appellate court held that as a matter of statutory construction, the reference to parents for purposes of appointment of counsel did not make a distinction between offending and non-offending parents.¹⁰ The court recognized that if a parent was non-offending, there would be no logical grounds, and in fact, it would be frivolous to charge that parent.¹¹ The court held that “as a matter of common sense, the non-offending parent may need, and indeed [would] be entitled to take action” with regard to the possible relief ordered by the court.¹² Finally, as the court said, “a ‘non-offending,’ indigent, non-attorney parent can hardly be expected to navigate through such proceedings without counsel. At any juncture, failure to act could prejudice the non-offending parent’s rights in intervention.”¹³ For these reasons, the court granted the petition and quashed the court order below denying the right to counsel.¹⁴

Evidentiary issues come up regularly in dependency proceedings in Florida.¹⁵ In *W.S. v. Department of Children & Families (In re Interest of C.S.)*,¹⁶ the parents appealed from an order adjudicating their child depen-

5. *Id.*

6. See FLA. STAT. § 39.013(1) (1999); Dale & Reidenberg, *supra* note 2, at 336–37.

7. 40 So. 3d 908, 909 (Fla. 3d Dist. Ct. App. 2010).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *In re Interest of A.G.*, 40 So. 3d at 910.

13. *Id.*

14. *Id.*

15. See Michael J. Dale, 2009 *Survey of Juvenile Law*, 34 NOVA L. REV. 199, 201–02 (2009).

16. 41 So. 3d 433 (Fla. 1st Dist. Ct. App. 2010) (per curiam).

dent.¹⁷ They argued that the court relied upon inadmissible hearsay to make its finding.¹⁸ The Department of Children and Families (DCF) and the Guardian ad Litem Program conceded error.¹⁹ The hearsay was testimony from an investigator describing what other foster children in the home said about the parents' care.²⁰ "The investigator did not personally observe any of the [reported] abuse"²¹ Nor did any other witnesses testify as to the physical abuse.²² The trial court finding was based entirely on hearsay testimony which demonstrated the "probability of prospective abuse."²³ The appellate court held that the Florida Rules of Evidence "applicable in civil cases also apply in adjudicatory hearings under [c]hapter 39."²⁴ There being no exception to the hearsay rule, and the trial court having relied almost entirely on the inadmissible hearsay, the appellate court reversed and remanded.²⁵

In *S.D. v. Department of Children & Family Services (In re Interest of J.D.)*,²⁶ a mother appealed from an order adjudicating her child dependent on the ground that the evidence "was legally insufficient to sustain the determination."²⁷ One of the witnesses was a child protection investigator who gave his opinion that the bruises that he saw often look like those resulting from a "struggle and attempted choke."²⁸ At issue in the case was whether the father had a history of domestic violence and whether the mother was a victim of domestic violence.²⁹ When the protective investigator met with the mother, "she had scratches on her neck and chest."³⁰ She replied that "she sometimes scratche[d] herself around her throat when she [was] anxious."³¹ The appellate court held that "the only evidence of domestic violence was the child protective investigator's opinion as to the cause of the scratching and bruising on the [m]other's neck."³² Without addressing the question of whether the opinion testimony was admissible as either expert testimony or proper lay

17. *Id.* at 433.

18. *Id.*

19. *Id.*

20. *Id.*

21. *In re Interest of C.S.*, 41 So. 3d at 433.

22. *Id.*

23. *Id.*

24. *Id.* at 433–34.

25. *Id.* at 434.

26. 42 So. 3d 938 (Fla. 2d Dist. Ct. App. 2010).

27. *Id.* at 938.

28. *Id.* at 939.

29. *Id.*

30. *Id.*

31. *In re Interest of J.D.*, 42 So. 3d at 939.

32. *Id.*

testimony,³³ the court held that in any event there was no evidence “that the child saw or heard any alleged violence or was otherwise . . . [present for] such violence” as required by Florida law.³⁴ Thus, the appellate court reversed.³⁵

Dependency determinations may be based on what the Florida courts refer to as “prospective neglect.”³⁶ The Florida courts have regularly ruled on the question of prospective neglect³⁷ beginning with the supreme court opinion in *Padgett v. Department of Health & Rehabilitative Services*.³⁸ In *R.M. v. Department of Children & Family Services (In re Interest of J.B.)*,³⁹ a mother appealed from a dependency adjudication on abuse of discretion grounds where the finding was based on prospective neglect.⁴⁰ The trial court had found a significant danger posed to the child by the mother’s persistent anger management problems.⁴¹ To make a finding of prospective neglect, the court must find “a *nexus* between the parent’s problem and the potential for future neglect.”⁴² The testimony from family members as to the mother’s chronic use of marijuana, her impairment, her failure to pay attention to her son, and that her marijuana use put her in danger were “predictive of a risk of harm to [the] child.”⁴³

A significant procedural issue arose in *C.R. v. Department of Children & Family Services*,⁴⁴ where a dependency adjudication was based upon the mother’s consent and where there was an administrative finding that the child had no legal father.⁴⁵ In its dependency order, the trial court withheld adjudication as to the mother.⁴⁶ When the father came forward, the trial court vacated its order of disposition and then adjudicated the child depen-

33. See FLA. STAT. §§ 90.701, .702 (2011).

34. *In re Interest of J.D.*, 42 So. 3d at 940.

35. *Id.*

36. 1 MICHAEL J. DALE, REPRESENTING THE CHILD CLIENT ¶ 4.14[4][d] (MB 2011). For a discussion of the subject nationally, see *id.*

37. Michael J. Dale, 2005–2006 *Survey of Florida Juvenile Law*, 31 NOVA L. REV. 577, 594–95 (2007); Michael J. Dale, 2004 *Survey of Florida Juvenile Law*, 29 NOVA L. REV. 397, 413–14 (2005).

38. 577 So. 2d 565, 565 (Fla. 1991).

39. 40 So. 3d 917 (Fla. 2d Dist. Ct. App. 2010).

40. *Id.* at 917–18.

41. *Id.* at 918.

42. *Id.* (emphasis added) (citing *N.D. v. Dep’t of Children & Family Servs. (In re Interest of T.B.)*, 939 So. 2d 1192, 1194 (Fla. 2d Dist. Ct. App. 2006)).

43. *Id.*

44. 53 So. 3d 240 (Fla. 3d Dist. Ct. App. 2010).

45. *Id.* at 241.

46. *Id.*

dent as to the father and issued a subsequent order of dependency.⁴⁷ The mother appealed, contending that the trial court erred when it vacated the initial order withholding adjudication as to the mother.⁴⁸ The appellate court held that “the trial court should have allowed the [w]ithhold [a]djudication [o]rder to stand and then, [should have] held a subsequent evidentiary hearing to determine the father’s status” because the Florida statute allows a supplementary decision to be entered which, in the case at bar, would have allowed a determination of the father’s status.⁴⁹

In Florida, there is a procedure known as a private dependency action.⁵⁰ *A.N.B. ex rel. J.T.N. v. Department of Children & Families*⁵¹ is a case in which maternal grandparents brought a dependency proceeding, and the mother appealed from an order of adjudication of the child “who was nineteen days short of [the] seventeenth birthday when the order was entered.”⁵² The appellate court found that there were adequate grounds for a finding “that there was no parent capable of supervision and care” under the Florida statute.⁵³ In addition, the mother appealed on the ground that the “court improperly based its ruling on the child’s preference.”⁵⁴ The appellate court held “that the child’s preference is not a valid basis for a finding of dependency, but [in the case at bar], this was not the sole basis for the court’s . . . finding.”⁵⁵

When there are placements of children in other states or other interstate issues arise in dependency cases, the Interstate Compact for the Placement of Children (ICPC) comes into play.⁵⁶ Issues can arise concerning proper implementation of the ICPC as in *Department of Children & Families v. T.T. ex rel. M.R.*⁵⁷ In a per curiam opinion, the appellate court reversed a trial court order that reunited children with their mother, as well as dismissed a dependency proceeding, terminating the trial court’s jurisdiction for failure to comply with the ICPC.⁵⁸ The children had been adjudicated dependent be-

47. *Id.* at 241, 243.

48. *Id.* at 241–42.

49. *C.R.*, 53 So. 3d at 243; *see* FLA. STAT. § 39.507(7)(b) (2011).

50. *See* FLA. STAT. § 39.501; *see, e.g.*, *A.N.B. ex rel. J.T.N. v. Dep’t of Children & Families*, 54 So. 3d 1049, 1050 (Fla. 5th Dist. Ct. App. 2011) (per curiam).

51. 54 So. 3d 1049 (Fla. 5th Dist. Ct. App. 2011) (per curiam).

52. *Id.* at 1050.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* FLA. STAT. § 409.401, art. I (2011).

57. 42 So. 3d 962, 963 (Fla. 5th Dist. Ct. App. 2010) (per curiam).

58. *Id.*

cause of “domestic violence between their mother and her paramour.”⁵⁹ Subsequently, the mother and father “moved out-of-state to Georgia and Ohio [and] sought reunification.”⁶⁰ “[T]he trial court directed DCF to obtain orders of compliance with [the] ICPC for home studies on both parents.”⁶¹ “DCF did not submit the ICPC orders to [either state’s] compact administrators” for a period of time.⁶² Despite the lack of compliance, the trial court ordered reunification.⁶³ The appellate court noted that while “[t]he trial court was understandably frustrated,” a trial court, it held, cannot return the child to a receiving state without compliance of all of the requirements of the ICPC.⁶⁴

Dependency cases occasionally arise involving immigrant children.⁶⁵ Two such cases are *In re Interest of T.J.*⁶⁶ and *L.T. ex rel. K.S.L. v. Department of Children & Families*.⁶⁷ In *In re Interest of T.J.*, “[r]epresentatives of the Florida International University College of Law Immigrant Children’s Justice Clinic, as next friends of [the child], . . . appeal[ed] a circuit court order summarily denying [an] amended petition for an adjudication of dependency.”⁶⁸ The child, who had been “born in Turks and Caicos and came to Florida at the age of four months, . . . lived [in Florida] continuously since then” and was to turn eighteen relatively shortly after the dependency proceeding began.⁶⁹ The child had been cared for by her mother, but when her mother passed away, and as the whereabouts of the father, who had left the child and the mother when the youngster was an infant, were unknown, a volunteer provided her with a place to stay.⁷⁰ The volunteer did “not have any judicially-conferred status as a custodian or guardian of [the child],” and thus a dependency proceeding was brought.⁷¹ The appellate court held that, based on earlier case law, the child had no legal custodian.⁷² The child,

59. *Id.*

60. *Id.*

61. *Id.*

62. *T.T. ex rel. M.R.*, 42 So. 3d at 963.

63. *Id.*

64. *Id.* at 963–64 (citing Dep’t of Children & Families v. Fellows, 895 So. 2d 1181, 1185 (Fla. 5th Dist. Ct. App. 2005)).

65. See, e.g., *In re Interest of T.J.*, 59 So. 3d 1187, 1188 (Fla. 3d Dist. Ct. App. 2011); *L.T. ex rel. K.S.L. v. Dep’t of Children & Families*, 48 So. 3d 928, 929 (Fla. 5th Dist. Ct. App. 2010).

66. 59 So. 3d 1187 (Fla. 3d Dist. Ct. App. 2011).

67. 48 So. 3d 928 (Fla. 5th Dist. Ct. App. 2010).

68. *In re Interest of T.J.*, 59 So. 3d at 1188.

69. *Id.* at 1189.

70. *Id.*

71. *Id.*

72. *Id.* at 1190, 1194.

therefore, “ha[d] made a prima facie case that she [was] dependent.”⁷³ In a two to one opinion, the court majority also concluded in dicta that the dependency issue was not a “back door route to naturalization.”⁷⁴ The child qualified for a declaration of dependency under the *Florida Statutes*, and thus “the child’s motivation to obtain legal residency status from the United States Attorney General [was] irrelevant.”⁷⁵ The court then remanded on the ground that the petitioner must demonstrate making a diligent search to find the father.⁷⁶

In *L.T.*, relied upon by the court in *In re Interest of T.J.*, the child had been rescued from a boat that capsized off the coast of Florida.⁷⁷ The child’s uncle filed a dependency proceeding on the child’s behalf.⁷⁸ “[A]n adjudication of dependency would allow [the child] to petition as a special immigrant juvenile.”⁷⁹ The child’s parents were deceased and the child was close to eighteen years of age.⁸⁰ The uncle had been the youngster’s caregiver for nine months and continued to do so.⁸¹ Over the objections of DCF, the court reversed and remanded to the trial court, which had dismissed the petition for dependency.⁸²

In Florida, when foster children age out of the child welfare system, as adults, they may be entitled to educational and vocational training under the state’s Road to Independence Program (RTI).⁸³ In *Department of Children & Family Services v. K.D.*,⁸⁴ DCF appealed from a trial court order that a child was eligible for RTI funds even though “she had been living with a non-relative court-approved guardian rather than in foster care.”⁸⁵ The trial court decided “that the statute’s eligibility provisions violated equal protection by unfairly [providing] services to foster children but not to [those] children [who were] living in non-relative placements.”⁸⁶ The appellate

73. *In re Interest of T.J.*, 59 So. 3d at 1190 (citing *L.T. ex rel. K.S.L. v. Dep’t of Children & Families*, 48 So. 3d 928, 930 (Fla. 5th Dist. Ct. App. 2010); *F.L.M. v. Dep’t of Children & Families*, 912 So. 2d 1264, 1268–69 (Fla. 4th Dist. Ct. App. 2005) (per curiam)).

74. *Id.* at 1191 (quoting *Id.* at 1194–95 (Wells, J., concurring in part, dissenting in part) (internal quotation marks omitted)).

75. *Id.* (quoting *F.L.M.*, 912 So. 2d at 1269).

76. *Id.* at 1192, 1194.

77. *Id.* at 1190 (citing *L.T. ex rel. K.S.L.*, 48 So. 3d at 929).

78. *L.T. ex rel. K.S.L.*, 48 So. 3d at 929.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 929–31.

83. FLA. STAT. § 409.1451(5)(b) (2011).

84. 45 So. 3d 46 (Fla. 5th Dist. Ct. App.), *review denied*, 49 So. 3d 747 (Fla. 2010).

85. *Id.* at 47.

86. *Id.*

court held that as a matter of statutory construction, the term foster care means licensed foster care home.⁸⁷ A person or a family providing foster care must be licensed.⁸⁸ The court reversed and remanded, although it granted a motion for certification to the Supreme Court of Florida on the issue of the definition.⁸⁹

A second case involving RTI is *Wade v. Florida Department of Children & Families*.⁹⁰ There, the appellant was notified by DCF services that it planned to terminate her RTI scholarship because she failed to attend school full-time or make satisfactory progress during the prior year.⁹¹ She was notified of her right to request a fair hearing, which she did.⁹² A fair hearing followed, and the hearing officer entered an order affirming DCF's decision to terminate the scholarship.⁹³ The order was entered as a "final order."⁹⁴ It also included a notice of right of appeal.⁹⁵ The appellate court held that the order was not a final order in the sense of it being final agency action because the decision was not reviewed by the secretary of DCF, and "it is the secretary's decision that is the final agency action [which is then] subject to judicial review."⁹⁶ For this technical reason, the appeal was dismissed.⁹⁷

III. TERMINATION OF PARENTAL RIGHTS

Florida, like other states, provides multiple grounds for termination of parental rights in its statutes.⁹⁸ One of these grounds is where a "parent . . . is incarcerated in a state or a federal . . . institution."⁹⁹ In a case of first impression recently decided in the Second District Court of Appeal, the question was whether the provision that there be no "commission of [a] new law violation[]" constitutes a valid case plan task," which may then support a decision to terminate a parent's parental rights when the parent's imprisonment results in "a new law violation, [which makes] it impossible for [the parent]

87. *Id.* at 48 n.2 (citing FLA. STAT. §§ 39.01(31), 409.175(4)(a) (2009)).

88. *Id.* (citing FLA. STAT. § 409.175(4)(a)).

89. *K.D.*, 45 So. 3d at 48–49.

90. 57 So. 3d 869, 870 (Fla. 1st Dist. Ct. App. 2011).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Wade*, 57 So. 3d at 870.

96. *Id.* at 872.

97. *Id.*

98. FLA. STAT. § 39.806 (2011); *see also* DALE, *supra* note 36, at ¶ 4.14[4][a]–[h].

99. FLA. STAT. § 39.806(1)(d).

to complete . . . other case plan tasks within the allotted time.”¹⁰⁰ In *M.N. v. Department of Children & Family Services (In re Interest of C.N.)*,¹⁰¹ the appellate court held “that the statutory scheme for . . . termination of parental rights,” which includes a provision for termination based upon imprisonment, is “the exclusive method for . . . termination . . . based [upon] the fact of [the] parent’s incarceration.”¹⁰² Thus, inclusion of a provision in a case plan that the “parent [not] commit [a] new law violation[] . . . may not properly be included as a case plan task. The breach of such a task that results in the parent’s incarceration,” the court held, by itself, is not “a proper ground for the termination of parental rights.”¹⁰³ The court noted that there is “a comprehensive and detailed list of twelve [distinct] grounds for . . . termination of parental rights” in Florida.¹⁰⁴ The commission of a crime is not among them.¹⁰⁵ Finally, the court noted, a chapter 39 case plan “was [not] intended to be a form of criminal probation.”¹⁰⁶ For these reasons, the court reversed.¹⁰⁷

The termination of parental rights sometimes occurs on the basis of consent documents signed by the parents in which case a specific statutory requirement as to their filing with the court is required.¹⁰⁸ In *T.H. v. Department of Children & Families*,¹⁰⁹ the Fourth District Court of Appeal reversed the trial court because it failed to receive the proper documentation.¹¹⁰ In the underlying case, a mother consented to termination of parental rights “conditioned upon [her children] being adopted by her sister who lived in Tennessee.”¹¹¹ When that adoption did not go forward, the mother moved for reconsideration of the termination of parental rights which was denied and her rights were terminated.¹¹² She then appealed.¹¹³ The appellate court found that the trial court had erred in terminating parental rights “because the written surrenders [of parental rights] were neither filed, nor examined [by the court], to determine [whether] they comported with statutory require-

100. *M.N. v. Dep’t of Children & Family Servs. (In re Interest of C.N.)*, 51 So. 3d 1224, 1225 (Fla. 2d Dist. Ct. App. 2011).

101. 51 So. 3d 1224 (Fla. 2d Dist. Ct. App. 2011).

102. *Id.* at 1225–26.

103. *Id.* at 1232; *see also* FLA. STAT. § 39.806.

104. *In re Interest of C.N.*, 51 So. 3d at 1232.

105. *Id.*

106. *Id.* at 1233; *see also* FLA. STAT. § 39.001(1).

107. *In re Interest of C.N.*, 51 So. 3d at 1234.

108. FLA. STAT. § 39.806(1)(a)(1).

109. 56 So. 3d 150 (Fla. 4th Dist. Ct. App. 2011).

110. *Id.* at 155.

111. *Id.* at 151–52.

112. *Id.* at 154.

113. *Id.* at 151.

ments.”¹¹⁴ Statutory grounds not having been met, the appellate court reversed.¹¹⁵

It is not uncommon for termination of parental rights to involve parents who have mental health problems.¹¹⁶ The question, however, in a termination of parental rights case, as in *I.Z. v. B.H.*,¹¹⁷ was whether the mother’s mental health issues “pose[] a risk to the child’s well-being” in order to justify termination of parental rights under the Florida statute.¹¹⁸ Among the grounds for termination of parental rights is “section 39.806(1)(c), which provides . . . that the parent’s conduct towards the child . . . demonstrates . . . continu[al] involvement of the parent . . . [with the child] threatens the life, safety, well-being, or . . . health of the child irrespective of the provision of services.”¹¹⁹ The appellate court reversed on this ground and on others, finding that the only evidence of mental health issues that threatened the child’s well-being were at a visit where “the mother began to raise her voice and told the child she was ‘spoiled.’ [Whereupon] workers told the mother she was scaring the child and removed the child to safety.”¹²⁰ That event occurred three years earlier, and on that ground and others, the appellate court reversed.¹²¹

IV. CRIMINAL CHILD NEGLECT

Under Florida law, as is true in other jurisdictions, the State may charge a parent with criminal child neglect as well as charge the parent through the DCF with civil child neglect.¹²² In *State v. Nowlin*,¹²³ a seventeen-year-old mother was at home babysitting a neighbor’s two-year-old daughter when it was alleged that a pit bull she owned, and which had bitten another neighborhood child, mauled the two-year-old child.¹²⁴ “The State charged [the seventeen year-old] with neglect of a child causing great bodily harm, a second-degree felony”¹²⁵ The trial court held that the seventeen-year-old could not be held criminally liable as she was a juvenile when the event

114. *T.H.*, 56 So. 3d at 154.

115. *Id.* at 155.

116. DALE, *supra* note 36, at ¶ 4.14[4][b].

117. 53 So. 3d 406 (Fla. 4th Dist. Ct. App. 2011).

118. *Id.* at 409.

119. *Id.*; *see also* FLA. STAT. § 39.806(1)(c) (2011).

120. *I.Z.*, 53 So. 3d at 409–10.

121. *Id.* at 410.

122. *See* FLA. STAT. § 827.03; *id.* § 39.001(8)(a).

123. 50 So. 3d 79 (Fla. 1st Dist. Ct. App. 2010).

124. *Id.* at 80–81.

125. *Id.* at 81.

occurred, and was thus not a caregiver as defined by section 39.01(10) of the *Florida Statutes*.¹²⁶ Over a dissent, the appeals court held that the seventeen-year-old indeed was a caregiver, and that the State had made a prima facie showing thereof by demonstrating the seventeen year-old regularly, if not on a daily basis, took care of the two year-old victim.¹²⁷ The dissent argued that the term “other person” in the statute governing caregivers is ambiguous and, therefore, did “not give fair notice that a child may be held criminally liable for negligent care of another child.”¹²⁸

V. JUVENILE DELINQUENCY

A very important Florida case involving the interpretation of the state sex offender statute in the context of a juvenile delinquency case is *K.J.F. v. State*.¹²⁹ In that case, “a child appeal[ed] a final disposition entered after he pled guilty to . . . sexual battery” and other sexual charges whereupon the “court withheld adjudication of delinquency, placed [the child] on probation, and [also] ordered [the child] to register as a sex[] offender.”¹³⁰ The appellate court reviewed the Florida juvenile delinquency statute¹³¹ and the sexual offender statute¹³² and found that a “plain-language interpretation of the definitions of a ‘sexual offender’ and ‘convicted’” in the law demonstrate that the statutory obligation of a juvenile to register as a sex offender “does not apply to juveniles for whom adjudication of delinquency is withheld.”¹³³ The appellate court thus reversed.¹³⁴

In 1975, the Supreme Court of the United States held, in *Breed v. Jones*,¹³⁵ that the Double Jeopardy Clause of the Fifth Amendment applied to juvenile delinquency proceedings.¹³⁶ The issue before the Fourth District Court of Appeal in *V.M.S. v. State*,¹³⁷ was whether, when a circuit court withheld adjudication and placed a juvenile on probation, it could subsequently modify the probation order to require the juvenile to attend a non-

126. *Id.* at 81–82; FLA. STAT. § 39.01(10).

127. *See Nowlin*, 50 So. 3d at 83.

128. *Id.* at 84 (Padovano, J., dissenting).

129. 44 So. 3d 1204, 1205 (Fla. 1st Dist. Ct. App. 2010).

130. *Id.* at 1205.

131. FLA. STAT. § 985.4815 (2011).

132. *Id.* § 943.0435.

133. *K.J.F.*, 44 So. 3d at 1206–07, 1211.

134. *Id.* at 1205.

135. 421 U.S. 519 (1975).

136. *See id.* at 531; *see also* *V.B. v. State*, 944 So. 2d 1185, 1186 (Fla. 1st Dist. Ct. App. 2006) (per curiam); *Lisak v. State*, 433 So. 2d 487, 489 (Fla. 1983).

137. 43 So. 3d 938 (Fla. 4th Dist. Ct. App. 2010).

public school and impose a fifty dollar charge under Florida's Crimes Compensation Trust Fund.¹³⁸ The appellate court found that a trial court may not "enhance a defendant's probation without the state first charging, and the court determining, that the defendant violated [the] probation."¹³⁹ Because the trial court in the case at bar "modified [the child's] probation without [the youngster] having been found in violation of it, [t]he requirement that [the juvenile] attend the PACE School was an enhancement [of] the original sentence [making] the sentence more severe" and thus constituted double jeopardy.¹⁴⁰ Further, the addition of the sentence assessing a fifty dollar payment obligation was also deemed an enhancement.¹⁴¹ Thus, the appellate court reversed.¹⁴²

A second double jeopardy case is *Z.C.B. v. State*.¹⁴³ In that case, the juvenile "challenge[d] [a] disposition order adjudicating him delinquent on a charge of possession of cannabis."¹⁴⁴ Specifically, he claimed that the error was in "adjudicating him delinquent after having dismissed the petition [and subsequently] . . . imposing \$115 [in] court costs."¹⁴⁵ When the State was unable to twice proceed because witnesses were not present, the court dismissed the charge against the juvenile with prejudice.¹⁴⁶ When the State, later in the day, advised the court that the witnesses were present, the court went ahead with the case, denied the defendant's motion to dismiss, and accepted a no contest plea subject to the right of appeal.¹⁴⁷ The appellate court held that double jeopardy did not apply because the order of dismissal, as a result of the State's failure to present evidence, is not an adjudicatory finding.¹⁴⁸ Thus, jeopardy had not attached when the court began the hearing on the merits although it had previously dismissed the case.¹⁴⁹ The court reversed the imposition of the \$115 court costs because the child was only adjudicated on a misdemeanor offense.¹⁵⁰

138. *See id.* at 939–40.

139. *Id.* at 940 (citing *Lippman v. State*, 633 So. 2d 1061, 1064–65 (Fla. 1994)).

140. *Id.* at 941.

141. *See id.*

142. *V.M.S.*, 43 So. 3d at 941.

143. 40 So. 3d 36, 37 (Fla. 2d Dist. Ct. App. 2010).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 37–38.

148. *Z.C.B.*, 40 So. 3d at 38.

149. *Id.*

150. *Id.*

An important issue of sequestering witnesses in delinquency cases arose in *L.E.D. v. State*.¹⁵¹ A child appealed from a finding of burglary of a dwelling and grand theft on the grounds that the trial court abused its discretion in sequestering the child's mother.¹⁵² "At the beginning of the trial, [the child's] defense counsel invoked the rule of sequestration of witnesses."¹⁵³ However, the lawyer argued that the mother, who was a party to the case, should not be sequestered.¹⁵⁴ The trial court disagreed, and the mother was "sequestered until she was called as a witness [for] the defense."¹⁵⁵ Under Florida law, because a parent may be legally responsible for restitution, service of process is to be made upon parents, and Florida law "contemplates [that] parents' participation at both detention . . . and final disposition hearings" are necessary;¹⁵⁶ the parent is viewed as a party. The appellate court held that it is not harmless error to sequester a parent who is a party, and that under Florida law a parent, him or herself a party, is entitled to be present at the adjudicatory hearing.¹⁵⁷

Sometimes matters are heard by appellate courts involving issues that ought to be, at first glance, obvious. One such case is *R.O. v. State*.¹⁵⁸ In *R.O.*, the State filed a delinquency petition charging the child with possession of cocaine and other offenses.¹⁵⁹ "[T]he State put on one police officer, who testified [to the] charges."¹⁶⁰ Then, the defense put the child on "who testified that he did not realize that the men stopping him were police, and [that] he ran because he was afraid [of somebody] trying to rob him."¹⁶¹ The defense asked the child no further questions.¹⁶² The court then began asking questions in matters covered neither by the direct examination of the police officer nor the direct examination by defense counsel, especially the cocaine charge.¹⁶³ "After the court questioned [the child], the State commenced

151. 48 So. 3d 167, 168 (Fla. 4th Dist. Ct. App. 2010).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*; see FLA. STAT. § 90.616 (2011) (governing sequestration).

156. *L.E.D.*, 48 So. 3d at 169 (citing FLA. STAT. § 985.219; FLA. R. JUV. P. 8.010(a), 8.030(b)).

157. *Id.* (citing FLA. STAT. § 985.319; *J.R. v. State*, 923 So. 2d 1269, 1272 (Fla. 1st Dist. Ct. App. 2006)); *L.B. v. State*, 675 N.E.2d 1104, 1107 (Ind. Ct. App. 1996)); see *Interest of Hopkins v. Youth Court of Issaquena Cnty.*, 227 So. 2d 282, 284 (Miss. 1969). *But see* *People v. Akers (In re Interest of Akers)*, 307 N.E.2d 630, 631–32 (Ill. App. Ct. 1974).

158. 46 So. 3d 124 (Fla. 3d Dist. Ct. App. 2010).

159. *Id.* at 125.

160. *Id.*

161. *Id.*

162. *Id.*

163. *R.O.*, 46 So. 3d at 125.

cross-examination [as to the cocaine charge].”¹⁶⁴ On appeal, the child argued “that the trial court departed from [its] role of neutrality when questioning [the child] about the cocaine possession.”¹⁶⁵ The appellate court held, citing earlier authority, that “[a] court may not ask questions or make comments in an attempt to supply essential elements to the State’s case.”¹⁶⁶ The appellate court held that the trial court, “*sua sponte* questioned [the child] to supply essential elements of the prosecution’s case.”¹⁶⁷ The trial court went to the ultimate issue of guilt on its own.¹⁶⁸ Thus, as the appellate court said, “the trial court became an advocate for the prosecution, thus depriving [the child] of his right to a fair and impartial trial.”¹⁶⁹ The court thus reversed.¹⁷⁰

In *D.F.J. v. State*,¹⁷¹ the child appealed an adjudication of delinquency for aggravated battery and robbery with a weapon.¹⁷² The child contended on appeal that the only evidence against him presented by the State was that “he was present at the scene of the commission of the crimes and that he fled.”¹⁷³ There was no evidence that the child assisted in the perpetration of the crimes or that he had intent to join.¹⁷⁴ Thus, the child “argu[ed] that the State [had] failed to present evidence from which the judge could exclude the reasonable hypothesis that [the child] was merely a witness” and thus not guilty of the charges.¹⁷⁵ The appellate court recognized that the trial court evidence was circumstantial.¹⁷⁶ However, despite the strength of the circumstantial evidence pointing toward guilt, the appellate court held that such “evidence must, nonetheless, rebut any hypothesis of innocence, including [the fact] that [the child] was present [but] was merely a witness.”¹⁷⁷ “[T]he only witness to the crime was the victim and he could not definitively state who attacked him”¹⁷⁸ Thus, “the State was unable to overcome [the respondent’s] reasonable hypothesis of innocence,” and reversal was required.¹⁷⁹

164. *Id.* at 126.

165. *Id.*

166. *Id.* (citing *Sears v. State*, 889 So. 2d 956, 959 (Fla. 5th Dist. Ct. App. 2004)).

167. *Id.* (alteration in original).

168. *R.O.*, 46 So. 3d at 126.

169. *Id.*

170. *Id.*

171. 60 So. 3d 1183 (Fla. 4th Dist. Ct. App. 2011).

172. *Id.* at 1184.

173. *Id.* at 1185.

174. *Id.*

175. *Id.*

176. *D.F.J.*, 60 So. 3d at 1185.

177. *Id.*

178. *Id.*

179. *Id.*

The need for vigorous representation by defense counsel on behalf of juvenile defendants is demonstrated in the second district case, *Henderson v. State*.¹⁸⁰ There, a sixteen year-old was convicted of both battery on a person over sixty-five and robbery.¹⁸¹ He appealed the judgment and sentence including the trial court's failure to transfer him to the Department of Juvenile Justice for dispositional placement.¹⁸² The Department of Juvenile Justice Multidisciplinary Panel recommended that the child remain in the juvenile justice system, but the trial court rejected that alternative.¹⁸³ In affirming the adult sanction of ten years in prison, the appellate court noted that the trial lawyer did not advocate strenuously for the juvenile sentence.¹⁸⁴ The appellate court then affirmed, finding that "[t]he presumption of appropriateness of adult sanctions *compels* us to conclude that this record provides no basis for reversal on direct appeal."¹⁸⁵ One might infer from the court's language, its reference to the trial lawyer's lack of strenuous representation, the detailed nature of the Department of Juvenile Justice Multidisciplinary Panel report, and the appellate lawyer's citation to *Anders v. California*,¹⁸⁶ that had there been vigorous representation, its appellate ruling might have been different.¹⁸⁷

Practitioners know that cases are often continued because of the inability of parties to proceed for a number of reasons, including lack of witness availability. The issue of court discretion to therefore dismiss the charges in juvenile delinquency cases came before the Fifth District Court of Appeal in two cases: *State v. S.M.M.*¹⁸⁸ and *State v. A.D.C.*,¹⁸⁹ both involving problems in the same circuit.¹⁹⁰ In *A.D.C.*, the State appealed an order denying its motion to continue a restitution hearing.¹⁹¹ In that case and in others, the State did not have witnesses present at the trial, duly noticed on evidentiary hearing time.¹⁹² In *A.D.C.*, the appellate court held "that the State was diligent in its [efforts] to prepare for the hearing and secure the attendance of its neces-

180. 61 So. 3d 494, 495 (Fla. 2d Dist. Ct. App. 2011).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Henderson*, 61 So. 3d at 496 (emphasis added).

186. 386 U.S. 738, 744 (1967) (setting forth the method for appellate brief filing when counsel does not believe there is a meritorious issue on appeal).

187. *See Henderson*, 61 So. 3d at 495-96.

188. 59 So. 3d 1210 (Fla. 5th Dist. Ct. App. 2011).

189. 59 So. 3d 1209 (Fla. 5th Dist. Ct. App. 2011).

190. *Id.* at 1209; *S.M.M.*, 59 So. 3d at 1211.

191. *A.D.C.*, 59 So. 3d at 1209.

192. *Id.*

sary witnesses” and that it had not sought a prior continuance of the case.¹⁹³ Furthermore, the respondent did not establish that he was “suffer[ing] any prejudice as a result of [the] resetting.”¹⁹⁴ For these reasons, the appellate court held that it was abuse of discretion to deny the motion to continue.¹⁹⁵ However, in *S.M.M.*, a case involving an order dismissing a delinquency petition, the appellate court held there was no abuse of discretion and thus affirmed the dismissal.¹⁹⁶ In that case, while recognizing that “dismissal is an extreme sanction that should be employed only when lesser sanctions” are not available, the appellate court held that the facts in that case did not involve an isolated incident.¹⁹⁷ There was “a systemic problem involving a pattern of repeated failures by the State to [provide] witnesses for properly noticed trials [and] other evidentiary hearings,” and in the case at bar, there had been at least one prior continuance of the date of trial, and “almost three hours after the trial was scheduled to start the State had no definitive estimate of when its witnesses might appear,” nor any “explanation [for] why they had not appeared.”¹⁹⁸ The court thus affirmed the dismissal.¹⁹⁹

In Florida, when a discovery violation occurs, the trial court is required to hold what is known as a *Richardson* hearing.²⁰⁰ *Richardson v. State*²⁰¹ provides a test to determine whether a discovery violation is harmless or whether there is a reasonable probability that the discovery violation procedurally prejudiced the defense.²⁰² In *T.J. v. State*,²⁰³ the issue was whether the trial court complied with *Richardson* where a juvenile was charged as a “delinquen[t] with burglary of an unoccupied dwelling, third degree grand theft, and criminal mischief.”²⁰⁴ The juvenile appealed seeking to reverse the adjudication on the ground that there was a *Richardson* violation in that the State, on the first day of trial, listed two witnesses that were not known to the defense.²⁰⁵ He argued that the late submission was error and not harmless.²⁰⁶ The witnesses were a crime scene investigator and a latent fingerprint analyst

193. *Id.* at 1210.

194. *Id.*

195. *Id.*

196. *State v. S.M.M.*, 59 So. 3d 1210, 1211 (Fla. 5th Dist. Ct. App. 2011).

197. *Id.* at 1212.

198. *Id.*

199. *Id.*

200. *See Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971).

201. 246 So. 2d 771 (Fla. 1971).

202. *Id.* at 775.

203. 57 So. 3d 975 (Fla. 3d Dist. Ct. App. 2011).

204. *Id.* at 976.

205. *Id.*

206. *Id.*

and expert witness.²⁰⁷ The appellate court reversed on the grounds that “the trial court [had] failed to hold an adequate *Richardson* inquiry” by failing to ask “whether the discovery violation was willful or inadvertent, whether it was substantial or [minor], and whether [it] had a prejudicial [impact] on the defense’s trial preparation.”²⁰⁸ “[F]ailure to make an adequate inquiry is not harmless error,” the appellate court held.²⁰⁹ It thus reversed.²¹⁰

Timely filing of motions to suppress is required under the Florida Rules of Juvenile Procedure.²¹¹ In *C.M. v. State*,²¹² a child appealed from an adjudication of delinquency for possession of cannabis on the ground “that the trial court erred [in] denying his oral motion to suppress.”²¹³ When at trial, the State attempted to admit into evidence the cannabis, which was found near the child, counsel for the child objected on grounds of lack of chain of custody and that the search was illegal.²¹⁴ The State responded that the child’s counsel had not filed a motion to suppress.²¹⁵ “The trial court refused to consider [the] oral motion to suppress . . . [as] no written motion to suppress had been filed.”²¹⁶ The appellate court affirmed on grounds that in the absence of the “lack[] [of] opportunity to make a motion to suppress prior to the date of the adjudicatory hearing,” it was not an abuse of discretion to deny the motion.²¹⁷

Being a disrespectful teenager is not grounds for adjudication as a delinquent for resisting a police officer without violence.²¹⁸ In *M.M. v. State*²¹⁹ this was exactly the issue.²²⁰ A juvenile who was “neither under arrest nor being detained when he refused to give his name or identification to [a] requesting officer” appealed his adjudication for resisting without violence when the youngster walked away slowly from the officer, subsequently “refused to give his name and claimed he had no identification on him.”²²¹ At no time was the child “under arrest or otherwise lawfully detained when he

207. *Id.*

208. *T.J.*, 57 So. 3d at 977 (citing *Richardson v. State*, 246 So. 2d 771, 775 (Fla. 1971)).

209. *Id.*

210. *Id.*

211. *See* FLA. R. JUV. P. 8.085(a)(5) (2011).

212. 51 So. 3d 540 (Fla. 5th Dist. Ct. App. 2010).

213. *Id.* at 541.

214. *Id.*

215. *Id.*

216. *Id.*

217. *C.M.*, 51 So. 3d at 541.

218. *See* *M.M. v. State*, 51 So. 3d 614, 615 (Fla. 1st Dist. Ct. App. 2011).

219. 51 So. 3d 614 (Fla. 1st Dist. Ct. App. 2011).

220. *See id.* at 615–16.

221. *Id.* at 615.

[refused] to give [the officer] his name or provide identification.”²²² The appellate court reversed the adjudication finding that the youngster “did not obstruct the officer in executing a legal duty.”²²³

VI. OTHER MATTERS

Two other cases require analysis in this survey. The first is *Statewide Guardian ad Litem Office v. State Attorney Twentieth Judicial Circuit*.²²⁴ The specific issue before the appellate court in *Statewide Guardian ad Litem Office* was whether the circuit court in the Twentieth Judicial Circuit could order the Guardian ad Litem Program to act as guardians ad litem in criminal proceedings where children, allegedly “victims or witnesses of abuse [and] neglect or sexual offenses,” were expected to testify as witnesses.²²⁵ Apparently, this had been an ongoing procedure in that circuit for some time pursuant to a local administrative order.²²⁶ Initially, the policy applied while the Guardian ad Litem Program “was under the jurisdiction of the judiciary.”²²⁷ However, in 2003, the Statewide Guardian ad Litem Program was placed within the Justice Administrative Commission of the State of Florida, an office of the executive branch of government.²²⁸ As the appellate court put it:

When the guardian ad litem program was under the auspices of the circuit court, no one disputed that the court had authority to appoint guardians from its own program to represent any child that needed a guardian ad litem under any statute authorizing such an appointment. Now that the Statewide [Guardian ad Litem] is an office in the executive branch, we conclude that the circuit court can no longer compel the Statewide [Guardian ad Litem] to appear and assist children in the absence of a statute that gives the court such authority over an agency in another branch of government.²²⁹

222. *Id.* at 616.

223. *Id.*

224. 55 So. 3d 747 (Fla. 2d Dist. Ct. App. 2011).

225. *Id.* at 748.

226. *Id.*

227. *Id.* at 749.

228. *Id.* (citing FLA. STAT. § 39.8296(2) (2011)).

229. *Statewide Guardian ad Litem Office*, 55 So. 3d at 750.

As things now stand, both the Guardian ad Litem Program and DCF exist in the executive branch, both with roles that would appear at first glance to be quite similar in the context of dependency proceedings.²³⁰

The second case is *Department of Children & Families v. D.B.D.*²³¹ In that case, DCF appealed from “an order dismissing an *ex parte* injunction entered against a father of minor children” under Florida’s dependency statute.²³² The appellate court held that the father was denied due process because “DCF failed to justify the continuation of the injunction.”²³³ The underlying facts are disturbing. In *D.B.D.*, the mother who was an attorney for the DCF in Miami-Dade County and the father, also an attorney, had what the appellate court described as “an ongoing, contentious divorce case in Broward County.”²³⁴ The family court in the divorce case had “ruled against the mother on some of the allegations she made against the father.”²³⁵ Six months after the family court “denied the mother an injunction she had sought on behalf of her children, . . . the mother filed a pro se emergency motion to suspend visitation, . . . [but] never called [the] motion up for hearing before the family court judge.”²³⁶ A month later, DCF filed a petition seeking an injunction under Florida’s dependency statute, making many of the same allegations contained in the DCF attorney mother’s pro se emergency motion to suspend visitation.²³⁷ On the day the dependency petition was filed, “a hearing was held before [a judge] who was not the family court judge familiar with the hostile dynamics of this family.”²³⁸ The father received two hours notice of the hearing, but was in the Florida Keys and asked to appear by telephone.²³⁹ When DCF objected, the court would not allow the appearance.²⁴⁰ Present were the mother, two lawyers, and three DCF representatives.²⁴¹ None of them, all professionals according to the appellate court, “advised [the judge] of the pending proceedings in the family court,” nor did he ask.²⁴² At a short hearing, the DCF attorney sought and received “an injunction that remained in effect until further order of the court

230. See Dale & Reidenberg, *supra* note 2, at 327, 333.

231. 42 So. 3d 916 (Fla. 4th Dist. Ct. App. 2010).

232. *Id.* at 917 (citing FLA. STAT. § 39.504).

233. *Id.*

234. *Id.*

235. *Id.*

236. *D.B.D.*, 42 So. 3d at 917.

237. *Id.* (citing FLA. STAT. § 39.504(1) (2011)).

238. *Id.*

239. *Id.*

240. *Id.* at 918.

241. *D.B.D.*, 42 So. 3d at 918.

242. *Id.*

without . . . any further hearing.”²⁴³ The trial court entered the injunction which took effect immediately so that, according to the Fourth District Court of Appeal, “the mother could leave [the] court with it in hand.”²⁴⁴ According to the appellate court, although the trial court “had never seen [n]or heard from the father, the injunction also ordered the father to undergo two evaluations—for substance abuse and by a psychologist.”²⁴⁵

A month later, before the family court judge,

[t]he judge found that the DCF petition for injunction was filed in bad faith, and [that] the mother used her position as an attorney with [DCF] to bypass [the] proceeding before [the family] court [in order to] obtain an injunction before a dependency [court] judge who ha[d] no knowledge [of] the history of the parties.²⁴⁶

The trial court dismissed the injunction and DCF then appealed, claiming that the trial judge in the family court “improperly placed the burden of proof on the Department to maintain the injunction [and] that the father was not entitled to an immediate hearing to dissolve the injunction. [B]ecause the husband had ‘actual notice,’ the injunction did not qualify as an immediate injunction.”²⁴⁷ The appellate court rejected these arguments, finding first that DCF’s position “ignore[d] basic principles of due process.”²⁴⁸ Citing an expansive body of law which rejects the positions asserted by DCF, the appellate court affirmed the family court dissolution of the injunction.²⁴⁹ In rendering its opinion, the appellate court was unusually blunt:

To anyone familiar with the concept of due process, the abbreviated September 18 “hearing,” consuming but eight pages of transcript, is shocking. Three attorneys were present—Ali Vazquez, on behalf of DCF, Lee Seidlin, for the Guardian Ad Litem [P]rogram, and the mother. None of the[se] attorneys made Judge Rebollo aware of the ongoing proceedings in family court. None of the[se] attorneys mentioned the mother’s August 21 emergency motion. None of the attorneys brought up the mother’s previous

243. *Id.*

244. *Id.*

245. *Id.*

246. *D.B.D.*, 42 So. 3d at 919–20.

247. *Id.* at 920.

248. *Id.*

249. *Id.* at 920–21.

attempt to secure an injunction on behalf of the children, which was denied.²⁵⁰

The appellate court then added: “A primary focus of DCF’s attorney at the hearing was how to avoid further scrutiny of the injunction at a time when the person enjoined could have a meaningful opportunity to be heard.”²⁵¹

Perhaps to emphasize the severity of the attorneys’ failure to act properly, the appellate court cited to the Florida Rules of Professional Conduct concerning *ex parte* proceedings, which state that “[i]n an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that [would] enable the tribunal to make an informed decision, whether or not the facts are adverse.”²⁵²

VII. STATUS OFFENSES—CHILDREN IN NEED OF SERVICES

Chapter 984 of the *Florida Statutes* governs intervention in the lives of families and children in need of supervision, known commonly as status offenders.²⁵³ Cases involving status offenders do not come up regularly in the appellate case law in Florida.²⁵⁴ *A.B.S. v. State*²⁵⁵ is an exception. In that case, a juvenile who was charged as a delinquent for possession of a controlled substance “admitted . . . the charge while reserving the right to appeal [based upon] the denial of his motion to suppress.”²⁵⁶ The child had been “taken into custody as a possible runaway in need of services,” one of the status offense categories under chapter 984.²⁵⁷ The police officer took the youngster into custody, told him that he would take the child home, but before he placed the child into the police cruiser, he handcuffed and searched the child as was the officer’s practice.²⁵⁸ He found a key chain in the youngster’s pocket with “an aluminum screw-top container” which the police officer believed was of the “type [usually] used to store illegal drugs.”²⁵⁹

250. *Id.* at 918.

251. *D.B.D.*, 42 So. 3d at 919.

252. *Id.* at 919 n.2 (quoting FLA. R. PROF’L CONDUCT 4-3.3(c) (2010)).

253. FLA. STAT. ch. 984 (2011); *see generally* DALE, *supra* note 36, at ¶ 5.02.

254. Michael J. Dale, *Juvenile Law in Florida in 1998*, 23 NOVA L. REV. 819, 831 (1999) (discussing the rarity of opinions regarding the Children in Need of Services/Families in Need of Services Statute).

255. 51 So. 3d 1181 (Fla. 2d Dist. Ct. App. 2010).

256. *Id.* at 1182.

257. *Id.*; FLA. STAT. § 984.13(1)(a).

258. *A.B.S.*, 51 So. 3d at 1182.

259. *Id.*

When the officer shook it, it rattled.²⁶⁰ That made the police officer suspicious, and when the officer opened the container, the officer found a controlled substance.²⁶¹ The appellate court reversed the denial of the motion to suppress “because the [police] officer did not have a legal basis to search.”²⁶² It held that the circumstances under which “a juvenile [may] be taken into custody [pursuant to] section 984.13 are not crimes.”²⁶³ “[T]herefore, [a] search incident to [an] arrest exception to the warrant requirement d[id] not apply.”²⁶⁴ There having been “no indication that [the child] was in possession of either a weapon or contraband when [the police officer] searched [him] . . . the search was conducted without a legal basis, [and] the trial court erred in denying the motion to suppress.”²⁶⁵

VIII. CONCLUSION

The intermediate appellate courts were quite busy during the past survey year in the areas of dependency, termination of parental rights, and juvenile delinquency, ruling on a number of procedural matters as well as refining definitional language within the relevant statutes. The courts decided one important case outside of these areas, affirming the proposition that the Guardian ad Litem Program, like the DCF Services, is a division within the Executive Department.²⁶⁶ And, in one particularly troubling case, casting a shadow on the legal profession, one appellate court castigated attorneys within the DCF Services and Guardian ad Litem Program for their behavior in an ill-conceived dependency matter.²⁶⁷

260. *Id.*

261. *Id.*

262. *Id.* (citing *L.C. v. State*, 23 So. 3d 1215, 1218 (Fla. 3d Dist. Ct. App. 2009).

263. *A.B.S.*, 51 So. 3d at 1182 (citing *L.C.*, 23 So. 3d at 1218; FLA. STAT. § 984.13 (2011).

264. *Id.* (citing *L.C.*, 23 So. 3d at 1218).

265. *Id.*

266. *Statewide Guardian ad Litem Office v. State Att’y Twentieth Judicial Circuit*, 55 So. 3d 747, 749 (Fla. 2d Dist. Ct. App. 2011).

267. *Dep’t of Children & Families v. D.B.D.*, 42 So. 3d 916, 917–20 (Fla. 4th Dist. Ct. App. 2010).

SOMETHING SMELLS AFOUL: AN ANALYSIS OF THE END OF A DISTRICT COURT SPLIT

ABIGAIL BROWN*

I.	INTRODUCTION.....	201
II.	SUPREME COURT DECISIONS.....	203
	A. <i>Initial Fourth Amendment Cases</i>	203
	B. <i>Supreme Court Cases Relied Upon by Lower Courts</i>	204
	1. First Dog Sniff Case.....	204
	2. The Illegitimacy of Contraband.....	206
	3. The Privacy of the Home	206
	4. The Clashing of <i>Caballes</i>	208
III.	FLORIDA DISTRICT COURT CASES	209
	A. <i>The Beginning of a Split</i>	210
	B. <i>The Controversial Rabb Decision</i>	211
	C. <i>Post-Rabb Decision</i>	214
IV.	THE SUPREME COURT OF FLORIDA AND <i>JARDINES</i>	215
	A. <i>The District Court Decision</i>	215
	B. <i>The Supreme Court Decision</i>	217
V.	ISSUES ARISING FROM <i>JARDINES</i>	220
	A. <i>Kyllo Should Not be Applied to the “Dog Sniff” Cases</i>	221
	B. <i>Caballes as the Controlling Precedent for “Dog Sniff” Cases</i>	223
VI.	CONCLUSION	225

I. INTRODUCTION

On April 14, 2011, the Supreme Court of Florida made a final decision on *Jardines v. State (Jardines III)*,¹ ending an issue split in the Florida Dis-

* Abigail Brown will receive her J.D. from Nova Southeastern University, Shepard Broad Law Center, in May 2013. Abigail received a Bachelor’s of Science from the University of Iowa, with a major in political science, emphasizing on pre-law. Abigail would like to thank the office of the Coral Springs City Attorney and her fellow interns, for sparking and fueling the idea and desire to write this article. She would also like to thank the entire staff of *Nova Law Review* for their dedication and skill in editing this article, as well as her amazing new friends here at Nova Southeastern University for their laughter and kindness. Most importantly, Abigail would like to thank her mother and father for always being there for her and her husband for his continuing love and support—without him, she would be missing the best part of herself.

1. 36 Fla. L. Weekly S147 (Apr. 14, 2011).

strict Courts of Appeal.² *Jardines III* stemmed from an appeal by the defendant seeking to quash evidence that was seized due to a search warrant.³ In its holding, the court held that, contrary to other decisions by the First and Third District Courts of Appeal of Florida, a “sniff test” conducted at the front door of a home is a search that is protected under the Fourth Amendment.⁴ In order for the test to be conducted, probable cause—and not reasonable suspicion—must be met for any search to be constitutional.⁵

In the lower court decision by the Third District Court of Appeal, which was overturned by the Supreme Court of Florida, the court held that a person does not have a right of privacy involving contraband, and therefore, a “sniff test” does not fall under the meaning of the Fourth Amendment.⁶ The split had been created between the third district and the fourth district, which found in *State v. Rabb (Rabb II)*⁷ that a “sniff test” is a search under the meaning of the Fourth Amendment.⁸ However, the Supreme Court of the United States reversed and remanded *Rabb II* back to the fourth district⁹ in light of its decision in *Illinois v. Caballes*.¹⁰ In its holding in *Caballes*, the Supreme Court stated that during a lawful traffic stop, the use of a narcotics-detection dog is not a search under the Fourth Amendment when conducted by a newly arrived officer to the scene.¹¹ This case was part of a line of decisions by the Supreme Court of the United States to hold that the use of a narcotics dog to sniff out narcotics is not a search under the Fourth Amendment because a person has no legitimate privacy interest in contraband.¹²

At the same time, in some lower courts’ eyes, there have been decisions by the Supreme Court of the United States that have created a different impression of a dog sniff test, especially of a private residence from the front step.¹³ In particular, the key decision of *Kyllo v. United States*¹⁴ has been seen by lower courts as a reinforcement of the protection of the inside of a

2. *Id.* at S147.

3. *Id.*

4. *Id.* at S147, S148 n.3.

5. *Id.* at S147.

6. *See State v. Jardines (Jardines I)*, 9 So. 3d 1, 4 (Fla. 3d Dist. Ct. App. 2008), *review granted*, 3 So. 3d 1246 (Fla. 2009), *and quashed* by 36 Fla. L. Weekly S147 (Apr. 14, 2011).

7. 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).

8. *Id.* at 1192; *see also Jardines I*, 9 So. 3d at 10.

9. *Florida v. Rabb (Rabb I)*, 544 U.S. 1028, 1028 (2005), *substituted by*, 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).

10. 543 U.S. 405 (2005).

11. *Id.* at 410.

12. *Id.* at 409 (citing *United States v. Place*, 462 U.S. 696, 707 (1983)).

13. *Rabb II*, 920 So. 2d at 1182–83 (interpreting *Kyllo v. United States*, 533 U.S. 27, 29–31 (2001)).

14. 533 U.S. 27 (2001).

home from arbitrary government intrusion.¹⁵ However, the Supreme Court of the United States distinguished *Caballes* from *Kyllo*, which has caused many lower courts to come to completely different conclusions on a dog sniff of a private residence, including the different appellate courts of Florida.¹⁶

This article will first discuss the cases decided by the Supreme Court of the United States that evolved the law of the Fourth Amendment and the legality of a dog sniff for contraband. The next section will analyze the different decisions by the appellate courts in Florida on whether a dog sniff is a search under the Fourth Amendment. The third section will dissect the decision by the Supreme Court of Florida that ended the district court split. Finally, the last section will explain why this is probably not in accord with what the Supreme Court of the United States would decide if and when the Court finally accepts a case involving a dog sniff of a private residence from the front step.

II. SUPREME COURT DECISIONS

The decisions by the highest court of the United States have had an impact on the diverging results of lower courts on the issue of a dog sniff of a private residence from the front step of the home.¹⁷ The Supreme Court of the United States has only addressed the issue of a dog sniff of areas not involving the home.¹⁸ Because of this, when resolving the issue of a dog sniff of a private residence, lower courts have combined the holdings of multiple cases in order to formulate specific rules for these new cases.¹⁹

A. Initial Fourth Amendment Cases

Before *Katz v. United States*,²⁰ the Supreme Court of the United States used a trespass theory to decide if a person's rights under the Fourth Amendment had been violated.²¹ The Court would ask if an individual's

15. *Rabb II*, 920 So. 2d at 1182–83 (citing *Kyllo*, 533 U.S. at 29–31).

16. *Caballes*, 543 U.S. at 409–10; *Jardines I*, 9 So. 3d at 10.

17. See *Jardines I*, 9 So. 3d at 10.

18. *Caballes*, 543 U.S. at 410; *United States v. Place*, 462 U.S. 696, 707 (1983).

19. See *Rabb II*, 920 So. 2d at 1183–85.

20. 389 U.S. 347 (1967), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520.

21. Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 304 (2010).

person, papers, house or effects had been physically invaded.²² In *Olmstead v. United States*,²³ the Court addressed the issue of “whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth . . . Amendment[.]”²⁴ The Court focused on how the Fourth Amendment specifically mentions only “material things,” and therefore, the wiretapping was not a search because it only involved use of the senses to detect a non-material item.²⁵

“In *Katz*, the Supreme Court overruled the trespass theory and replaced it with the reasonable expectation of privacy theory.”²⁶ The majority focused on the idea that the Fourth Amendment does not create “constitutionally protected area[s]— . . . the Fourth Amendment protects people, not places.”²⁷ However, it was Justice Harlan’s concurring opinion in *Katz* that created the presently used test for Fourth Amendment searches and seizures.²⁸ The test has a two-fold requirement: First, the person needs to have shown an actual and subjective expectation of privacy, and second, this expectation must be recognized as reasonable by society.²⁹ This two-fold test has been asked in the shorthand: “Did the defendant have a reasonable expectation of privacy?”³⁰ One of the unusual times in which the Court has considered whether an action is a search under the Fourth Amendment is when a dog sniff was used to detect for narcotics.³¹

B. Supreme Court Cases Relied Upon by Lower Courts

1. First Dog Sniff Case

The Court first addressed the issue of a dog sniff as a search in *United States v. Place*.³² “[The] Court addressed the issue of whether police, based on reasonable suspicion, could temporarily seize a piece of luggage at an

22. *Olmstead v. United States*, 277 U.S. 438, 464 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967).

23. 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

24. *Id.* at 455.

25. *Id.* at 464.

26. MacDonnell, *supra* note 21, at 304.

27. *Katz v. United States*, 389 U.S. 347, 351 (1967).

28. *Id.* at 361 (Harlan, J., concurring).

29. *Id.*

30. MacDonnell, *supra* note 21, at 307–08.

31. *United States v. Place*, 462 U.S. 696, 699 (1983).

32. 462 U.S. 696, 699 (1983).

airport and then subject the luggage to a ‘sniff test’ by a drug detection dog.”³³ In *Place*, federal agents met the defendant at the La Guardia Airport on information they received from the Miami police.³⁴ However, upon the request for his luggage, Place refused the search.³⁵ Still, the agents retrieved the bags from him and told him they would obtain a search warrant for the luggage.³⁶ The agents held the bags for ninety minutes as they drove to another airport for a drug detection dog to sniff the luggage, which alerted the dog positively to the presence of narcotics.³⁷ On Monday, the agents received a probable cause warrant to open and physically search the luggage.³⁸ The Court held the retention of the luggage for ninety minutes was impermissibly long.³⁹

However, the Court went further and analyzed the dog sniff of the luggage in dicta.⁴⁰ In her article, Leslie Lunney points out that Justice O’Connor’s majority opinion gives a two paragraph citation-less statement saying, a dog sniff of the luggage did not reveal non-contraband items to the public.⁴¹ This is the first time the Court used the phrase *sui generis* to describe a dog sniff.⁴² The Court stated a dog sniff is *sui generis* because it “is so limited both in the manner in which the information is obtained” and the manner in which the information is revealed.⁴³ According to Timothy MacDonnell, this dictum carved out the “contraband exception” to the Fourth Amendment, which is also known as the binary search doctrine.⁴⁴ These names refer to the Court’s reasoning that the dog sniff only reveals the possession of contraband and therefore does not violate any legitimate privacy interest.⁴⁵ Since the Supreme Court of the United States related in dicta the nature of a dog sniff, lower courts have been using this reasoning that a dog sniff is *per se* a non-search.⁴⁶

33. *Jardines III*, 36 Fla. L. Weekly S147, S148 (Apr. 14, 2011).

34. *Place*, 462 U.S. at 698.

35. *Id.* at 699.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Place*, 462 U.S. at 710.

40. *See id.* at 707 (dictum).

41. Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 844 (2009).

42. *See Place*, 462 U.S. at 707.

43. *Id.*

44. MacDonnell, *supra* note 21, at 302.

45. *Place*, 462 U.S. at 707.

46. Lunney, *supra* note 41, at 831.

2. The Illegitimacy of Contraband

In 1984, the Supreme Court of the United States further addressed the illegitimacy of an interest in contraband.⁴⁷ Employees of a freight carrier discovered a suspicious white powder in a damaged package.⁴⁸ While *United States v. Jacobsen*⁴⁹ did not involve the use of a narcotics dog to reveal the presence of contraband, the Court affirmed this thinking by holding that a chemical field test is not a search because there is no legitimate private interest in contraband.⁵⁰ The Court explained by stating, “Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”⁵¹ Since there is no legitimate interest in cocaine, there was no legitimate interest in privacy compromised.⁵² However, not every Justice agreed with this holding.⁵³ In his dissenting opinion, Justice Brennan stated, “we have always looked to the context in which an item is concealed, not to the identity of the concealed item.”⁵⁴ Yet, the majority’s reasoning of an illegitimate interest in contraband still remains in effect today.⁵⁵

3. The Privacy of the Home

Another more recent decision that has centered on the possible illegitimacy of contraband is *Kyllo*.⁵⁶ The Court addressed the issue of “whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment.”⁵⁷ The Court answered by holding that, “[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that previously have been unknowable without physical intrusion, the surveillance is

47. See *United States v. Jacobsen*, 466 U.S. 109, 123 (1984).

48. *Id.* at 111.

49. 466 U.S. 109 (1984).

50. See *id.* at 123.

51. *Id.*

52. *Id.*

53. *Id.* at 133–34 (Brennan, J., dissenting).

54. *Jacobsen*, 466 U.S. at 139 (Brennan, J., dissenting).

55. See *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

56. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

57. *Id.*

a ‘search’ and is presumptively unreasonable without a warrant.”⁵⁸ In *Kyllo*, a federal agent came to suspect that the respondent was using his house to grow marijuana, and to determine this, the agent used a thermal imager to scan the home of the respondent.⁵⁹ The scan “took only a few minutes and was performed from [a car] across the street.”⁶⁰ The majority opinion, written by Justice Scalia, gave an extensive discussion of the special nature of the home afforded by the Constitution.⁶¹ “‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”⁶² Justice Scalia noted that with very few exceptions, the warrantless search of a home is unconstitutional.⁶³ He stated, “[w]e have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’”⁶⁴ The “scan was a ‘search’ because it made technology-assisted inferencing about the interior of a home possible.”⁶⁵ However, the dissent did not believe that intimate details were stolen from the home.⁶⁶

Justice Stevens began by reminding the Court that it held “[w]hat a person knowingly exposes to the public” is not protected by the Fourth Amendment.⁶⁷ For a simpler argument, he pointed out that the Fourth Amendment states, “‘secure *in* their . . . houses.’”⁶⁸

Just as “the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public,” so too public officials should not have to avert their senses or their equipment from detecting emissions in the public domain such as excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community.⁶⁹

Justice Stevens believed the Court did not exercise judicial restraint and crafted a new rule that encompassed too much, including a dog sniff being

58. *Id.* at 40.

59. *Id.* at 29.

60. *Id.* at 30.

61. *Kyllo*, 533 U.S. at 29, 31.

62. *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

63. *Id.*

64. *Id.* at 40 (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

65. Lunney, *supra* note 41, at 855.

66. *Kyllo*, 533 U.S. at 43 (Stevens, J., dissenting).

67. *Id.* at 42 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

68. *Id.* at 43 (quoting U.S. CONST. amend. IV).

69. *Id.* at 45 (quoting *California v. Greenwood*, 486 U.S. 35, 41 (1988)).

allowed at a home.⁷⁰ In response to Justice Stevens's dissenting opinion, Justice Scalia stated, "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained."⁷¹ Furthermore, to say the device only picks up the heat coming from the walls would be to say the eavesdropping device in *Katz* only picked up sound waves coming off the phone booth.⁷² This decision would become the case most relied upon by opponents of a warrantless dog sniff at a private residence.⁷³

4. The Clashing of *Caballes*

The most recent decision by the Supreme Court of the United States addressing a dog sniff is *Caballes*.⁷⁴ In this case, the Court held "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."⁷⁵ The respondent was pulled over by an officer for speeding, and while the respondent waited in the officer's car, a second officer arrived at the scene and conducted a sniff test with a narcotics dog that lasted less than ten minutes around the outside of the respondent's car.⁷⁶ The Court started off by noting "that a seizure that is lawful at its inception" can become unlawful by an execution that violates a protected interest.⁷⁷ However, the Court found the dog sniff did not violate any protected interest because there is no legitimate privacy interest in contraband.⁷⁸ "[G]overnmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"⁷⁹ The Court also addressed the issue of a false positive by the dog.⁸⁰ The Court responded to this contention raised by the respondent by saying that the tests are designed,

70. *Id.* at 47, 51.

71. *Kyllo*, 533 U.S. at 37.

72. *Id.* at 35.

73. *Jardines III*, 36 Fla. L. Weekly S147, S154 (Apr. 14, 2011); *Rabb II*, 920 So. 2d 1175, 1183 (Fla. 4th Dist. Ct. App. 2006).

74. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

75. *Id.* at 410.

76. *Id.* at 406.

77. *Id.* at 407.

78. *Id.* at 408.

79. *Caballes*, 543 U.S. at 408 (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

80. *Id.* at 409.

if done properly, to only reveal the presence of contraband and no other interests.⁸¹

The Court recognized the potential misinterpretations by lower courts of *Kyllo* as applied to a dog sniff.⁸² In its opinion, the Court points out that the central factor in *Kyllo* was the ability of the technology to detect intimate details of a home other than contraband.⁸³ As stated previously, when done right, a dog sniff only detects the presence of contraband; therefore, the decision of *Caballes* is consistent with *Kyllo* because no intimate details were invaded.⁸⁴ However, the dissent believed there was more than a possibility for a false positive than the majority believed.⁸⁵ Justice Souter pointed out that an erroneous alert is the triggering factor if there is a search that turns up nothing but intimate details of a person's home.⁸⁶

When combining these decisions by the Supreme Court of the United States, lower courts have been left at a fork in the road, needing to decide which path they will take.⁸⁷ Lower courts can follow the general rule for contraband laid out in the dog sniff cases and in *Jacobsen*,⁸⁸ or they can follow the *Kyllo* decision that “the Fourth Amendment draws ‘a firm line at the entrance to the house’” which the Court believes “must be not only firm but also bright.”⁸⁹

III. FLORIDA DISTRICT COURT CASES

By using the above analyzed decisions by the Supreme Court of the United States, lower courts across the United States have come to varying conclusions on cases that involve a dog sniff of a private residence.⁹⁰ The State of Florida is no exception to this.⁹¹

81. *Id.*

82. *See id.* (citing *Kyllo v. United States*, 533 U.S. 27, 29–31 (2001)).

83. *Id.* at 409–10 (citing *Kyllo*, 533 U.S. at 38).

84. *Caballes*, 543 U.S. at 409–10.

85. *See id.* at 411 (Souter, J., dissenting). “Justice Souter documented cases in which dogs were accepted by a court as reliable with an accuracy rate of 71%, an error rate of 8% over a dog’s entire career, and an error rate of between 7% and 38%.” Lunny, *supra* note 41, at 862 n.155 (citations omitted).

86. *Caballes*, 543 U.S. at 413 (Souter, J., dissenting).

87. *See* Lunny, *supra* note 41, at 854.

88. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *Caballes*, 543 U.S. at 410; *United States v. Place*, 462 U.S. 696, 707 (1983).

89. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)).

90. *See Jardines I*, 9 So. 3d 1, 10 (Fla. 3d Dist. Ct. App. 2008), *review granted*, 3 So. 3d 1246 (Fla. 2009), and *quashed by* 36 Fla. L. Weekly S147 (Apr. 14, 2011).

91. *See id.*

A. *The Beginning of a Split*

In *State v. Griffin (Griffin I)*,⁹² the First District Court of Appeal of Florida held, while a positive alert by a narcotics detection dog in a dog sniff of the defendant's car was probable cause to search the car, it was not enough to search his person.⁹³ However, the court reluctantly held this way.⁹⁴ The first district certified a question to the Supreme Court of Florida, which stated, "[w]hether, under the Fourth Amendment of the United States Constitution, a trained narcotics-detection dog alert of a vehicle provides probable cause to search the vehicle's driver who is also the sole occupant of the vehicle?"⁹⁵ The court was required to follow precedent established by *Williams v. State*,⁹⁶ but felt the recent decision of the Supreme Court of the United States in *Caballes* conflicted with the holding of *Williams*.⁹⁷ "Our constitution requires us to construe the right to be free from unreasonable searches or seizures 'in conformity with the [Fourth] Amendment to the United States Constitution, as interpreted by the United States Supreme Court.'"⁹⁸ The court certified the question to the Supreme Court of Florida because it felt that *Caballes* intended for incidences like this to not be searches, but thought that the Supreme Court of Florida should decide since it is an issue that has not been analyzed by the highest court yet.⁹⁹ The First District Court quoted the Supreme Court of the United States which stated in *Maryland v. Pringle*¹⁰⁰ that the "standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'"¹⁰¹ The Supreme Court of Florida denied review on this appeal.¹⁰²

92. 949 So. 2d 309 (Fla. 1st Dist. Ct. App. 2007).

93. *Id.* at 312.

94. *See id.* at 314.

95. *Id.* at 315 (emphasis omitted).

96. 911 So. 2d 861 (Fla. 1st Dist. Ct. App. 2005) (per curiam).

97. *Griffin I*, 949 So. 2d at 310. The *Williams* court held that a positive alert by a drug detection dog did not allow probable cause to search the suspect's person. *Williams*, 911 So. 2d at 861. The court based this decision on two Second District Court of Appeal's decisions that held a dog sniff was not probable cause to conduct a search. *Id.*

98. *Griffin I*, 949 So. 2d at 314 (quoting FLA. CONST. art. I, § 12).

99. *Id.* at 310, 314.

100. 540 U.S. 366 (2003).

101. *Griffin I*, 949 So. 2d at 312 (quoting *Pringle*, 540 U.S. at 370).

102. *State v. Griffin (Griffin II)*, 958 So. 2d 920, 920 (Fla. 2007).

B. *The Controversial Rabb Decision*

Like the First District Court in *Williams*, the Fourth District Court of Appeal of Florida held a dog sniff for the detection of narcotics of a private residence from the outside of the home is a search under the Fourth Amendment in *Rabb II*.¹⁰³ This court ruled on *Rabb* twice—on the first appeal and then on remand from the Supreme Court of the United States.¹⁰⁴ The first decision was vacated and remanded back to the fourth district “for further consideration in light of . . . [*Caballes*.]”¹⁰⁵ The case centers around the dog sniff of a private residence for a probable cause warrant.¹⁰⁶ Information was gathered from a confidential source that the defendant was cultivating marijuana.¹⁰⁷ The police pulled the defendant over in his car after watching him leave his home.¹⁰⁸ Upon pulling him over, the police noticed marijuana cultivation books and videos on his front seat.¹⁰⁹ The officer performed a dog sniff on the outside of the defendant’s home, and after a positive alert, received a probable cause warrant to search the home.¹¹⁰

While the State insisted the warrant was based on the totality of the circumstances and not just the dog sniff, the district court still did not believe all the circumstances combined would allow a search of the home.¹¹¹ Furthermore, the court held the dog sniff of a private residence performed on the doorstep of a person’s home is a search under the Fourth Amendment.¹¹² By this holding, the court relied on *United States v. Thomas*¹¹³ from the Second Circuit.¹¹⁴ As in *Kyllo*, the court strongly focused on the sanctity of the home in Anglo-American law.¹¹⁵ “[T]he ‘physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.’”¹¹⁶ The court further focused on the holding of *Kyllo* by analogizing the heat emanating from the home and the smell of marijuana that reached the ca-

103. *Rabb II*, 920 So. 2d 1175, 1192 (Fla. 4th Dist. Ct. App. 2006); *Williams v. State*, 911 So. 2d 861, 861 (Fla. 1st Dist. Ct. App. 2005) (per curiam).

104. *Rabb II*, 920 So. 2d at 1177.

105. *Rabb I*, 544 U.S. 1028, 1028 (2005), substituted by 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).

106. *Rabb II*, 920 So. 2d at 1178.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1179.

111. *Rabb II*, 920 So. 2d at 1179–80.

112. *Id.* at 1192.

113. 757 F.2d 1359 (2d Cir. 1985).

114. *Rabb II*, 920 So. 2d at 1184.

115. *See id.* at 1182–83.

116. *Id.* at 1182 (quoting *Payton v. New York*, 445 U.S. 573, 585 (1980)).

nine's nose on the doorstep.¹¹⁷ In the court's view, the smell of marijuana originating from the inside of the home was just an intimate detail as the heat emanating from the home in *Kyllo*.¹¹⁸

Because of precedent set by the Supreme Court of the United States and prior decisions of the Florida district courts of appeal, the fourth district was forced to distinguish multiple cases that held a dog sniff of the outside of a private residence was not a search under the Fourth Amendment.¹¹⁹ First, the court distinguished this case from *Place*.¹²⁰ While the subject of the dog sniff in *Place* was luggage, the court thought that a private residence is very different both in physical characteristics and in protection granted by law, especially historically.¹²¹ A decision by the Fifth District Court of Appeal of Florida was slightly harder to overcome.¹²² *Nelson v. State*¹²³ involved a dog sniff in a hotel hallway.¹²⁴ The court distinguished this case from the one at hand by stating that a hotel guest expects people to be in the hallways more than one expects a person to be on the doorstep of his or her private residence.¹²⁵

However, the most important distinction the *Rabb II* court was forced to make relates to the reason the Supreme Court of the United States remanded.¹²⁶ The Fourth District Court of Appeal of Florida felt this was different from *Caballes* because the issue was not a dog sniff performed on a car, as it was in *Caballes*, but the issue was a dog sniff performed on a home.¹²⁷ Most importantly, the *Rabb II* court believed that case law is "not developed in a vacuum."¹²⁸ Every case is situation-sensitive.¹²⁹ As the majority opinion pointed out, the expectation of privacy is analyzed based on the place, not the item being retrieved from inside, as the dissent did.¹³⁰ Both of those actions, looking at the expectation of privacy of the item and not evolving case law as it pertains to special circumstances, will lead to a slippery slope in the majority's view.¹³¹

117. *Id.* at 1183.

118. *Id.* at 1184–85.

119. *Rabb II*, 920 So. 2d at 1185–86.

120. *Id.* at 1183–84.

121. *Id.* at 1184.

122. *Id.* at 1185.

123. 867 So. 2d 534 (Fla. 5th Dist. Ct. App. 2004).

124. *Id.* at 535.

125. *Rabb II*, 920 So. 2d at 1187.

126. *See id.* at 1189.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Rabb II*, 920 So. 2d at 1190.

131. *Id.*

Believing the majority created a “schizophrenic” law, the dissent had much to say.¹³² “[B]ecause a house is neither luggage in an airport nor a car by the side of the road, a dog sniff at the front door of a house is a Fourth Amendment search.”¹³³ Just as the majority believed the dissent was focusing on the incorrect area, the dissent believed the majority misinterpreted the turning factor in the decisions of dog sniff cases by the Supreme Court of the United States.¹³⁴ “Neither of the Supreme Court’s dog sniff cases turns on the location of the sniff. Both cases are based on the unique nature of the canine nose.”¹³⁵ While the Supreme Court of the United States did state the place in its ruling, such as luggage or a car, the main reasoning for the Supreme Court of the United States in these prior decisions of dog sniff was the fact that a sniff only discloses the presence of contraband.¹³⁶ “If the possession of narcotics in an automobile or a suitcase is illegitimate, so too is the possession of narcotics in a home.”¹³⁷ Moving beyond the dog sniff cases considered by the Supreme Court of the United States, the dissent also brought up *Jacobsen*.¹³⁸ In that case, the Court defined a search as occurring “when an expectation of privacy that society is prepared to consider reasonable is infringed.”¹³⁹ “A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.”¹⁴⁰ Lastly, the dissent wanted to draw attention to the lack of critical analysis the majority gave to the *Caballes* decision.¹⁴¹ The Supreme Court of the United States distinguished *Caballes* from *Kyllo* by focusing on the fact that the thermal-imaging device could detect lawful activity.¹⁴² As stated before by the Court in the federal dog sniff cases, a drug detection dog does not detect lawful activity—it only detects the unlawful possession of contraband.¹⁴³

132. *Id.* at 1203 (Gross, J., dissenting).

133. *Id.* at 1193.

134. *Id.* at 1197.

135. *Rabb II*, 920 So. 2d at 1193.

136. *See id.*

137. *Fitzgerald v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003).

138. *Rabb II*, 920 So. 2d at 1197 (Gross, J., dissenting) (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

139. *Jacobsen*, 466 U.S. at 113.

140. *Id.* at 123.

141. *Rabb II*, 920 So. 2d at 1199 (Gross, J., dissenting).

142. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (citing *Kyllo v. United States*, 533 U.S. 27, 35–36 (2001)).

143. *United States v. Place*, 462 U.S. 696, 707 (1983).

C. *Post-Rabb Decision*

The different outcome in *Rabb II* incited another certified question to be sent to the Supreme Court of Florida.¹⁴⁴ The First District Court of Appeal of Florida certified a conflict with *Rabb II* in *Stabler v. State*.¹⁴⁵ In *Stabler*, officers initiated a surveillance based on a tip and followed the suspect as he was leaving his home.¹⁴⁶ Upon stopping the suspect in his car, the officers performed a dog sniff around the exterior of the car, whereupon a bottle of liquid codeine was found.¹⁴⁷ At the same time, officers at the suspect's girlfriend's home had a detection dog sniff the outside of the home from the front door of the apartment.¹⁴⁸ The dog alerted positively to the presence of narcotics in the private residence.¹⁴⁹ Based on these two happenings, the officers obtained a probable cause search warrant and physically searched the home.¹⁵⁰ The deference given to the dog sniff cases decided upon by the Supreme Court of the United States and by the court in *Stabler* was much greater than that of the court in *Rabb II*.¹⁵¹ The court stated, “[c]onsidering that *Caballes* and *Place* represent the only two cases in which the Court has endeavored to address the dog sniff issue, the reasoning espoused therein is controlling and must guide this Court’s ruling in th[is] instant case.”¹⁵² Also, the court did not believe *Kyllo* was a controlling factor.¹⁵³ “Critical to that decision was the fact that the device was [also] capable of detecting lawful activity”¹⁵⁴

These cases represent an established pattern in the appellate courts of Florida.¹⁵⁵ These cases represent two sides that interpreted very binding and valid precedent established by the Supreme Court of the United States.¹⁵⁶

144. See *Stabler v. State*, 990 So. 2d 1258, 1263 (Fla. 1st Dist. Ct. App. 2008).

145. 990 So. 2d 1258, 1263 (Fla. 1st Dist. Ct. App. 2008) (citing *Rabb II*, 920 So. 2d at 1192).

146. *Id.* at 1258–59.

147. *Id.* at 1259.

148. *Id.*

149. *Id.*

150. *Stabler*, 990 So. 2d at 1259.

151. Compare *id.* at 1261 with *Rabb II*, 920 So. 2d 1175, 1184 (Fla. 4th Dist. Ct. App. 2006).

152. *Stabler*, 990 So. 2d at 1260.

153. See *id.* at 1261–62.

154. *Id.* at 1261 (quoting *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)) (alteration in original).

155. See *id.*; *Griffin I*, 949 So. 2d 309, 315 (Fla. 1st Dist. Ct. App. 2007); *Rabb II*, 920 So. 2d at 1192.

156. See *Griffin I*, 949 So. 2d at 315; *Rabb II*, 920 So. 2d at 1192.

Eventually, these views would come head to head and a winner would be chosen—at least a winner in the State of Florida.¹⁵⁷

IV. THE SUPREME COURT OF FLORIDA AND *JARDINES*

Finally, the Supreme Court of Florida accepted a certified conflict.¹⁵⁸ This time it was between *Rabb II* and *State v. Jardines (Jardines I)*.¹⁵⁹

A. *The District Court Decision*

In *Jardines I*, a crime stoppers tip led two police officers to approach the defendant's door.¹⁶⁰ When the officers stood at the door, they noticed the air conditioner was continuously running.¹⁶¹ A drug detection dog, which was “positively alerted to the odor of narcotics approximately 399 times” in his career, was alerted to the presence of narcotics from the front door.¹⁶² In his defense, the defendant relied on *Rabb II*.¹⁶³

The Third District Court of Appeal of Florida held that “a canine sniff is not a Fourth Amendment search.”¹⁶⁴ The court relied on *Caballes* and *Place* to come to this usual conclusion.¹⁶⁵ Furthermore, the court utilized the reasoning from *Jacobsen*.¹⁶⁶ Because a dog only detects contraband and because there is no “‘legitimate’ privacy interest in contraband,” a canine sniff is not a Fourth Amendment search.¹⁶⁷ Because *Kyllo* is the case most cited by courts that find a dog sniff of a private residence is a search, the district court needed to explain why it found it to not apply to the dog sniff of a home.¹⁶⁸ The court first began by stating that a dog is not technology—it has no modifications.¹⁶⁹ That is why the Supreme Court of the United States described dogs as *sui generis*.¹⁷⁰ As contrasted to the thermal imager in *Kyl-*

157. See *Jardines III*, 36 Fla. L. Weekly S147, S147 (Apr. 14, 2011).

158. *Jardines v. State (Jardines II)*, 3 So. 3d 1246, 1246 (Fla. 2009), *quashed by* 36 Fla. L. Weekly S147 (Apr. 14, 2011).

159. 9 So. 3d 1 (Fla. 3d Dist. Ct. App. 2008), *review granted*, 3 So. 3d 1246 (Fla. 2009), *and quashed by* 36 Fla. L. Weekly S147 (Apr. 14, 2011).

160. *Id.* at 3.

161. *Id.*

162. *Id.*

163. *Id.* at 4.

164. *Jardines I*, 9 So. 3d at 4.

165. *Id.*

166. *Id.*

167. *Id.* (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

168. See *id.* at 5.

169. *Jardines I*, 9 So. 3d at 5.

170. *Id.*

lo, a dog sniff “does not indiscriminately detect legal activity.”¹⁷¹ “Just as evidence in the plain view of officers may be searched without a warrant,¹⁷² evidence in the plain smell may be detected without a warrant.”¹⁷³ Furthermore, in order to use this plain smell doctrine, the officer and the dog must be there lawfully.¹⁷⁴ The court addressed this by citing, “one does not harbor an expectation of privacy on a front porch where salesmen or visitor may appear at any time.”¹⁷⁵

Judge Cope wrote an opinion that concurred in part and dissented in part.¹⁷⁶ He gave a different take on the dog sniff of a private residence that not many have considered in the discussion.¹⁷⁷ He believed the court should hold that a dog sniff can be performed “if there is a reasonable suspicion of drug activity.”¹⁷⁸ Most courts that hold that a dog sniff of a private residence is a search require probable cause.¹⁷⁹ Judge Cope dictated three schools of thought on the issue of a dog sniff of a home.¹⁸⁰ The first school of thought holds in accord with the general idea given by the Supreme Court of the United States: a dog sniff of a private residence is not a search.¹⁸¹ Logically, a search warrant is not required.¹⁸² The second school of thought is the evident counterpart of the first—the government must have a probable cause warrant in order to perform a dog sniff from the outside of a private residence.¹⁸³ The last category is somewhere in the middle.¹⁸⁴ Rather than probable cause, an officer only needs reasonable, articulable suspicion in order to perform the dog sniff of a private residence from the front door step.¹⁸⁵ This idea centers on the idea that “a free society will not remain free if police may use this, or any other crime detection device, at random and without reason.”¹⁸⁶ This is the position that Judge Cope advocated.¹⁸⁷ He finished by

171. *Id.*

172. *Id.* at 6 (citing *Harris v. United States*, 390 U.S. 234, 236 (1968) (per curiam)).

173. *Id.* (citing *United States v. Harvey*, 961 F.2d 1361, 1363 (8th Cir. 1992) (per curiam)).

174. *Jardines I*, 9 So. 3d at 6 (quoting *People v. Jones*, 755 N.W.2d 224, 228 (Mich. Ct. App. 2008)).

175. *Id.* at 7 (quoting *State v. Morsman*, 394 So. 2d 408, 409 (Fla. 1981)).

176. *Id.* at 10 (Cope, J., concurring in part and dissenting in part).

177. *See id.* at 12.

178. *Id.* at 10.

179. *Jardines I*, 9 So. 3d at 12 (Cope, J., concurring in part and dissenting in part).

180. *Id.* at 12–13.

181. *Id.* at 12.

182. *Id.*

183. *Id.*

184. *Jardines I*, 9 So. 3d at 12–13.

185. *Id.* at 13.

186. *Id.*

adding, “[w]hile the denial of certiorari by the United States Supreme Court has no precedential effect, it certainly indicates that the Court has decided to leave this dog sniff question open for decision another day.”¹⁸⁸

B. *The Supreme Court Decision*

This decision was expressly overruled by the Supreme Court of Florida.¹⁸⁹ The court addressed two issues when deciding *Jardines III*.¹⁹⁰ First, “whether a ‘sniff test’ by a drug detection dog conducted at the front door of a private residence is a ‘search’ under the Fourth Amendment.”¹⁹¹ Second, “whether the evidentiary showing of wrongdoing that the government must make prior to conducting such a search is probable cause or reasonable suspicion.”¹⁹² The court answered the first question with a resounding yes.¹⁹³

Given the special status accorded a citizen’s home under the Fourth Amendment, we conclude that a “sniff test”, such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a “search” within the meaning of the Fourth Amendment.¹⁹⁴

The court focused its discussion on the home and the privacy it should be afforded.¹⁹⁵ “[W]herever an individual may harbor a reasonable ‘expectation of privacy,’ he is entitled to be free from unreasonable government intrusion.”¹⁹⁶ After analyzing the federal drug sniff cases—*Place*, *City of Indianapolis v. Edmond*,¹⁹⁷ and *Caballes*—the court concluded those instances were less intrusive than the case at hand.¹⁹⁸ The sniffs in the previous cases involved luggage or a car, whereas a home was more special to this court.¹⁹⁹ More importantly to the court, the majority opinion believed the case at hand created more of a public spectacle and caused more harassment and embar-

187. *Id.* at 10.

188. *Id.* at 14 (Cope, J., concurring in part and dissenting in part).

189. *Jardines III*, 36 Fla. L. Weekly S147, S147 (Apr. 14, 2011).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at S154.

194. *Jardines III*, 36 Fla. L. Weekly at S152.

195. *See id.* at S150.

196. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)).

197. 531 U.S. 32 (2000).

198. *Jardines III*, 36 Fla. L. Weekly at S150.

199. *Id.*

rassment to the suspect than the previous federal cases.²⁰⁰ The court believed the situation was a much larger affair than a “subtle” sniff test.²⁰¹ The court listed the players involved to fabricate the drama: multiple police vehicles, multiple law enforcement personnel, a dog handler, and a trained detection dog “engaged in a vigorous search effort on the front porch,” all viewed by the general public.²⁰² The court further commented on the whole scene by adding that if the resident were home, the sniff could be a “frightening and harrowing experience that could prompt a reflexive or unpredictable response.”²⁰³ Above all, the court did not believe that the prior decisions by the Supreme Court of the United States that involved dog sniffs applied to a sniff at a home.²⁰⁴

What the Supreme Court of Florida was most worried about was police abuse of a dog sniff.²⁰⁵ The court felt that if the sniff was not treated as a search then there would be “nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen.”²⁰⁶ Therefore, the court believed that a warrant should be required to perform a dog sniff of a private residence from the front door.²⁰⁷ ““With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”²⁰⁸ Furthermore, anything short of a probable cause warrant would not suffice for the highest court of Florida.²⁰⁹ As opposed to Justice Cope’s opinion in the lower court’s decision,²¹⁰ the majority did not think reasonable suspicion is enough.²¹¹ The court pointed to the Warrant Clause of the Fourth Amendment and said a balancing of interests—governmental and private—for reasonable suspicion is only used when there are needs that go

200. *Id.* at S152.

201. *See id.* at S150–51.

202. *Id.* at S151–52.

203. *Jardines III*, 36 Fla. L. Weekly at S152.

204. *Id.* at S150.

205. *See id.* at S152.

206. *Id.*

207. *Id.* at S153. Lunney thinks this is the right choice and further combats naysayers by pointing out that it does not conflict with the idea that having probable cause would defeat the purpose of the dog sniff and lead straight to a search of the home. Lunney, *supra* note 41, at 891. Rather, the probable cause is for the dog sniff, not the physical search inside the private residence. *See id.*

208. *Jardines III*, 36 Fla. L. Weekly at S152 (quoting *Kyllo v. United States*, 533 U.S. 27, 31 (2001)).

209. *See id.* at S153.

210. *Jardines I*, 9 So. 3d 1, 10 (Fla. 3d Dist. Ct. App. 2008), *review granted*, 3 So. 3d 1246 (Fla. 2009), and *quashed* by 36 Fla. L. Weekly S147 (Apr. 14, 2011).

211. *Jardines III*, 36 Fla. L. Weekly at S153.

beyond the typical law enforcement.²¹² By citing to the Warrant Clause of the Fourth Amendment, the court is saying this is a search and nothing less.²¹³

The concurring opinion written by Justice Lewis takes the majority opinion one step further.²¹⁴ He believed the court did not focus on the home enough.²¹⁵ He continued by poking fun at the idea that the police officers could use a continuously running air conditioner as a factor for reasonable suspicion by stating that most persons in South Florida run their air continuously.²¹⁶ Furthermore, he analogized the aromas a dog could potentially sniff with the intimate details the thermal imaging device in *Kyllo* could detect.²¹⁷ There is the aroma of cooking, a scent from an air freshener, and even more unpleasant smells originating inside a home.²¹⁸ “[I]t is inescapable that the air and the content of the air within the private home is inextricably interwoven as part of the protected zone of privacy to which the expectation of privacy attaches.”²¹⁹ While the majority opinion did not focus on the intimate details of the home, Justice Lewis thought this should have been emphasized more.²²⁰

As the courts before that relied on the dog sniff cases by the Supreme Court of the United States, so too did the dissenting opinion in this groundbreaking case from the Supreme Court of Florida.²²¹ “[D]espite statements about privacy interests in items and odors within and escaping from a home, the United States Supreme Court has ruled that there are no legitimate privacy interests in contraband under the Fourth Amendment.”²²² In his dissenting opinion, Justice Polston lays out two reasons why his view is correct, and these two reasons are rules set out by the Supreme Court of the United States.²²³ First, a search does not occur “unless ‘the [person] manifested a subjective expectation of privacy.’”²²⁴ Second, and lastly, the Supreme Court of the United States has held that, “because [a dog sniff] only

212. *Id.*

213. *See id.* at S152.

214. *Id.* at S154 (Lewis, J., specially concurring).

215. *Id.* at S155.

216. *Jardines III*, 36 Fla. L. Weekly at S155.

217. *See id.*

218. *Id.*

219. *Id.*

220. *See id.*

221. *Jardines III*, 36 Fla. L. Weekly at S157 (Polston, J., dissenting).

222. *Id.* at S157.

223. *Id.* at S158.

224. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 33 (2001)).

reveals contraband, . . . there is no legitimate privacy interest” that can be infringed upon.²²⁵

Justice Polston addresses the issue of a dog sniff detecting legitimate interests or even alerting a false positive by saying, “as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.”²²⁶ Along this line, Justice Polston distinguished *Kyllo* from the situation at hand.²²⁷ The Supreme Court of the United States held in *Kyllo* that the thermal imager was a search under the Fourth Amendment, because it detected lawful activity that does have a legitimate privacy interest.²²⁸ Furthermore, even though *Kyllo* is the case relied upon by courts finding a dog sniff is a search, this dissenting opinion reasons that the dog sniff of a private residence does not matter.²²⁹ Neither *Jacobsen*, *Place*, nor *Caballes* center on what was being searched, such as the luggage or the car.²³⁰ The cases center on the capability of the dog to detect only a contraband item in which a person has no legitimate interest.²³¹ Moreover, the Supreme Court of the United States specifically distinguished *Kyllo* in *Caballes* as a case that involved a home, so that the dog sniff would not be applied to that as Justice Stevens worried in *Kyllo*.²³² It is precisely these two different views of decisions by the Supreme Court of the United States that lead to varying outcomes which may not be in accord with what the Supreme Court of the United States would choose.²³³

V. ISSUES ARISING FROM *JARDINES*

According to article I, section 12 of the Florida Constitution, the Supreme Court of Florida is allowed to grant higher protection in the absence of a precedent established by the Supreme Court of the United States that is

225. *Id.*

226. *Jardines III*, 36 Fla. L. Weekly at S158 (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

227. *Id.* at S159.

228. *Kyllo*, 533 U.S. at 40.

229. *See Jardines III*, 36 Fla. L. Weekly at S159 (Polston, J., dissenting).

230. *See id.* at S157. Justice Polston also addresses the humiliation issue that the majority felt was a major part of its decision. *Id.* at S159. “*Place*, *Edmond*, and *Caballes* all involved law enforcement activity by multiple officers.” *Id.*

231. *Id.*

232. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005); *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting).

233. *Jardines III*, 36 Fla. L. Weekly at S154, S159 (Polston, J., dissenting).

directly on point to the contrary.²³⁴ Some states have extended protection to citizens in their homes beyond that of the Fourth Amendment because these states' constitutions allow them to do that.²³⁵

The *Rabb* court could not avoid the issue as other courts had by declaring that the state constitution provided greater protection than the United States Constitution. Article I, section 12 of the Florida Constitution, which provides Florida citizens the right to be free from unreasonable searches and seizures, also states section 12 "shall be construed in conformity with the 4th Amendment of the United States Constitution, as interpreted by the United States Supreme Court." . . . The *Rabb* court focused its analysis on distinguishing *Caballes* from *Kyllo* and explaining why *Kyllo* was more applicable to the case at bar.²³⁶

Therefore, the Supreme Court of Florida can only ignore precedent established by the Supreme Court of the United States when the precedent is contrary to the case at hand.²³⁷ The Supreme Court of Florida, in *Jardines III*, tried to do just that—first, by stating that neither *Caballes* nor *Place* involved dog sniffs of a home, and second, by stating that *Kyllo*'s use of a thermal imager is more on point because it involved a home.²³⁸

A. *Kyllo Should Not be Applied to the "Dog Sniff" Cases*

Kyllo is not the proper case to be used for comparison to the dog sniff of a home.²³⁹ The use of the thermal imager in *Kyllo* was a search under the Fourth Amendment because the device revealed intimate details of a home other than the illegitimate interest from the heat produced by the growing lamps.²⁴⁰ While the concurring opinion in *Jardines III* tried to take the fact

234. FLA. CONST. art. I, § 12.

235. MacDonnell, *supra* note 21, at 336. For example, Indiana's constitution has the same written language as the Fourth Amendment, but an appeals court of Indiana has interpreted its constitution as allowing greater protection. *Id.* The court states the highest court of Indiana "explicitly rejected the expectation of privacy as a test of the reasonableness of a search or seizure." *Id.* (quoting *Litchfield v. State*, 824 N.E.2d 356, 359 (Ind. 2005)). In this case, the greater protection is treating a dog sniff of a private residence from the front porch of the home as a search under the Fourth Amendment. *Id.*

236. *Id.* at 341–42 (quoting FLA. CONST. art I, § 12).

237. MacDonnell, *supra* note 21, at 341.

238. *Jardines III*, 36 Fla. L. Weekly at S150.

239. *Id.* at S159 (Polston, J., dissenting).

240. *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (citing *Kyllo v. United States* 533 U.S. 27, 38 (2001)).

that a dog can smell the presence of other items in a home, such as air fresheners or cooking, Justice Lewis failed to remember one thing: this is a dog.²⁴¹ The heat that was intimate in the home in *Kyllo* was revealed to a person.²⁴² A person had to evaluate the heat scan to determine if there was extra heat radiating from the home.²⁴³ The person who must read the scan is invading a privacy interest, whereas when a dog is detecting the intimate smells of a home, it is not telling a human: They are baking an apple pie in there.²⁴⁴

The rule established by the *Kyllo* court should be considered when deciding if *Kyllo* should be applied to a dog sniff performed at a private residence.²⁴⁵ “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”²⁴⁶ This standard raises multiple issues.²⁴⁷ First, is a dog technology?²⁴⁸ Second, would a dog sniff be considered a physical intrusion?²⁴⁹ Third, is a narcotics detection dog considered in “general public use”?²⁵⁰ The first and last questions can be considered similarly.²⁵¹ Dogs have been used throughout history for hundreds of years.²⁵² However, Leslie Lunney cites to the White House’s Office of National Drug Control Policy, which lists detection dogs as “Non-Intrusive Technology.”²⁵³ While this may seem to create conflict, the focus then should be on the non-intrusive part of the title, which leads to the second question.²⁵⁴ The *Jardines III* court relied on this language in *Kyllo* to relate

241. *Jardines III*, 36 Fla. L. Weekly at S155 (Lewis, J., specially concurring).

242. *See Kyllo*, 533 U.S. at 29–30.

243. *See id.* at 30. The federal agent was the person to conclude that *Kyllo* was using heat to grow marijuana in his home. *Id.*

244. *Id.*; *see United States v. Place*, 462 U.S. 696, 707 (1983) (stating a dog only detects the presence of contraband).

245. Lunney, *supra* note 41, at 898–900.

246. *Kyllo*, 533 U.S. at 40.

247. Lunney, *supra* note 41, at 893, 898–900.

248. *Id.* at 893.

249. *Id.* at 898.

250. *Id.*

251. *See id.* at 897.

252. *See Debruler v. Commonwealth*, 231 S.W.3d 752, 758 (Ky. 2007).

253. Lunney, *supra* note 41, at 893 (citing THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY: COUNTERDRUG RESEARCH AND DEVELOPMENT BLUEPRINT UPDATE, at C-1 (2002), available at <https://www.hsdl.org/?view&did=3431>).

254. *Id.* (stating this would create a problem for an attorney general who is arguing the dog is not technology when the White House labels it as such).

the dog sniff of the private residence to the use of the thermal imager.²⁵⁵ The Supreme Court of Florida stated that the information gathered by the dog sniff could not have otherwise been obtained without physical intrusion.²⁵⁶ On the other hand, the *Place* court called the act of a dog sniff less intrusive than a physical search because a dog sniff does not require the opening of a car door.²⁵⁷ Just the same, neither would the dog sniff of a home require the opening of a door.²⁵⁸

B. *Caballes* as the Controlling Precedent for “Dog Sniff” Cases

Furthermore, *Caballes* addressed the issue of a false positive, which would reveal to humans a privacy interest that should have been protected.²⁵⁹ The Supreme Court of the United States pointed out that when done right, a dog sniff should not jeopardize any privacy interests in a home.²⁶⁰ This seems to say the Court recognized that there is a potential, but that it is too remote.²⁶¹ In the same opinion, Justice Stevens responded to the false positive argument raised by the respondent by stating that a false positive does not, in and of itself, reveal any legitimate privacy interest.²⁶² While some may read this as completely discarding the issue of a false positive,²⁶³ this is probably not what Justice Stevens was hinting at.²⁶⁴ Justice Stevens was not saying a false positive does not reveal any legitimate interests because clearly, it would.²⁶⁵ What Justice Stevens was probably implicating is the fact that the physical intrusion will actually be the cause of invasion of a legitimate interest, rather than the dog sniff.²⁶⁶

Some have criticized the *Caballes* court for going “beyond what was strictly necessary” by explaining “why the *Caballes* decision was ‘entirely consistent with’ *Kyllo*.”²⁶⁷ MacDonnell believes that the majority in *Caballes* changed the meaning of *Kyllo* from the home being protected to what

255. *Jardines III*, 36 Fla. L. Weekly S147, S149 (Apr. 14, 2011) (citing *Kyllo v. United States*, 533 U.S. 27, 29 (2001)).

256. *Id.* at S150.

257. *See United States v. Place*, 462 U.S. 696, 707 (1983).

258. *See Jardines III*, 36 Fla. L. Weekly at S151.

259. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

260. *Id.*

261. *See id.*; *United States v. Jacobsen*, 466 U.S. 109, 124 (1984).

262. *Caballes*, 543 U.S. at 409.

263. *See Lunney, supra* note 41, at 871 (calling this an “artificial conclusion”).

264. *See Caballes*, 543 U.S. at 409.

265. *See id.*

266. *See id.*

267. MacDonnell, *supra* note 21, at 316 (citing *Caballes*, 543 U.S. at 409).

is being protected—or not, in the dog sniff case.²⁶⁸ However, the distinction between *Caballes* and *Kyllo* could be seen as directly in accord with other previous decisions by the Supreme Court of the United States.²⁶⁹ In *California v. Ciraolo*,²⁷⁰ the Court stated, “[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”²⁷¹ Just as an officer need not close his eyes when he is approaching a home, he need not block his other senses, such as smell.²⁷² While some believe that a narcotics dog should not be equated to an officer, dogs have been used in law enforcement since the constitution was created.²⁷³

Furthermore, the protection of the Fourth Amendment allows “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”²⁷⁴ Similarly, the rule from Justice Harlan’s concurring opinion in *Katz* asks whether the person has a reasonable subjective expectation of privacy.²⁷⁵ Both of these statements from the Supreme Court of the United States involve a reasonable expectation.²⁷⁶ The Court has held that there is no reasonable expectation of privacy in contraband.²⁷⁷ Therefore, a person should have no expectation of privacy in respect to contraband, even if that item is located within a private residence.²⁷⁸ Protectors of the home worry that allowing a dog sniff of a home will allow officers to begin arbitrarily sniffing anytime at any home.²⁷⁹ However, while Anglo-American law may afford the home more protection, it does not afford that protection to contraband.²⁸⁰

The Supreme Court of the United States even remanded a case back to the Supreme Court of Florida in light of its decision in *Caballes*.²⁸¹ The Supreme Court of the United States reviewed a decision by an appellate court

268. *Id.* at 317.

269. *Caballes*, 543 U.S. at 409–10.

270. 476 U.S. 207 (1986).

271. *Id.* at 213, 215 (holding that aerial surveillance is not a search).

272. *Kyllo v. United States*, 533 U.S. 27, 45 (2001) (quoting *California v. Greenwood*, 486 U.S. 35, 41(1988)).

273. *See Debruler v. Commonwealth*, 231 S.W.3d 752, 757 (Ky. 2007).

274. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

275. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520.

276. *Id.*; *see also Silverman*, 365 U.S. at 511.

277. *See United States v. Place*, 462 U.S. 696, 707 (1983).

278. *Fitzgerald v. State*, 837 A.2d 989, 1031 (Md. Ct. Spec. App. 2003).

279. *Jardines III*, 36 Fla. L. Weekly S147, S147 (Apr. 14, 2011).

280. *Id.*; *Place*, 462 U.S. at 707.

281. *Rabb I*, 544 U.S. 1028, 1028 (2005), *substituted by* 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006).

of Florida on the issue of a dog sniff of a private residence and remanded it back to the appeals court in order for the Florida court to reevaluate the decision.²⁸² If the Supreme Court of the United States felt like it was the right decision, it probably would not have remanded the case back to be reevaluated. The *Rabb II* court distinguished the two cases by stating that *Rabb I* did not involve a dog sniff of a car.²⁸³ By stating this, it seems to imply that the Supreme Court of the United States did not read the issue before it.²⁸⁴ *Kyllo* was before *Caballes*; if the Supreme Court of the United States wanted *Kyllo* to apply to *Caballes*, the Court would have explained that.²⁸⁵ After quickly dismissing *Caballes*, the *Rabb II* court then relied on another circuit's opinion,²⁸⁶ a case by the Supreme Court of the United States, not involving a dog sniff,²⁸⁷ and a dissenting opinion from *Caballes*,²⁸⁸ instead of the majority opinion that the Supreme Court of the United States was intending the Florida court to reconsider.²⁸⁹

VI. CONCLUSION

The Supreme Court of Florida has held that a dog sniff performed on a private residence from the front step is a search under the Fourth Amendment of the Florida Constitution.²⁹⁰ According to the Florida Constitution, the highest court of Florida is allowed to make decisions in the absence of precedent to the contrary by the Supreme Court of the United States.²⁹¹ Feeling that none of the federal "dog sniff" cases pertained directly to a private residence, the Supreme Court of Florida made an unprecedented decision in the theater of the Fourth Amendment.²⁹²

However, by focusing so strongly on the importance of the privacy of a home, the Supreme Court of Florida, overlooked—and noticeably ignored—

282. *Id.*

283. *Rabb II*, 920 So. 2d 1175, 1189 (Fla. 4th Dist. Ct. App. 2006).

284. *See id.*; *Rabb I*, 544 U.S. at 1028.

285. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

286. *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985). The second circuit is the only federal circuit to decide that a dog sniff of a home from the outside is a search under the Fourth Amendment. Lunney, *supra* note 41, at 887–88. The seventh circuit criticized *Thomas* by pointing out that even if *Thomas* had a subjective expectation of privacy, society is not ready to consider that expectation to be reasonable in contraband. *United States v. Brock*, 417 F.3d 692, 697 (7th Cir. 2005), *cert. denied*, 130 S. Ct. 762 (2009).

287. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

288. *Caballes*, 543 U.S. at 411 (Souter, J., dissenting).

289. *Rabb I*, 544 U.S. at 1028.

290. *Jardines III*, 36 Fla. L. Weekly S147, S154 (Apr. 14, 2011).

291. *See* FLA. CONST. art I, § 12.

292. *See Jardines III*, 36 Fla. L. Weekly at S152.

the holdings of the Supreme Court of the United States that a person has no legitimate privacy interest in contraband.²⁹³ Still, as long as there is no binding decision by the highest court of this nation on a case involving a dog sniff of a private residence, the Supreme Court of Florida's decision will stand in its jurisdiction.²⁹⁴

293. *Id.*; *United States v. Place*, 462 U.S. 696, 707 (1983).

294. *See* FLA. CONST. art I, § 12.

THE EFFECTS THE BANK SECRECY ACT HAS HAD ON THE SOUTH FLORIDA BANKING INDUSTRY AND ECONOMY, AND HOW THE NEWLY PROPOSED IRS REGULATION WOULD COMPOUND THOSE EFFECTS

ASHLEY L. FERNALD*

I.	INTRODUCTION.....	227
II.	THE BANK SECRECY ACT.....	228
	A. <i>The History of the Bank Secrecy Act</i>	229
	B. <i>Effects of BSA on South Florida Banking Industry & Economy</i>	236
III.	THE PROPOSED IRS REGULATION REGARDING REPORTING OF INTEREST EARNED BY NONRESIDENT ALIENS	239
	A. <i>Evolution of Proposed IRS Regulations Regarding Reporting of Interest Earned by Nonresident Aliens</i>	240
	1. The 2001 Proposition.....	240
	2. The 2002 Proposition.....	240
	3. The 2011 Proposition.....	242
	B. <i>Effects of the 2011 Proposed IRS Regulation on South Florida Banking Industry & Economy</i>	243
IV.	CONCLUSION	249

I. INTRODUCTION

The current trying economic times have put added stress on the lives of many Americans. This was not an overnight change; it was a change that happened over years that adjusted the economic condition. The banking industry is one sector that has direct and indirect effects on the economy as a whole.¹ In fact, part of the banking system and its actions has even been

* The author is a J.D. Candidate, May 2013, Nova Southeastern University, Shepard Broad Law Center. Ashley received her Bachelor of Arts from Florida International University with a major in International Relations and a minor in Criminal Justice and Geography. The author wishes to thank Mr. Raul Garcia, Mr. Alex Sanchez, and Mr. Jorge Triay for their assistance in the development of this article. In addition, she would like to thank the faculty of the Law Center and the members of *Nova Law Review*. Most importantly, Ashley would like to thank her family and friends for the love and encouragement during the development of the article, and always.

1. See John J. Byrne, *The Bank Secrecy Act: Do Reporting Requirements Really Assist the Government?*, 44 ALA. L. REV. 801, 803 (1993).

blamed for the economic hardship.² However, if blame is going to be doled out, another thing to blame is the Bank Secrecy Act (BSA), along with other bank regulations that impair banks' lending capabilities and hurt the communities which they are a part of.³ The BSA was enacted with good intentions; however, it has evolved over its forty years of existence and has grown to have a negative impact on the economic system.⁴

The Internal Revenue Service (IRS) has recently proposed a regulation that would compound the effects that the BSA has had on the banking industry and the economy.⁵ This would have particularly detrimental effects on the South Florida banking industry and economy.⁶ The main focus of this article is to assess the effects that the BSA has had on the South Florida banking system and economy, and how the proposed IRS regulation could compound those effects and worsen our economic position. The second section of this article discusses the BSA. It discusses the history of the BSA and the effects that it has had on the South Florida banking industry and the economy. The third section of this article discusses the proposed IRS regulation. It discusses the past versions of similar propositions by the IRS. Then it goes on to discuss how the most recent proposed regulation could impact the South Florida banking sector and the economy. Lastly, this article discusses how the BSA could be changed to help the economy and some proposed solutions of how the goals of the proposed IRS regulation could be achieved without this particular proposed regulation.

II. THE BANK SECRECY ACT

The Bank Records and Foreign Transactions Act was signed into law on October 26, 1970.⁷ "The . . . Bank Secrecy Act imposes reporting, record keeping, and anti-money laundering requirements on financial institutions . . ."⁸ For many decades, some form of the BSA has existed.⁹ However, the

2. See Jennifer Mattern, *Who's to Blame for the Recession?*, DIRECTORY JOURNAL (July 24, 2009), <http://www.dirjournal.com/business-journal/whos-to-blame-for-the-recession/>.

3. See Byrne, *supra* note 1, at 802.

4. See *id.* at 801-02.

5. Remy Farag, *Proposed Regs. Expand Bank Deposit Interest Reporting for NRAs*, J. INT'L TAX'N, Mar. 2011, at 9, 9.

6. Brian Bandell, *Foreign Deposits May Be Scrutinized*, S. FLA. BUS. J. (Feb. 11, 2011, 6:00 AM), <http://www.bizjournals.com/southflorida/print-edition/2011/02/11/foreign-deposits-may-be-scrutinized.html>.

7. Byrne, *supra* note 1, at 801.

8. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 92:22.50, at 182 (3d ed. 2009).

9. Interview with Raul Garcia, Chairman of the Exec. Comm., First Bank of Miami, in Miami, Fla. (July 21, 2011). Mr. Raul Garcia is currently the Chairman of the Executive

BSA, as it is today, is a direct result of the terrorist attacks of September 11, 2001.¹⁰ While these measures came from good intentions, they have had inadvertent negative effects on the international economic system.¹¹

A. *The History of the Bank Secrecy Act*

In 1970, the Bank Records and Foreign Transactions Act was enacted into law.¹² The second part—or Title II—of the Bank Records and Foreign Transactions Act is the part that has become known as the Bank Secrecy Act.¹³ The original purpose of this law was to have financial institutions keep records that could be useful in criminal or tax investigations or proceedings.¹⁴ The BSA attempted to accomplish this goal by mandating that financial institutions create a paper trail of financial records.¹⁵ The BSA requires financial institutions to file a Currency Transaction Report (CTR) for every transaction—including a “deposit, [a] withdrawal, [an] exchange of currency, or other payment or transfer”—made through the financial institution involving more than \$10,000.¹⁶ The CTR must include the following information:

- 1) the legal capacity in which the person filing the report is acting;
- 2) the origin, destination, and route of the monetary instruments;
- 3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person

Committee of First Bank of Miami. *Id.* In addition, he is the President and Chief Executive Officer of First Bank of Miami Shares, Inc., which is the only shareholder of First Bank of Miami. *Id.* Before becoming an integral part of First Bank of Miami, Mr. Garcia was the Executive Vice President of SG Private Banking for twenty-five years and head of its Latin American division. *Id.* Prior to SG, Mr. Garcia was a branch administrator at Intercontinental Bank. *Id.* In total, Mr. Garcia has forty-one years of experience in the banking industry, most of which were spent in Miami, Florida. Interview with Raul Garcia, *supra* note 9.

10. *Id.*

11. Int'l Trade & Bus. Dev., *Impact of Homeland Security Measures on International Business in the State of Florida*, ENTER. FLA., INC. 2 (Mar. 2005), available at http://www.feir.org/images/Impact_of_Homeland_Security_Measures_on_Florida.pdf.

12. Byrne, *supra* note 1, at 801; MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE 7A-100 to 7A-101* (Rev. 2d ed. 2004).

13. SALTZMAN, *supra* note 12, at 7A-101.

14. Byrne, *supra* note 1, at 801.

15. Elizabeth A. Cheney, Special Project Note, *Leaving No Loopholes for Terrorist Financing: The Implementation of the USA Patriot Act in the Real Estate Field*, 58 VAND. L. REV. 1705, 1711 (2005).

16. Michael J. Parrish, Comment, *The Burden of Currency Transaction Reporting on Deposit Institutions and the Need for Regulatory Relief*, 43 WAKE FOREST L. REV. 559, 561 (2008); SALTZMAN, *supra* note 12, at 7A-101 to 7A-102; Cheney, *supra* note 15, at 1711; 31 U.S.C. § 5331(a) (2006).

transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both; [and] 4) the amount and kind of monetary instruments transported.¹⁷

The CTR is filed with the Treasury Department Financial Crimes Enforcement Network (FinCEN) and sometimes with the IRS.¹⁸ Additionally, financial institutions must aggregate multiple transactions to determine if the \$10,000 threshold is met.¹⁹

The Money Laundering Suppression Act of 1994 established both mandatory and discretionary exceptions to CTR filing requirements.²⁰ The statute stipulates that:

The Secretary of the Treasury shall exempt, pursuant to section 5318(a)(6), a depository institution from the reporting requirements of subsection (a) with respect to transactions between the depository institution and the following categories of entities: A) Another depository institution; B) A department or agency of the United States, any State, or any political subdivision of any State; C) Any entity established under the laws of the United States, any State, or any political subdivision of any State, or under an interstate compact between [two] or more States, which exercises governmental authority on behalf of the United States or any such State or political subdivision; D) Any business or category of business the reports on which have little or no value for law enforcement purposes.²¹

Furthermore, a bank is entitled to exempt business customers who have had a transaction account at the bank for more than one year and who regularly make transactions over \$10,000.²² However, in order for a bank to exempt a business customer from CTR filings, the bank must go through an extensive process.²³ Once a customer becomes eligible for exemption, the bank must file a form with the Department of the Treasury.²⁴ Then, the bank

17. 31 U.S.C. § 5316(b)(1)–(4).

18. Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States Patriot Act?*, 11 MICH. J. RACE & L. 557, 570 (2006).

19. Parrish, *supra* note 16, at 561.

20. SALTZMAN, *supra* note 12, at 7A-106.

21. 31 U.S.C. § 5313(d)(1).

22. Parrish, *supra* note 16, at 561; *see* 31 U.S.C. § 5313(e).

23. Parrish, *supra* note 16, at 561–62.

24. *Id.*

must analyze the customer each year, monitor for any suspicious activity, and file an updated exemption form every two years.²⁵

In addition to CTRs, the BSA requires banks to file Suspicious Activity Reports (SARs).²⁶ The Annunzio-Wylie Anti-Money Laundering Act, enacted in 1992 as part of the Housing and Community Development Act, made SARs mandatory.²⁷ “The Secretary may require any financial institution, and any director, officer, employee, or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation.”²⁸ A SAR must be filed for a transaction—or transactions in the aggregate—of \$5000 or more, when the bank or its employee knows or suspects that the transaction: 1) involves funds gained from illegal activity; 2) is intended to escape the reporting requirement; 3) has no business or lawful purpose, or is uncharacteristic of the customer and has no sensible explanation; or 4) is aiding criminal activity.²⁹

When filing a SAR, it should include information about the financial institution, what the suspicious activity was, who the actor was, any witnesses to the suspicious activity, and the person who prepared the report.³⁰ The financial institution is required to keep a copy of the SAR for five years.³¹ Furthermore, the financial institution is not permitted to notify a person who was involved in a transaction that has been reported as suspicious.³² A SAR is sent to the U.S. Department of the Treasury, the IRS, FinCEN, and other government agencies that request SARs.³³ FinCEN, which was created by the Department of the Treasury in 1990, keeps a database of all CTRs and SARs and makes the reports available to law enforcement officials.³⁴ “Unless requested by law enforcement or a firm’s securities regulator, neither a SAR nor any information in a SAR may be produced or disclosed, even when faced with a subpoena.”³⁵ SARs are privileged, and therefore, cannot be compelled by courts.³⁶

25. *Id.* at 562; see 31 U.S.C. § 5313(e)(5).

26. Parrish, *supra* note 16, at 562.

27. SALTZMAN, *supra* note 12, at 7A-103; Matthew S. Morgan, *Money Laundering: The American Law and its Global Influence*, 3 NAFTA L. & BUS. REV. AM. 24, 41, 44–45 (1997).

28. 31 U.S.C. § 5318(g)(1).

29. OEHMKE, *supra* note 8, at 182; Parrish, *supra* note 16, at 562–63; SALTZMAN, *supra* note 12, at 7A-107.

30. Morgan, *supra* note 27, at 45.

31. *Id.* at 46.

32. 31 U.S.C. § 5318(g)(2)(A)(i); OEHMKE, *supra* note 8, at 182.

33. Lee, *supra* note 18, at 571.

34. Cheney, *supra* note 15, at 1712.

35. OEHMKE, *supra* note 8, at 182–83.

36. *See id.* at 183.

On top of CTRs and SARs, banks were expected to have a “know-your-customer (KYC) program[.]”³⁷ The bank personnel had to take reasonable care to know the identity of each of their customers, know the true owners of all accounts, acquire identification information on all new customers, obtain evidence of the identity of any person who wants to conduct a transaction, and make a note of any unusual departure from a customer’s normal activities.³⁸ This KYC program was eventually withdrawn and later replaced with customer due diligence.³⁹

The terrorist attacks on September 11, 2001 changed all facets of life in America. This includes the banking industry.⁴⁰ Following the September 11th terrorist attacks, on September 24, 2001, President George W. Bush issued the Terrorist Financing Executive Order.⁴¹ The purpose of this executive order was to “starve terrorists of funding, turn them against each other, rout them out of their safe hiding places, and bring them to justice.”⁴² The executive order was codified as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act—the Patriot Act.⁴³ The main purposes of the Patriot Act “were [t]o deter and punish [domestic and foreign] terrorists acts . . . [and] to enhance law enforcement investigatory tools.”⁴⁴ The Patriot Act augmented the requirements of the BSA.⁴⁵ Before the Patriot Act, the BSA “was not as formalized as it [became after] the Patriot Act.”⁴⁶ The Patriot Act was meant to eradicate money laundering because Congress had uncovered that money laundering had helped to fund the terrorist activities.⁴⁷ The Patriot Act expanded the reporting requirements that were already required by BSA.⁴⁸

37. See Morgan, *supra* note 27, at 47.

38. *Id.*

39. JEFFREY TORP, CUSTOMER IDENTIFICATION COMPLIANCE TOOLKIT 3.10 (rev. ed. 2009).

40. See, e.g., Cheney, *supra* note 15, at 1715.

41. *Id.*

42. *Id.* (quoting Press Release, Office of the Press Sec’y, Fact Sheet on Terrorist Fin. Exec. Order (Sept. 24, 2001) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010924-2.html>).

43. Norma J. Williams, 2007 Update on the USA Patriot Act and Executive Order 13224 in, COMMERCIAL REAL ESTATE FINANCING 2008: WHAT BORROWERS & LENDERS NEED TO KNOW NOW, at 43, 49 (PLI Real Estate L. & Prac. Course Handbook Ser. No. 549, 2008); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §1, 115 Stat. 272-402 (2001) [hereinafter Patriot Act].

44. Williams, *supra* note 43, at 49 (alteration in original) (quoting Patriot Act, at 272).

45. Cheney, *supra* note 15, at 1707; Patriot Act § 302.

46. Interview with Raul Garcia, *supra* note 9.

47. Cheney, *supra* note 15, at 1707.

48. See Interview with Raul Garcia, *supra* note 9; Patriot Act § 302.

Additionally, the Patriot Act required banks to have programs that allowed them to confirm customer identity.⁴⁹ The banks are required to confirm the identity of anyone who opens an account.⁵⁰ Furthermore, the banks have to keep records of this information and cross-reference it with “lists [supplied] by the government to [ascertain] whether the customer is a known or suspected terrorist.”⁵¹

The banks must each create and maintain an anti-money laundering department of their own.⁵² This includes, at the very minimum: “A) the development of internal policies, procedures, and controls; B) the designation of a compliance officer; C) an ongoing employee training program; and D) an independent audit function to test programs.”⁵³

Another challenging requirement for banks is “due diligence.”⁵⁴ The statute states:

Each financial institution that establishes, maintains, administers, or manages a “private banking account”⁵⁵ or a correspondent account in the United States for a non-United States person, including a foreign individual visiting the United States, or a representative of a non-United States person shall establish appropriate, specific, and, where necessary, enhanced, due diligence policies, procedures, and controls that are reasonably designed to detect and report instances of money laundering through those accounts.⁵⁶

The KYC program was replaced with this requirement for “customer due diligence.”⁵⁷ Under this program the bank employee must “verify[] the customer’s identity and [gauge] the risks [related to] that customer.”⁵⁸ In

49. Williams, *supra* note 43, at 50; Patriot Act § 326.

50. Williams, *supra* note 43, at 50–51.

51. *Id.* at 51.

52. *Id.* at 50.

53. 31 U.S.C. § 5318(h)(1)(A)–(D) (2006).

54. *See id.* § 5318(i)(1).

55.

The term “private banking account” means an account (or any combination of accounts) that—
(i) requires a minimum aggregate deposits of funds or other assets of not less than \$1,000,000;
(ii) is established on behalf of 1 or more individuals who have a direct or beneficial ownership interest in the account; and (iii) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a financial institution acting as a liaison between the financial institution and the direct or beneficial owner of the account.

Id. § 5318(i)(4)(B).

56. *Id.* § 5318(i)(1).

57. TORP, *supra* note 39.

58. *Id.*

addition, the due diligence is ongoing for high-risk customers.⁵⁹ The enhanced due diligence required for a non-U.S. person is stringent.⁶⁰

If a private banking account is requested or maintained by, or on behalf of, a non-United States person, then the due diligence policies, procedures, and controls required under paragraph (1) shall, at a minimum, ensure that the financial institution takes reasonable steps—(A) to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, such account as needed to guard against money laundering and report any suspicious transactions under subsection (g); and (B) to conduct enhanced scrutiny of any such account that is requested or maintained by, or on behalf of, a senior foreign political figure, or any immediate family member or close associate of a senior foreign political figure, that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.⁶¹

The bank must also have “an understanding of normal and expected activity” for the account.⁶² This can be confirmed in many ways, one of which is visiting the site of a business accountholder.⁶³ “[T]he Secretary may require any domestic financial institution or domestic financial agency to take such steps as the Secretary may determine to be reasonable and practicable to obtain and retain information concerning the beneficial ownership of any account opened or maintained in the United States by a foreign person”⁶⁴ In addition, the Secretary may make more stringent requirements depending upon the geographic location.⁶⁵ Furthermore, the bank must periodically monitor each high-risk relationship to determine whether any changes to the business operation occurred.⁶⁶

Financial institutions face the possibility of civil money penalties if they violate provisions of the BSA.⁶⁷ The federal regulators and FinCEN can seek civil money penalties due to noncompliance.⁶⁸ If the regulator determines that there has been a “willful violation of the SAR reporting [requirements]

59. *Id.*

60. *See* 31 U.S.C. § 5318(i)(3).

61. *Id.*

62. TORP, *supra* note 39.

63. *Id.*

64. 31 U.S.C. § 5318A(b)(2).

65. *Id.* § 5326(a).

66. TORP, *supra* note 39.

67. STEVEN MARK LEVY, FEDERAL MONEY LAUNDERING REGULATION: BANKING, CORPORATE AND SECURITIES COMPLIANCE § 10.09 (Supp. II 2011).

68. *Id.* § 7.11.

by a financial institution or by any of [the institution's] officers, directors, partners or employees," a civil penalty may be ordered.⁶⁹ The penalty can be "up to \$25,000 or the amount of the transaction (up to \$100,000)."⁷⁰ A willful violation is not just deliberate wrongdoing.⁷¹ A willful violation also includes any shortcomings of BSA compliance procedures which are insufficient to discover a major kind of "suspicious activity, or internal controls and due diligence procedures" that are inadequate to substantially comply "with the financial institution's BSA policies."⁷² Willful violations can lead not only to fines, but also to criminal prosecution by the Department of Justice.⁷³ A willful violation of a SAR reporting requirement may be subject to a "fine of up to \$250,000, or imprisonment of up to five years" upon criminal conviction.⁷⁴ If the violation of a SAR reporting requirement is in conjunction with a violation of another federal law or within a pattern of illegal activity involving more than \$100,000 in a one-year interval, the person in violation may be fined up to \$500,000 or be imprisoned for ten years, or both.⁷⁵ Generally, a financial institution can avoid criminal prosecution by agreeing to pay civil money penalties and agreeing to make the policies and procedures stronger.⁷⁶

If the violation is merely a negligent violation, FinCEN can apply a civil penalty up to \$500.⁷⁷ However, "[i]f the negligent violation is part of a pattern of negligent activity, an additional penalty of up to \$50,000 may be assessed."⁷⁸ Furthermore, "[e]ach failure to timely file a suspicious activity report can lead to a civil penalty of the greater of the amount involved in the transaction (up to \$100,000) or \$25,000."⁷⁹ The consequences for any mistake by a financial institution or its employees can have serious consequences for both the financial institution and the individual.⁸⁰

69. *Id.*

70. *Id.*

71. *Id.*

72. LEVY, *supra* note 67, § 7.11.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. LEVY, *supra* note 67, § 7.11.

78. *Id.*

79. *Id.* § 5.14.

80. *See id.*

B. *Effects of BSA on South Florida Banking Industry & Economy*

The reporting requirements have cost the banking industry enormous amounts of money.⁸¹ These reports were “intended to provide information with ‘a high degree of usefulness.’”⁸² Nevertheless, FinCEN and the Government Accountability Office (GAO) reported that many of the CTRs and SARs filed have no value to law enforcement, and thirty to forty percent of CTRs filed yearly are only regular, daily transactions by customers who have had long relationships with their banks.⁸³ In 1975, American banks filed 3418 CTRs.⁸⁴ In 1992, 9,200,000 CTRs were filed.⁸⁵ In 1990, it was estimated that banks spent \$129,000,000 on BSA compliance.⁸⁶ “In 2006, financial institutions submitted 15,994,484 CTRs”⁸⁷ As many as seventy-five percent of those CTRs filed in 2006 were only related to innocent business transactions.⁸⁸ “FinCEN estimate[d] that [a] CTR requires twenty-five minutes . . . to fill out and submit”⁸⁹

The SAR relies heavily on bank employees’ judgment.⁹⁰ Because of this, extensive training is required for employees to detect suspicious activity.⁹¹ Additionally, banks are concerned that due to the fact that many different government agencies are reviewing SARs, and that they are all reviewing SARs for different reasons, their demands about what information should be included makes filing these reports confusing.⁹² Furthermore, because of the threat of civil money penalties and even criminal prosecution, banks may encourage their employees to file a report even if it might not be completely necessary, just to cover themselves so they do not get cited in a review.⁹³ Moreover, the bank employees themselves are most likely fearful of the possibility of being fined personally and even criminally prosecuted for not complying with reporting requirements.⁹⁴ With the worry of personal penal-

81. Parrish, *supra* note 16, at 561, 564.

82. *Id.* at 559 (quoting 12 U.S.C. § 1829b(a)(1) (2006)).

83. *Id.*

84. Byrne, *supra* note 1, at 803.

85. *Id.*

86. *Id.* at 818.

87. Parrish, *supra* note 16, at 564.

88. *Id.* at 565.

89. *Id.* at 564.

90. *Id.* at 563.

91. *Id.*

92. Lee, *supra* note 18, at 575.

93. See SALTZMAN, *supra* note 12, at 7A-105 to 7A-114.

94. See *id.* at 7A-104.

ties hanging overhead, bank employees may even waste their time—and therefore the bank’s resources—by filing unnecessary reports.⁹⁵

There are considerable costs associated with training employees to submit the filings and purchasing the technology required for flagging the suspicious transactions or transactions over the threshold.⁹⁶ The software necessary to comply with the BSA ran between \$30,000 and \$50,000, plus \$5000 per month for maintenance as of 2006.⁹⁷

Mr. Garcia, the Chairman of the Executive Committee of First Bank of Miami, a community bank, stated that he believed that:

[T]he government[’s] train of thought was that they were going to monitor terrorist activity by following the money. In doing so, they, [the U.S. government], turned around and decided that the banks were going to be cops. And if the banks were not willing to be cops, which is not the job of the financial sector, then huge penalties were created and for a period [of four to five] year[s], you, [the bank], would get examinations and all they were focus[ed] on were BSA, anti-money laundering, and compliance.

....

Banks who did not take the initiative and didn’t set up the necessary compliance departments, BSA departments, monitoring, [and] the IT to follow unusual transactions, paid dearly because they were given cease [and] desist orders—very, very serious penalties.⁹⁸

If a financial institution does not file a required report, “the person responsible is subject to civil penalties and [even] criminal prosecution.”⁹⁹ This potential penalty to bank employees may even scare them into filing SARs when they might not be necessary, throwing more resources into report filings.¹⁰⁰ This, of course, leaves less for lending, which is what should be infused into the market for small business owners to help move the economy and help with unemployment levels.¹⁰¹

“[A]fter [September 11th], the [P]atriot [A]ct came out, and it basically restructured the way we did business,” Mr. Jorge Triay said of the major changes that the banking industry underwent after the enactment of the Pa-

95. *See, e.g., id.*

96. Parrish, *supra* note 16, at 563.

97. *Id.* at 565.

98. Interview with Raul Garcia, *supra* note 9.

99. SALTZMAN, *supra* note 12, at 7A-104.

100. *See id.* at 7A-107.

101. *See* Parrish, *supra* note 16, at 564.

triot Act and its changes to the BSA.¹⁰² Mr. Triay found that after the Patriot Act was enacted, the banks had to invest enormous amounts of money and intellect in order to comply with the new stringent requirements.¹⁰³

In order to set up a strong compliance program, a bank must be willing to give up a substantial percentage of its yearly earnings.¹⁰⁴ Mr. Garcia said that setting up the technology necessary, along with adding staff to comply with the BSA costs his bank anywhere from \$400,000 to as much as \$500,000 per year.¹⁰⁵ This amounted to roughly a third of his annual profit, which now must be added to the operating cost of the bank.¹⁰⁶ The First Bank of Miami, a community bank of \$250,000,000, spends between seven and ten percent of its total expenses on compliance alone.¹⁰⁷

In addition to the costs of setting up a strong compliance department, banks must pay for their employees to have BSA training.¹⁰⁸ Depending on the year and the type of training necessary the bank could spend as little as \$900 per day, per person, to be trained if the conference is local.¹⁰⁹ However, if the bank has to send its employees to get trained elsewhere, this cost could increase exponentially.

Enhanced due diligence is another area of compliance that can cost a bank incredible amounts of money.¹¹⁰ It may even require special visits by the bank for "high-risk customers."¹¹¹ High-risk customers include international customers.¹¹² After enhanced due diligence was required, banks sometimes had to make site visits to their high-risk customers, no matter how far.¹¹³ This actually eliminated a group of customers because it was too difficult and costly to go visit some of these international customers in hard to reach or even dangerous regions.¹¹⁴ Some banks actually had to close these customers' accounts because they would rather lose the customer than run

102. Interview with Jorge Triay, President & Chief Exec. Officer, First Bank of Miami, in Miami, Fla. (July 27, 2011). Mr. Jorge Triay is the current President and Chief Executive Officer of First Bank of Miami. *Id.* Prior to First Bank of Miami, Mr. Triay was the President and Chief Executive Officer of Ready State Bank. *Id.* In all, Mr. Triay has thirty-five years of experience in the banking industry. *Id.*

103. *Id.*

104. See Interview with Raul Garcia, *supra* note 9.

105. *Id.*

106. See *id.*

107. Interview with Jorge Triay, *supra* note 102.

108. *Id.*

109. See *id.*

110. *Id.*

111. *Id.*

112. Interview with Jorge Triay, *supra* note 102.

113. See *id.*

114. See *id.*

the risk of getting penalized for not visiting these high-risk, international customers.¹¹⁵ So, not only did the BSA requirements after the Patriot Act force banks to spend enormous amounts of money on compliance staff, IT, and training, but its due diligence requirements also forced banks to choose between letting some customers go and losing capital, or just spending more on traveling to some hard to reach places.¹¹⁶

III. THE PROPOSED IRS REGULATION REGARDING REPORTING OF INTEREST EARNED BY NONRESIDENT ALIENS

“The [United States] has long allowed foreigners to deposit money, which earns interest tax free.”¹¹⁷ Both parties—the nonresident alien and the U.S. bank—benefit from this relationship.¹¹⁸ The bank has the benefit of capital that can be lent, and the nonresident alien (NRA) depositor has a safe place to invest money.¹¹⁹ At this time, “foreigners do not have to pay taxes [in] the [United States] on interest earned” on deposits in this country.¹²⁰ Currently, under the regulation now in effect—Reg. 1.6049-8(a)—American financial institutions are only required to report to the IRS annually interest earned on deposit accounts belonging to Canadians.¹²¹ The financial institution must file form 1042-S with the IRS for any Canadian who earns interest in a U.S. financial institution, even though interest paid to a Canadian NRA is not subject to taxation.¹²² In addition, the financial institution must send a copy of form 1042-S to the Canadian depositor.¹²³

115. *Id.*

116. *Id.*

117. Alex Leary, *Florida Delegation Implores Obama: Hands Off Foreign Deposits in U.S. Banks*, THE BUZZ FROM THE STAFF OF THE ST. PETERSBURG TIMES (Mar. 3, 2011, 1:34 PM) <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/florida-delegation-implores-obama-hands-foreign-deposits-us-banks>.

118. *Id.*

119. *Id.*

120. Bandell, *supra* note 6; David M. Balaban et al., *Proposed Regs. Reduce Reporting Burden for Interest Paid to NRAs*, J. INT’L TAX’N, Oct. 2002, at 62, 62; Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 581 (2004).

121. Fla. S. Comm. on Banking and Insurance, SM 1344 (2011) Bill Analysis and Fiscal Impact Statement 1 (Mar. 10, 2011), [hereinafter Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement], available at www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?FileName=2011s1344.pre.bi.Docx&DocumentType=Analysis&BillNumber=1344&Session=2011; Farag, *supra* note 5, at 9; Balaban, *supra* note 120, at 62; Blum, *supra* note 120, at 581.

122. Mar. 10, 2011, Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 1.

123. *Id.*

A. *Evolution of Proposed IRS Regulations Regarding Reporting of Interest Earned by Nonresident Aliens*

The IRS has proposed, time after time, ways in which U.S. banks should report interest earned by foreign accountholders.¹²⁴ The last three examples were proposed in 2001, 2002, and 2011.¹²⁵

1. The 2001 Proposition

In 2001, the IRS proposed a regulation, REG-126100-00, that would require U.S. banks to report annually to the IRS interest earned by any NRA through a deposit account.¹²⁶ The 2001 proposed regulation, which was one of the last acts of the Clinton Administration, was heavily criticized by the banking community.¹²⁷ The biggest concern “was that the administrative burden . . . would . . . outweigh any benefits.”¹²⁸ Furthermore, the banking community was concerned that there would be a negative impact on U.S. banks, especially those banks with a high percentage of NRA depositors.¹²⁹ At the time of this proposition, Florida banks claimed they would be particularly susceptible because a considerable percentage of the banks’ deposits were held by foreigners who could move their money to accounts in the Caribbean or Panama.¹³⁰ Moreover, some feared that the information attained under the proposed regulation could be misused.¹³¹ Bankers and organizations, such as the Center for Freedom and Prosperity, and former Governor of Florida Jeb Bush expressed opposition.¹³²

2. The 2002 Proposition

On July 30, 2002, the IRS withdrew the proposed regulation from 2001 and issued a new proposed regulation.¹³³ The 2002 proposed regulation, REG-133254-02, would have required financial institutions to report interest

124. See Farag, *supra* note 5, at 9.

125. *Id.*

126. *I.R.S. Reporting of Bank Interest Paid to NRAs*, INT’L TAX BLOG (Mar. 29, 2011) http://intltax.typepad.com/intltax_blog/2011/03/irs-reporting-of-bank-interest-paid-to-nras.html; Farag, *supra* note 5, at 9.

127. See Balaban, *supra* note 120, at 62; Blum, *supra* note 120, at 581.

128. Balaban, *supra* note 120, at 62.

129. *Id.*

130. *Id.*

131. *Id.*

132. Blum, *supra* note 120, at 581–82.

133. Balaban, *supra* note 120, at 62.

earned by NRAs of sixteen countries.¹³⁴ The proposed regulation would have become effective for interest paid after December 31st of the year that the final form of the regulation was published.¹³⁵ The IRS acknowledged that the 2001 proposed regulation was too broad in requiring banks to report interest paid to any NRA.¹³⁶ To lessen the load on the banks, the 2002 proposed regulation required reporting interest paid to NRAs of sixteen countries, rather than all countries.¹³⁷ These countries were Australia, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom.¹³⁸ The reason the IRS chose these countries was because it decided to reduce the reporting requirement to those countries that had a bilateral tax treaty with the United States.¹³⁹ In addition, financial institutions could report all interest earned by NRAs of any country if the financial institution chose to do so.¹⁴⁰ The IRS believed that the proposed regulation would increase compliance with U.S. tax laws and would not put too much of a burden on U.S. banks.¹⁴¹

One of the purposes of this proposed regulation was to reduce the possibility for U.S. citizens to evade taxes by claiming foreign status.¹⁴² Prior to this proposition, banks were only required to report interest earned on deposits kept by U.S. citizens.¹⁴³ Banks were not required to report interest earned by foreigners.¹⁴⁴ Therefore, a U.S. citizen could attempt to avoid paying taxes on interest earned by claiming foreign status.¹⁴⁵ One problem that this regulation did not seek to fix was the problem of a U.S. citizen giving money to a foreign owned corporation that made a deposit in a U.S. bank.¹⁴⁶

Another purpose for the proposed regulation was to facilitate information sharing with other countries.¹⁴⁷ The theory was that it would encourage

134. Farag, *supra* note 5, at 9; *see also* Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

135. Balaban, *supra* note 120, at 62.

136. *Id.* at 62, 64.

137. *See id.* at 64; *see also* Farag, *supra* note 5, at 9.

138. Farag, *supra* note 5, at 9.

139. Balaban, *supra* note 120, at 64.

140. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; Farag, *supra* note 5, at 9.

141. *See* Balaban, *supra* note 120, at 64.

142. Blum, *supra* note 120, at 584.

143. *See id.*

144. *Id.*

145. *Id.* at 584–85.

146. *Id.* at 586–87.

147. Blum, *supra* note 120, at 587.

voluntary compliance by U.S. citizens.¹⁴⁸ If the proposition had been put into order, the sixteen countries included in the list above could have exchanged information with the United States.¹⁴⁹ Those sixteen countries could have learned information about interest paid by U.S. banks to their own citizens, allowing the countries to impose taxes on that interest.¹⁵⁰ Likewise, the United States could have learned about U.S. citizens who earned interest in other countries that were not paying U.S. taxes on that interest.¹⁵¹

After the IRS proposed this regulation, it was met with much opposition.¹⁵² There were many who were concerned that if the regulation were implemented, then NRAs would not want to keep deposits in U.S. banks.¹⁵³ Jay Cochran, an economics professor at George Mason University, estimated that \$88.1 billion in U.S. deposits could be withdrawn from U.S. financial institutions if this proposed regulation were enacted.¹⁵⁴ One of the reasons that a NRA would remove his or her money from the United States, if this regulation was implemented, is the worry that once the IRS had the information, it would communicate that information to the tax authorities of the NRA's country of origin.¹⁵⁵ Furthermore, if the NRA's home country was oppressive, corrupt, or unstable, there could be horrible consequences for the NRA.¹⁵⁶ Wealthy persons from countries like these could face persecution, robbing, or kidnapping if the information fell into the wrong hands.¹⁵⁷

3. The 2011 Proposition

The newest of the IRS proposed regulations, if finalized, would require U.S. financial institutions to report all interest of more than ten dollars earned on deposits by *all* NRAs, of *all* countries, to the IRS using form 1042-S.¹⁵⁸ Banks would have to report interest earned after December 31st

148. *Id.*

149. *Id.* at 588.

150. *Id.*

151. *Id.*

152. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; see Letter from Bill Posey, Member of Cong., to Barack Obama, President of the United States, (Mar. 2, 2011) (on file with *Nova Law Review*), available at <http://posey.house.gov/UploadedFiles/IRS-DelegationLetter-March3-2011.pdf>.

153. See Blum, *supra* note 120, at 623.

154. Heather Landy, *Fight Over Reporting of Foreigner Interest Returns*, 176 AM. BANKERS 1, 1 (2011).

155. Blum, *supra* note 120, at 624.

156. *Id.*

157. *Id.* at 624–25.

158. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2 (emphasis added); Farag, *supra* note 5, at 9 (emphasis added).

of the year that the regulation is finalized.¹⁵⁹ There are several purposes for this proposed regulation.¹⁶⁰ One of these purposes is to increase information sharing with other countries.¹⁶¹ The idea is that this will help to establish agreements with other countries to exchange information on interest earned by each country's citizens.¹⁶² The IRS wants to receive information regarding interest paid to U.S. citizens and residents by banks in other countries.¹⁶³ Another purpose of the regulation is to minimize tax evasion by U.S. citizens who are keeping deposits in U.S. banks but are claiming to be NRAs.¹⁶⁴ Yet, another purpose of the proposed regulation is to discover foreign companies that are controlled by American citizens.¹⁶⁵

B. *Effects of the 2011 Proposed IRS Regulation on South Florida Banking Industry & Economy*

Currently, wealthy foreigners have accounts in the United States and Florida because of the privacy ensured by the banks and the relative stability of the political system and economy.¹⁶⁶ This is particularly true for "people from [South] America, where there has been corruption and economic collapse[]." ¹⁶⁷ According to the Commerce Department, foreigners have roughly \$3.6 trillion in U.S. banks and securities combined.¹⁶⁸ Furthermore, foreigners have an estimated "\$35 billion to \$50 billion in Florida banks."¹⁶⁹ Banks are concerned that the newly proposed IRS regulation will drain capital from the U.S. banks and the economy.¹⁷⁰

159. Farag, *supra* note 5, at 9.

160. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

161. *Id.*; Bandell, *supra* note 6; Clemente L. Vazquez-Bello, *U.S. Banks Fear Loss of Foreign Deposits Due to Proposed IRS Regulation*, GUNSTER'SBOARDROOMBRIEF.COM (Feb. 17, 2011), <http://boardroombrief.com/theblog/2011/02/17/u-s-banks-fear-loss-of-foreign-deposits-due-to-proposedregulation/>.

162. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

163. *I.R.S. Reporting of Bank Interest Paid to NRAs*, *supra* note 126; Vazquez-Bello, *supra* note 161.

164. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2; Farag, *supra* note 5, at 9.

165. Bandell, *supra* note 6; Vazquez-Bello, *supra* note 161.

166. Bandell, *supra* note 6; Vazquez-Bello, *supra* note 161.

167. See Telephone Interview with Alex Sanchez, President & Chief Exec. Officer, Fla. Bankers Ass'n, Tallahassee, Fla. (Aug. 1, 2011).

168. Zachary Fagenson, *Looming IRS Rule Could Drain Billions in Foreign Deposits from Florida Banks*, MIAMI TODAY NEWS.COM (Week of June 2, 2011), <http://www.miamitodaynews.com/news/110602/story4.shtml>.

169. *Id.*; see Interview with Raul Garcia, *supra* note 9 (stating that roughly half of the deposits at First Bank of Miami are from NRAs).

170. Landy, *supra* note 154.

The tradition is that deposits and certain government securities have been offered to NRAs tax-free. They would have to meet certain criteria—they would have to fill out forms that [are] excepted by [the] IRS, where they declare themselves foreigners, and they are foreigners—not [just] trying to pass as one. And as a result of that, monies that could have gone to Panama, Nassau, Cayman, and other international centers, came to the U.S. Banks were [then] able to use those funds, [and] lend them domestically. The attraction was always that you are playing on an equal playing field. Meaning, if you have a deposit in Panama, Panama may pay you a quarter of a point more than an FDIC insured deposit in the U.S., but the tax consequences would be the same. Most of the clients don't mind getting a quarter of a point less if they know the[y] have the U.S. government behind their investment. And this is something that made banks in South Florida thrive.¹⁷¹

Lobbyists for banks have been speaking to people on Capitol Hill regarding their opposition to the proposed regulation.¹⁷² This includes Mr. Alex Sanchez, the President of the Florida Bankers Association.¹⁷³ Mr. Sanchez told *Miami Today* that “[i]t was basically three bureaucrats from the IRS and they wanted to listen to comments. . . . I suspect, and I’m being very frank, the people at the hearing are not the ones who are going to make the decision. It’s the Obama administration policy decision-makers.”¹⁷⁴ In May 2011, Mr. Sanchez went to Washington where he testified before an IRS panel on the impact that the proposed regulation could have if it were to take effect.¹⁷⁵ The Florida Senate has even released a bill analysis and fiscal impact statement in response to the proposed IRS regulation, REG-146097-09.¹⁷⁶ In addition, Congressman Bill Posey¹⁷⁷ had a letter signed by all of the Florida Delegation of U.S. Congressmen in opposition to the regulation.¹⁷⁸ Congressman Posey stated, “[t]his IRS proposal is a bad idea that will drive tens of billions of dollars out of U.S. banks and our economy.”¹⁷⁹ He went on to say, “[a]t a time when we’re trying to improve the balance sheets of

171. Interview with Raul Garcia, *supra* note 9.

172. Landy, *supra* note 154.

173. Fagenson, *supra* note 168.

174. *Id.*

175. *Id.*

176. See Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 1.

177. Congressman “Bill Posey [is] a Florida Republican [and] sits on the House Financial Services Committee.” Landy, *supra* note 154.

178. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

179. Landy, *supra* note 154.

U.S. financial institutions, this proposal undermines that very goal.”¹⁸⁰ At another time, Congressman Posey said, “[t]his rule has the potential to be very damaging to our already struggling economy. . . . The current confidentiality practice is a major incentive for wealthy foreigners to invest their money here in the United States, making capital more available for loans to businesses for expansion and job creation.”¹⁸¹

The biggest concern is that this regulation would lead to a loss of these foreign deposits.¹⁸² In addition to Florida, eleven other states’ congressmen and women have written letters in opposition to the proposed regulation.¹⁸³ Florida bankers fear that the regulation could chase away foreign depositors.¹⁸⁴ Mr. Alex Sanchez said, “[i]t’s the wrong idea at the wrong time . . . especially when the [P]resident himself has called for the infusion of capital to help create jobs This is money deposited in banks that they lend to small businesses.”¹⁸⁵ The Institute of International Bankers is also preparing to fight the proposed regulation.¹⁸⁶

Miami banking attorney, Clemente Vazquez-Bello said, “[t]hey want to take away our banking business offering privacy and confidentiality,” and also said, “[t]his is unnecessary overkill without regard to the impact it would have to our businesses and economy.”¹⁸⁷

Local Florida banks hold a large amount of deposits from foreigners.¹⁸⁸ These banks include BAC Florida Bank, Espirito Santo Bank, BBU Bank, and Pacific National Bank.¹⁸⁹

Jay Cochran says that he expects the withdrawal of deposits to be magnified because of his estimation of \$88.1 billion in response to the 2002 proposed regulation.¹⁹⁰ He also said, “given the precarious nature of the U.S. economy, now does not seem like a good time to be damaging the U.S. credit markets.”¹⁹¹

The proposed IRS regulation could lead to these foreign depositors moving deposits to another tax free country that will not report the interest

180. *Id.*

181. Leary, *supra* note 117.

182. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

183. Fagenson, *supra* note 168.

184. Bandell, *supra* note 6.

185. Fagenson, *supra* note 168.

186. Landy, *supra* note 154.

187. Bandell, *supra* note 6.

188. *Id.*

189. *Id.*

190. Landy, *supra* note 154.

191. *Id.*

earned to the country of origin of the NRA.¹⁹² If NRA depositors withdrew their deposits from U.S. banks this could create a problem of the solvency for banks.¹⁹³ Florida, in particular, would suffer a great level of withdrawals.¹⁹⁴ The departure of foreign deposits could have noteworthy repercussions on Brickell Avenue in Miami due to its lively international banking sector.¹⁹⁵ This withdrawal of money by NRAs would decrease the amount that could be lent by banks.¹⁹⁶ If the banks have less money to lend, then the banks will make less money, which would force the banks to let employees go.¹⁹⁷ The deposits, which are lent by South Florida banks, often to local businesses, create jobs locally.¹⁹⁸ If NRA depositors withdrew their money from South Florida banks, this money would no longer be available for lending to local businesses, and the South Florida economy may be stunted. This stunted economy would keep the “circle” of bad economic times going as less people would have jobs, less people would have money to spend, and then businesses would make less money, forcing them to lay off more people and the circle goes round and round.

In addition, when NRAs have deposits in the United States, it is probable that the NRAs will spend some of this money in the United States on U.S. products and services, helping to stimulate the economy.¹⁹⁹ However, if the money is removed from the United States and deposited in another country, it is extremely unlikely that any of the NRA’s money will be spent in the United States.²⁰⁰

In addition to the negative effects that the regulation would have on Florida, it could have personal negative effects on these NRA depositors who could face kidnapping and extortion if their country of origin knew of their foreign deposits.²⁰¹ “A wealthy family from another country could be worried about the government seizing their businesses or criminals learning

192. Leary, *supra* note 117.

193. Letter from Lilly Thomas, Vice President & Regulatory Counsel, Indep. Cmty. Bankers of Am., to Dep’t of the Treasury, IRS (Apr. 1, 2011) (on file with *Nova Law Review*), available at www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf.

194. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 2.

195. Bandell, *supra* note 6.

196. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 3; see also Bandell, *supra* note 6.

197. See Bandell, *supra* note 6.

198. *Id.*

199. Mar. 10, 2011 Bill Analysis and Fiscal Impact Statement, *supra* note 121, at 3.

200. *Id.*

201. *Id.*

about their wealth and kidnapping them”²⁰² In a letter from the members of the Florida Delegation, it was written that:

Many nonresident alien depositors are from countries with unstable governments or political environments where personal security is a major concern. They are concerned that their personal bank account information could be leaked by unauthorized persons in their home country governments to criminal or terrorists groups upon receipt²⁰³

If wealthy foreigners are concerned about their safety or the safety of their families, they may likely withdraw their money from U.S. banks and deposit them somewhere else where their privacy could be ensured.

If foreign depositors withdrew their money from the United States, like many Florida bankers fear, there would be less capital in the United States for lending and spending.²⁰⁴ Patricio Perez, managing director for RSM McGladrey’s bank accounting practice said, “[i]f a bank lost a certain percentage of deposits, it is obviously going to diminish its lending opportunities and it obviously has to cut down on the staff to service those deposits and loans.”²⁰⁵ Additionally, this would create “quite a liquidity problem.”²⁰⁶ Rafael F. Saldaña, the president and chief executive officer of BBU Bank, a bank based in Coral Gables, Florida, added, “[w]e use that money to lend locally to business people who create economic development and jobs here in South Florida Money that could be available for local lending won’t be available.”²⁰⁷ It would also give an edge to competitors over the United States.²⁰⁸ It would “put U.S. banks, and in particular, banks in . . . Florida, at a disadvantage.”²⁰⁹ International areas like Panama, Switzerland, and the Caribbean are competing with the United States to take foreign deposits.²¹⁰ The proposed regulation would give them a competitive edge.²¹¹

The Independent Community Bankers of America (ICBA) wrote to the Senator with their concerns for what the proposed IRS regulation could do to

202. Bandell, *supra* note 6 (quoting Alex Sanchez, president of the Florida Bankers Association).

203. Letter from Bill Posey to Barack Obama, *supra* note 152.

204. Bandell, *supra* note 6; *see* Interview with Raul Garcia, *supra* note 9.

205. Bandell, *supra* note 6.

206. Interview with Jorge Triay, *supra* note 102.

207. Bandell, *supra* note 6.

208. *Id.*

209. Interview with Raul Garcia, *supra* note 9.

210. Bandell, *supra* note 6; Fagenson, *supra* note 168.

211. Bandell, *supra* note 6.

the community banks throughout the country.²¹² The ICBA said that Florida would have significant “economically damaging reductions in bank capital” because of its high concentration of NRA deposits.²¹³ This would jeopardize bank safety and soundness, and banks, many of which are already having issues, would be at risk for failure.²¹⁴ The probable effects of the proposed IRS regulation are in opposition to the orders of regulators for the banks to have more capital available.²¹⁵ Beyond this, the proposed IRS regulation would be in opposition to the longstanding policy decision of Congress not to tax foreigners to promote “an inflow of capital that would benefit our economy.”²¹⁶ The ICBA “urge[d] all policymakers to recognize that this onerous new IRS reporting requirement would be an unwarranted burden on community banks and would have a direct, adverse impact on investment, lending, and the economic recovery.”²¹⁷

ICBA also wrote to the IRS at the Department of the Treasury in opposition of the proposed regulation.²¹⁸ The letter stated:

[The] reporting requirement would likely result in significant shifts of foreign deposits to banks located in countries that give more reverence to depositors’ privacy. It would not only discourage nonresident aliens from depositing their assets in U.S. financial institutions but also encourage the withdrawal of existing deposits. Foreign deposits in U.S. banks are largely a function of the confidentiality, privacy, and stability of our banking system. These deposits are generally a stable source of funds, which banks use to support their lending activities. Such significant withdrawals, particularly in small and mid-sized banks in border states, would reduce the availability of capital needed for lending to consumers and small businesses. Reducing credit flow and thwarting economic development in these communities is contrary to the President’s and Treasury’s goal to stimulate lending to the small business sector, recharge our economy and create jobs.²¹⁹

212. Letter from Camden R. Fine, President & Chief Exec. Officer, to Marco Rubio, U.S. Senator, (June 2, 2011) (on file with *Nova Law Review*), available at www.icba.org/files/ICBASites/PDFs/ltr060211a.pdf.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Letter from Camden R. Fine to Marco Rubio, *supra* note 212.

218. Letter from Lilly Thomas to Dep’t of the Treasury, *supra* note 193.

219. *Id.*

Marco Rubio, U.S. Senator for Florida, wrote a letter to President Barack Obama, and captured the enormity of the effects the proposed regulation could have by writing:

At a time when unemployment remains high and economic growth is lagging, forcing banks to report interest paid to nonresident aliens would encourage the flight of capital overseas to jurisdictions without onerous reporting requirements, place unnecessary burdens on the American economy, put our financial system at a fundamental competitive disadvantage, and would restrict access to capital when our economy can least afford it.²²⁰

IV. CONCLUSION

“The State of Florida, . . . due to its geographic position, large volume of international trade and investment activity, our role as a hemispheric entrepot, and our position as a leading tourism destination, is particularly vulnerable to . . . negative consequences.”²²¹ If the proposed IRS regulation passes, it would burden the banking system during a very challenging economic time.²²² It could entice international clients to move their deposits to other countries, which would be a terrible loss for South Florida and to the overall financial system at a time when the United States simply cannot afford it.²²³

One important thing that must happen in order to make the system run better and to waste less time and money is to streamline the filing requirements to remove the burden on financial institutions and reduce filing of valueless reports.²²⁴ One way of doing this is by raising the CTR filing threshold.²²⁵ The current threshold of \$10,000 was established in 1970.²²⁶ The threshold should be increased to account for inflation of forty-one years.²²⁷ Because the threshold has not been increased to account for inflation, CTRs filed today are based on a relatively lower value than CTRs filed in the 1970s.²²⁸ “As the CTR filing threshold has not been updated to reflect the

220. Letter from Marco Rubio, U.S. Senator, to Barack Obama, President of the United States, (Apr. 4, 2011) (on file with *Nova Law Review*), available at www.floridabankersassociation.com/docs/links/IRS_NRA_Rubio.pdf.

221. Int’l Trade & Bus. Dev., *supra* note 11, at 2.

222. Vazquez-Bello, *supra* note 161.

223. Interview with Raul Garcia, *supra* note 9.

224. Parrish, *supra* note 16, at 564–66.

225. *Id.* at 568.

226. *Id.*

227. *Id.* at 568–69.

228. *Id.* at 569.

financial reality of inflation, the filing requirement has become watered down to include transactions of much lower relative value than those originally captured by the \$10,000 threshold in 1970.”²²⁹ FinCEN and financial industry associations’ data shows that if the CTR filing threshold was increased, there would be immediate relief of some of the compliance burden for financial institutions.²³⁰

The proposed IRS regulations are not necessary to achieve the purposes of the proposed regulation.²³¹ One of the purposes that the IRS stated was to improve voluntary compliance of paying taxes.²³² There are already practices in order to verify tax evasion by “false claims of alien status.”²³³ Banks already must conform to documentation requirements to guarantee that persons claiming alien status and exemption from taxes qualify for this exception.²³⁴ So, one of the purposes stated for the proposed IRS regulation is already being fulfilled by a less burdensome practice.²³⁵

One option is to withdraw the proposed IRS regulation and to allow the Foreign Account Tax Compliance Act (FATCA) implementation.²³⁶

Vazquez-Bello said the IRS proposal is not needed in light of a new law, *the Foreign Account Tax Compliance Act (FACTA)* [sic], set to start in 2013. It would force all foreign banks that maintain an account in the U.S. to either say they have no U.S. depositors or provide the IRS with information on their U.S. depositors. Since most foreign banks need an account here to conduct business, that law would have a broad impact and halt a lot of the tax evasion²³⁷

Congress enacted FATCA on March 18, 2010.²³⁸ FATCA was enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act.²³⁹ FATCA “targets noncompliance by U.S. taxpayers through foreign ac-

229. Parrish, *supra* note 16, at 569.

230. *Id.*

231. Letter from Lilly Thomas to Dep’t of the Treasury, *supra* note 193.

232. *Id.*

233. *Id.*

234. *Id.*

235. *See id.*

236. Bandell, *supra* note 6.

237. *Id.* (emphasis added).

238. Niels Jensen, Note, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland*, 63 VAND. L. REV. 1823, 1849 (2010).

239. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, IRS.GOV, <http://www.irs.gov/newsroom/article/0,,id=242164,00.html> (last updated July 14, 2011).

counts.”²⁴⁰ FATCA will be implemented in phases due to implementation challenges to financial institutions and because it is a “major undertaking for financial institutions.”²⁴¹ FATCA requires U.S. taxpayers to report information on foreign assets greater than \$50,000 on a new IRS form (Form 8938).²⁴² This applies to assets held on March 31, 2011 or later.²⁴³ If a taxpayer fails to report the required information on Form 8938, there will be an initial \$10,000 penalty, followed by penalties up to \$50,000 after notification by the IRS.²⁴⁴ Additionally, if the taxpayer underpays due to non-disclosed foreign financial assets, there could be a penalty of up to forty percent.²⁴⁵

“FATCA requires [foreign financial institutions] to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.”²⁴⁶ The foreign financial institutions must enter into an agreement with the IRS by June 30, 2013.²⁴⁷ Foreign financial institutions must agree to 1) identify accounts and have certain due diligence procedures; 2) report information to the IRS about the U.S. accountholders or foreign entities with substantial U.S. ownership; and 3) withhold and pay to the IRS thirty percent on certain payments to non-participating foreign financial institutions and account holders who are unwilling to provide information.²⁴⁸ Foreign financial institutions that refuse to agree with the IRS would be subject to withholding of certain payments, such as “U.S. source interest and dividends, gross proceeds from . . . U.S. securities, and passthru payments.”²⁴⁹

Therefore, there is an incentive for the foreign financial institutions to enter into the agreement with the IRS because if the institution chooses not to enter into the agreement, the institution would be taxed on all investments earned in the United States despite the client’s nationality.²⁵⁰ In other words, if the foreign financial institution chooses not to enter into the agreement with the IRS, it would be subjecting all clients to a thirty percent tax on in-

240. *Id.*

241. *Id.* (quoting IRS Commissioner Doug Shulman).

242. *Summary of Key FATCA Provisions*, IRS.GOV, <http://www.irs.gov/businesses/corporations/article/0,,id=236664,00.html> (last updated Aug. 18, 2011).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239.

247. *Summary of Key FATCA Provisions*, *supra* note 242.

248. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239; *Summary of Key FATCA Provisions*, *supra* note 242.

249. *Treasury and IRS Issue Guidance Outlining Phased Implementation of FATCA Beginning in 2013*, *supra* note 239.

250. *See* Jensen, *supra* note 238, at 1849–50.

come earned in the United States.²⁵¹ While the foreign financial institutions would give up U.S. citizens' privacy if the institution chose to comply with the IRS agreement, the institution's other clients would not be affected in any way.²⁵² Rather than finalizing the proposed IRS regulation, and causing further economic hardship to South Florida, the government should instead just wait for FATCA to begin applying.²⁵³ After FATCA has been active for a while, the IRS should re-evaluate the situation and see if FATCA is in fact helping to force U.S. citizens who have deposits in foreign financial institutions to pay taxes on that money.

Another way to minimize the burden on banks would be to change the proposed IRS regulation to only list some countries, rather than have the banks report interest earned by residents of *all* countries.²⁵⁴ Mr. Alex Sanchez, who is the President and Chief Executive Officer of the Florida Bankers Association, which is a lobbying group for Florida banks, offered this suggestion to the IRS.²⁵⁵ He explained that it would not be useful to even collect the information on countries such as Mexico or Venezuela, because very few Americans even have accounts in those countries.²⁵⁶ Therefore, these countries, which have high level of kidnappings and extortion of their wealthy, and which have many citizens with accounts in the United States whom would likely withdraw their money if their interest was going to be reported, should be left off the list of countries which banks should have to report interest on.²⁵⁷ Instead, the IRS should include countries such as France, the United Kingdom, and Germany, which have better relations with the United States and would be more likely to reciprocate the information.²⁵⁸

There are other methods to achieve the goals of the proposed IRS regulation, which have less destructive impacts to the South Florida economic market; therefore, these methods should be exhausted before putting any more stress than necessary on an already sunken market.²⁵⁹

251. *Id.*

252. *Id.* at 1850.

253. *See id.*

254. *See* Telephone Interview with Alex Sanchez, *supra* note 167.

255. *Id.*

256. *Id.*

257. *See id.*

258. *Id.*

259. *See* Telephone Interview with Alex Sanchez, *supra* note 167.

FLORIDA'S SUSPICIONLESS DRUG TESTING OF WELFARE APPLICANTS

JEFFREY WIDELITZ*

I.	INTRODUCTION	254
II.	BACKGROUND	255
	A. <i>Florida's Legislation</i>	255
	B. <i>Welfare in Florida</i>	257
	C. <i>Substance Abuse and Welfare Recipients: The Statistics and General Information</i>	259
	D. <i>How Parental Substance Abuse Affects Child Welfare</i>	260
	E. <i>Substance Abuse and the Workplace</i>	262
	F. <i>Recipients' Diminished Level of Privacy and Lack of Entitlement</i>	262
III.	THE FOURTH AMENDMENT	264
	A. <i>In General</i>	264
	B. <i>The Special Needs Doctrine</i>	266
	1. The Supreme Court of the United States Cases	267
	a. <i>The Beginning: Skinner v. Railway Labor Executives Ass'n</i>	267
	b. <i>The Skinner Companion: National Treasury Employees Union v. Von Raab</i>	270
	c. <i>Vernonia School District 47J v. Acton ex rel. Acton</i>	273
	d. <i>Chandler v. Miller</i>	279
	i. <i>The Chandler Dissent</i>	281
	e. <i>Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls</i> ...	282
	2. Trends Among the Lower Courts.....	285
	3. The Test	288
IV.	ANALYSIS	289
	A. <i>Florida vs. Michigan</i>	289
	1. Why the Michigan Legislation Failed.....	290
	2. Why the Current Florida Legislation Is Constitutional....	293
	a. <i>The "Special Needs" Test Applied</i>	293
	i. Does the Search Fall Within the Fourth Amendment?	293
	ii. Is the Search Reasonable?	294
	iii. The Extent and Character of the Privacy Intrusion.....	297

iv.	The Governmental Interest and Public Safety Implications	299
v.	The Balancing of the Interests	306
V.	CONCLUSION	307

I. INTRODUCTION

The State of Florida has passed legislation requiring welfare applicants to undergo drug testing in order to receive cash benefits.¹ Florida is the first state since Michigan to enact such a law.² This controversial law is being vehemently challenged by many groups and organizations around the country and by the welfare recipients themselves.³ The American Civil Liberties Union (ACLU) filed suit on September 6, 2011 in federal court in Orlando on behalf of Luis Lebron, a temporary cash benefit applicant.⁴

This note will focus on how this Florida legislation can withstand a Fourth Amendment constitutional challenge. First, the background section will dissect the current Florida legislation and the state of welfare in Florida including statistics of the recipients and the effects of drugs on children, families, and employment. Next, the legislation's biggest hurdle, the Fourth Amendment, will be explained and examined including an in depth look at the evolution of the special needs doctrine and how it has been applied in the suspicionless drug testing setting. This evolution of the suspicionless drug testing law will be demonstrated through cases from the Supreme Court of the United States and various lower courts across the United States. Furthermore, part IV examines why the Michigan legislation was ruled unconstitutional, focusing on the decision in *Marchwinski v. Howard (Marchwinski I)*,⁵ continuing with a detailed application of the special needs doctrine to the current Florida legislation. Finally, this note concludes that Florida's legisla-

* J.D. Candidate May 2013, Shepard Broad Law Center, Nova Southeastern University; B.S., 2009, Economics, Florida State University. The author would like to thank his family for their tremendous and continuous support. In addition, he would like to thank the members of *Nova Law Review* and the law school faculty, especially Professors Joseph Hnylka and Amanda Foster for their encouragement and guidance.

1. FLA. STAT. § 414.0652(1) (2011).

2. See MICH. COMP. LAWS § 400.571 (1999), *invalidated by Marchwinski v. Howard (Marchwinski I)*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *vacated and reh'g en banc granted*, 319 F.3d 258 (6th Cir. 2003).

3. See, e.g., *ACLU Files Suit in Federal Court Challenging Mandatory Drug Testing of Temporary Assistance Applicants*, ACLU (Sept. 7, 2011), <http://www.aclu.org/criminal-law-reform/aclu-files-suit-federal-court-challenging-mandatory-drug-testing-temporary>.

4. *Id.*

5. 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), and *vacated and reh'g en banc granted*, 319 F.3d 258 (6th Cir. 2003).

tion falls within the special needs exception of the Fourth Amendment and therefore, the legislation is constitutional.

II. BACKGROUND

A. *Florida's Legislation*

Florida's legislation on the drug screening of welfare recipients went into effect on July 1, 2011.⁶ Under this act, every applicant for Temporary Assistance for Needy Families (TANF) seeking cash assistance under the Temporary Cash Assistance (TCA) program will be required to undergo testing for illegal drugs.⁷ Drug testing will not be required when applying for food assistance and Medicaid programs.⁸ The applicant will be responsible for the initial cost of the drug test, but if passed, the cost will be returned to them in their first assistance check.⁹ The cost of a drug test is estimated to be between ten and thirty-six dollars, depending on the facility; a list of all of the approved facilities is on the Florida Department of Children and Families (DCF) website or can be provided to applicants in person.¹⁰ To the contrary, if the applicant fails the drug test, he or she will bear the cost of the test without a refund.¹¹ Further, the applicant will not be able to reapply for TANF for a period of one year from the date the applicant tested positive or three years if this is his or her second failed attempt.¹² The applicant may also reapply six months after the successful completion of a drug rehabilitation program.¹³ The rehabilitation option is only available to the applicant one time.¹⁴

6. FLA. LEGIS., FINAL BILL ANALYSIS, 2011 REG. SESS., SUMMARY ANALYSIS at 1, CS for HB 353 [hereinafter SUMMARY ANALYSIS, CS for HB 353].

7. FLA. STAT. § 414.0652(1) (2011); *Drug Testing Policy*, FLA. DEP'T OF CHILDREN & FAMILIES (Oct. 13, 2011, 2:31 PM), available at <http://www.alldeaf.com/war-political-news/93871-2-positive-welfare-drug-testing-5.html> (last visited Nov. 13, 2011) (stating drugs tested for are: Amphetamines, methamphetamines, cannabinoids (THC), cocaine, phencyclidine (PCP), opiates, barbiturates, benzodiazepines, methadone, propoxyphene).

8. See *Food Assistance & SUNCAP: Eligibility Requirements*, FLA. DEP'T OF CHILDREN & FAMILIES, <http://www.dcf.state.fl.us/programs/access/foodstamps.shtml> (last visited Nov. 13, 2011); *Access Florida Food, Medical Assistance and Cash*, FLA. DEP'T OF CHILDREN & FAMILIES, <http://www.dcf.state.fl.us/programs/access/medicaid.shtml> (last visited Nov. 13, 2011).

9. FLA. STAT. § 414.0652(2)(a) (2011).

10. *Drug Testing Policy*, *supra* note 7.

11. FLA. STAT. § 414.0652(1)(b), (2)(a), (h).

12. *Id.*

13. *Id.* § 414.0652(2)(j).

14. *Id.*

If an applicant fails the drug test and is a parent, there are two options to ensure that the dependent child still receives benefits.¹⁵ First, DCF may assign a “protective payee” who will receive the cash benefits on behalf of the child.¹⁶ Alternatively, the second option is that the parent may designate an immediate family member, which is undefined by the act, to receive the benefits on behalf of the child.¹⁷ Both the protective payee and the immediate relative will have to undergo and pass a drug screen.¹⁸

When a TANF applicant tests positive for an illegal substance, the DCF must provide the applicant with information regarding drug addiction, abuse, and treatment programs in the area, although neither DCF nor the State will be responsible for providing or paying any part of a rehabilitation program.¹⁹ At the time of the application, DCF must provide the applicant with a summary of the legislation, the procedures adopted by it, and all potential outcomes.²⁰ After being told of the drug screening policy, the applicant can choose not to continue with the application at that time and return at a later date.²¹ Additionally, DCF is required to have the applicant sign a form indicating that he or she has received notice of the drug screening policy and, at that point, the applicant can voluntarily disclose the use of any legally obtained prescriptions or over-the-counter medications that may have an effect on the outcome of the test.²² If the applicant does not feel comfortable disclosing prescription medication information at the time of application, the applicant can have a medical review officer privately review any prescriptions, over-the-counter medicines, or recent medical procedures that would cause the applicant to fail the drug test.²³ The medical review officer will just provide the applicant’s caseworker with the negative result and no further personal medical information.²⁴ This drug screening policy will apply to everyone receiving cash benefits who is included in the family except children under the age of eighteen.²⁵

15. *Id.* § 414.0652(3).

16. FLA. STAT. § 414.0652(3)(b).

17. *Id.* § 414.0652(3)(c).

18. *See id.*

19. *See id.* § 414.0652(2)(i).

20. *See id.* § 414.0652(2)(a).

21. FLA. STAT. § 414.0652 (2)(a).

22. *Id.* § 414.0652 (2)(d)–(e).

23. *See Drug Testing Policy, supra* note 7.

24. *Id.*

25. FLA. STAT. § 414.0652(2)(a).

B. *Welfare in Florida*

The welfare reform legislation of 1996 created the Personal Responsibility and Work Opportunity Reconciliation Act (PWRORA).²⁶ This act created the TANF program, replacing the previous welfare platform of Aid to Families with Dependent Children.²⁷ PWRORA terminated any federal entitlement to government welfare assistance and created TANF, granting federal funds to states each year.²⁸ These federal funds cover expenses incurred by the state from benefits, administrative expenses, and services rendered to needy families.²⁹ Additionally, the federal government cannot prohibit states from drug testing welfare recipients or taking away benefits because of a positive drug test.³⁰ Furthermore, TANF became effective in 1997, was reauthorized in 2006,³¹ expired again on September 30, 2011, and must be reauthorized by Congress in order to continue distributing benefits.³²

TANF is not a governmental hand-out, but a program designed to help people become independent and self-sufficient.³³ States receive funding for TANF in order to accomplish four main goals.³⁴ The first goal is “assisting needy families so that children can be cared for in their own homes.”³⁵ The second purpose is “reducing the dependency of needy parents by promoting job preparation, work, and marriage.”³⁶ Third is “preventing out-of-wedlock pregnancies,” and fourth is “encouraging the formation and maintenance of two-parent families.”³⁷

The only section of TANF that will be affected by the drug screening procedures is the TCA program.³⁸ The TCA program was set up in order to provide cash to families with dependent children under the age of eighteen.³⁹ A person applying for TCA under TANF must comply with every require-

26. SUMMARY ANALYSIS, CS for HB 353, at 2.

27. *About TANF*, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited Nov. 13, 2011).

28. *Id.*

29. *Id.*

30. 21 U.S.C. § 862b (1996).

31. *About TANF*, *supra* note 27.

32. SUMMARY ANALYSIS, CS for HB 353, at 2.

33. *See About TANF*, *supra* note 27.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See Temporary Cash Assistance: Eligibility Rules*, FLA. DEP'T OF CHILDREN & FAMILIES, <http://www.dcf.state.fl.us/programs/access/tca.shtml> (last visited Nov. 13, 2011).

39. *Id.*

ment before cash assistance will be disbursed.⁴⁰ Cash assistance will only be provided to applicants for a lifetime total of forty-eight months unless the applicant is a child, in which case, there is no time limit.⁴¹ Unless an exception is met, TCA recipients will be required to participate in work activities or some equivalent.⁴² The exceptions include having a child under the age of three months, being disabled, being deemed not work eligible, or an exemption from the time limit.⁴³ The income of the applicant must be less than 185% of the poverty level, and once an individual is receiving benefits, he or she will receive an earned income deduction in order to incentivize getting and keeping a job.⁴⁴ Additionally, applicants must either be a citizen of the United States or qualify as a non-citizen; no matter which category the applicant is in, he or she must reside in the State of Florida and provide a valid social security number, or at minimum, proof of application for one.⁴⁵

In the 2010 fiscal year, which was from October 2009 through September 2010, DCF received an average of 39,715 applications for TANF assistance per month.⁴⁶ Of the nearly 40,000 applications received, DCF approved an average of 6828 per month.⁴⁷ The total number of TANF recipients each month in the State of Florida for the fiscal year of 2010 was an average of 107,023 recipients per month.⁴⁸ As of January 1, 2011, DCF reported that roughly 113,346 people were receiving TCA.⁴⁹

40. *Id.*

41. *Id.*

42. *Id.*

43. FLA. DEP'T OF CHILDREN & FAMILIES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES STATE PLAN RENEWAL, OCT. 1, 2008–SEPT. 30, 2011 18 (effective Oct. 1, 2008).

44. *Temporary Cash Assistance: Eligibility Rules*, *supra* note 38.

45. *Id.*

46. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF: AVERAGE NUMBER OF APPLICATIONS RECEIVED (Fiscal Year 2010), http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/applications/tanf_fy_tappsrec_2010.htm (last updated May 16, 2011).

47. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF: AVERAGE NUMBER OF APPLICATIONS APPROVED (Fiscal Year 2010), http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/applications/tanf_fy_tappsapprv_2010.htm (last updated May 16, 2011).

48. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF: TOTAL NUMBER OF RECIPIENTS (Fiscal and Calendar Year 2010), http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/2010/2010_recipient_tan.htm (last updated May 16, 2011).

49. SUMMARY ANALYSIS, CS for HB 353, at 2 n.5.

C. *Substance Abuse and Welfare Recipients: The Statistics and General Information*

The TEDS Report is a publication that is published by the Center for Behavioral Health Statistics and Quality of the Substance Abuse and Mental Health Services Administration (SAMHSA).⁵⁰ SAMHSA is a governmental organization “established in 1992 and directed by Congress to target effectively substance abuse and mental health services to the people most in need and to translate research in these areas more effectively and more rapidly into the general health care system.”⁵¹ The “mission [of SAMHSA] is to reduce the impact of substance abuse and mental illness on America’s communities.”⁵² One of the main goals of the SAMHSA organization is to “provide[] . . . the public with the best and most up-to-date information about behavioral health issues and prevention/treatment approaches.”⁵³ The information compiled by SAMHSA seems to be the most comprehensive, reliable, and up-to-date. A majority of the statistics presented in this section and throughout this note will come from this governmental organization.

In 2008, 7.5% of all people admitted into a substance abuse treatment facility aged eighteen to fifty-four reported that their main source of income was public assistance.⁵⁴ The patients receiving public assistance were roughly 6% more likely to abuse heroin and roughly 5% more likely to abuse cocaine.⁵⁵ Patients receiving public assistance were also nearly 10% less likely to have completed treatment upon discharge and roughly 8% more likely to drop out of treatment.⁵⁶

SAMHSA also publishes data about substance use and abuse within families who receive government assistance.⁵⁷ This publication is called the National Household Survey on Drug Abuse, which is more commonly known as the NHSDA Report.⁵⁸ Their research indicated that roughly 14%

50. *Substance Abuse Treatment Admissions Receiving Public Assistance*, THE TEDS REP., 1 (Jan. 20, 2011), <http://oas.samhsa.gov/2k11/300/300PubAssist2k11.htm>.

51. *About the Agency*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <http://www.samhsa.gov/about/> (last visited Nov. 13, 2011).

52. *Id.*

53. *Id.*

54. *Substance Abuse Treatment Admissions Receiving Public Assistance*, *supra* note 50, at 2.

55. *Id.* at 3–4. “[H]eroin (19.0 vs. 13.7[%]) or cocaine (17.7 vs. 12.4[%]).” *Id.*

56. *Id.* at 4. “[C]omplete[d] treatment (39.2 vs. 48.8[%]) . . . drop[pe]d out . . . (28.3 vs. 20.5[%]).” *Id.*

57. *See generally Substance Use Among Persons in Families Receiving Government Assistance*, THE NHSDA REP., (Apr. 19, 2002), <http://www.oas.samhsa.gov/2k2/GovAid/GovAid.htm>.

58. *Id.*

of people between the ages of twelve and sixty-four lived in homes with families assisted by the government.⁵⁹ The focus of the report was to determine the percentage of members of families receiving government assistance who used illicit drugs within the past month.⁶⁰ Roughly 7.2% of all people aged twelve to sixty-four receiving government assistance reported using illicit drugs in the past month.⁶¹ When the focus is turned to persons in families receiving government assistance, the numbers go up; 9.6% of persons in government assisted families reported using illicit drugs, compared to only 6.8% of persons in families that did not receive assistance.⁶² Additionally, the study found drug use among persons in families receiving cash assistance is higher than in families that do not benefit from cash assistance.⁶³

D. *How Parental Substance Abuse Affects Child Welfare*

In 2007, DCF issued a training bulletin concerning child welfare and substance abuse.⁶⁴ This training bulletin compiled numerous statistical discoveries, which prompted DCF to draft this bulletin for their caseworkers.⁶⁵ DCF reports that “[c]hildren of substance-abusing parents are almost three times more likely to be abused and more than four times more likely to be neglected than children of caregivers who are not substance abusers.”⁶⁶ Additionally, “[c]hildren’s mental health problems are closely related to parental substance abuse, maltreatment, and other forms of family violence.”⁶⁷ Furthermore, nearly two-thirds of violence from a spouse occurs when the perpetrator is inebriated.⁶⁸ There is a lasting impact of spousal domestic violence on the children who are watching because they are then “50% more likely to abuse drugs and/or alcohol” after growing up in a home where domestic violence is a regular occurrence.⁶⁹

59. *Id.*

60. *Id.* “[I]llicit drug[s] [include] marijuana, cocaine, heroin, hallucinogens, and inhalants and non-medical use of prescription-type pain relievers, tranquilizers, stimulants, and sedatives.” *Id.* at n.2.

61. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

62. *Id.*

63. *Id.*

64. *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, DCF OFFICE OF FAMILY SAFETY TRAINING BULLETIN, Aug. 2007, at 1.

65. *See id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 1.

DCF gives numerous examples of potential risk of harm to children when their parents or guardians abuse or are dependent on drugs.⁷⁰ The parent may leave the child unattended while seeking out drugs or partying, placing the child in possibly unsafe conditions to fend for himself or herself.⁷¹ Even when the parent is home, the parent might neglect the essential dietary, clothing, and sanitary needs of the child because of the parent's altered state of mind due to drug use.⁷² More importantly, such parents who abuse illegal substances are more likely to use funds to buy alcohol or drugs, rather than food and clothing for the child, thus placing the need for the illegal drug over the child's necessities.⁷³ Additionally, 75% of welfare professionals have reported that children are much "more likely to enter foster care" when their parents are addicts.⁷⁴

Drug abuse by children is strongly correlated with parental drug abuse.⁷⁵ A child who witnesses his or her parents doing drugs is likely to perceive that his or her parents are "permissive about the use of drugs," and therefore, the child is more likely to use drugs in the future.⁷⁶ In fact, children are generally going to take drugs in their future if they witness their parents taking drugs, because studies show that children who use drugs, more often than not, have parents who use drugs.⁷⁷

DCF gives a long list of ways for a case manager, while on an in-home examination, to determine if the parents are abusing drugs.⁷⁸ This list includes numerous and obvious factors such as finding drug paraphernalia or a parent admitting to substance abuse, however, "[a]lcohol and drug use often are under-recognized" by caseworkers who interview parents.⁷⁹

70. *Id.* at 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Children of Addicted Parents: Important Facts*, HOPE NETWORKS, <http://www.hopenetworks.org/addiction/Children%20of%20Addicts.htm> (last visited Nov. 13, 2011).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 3.

79. *Id.*

E. *Substance Abuse and the Workplace*

Anyone who is attempting to get a new job in the private sector should prepare to take a drug test.⁸⁰ A study performed by the Society for Human Resource Management (SHRM) concluded that roughly 83.5% of employers administer drug tests as part of their pre-employment procedure and about 73.3% of employers will drug test employees upon reasonable suspicion after they have been hired.⁸¹ These employers drug test their applicants and employees because it is estimated that there is roughly eighty-one billion dollars in lost productivity among American businesses each year because of drug and alcohol abuse.⁸² Drug abuse by employees can result in “[r]isk, safety, and liability issues; [l]oss of production; [h]igher absenteeism . . . consistent tardiness; . . . [i]ncreased incidences of theft [and] embezzlement; . . . [h]igher employee turnover; [and] [e]mployee behavior issues that affect a company’s morale, culture, and image.”⁸³ The SHRM reports that employer drug testing is working in the United States.⁸⁴ According to the annual Drug Testing Index, positive drug test results fell from 13.6% in 1988 to roughly 3.8% in 2006.⁸⁵ Drug testing by employers appears to be a successful tactic in reducing employee drug use and increasing company efficiency and will likely be a continued tactic among American businesses.

F. *Recipients’ Diminished Level of Privacy and Lack of Entitlement*

Prior to being faced with the instant issue of suspicionless drug testing, the Supreme Court of the United States faced a similar issue in *Wyman v. James*.⁸⁶ Specifically, the issue in *Wyman* was whether a welfare caseworker has the right to enter the home of a recipient and whether the refusal of admission is sufficient grounds to terminate benefits.⁸⁷ The holding, which was that welfare recipients have a reduced expectation of privacy, is essential to the instant issue.⁸⁸

80. See Kathy Gurchiek, *Employer Testing Credited for Drop in Worker Drug Use*, SOC’Y FOR HUMAN RES. MGMT. (Apr. 18, 2007), http://www.shrm.org/publications/HRNEWS/pages/CMS_021232.aspx.

81. *Id.*

82. *For Employers*, EXPERTOX.COM, <http://www.expertox.com/html/services/employers.php> (last visited Nov. 13, 2011).

83. *Id.*

84. See Gurchiek, *supra* note 80.

85. *Id.*

86. 400 U.S. 309, 310 (1971).

87. *Id.* at 310.

88. See *id.* at 317–18.

In *Wyman*, the Supreme Court analyzed the issue of whether a welfare recipient can refuse a home visit by a caseworker and still retain his or her benefits.⁸⁹ The plaintiff, Mrs. James, denied her caseworker access to her home even though the caseworker told her that she was required by law to let her in and that if she did not let her in, her benefits would be terminated.⁹⁰ About a week after denying the caseworker entry into her home, Mrs. James received a letter stating that her benefits were going to be discontinued and was granted a hearing before a review officer.⁹¹ The review officer stated that the termination was proper and Mrs. James would no longer be receiving benefits unless she opened her home to the caseworker.⁹² Mrs. James then brought a civil rights suit on behalf of herself and everyone else in her situation.⁹³

The Court did not consider the home intrusion a violation of the Fourth Amendment rights of Mrs. James.⁹⁴ It was noted that a visitation to the home is neither compelled nor forced and denying the caseworker access does not result in a criminal act.⁹⁵ This instance was not considered a search because it did not reach the threshold of a search; if the caseworker is denied access, she does not enter and therefore, does not conduct a search.⁹⁶ Additionally, even if the caseworker was to enter the home, the visit is not unreasonable and still does not fall within the Fourth Amendment, as the Fourth Amendment only protects against unreasonable searches.⁹⁷ The Court stated many reasons why the home visit is not unreasonable.⁹⁸ The most noteworthy reasons being: first, there is a large public interest in protecting the children of these families;⁹⁹ second, the agency, by using state and federal tax funds, is satisfying a public trust, and the “agency has appropriate and paramount interest[s] and concern[s] in seeing” that the funds go to the intended party for the intended use;¹⁰⁰ third, the public is providing this funding in a purely charitable nature and has the right to know how its funds are put to work;¹⁰¹ fourth, the goals of the program are to help the recipient’s family become

89. *Id.* at 310.

90. *Id.* at 313–14.

91. *Wyman*, 400 U.S. at 314.

92. *Id.*

93. *Id.*

94. *Id.* at 318.

95. *Id.* at 317.

96. *Wyman*, 400 U.S. at 317–18.

97. *Id.* at 318.

98. *See id.* at 318–24.

99. *Id.* at 318.

100. *Id.* at 318–19.

101. *Wyman*, 400 U.S. at 319.

self-sufficient, to make sure the family has what it needs to live, and to make sure that the recipient is not merely exploiting a child for personal gain;¹⁰² fifth, there is only a minimum burden upon the recipient because the recipient is notified of the visit well in advance;¹⁰³ and sixth, there are no criminal consequences involved in any part of the initial visit.¹⁰⁴ Furthermore, the Court said that Mrs. James seemed to want the government agency to provide her family with “the necessities for life . . . upon her own informational terms, to utilize the Fourth Amendment as a wedge for imposing those terms, and to avoid questions of any kind.”¹⁰⁵

Although the Court did not consider this a search under the Fourth Amendment, it is still an important case when analyzing the instant issue. The Court ultimately determined the required visit to be constitutional because “there is no search involved in this case [and] even if there were a search, it would not be unreasonable; and that even if this were an unreasonable search, a welfare recipient waives her right to object by accepting benefits.”¹⁰⁶

Additionally, as vital to the analysis of suspicionless drug testing of welfare recipients, the language of 42 U.S.C. § 601 provides for “block grants to states for [TANF].”¹⁰⁷ 42 U.S.C. § 601(b) states: “[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.”¹⁰⁸ This section removed the previous entitlement to government assistance funds and sets out further requirements and limitations of the funds throughout various sections of the statute.¹⁰⁹

III. THE FOURTH AMENDMENT

A. *In General*

The Fourth Amendment guarantees the people of the United States that they will be free from unreasonable searches and seizures conducted by government officials.¹¹⁰ This “Amendment guarantees the privacy, dignity, and

102. *Id.*

103. *Id.* at 320–21.

104. *Id.* at 323.

105. *Id.* at 321–22.

106. *Wyman*, 400 U.S. at 338 (Marshall, J., dissenting).

107. 42 U.S.C. § 601 (1996).

108. *Id.* § 601(b).

109. *Id.* § 601.

110. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but

security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction.”¹¹¹ “[T]he Fourth Amendment cannot be translated into a general constitutional right to privacy,” and only covers certain intrusions by the Government.¹¹² A search, under this Amendment, is defined as a government invasion of a person’s privacy, and the specific invasion must be no greater than necessary under the circumstances of the case.¹¹³ The Fourth Amendment only bars those searches that are considered unreasonable.¹¹⁴ Reasonableness is determined by viewing the entirety of “the circumstances surrounding the search or seizure”¹¹⁵ and “a careful balancing of governmental and private interests.”¹¹⁶ In general, searches conducted without a warrant by government officials require an “unquestionabl[e] showing [of] probable cause”¹¹⁷ because the Constitution requires “that [a] deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police.”¹¹⁸

Justice Harlan, concurring in *Katz v. United States*,¹¹⁹ laid out a two-part test that emerged from the compilation of prior case law to determine if a person has a legitimate right to privacy in a given instance.¹²⁰ First, in order to have such a right, a person must “exhibit[] an actual (subjective) expectation of privacy, and second, that [person’s] expectation [must] be one that society is prepared to recognize as reasonable.”¹²¹ Justice Harlan stated as an example, that a person’s home is a place where privacy is to be expected, but on the contrary, a conversation with someone in public cannot be protected from being heard by others and thus, there would be an unreasonable expectation of privacy in that instance.¹²²

upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

111. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 613–14 (1989).

112. *Katz v. United States*, 389 U.S. 347, 350 (1967), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (internal quotation marks omitted).

113. *See Oliver v. United States*, 466 U.S. 170, 178 (1984).

114. *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

115. *United States v. de Hernandez*, 473 U.S. 531, 537 (1985).

116. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

117. *Katz*, 389 U.S. at 357.

118. *Id.* (quoting *Wong Sun v. United States*, 371 U.S. 471, 481–82 (1963)).

119. 389 U.S. 347 (1967), *superseded by statute*, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520.

120. *Id.* at 361 (Harlan, J., concurring).

121. *Id.* (internal quotation marks omitted).

122. *Id.*

The Fourth Amendment applies to state and local governments through the Due Process Clause of the Fourteenth Amendment.¹²³ Additionally, the Fourth Amendment's "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'"¹²⁴ Justice Black, in *Katz*, noted that the Fourth Amendment was originally enacted in order to prevent government officials from breaking into, ransacking, or seizing a person's personal effects without a warrant.¹²⁵ The Supreme Court of the United States has often stated that because the Fourth Amendment "must be interpreted 'in light of contemporary norms,'"¹²⁶ the "Bill of Rights' safeguards should be given a liberal construction."¹²⁷ As a result of changing times and technology, the courts are faced with new types of searches and seizures and must adapt accordingly.¹²⁸

B. *The Special Needs Doctrine*

The special needs exception was first articulated by Justice Blackmun in his concurring opinion in *New Jersey v. T.L.O.*¹²⁹ Justice Blackmun stated that this exception is only applicable to "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."¹³⁰ In such instances, governmental and privacy interests are balanced to see if requiring the official to have probable cause or a warrant is unreasonable.¹³¹ When a search or seizure by the government is found to be within the realm of the special needs doctrine, there is no need to show probable cause, reasonable suspicion, or to obtain a warrant.¹³² In fact, "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion."¹³³ Special needs cases involve:

123. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

124. *Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981), *review granted sub nom. United States v. Gaultney*, 664 F.2d 1242 (5th Cir. 1981) (quoting *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980)).

125. *Katz*, 389 U.S. at 367 (Black, J., dissenting).

126. *Steagald*, 451 U.S. at 217 n.10 (quoting *Payton* 445 U.S. at 591 n.33).

127. *Katz*, 389 U.S. at 366 (Black, J., dissenting).

128. *See id.* at 357–58.

129. 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

130. *Id.*

131. *See Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989).

132. *Neumeyer v. Beard*, 421 F.3d 210, 214 (3d Cir. 2005).

133. *T.L.O.*, 469 U.S. at 342 n.8. (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; 2) lack of individualized suspicion of wrongdoing, and concomitant lack of individualized stigma based on such suspicion; and 3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons [affected] by that person’s conduct, rather than [an interest in] deterrence or [in] punishment for past wrongdoing.¹³⁴

The Supreme Court of the United States has used the special needs exception four times to rule suspicionless drug testing constitutional¹³⁵ and once to rule it unconstitutional.¹³⁶

This section will discuss the evolution of the special needs doctrine in Supreme Court suspicionless drug testing cases. Additionally, this section will delve into the expanding application of the special needs doctrine by various lower courts across the country.

1. The Supreme Court of the United States Cases

a. *The Beginning*: *Skinner v. Railway Labor Executives Ass’n*

*Skinner v. Railway Labor Executives Ass’n*¹³⁷ is a case where the Supreme Court of the United States granted certiorari to decide the issue of whether the Federal Railroad Administration (FRA) could drug test certain employees without any sort of suspicion after an accident.¹³⁸ The FRA was attempting to drug and alcohol test their employees pursuant to the Federal Railroad Safety Act of 1970, which gives the FRA permission to “prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety.”¹³⁹ The Court held that the Fourth Amendment did apply to the drug and alcohol testing that the FRA wanted to implement, but that the testing was reasonable under the Fourth Amendment even though it

134. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1213–14 (10th Cir. 2003).

135. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 838 (2002); *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 664–65 (1995); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989); *Skinner*, 489 U.S. at 634.

136. *Chandler v. Miller*, 520 U.S. 305, 318, 322 (1997).

137. 489 U.S. 602 (1989).

138. *Id.* at 606.

139. *Id.* (quoting 45 U.S.C. § 431(a) (1970)).

did not require a warrant, probable cause, or any suspicion of use.¹⁴⁰ The Court did not need further evidence of a drug epidemic at this particular railway station; thus, a finding of drug use by railroad employees nationwide was enough to subject their employees to suspicionless testing.¹⁴¹

To validate the drug testing of the railroad employees, the *Skinner* Court used the special needs doctrine.¹⁴² When a court is faced with a special need, it “balance[s] the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.”¹⁴³ Here, the Court determined that the Government had an interest in ensuring the safety of the passengers, the railway employees, and surrounding property because many of the railway employees that would be drug tested had safety sensitive tasks.¹⁴⁴ The FRA proved to the Court that it would be counterproductive to require a warrant or probable cause when performing the drug tests.¹⁴⁵ The burden of obtaining a warrant on such occasions would frustrate the purpose because alcohol and other drugs exit the system at a constant rate and when a test is triggered, the FRA needs immediate results.¹⁴⁶ Additionally, the Court stated that requiring the FRA to get a warrant for each drug test is unreasonable because the FRA employees are not familiar with the law surrounding warrants, and would therefore be unfamiliar with the requisite procedures involved in obtaining a warrant.¹⁴⁷

In its analysis, the Court in *Skinner* first determined whether the drug tests themselves amount to a search and seizure under the Fourth Amendment.¹⁴⁸ The Court stated that the Fourth Amendment is always relevant at many different stages and levels when the Government is trying to get physical evidence from a person.¹⁴⁹ The Fourth Amendment will apply from the initial detention required to obtain the sample.¹⁵⁰ It will be particularly relevant where the detention itself interferes with the free movement of the person, if the actual method of obtaining the evidence is intrusive, or if taking the evidence “infringes [on] an expectation of privacy that society is prepared to recognize as reasonable.”¹⁵¹ The Court found that the railroad em-

140. *Id.* at 617–18, 634.

141. *See id.* at 632–34.

142. *Skinner*, 489 U.S. at 619.

143. *Id.*

144. *Id.* at 620–21.

145. *Id.* at 623 (citing *Camara v. Mun. Court*, 387 U.S. 523, 533 (1967)).

146. *Id.*

147. *Skinner*, 489 U.S. at 623–24.

148. *Id.* at 614.

149. *See id.* at 616.

150. *Id.*

151. *Id.*

ployees would only have to give urine samples and that urine testing did not involve any surgical intrusion like blood testing.¹⁵²

Next, the Court made mention of privacy issues that could be infringed upon; for example, the tester learning private medical facts about the person, as is the case in blood testing.¹⁵³ The Supreme Court ultimately decided that urinalysis “intrudes upon expectations of privacy that society has long recognized as reasonable” and the testing must be considered a search under the Fourth Amendment.¹⁵⁴ The FRA made it clear to the Court that privacy is not an issue because they would not be using the urinalysis results to assist in any prosecution or discover any medical conditions; but only to ensure that the employees are not intoxicated on the job or after an accident occurs.¹⁵⁵ Additionally, the urine sample was not required to be collected under the direct supervision of a monitor, even though the integrity of the sample could be compromised, and “the sample [was] collected in a medical environment,” not by an employee of the railroad company.¹⁵⁶

The Court reiterated its previous stance on the Fourth Amendment that a “showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.”¹⁵⁷ Limited instances arise during a search where the privacy interests that are infringed upon are minimal, and an important governmental interest is furthered by that minimal privacy infringement.¹⁵⁸ The Court found the suspicionless testing of the railroad employees to fall within this category because urinalysis is unobtrusive and there is a compelling governmental interest in keeping the railroad employees drug free because of the safety sensitive jobs that they hold.¹⁵⁹

The Court concluded “the compelling Government interests served by the FRA’s regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee.”¹⁶⁰ The Court ended its opinion with a final, powerful statement:

The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influ-

152. *Skinner*, 489 U.S. at 617.

153. *Id.*

154. *Id.*

155. *Id.* at 620–21.

156. *Id.* at 626–27.

157. *Skinner*, 489 U.S. at 624.

158. *Id.*

159. *Id.* at 626–28.

160. *Id.* at 633.

ence of those substances. . . . The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose.¹⁶¹

b. *The Skinner Companion: National Treasury Employees Union v. Von Raab*

The Supreme Court of the United States granted certiorari in *National Treasury Employees Union v. Von Raab*¹⁶² to determine whether the United States Customs Service can require urine testing from employees seeking to transfer or get promoted without violating the Fourth Amendment.¹⁶³ The Customs Service is “responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws.”¹⁶⁴ Additionally, the Customs Service has the responsibility of seizing contraband, including illegal drugs that people attempt to smuggle into the United States.¹⁶⁵ Many of the agents employed by the Customs Service use firearms while on duty because they come in contact with many dangerous criminals in charge of major drug operations who may use violence or threats against the agent.¹⁶⁶ In 1985, the Commissioner of Customs implemented a drug-screening program after extensive research led them to the conclusion that “drug screening through urinalysis is technologically reliable, valid and accurate.”¹⁶⁷ The Commissioner of Customs validated his drug-screening program by reasoning that he does not believe illegal drug use to be a major problem amongst Customs agents but that “unfortunately no segment of society is immune from the threat of illegal drug use.”¹⁶⁸ The Commissioner made drug testing a requirement for placement within jobs that meet any of three criteria: first, any job directly related to drug enforcement; second, any position which requires the employee to carry a firearm; and third, if the employee handles any classified materials.¹⁶⁹ After it is determined that the employee falls within one or more of these cate-

161. *Id.*

162. 489 U.S. 656 (1989).

163. *Id.* at 659.

164. *Id.*

165. *Id.* at 659–60.

166. *Id.* at 660.

167. *Von Raab*, 489 U.S. at 660.

168. *Id.*

169. *Id.* at 660–61.

gories, he or she is contacted by an independent drug testing facility to coordinate a time and place for the screening.¹⁷⁰ The employee has the option of either producing the sample behind a partition or in a stall.¹⁷¹ The main request of the testing facility is that the person being screened remove all of his or her personal belongings and any additional clothing that is not necessary; for example, a jacket.¹⁷²

The laboratory in *Von Raab* tested only for standard illegal drugs, not for additional medical conditions or prescription medications.¹⁷³ This laboratory has two levels of tests, and if the specimen fails the first test, it must be confirmed by the second test.¹⁷⁴ The result of a screen that is confirmed positive for illegal drugs is sent to a medical review officer at the Customs Service, who is a licensed physician.¹⁷⁵ The employees who test positive must have a valid explanation for their tests coming up positive or they can be dismissed from their position.¹⁷⁶ The Customs Service ensures that any positive results will not be turned over to any other agency for criminal proceedings without the express written consent of the employee.¹⁷⁷

It is noteworthy that *Von Raab* was decided on the same day as *Skinner*; thus, the Court relied on the finding in *Skinner* that a governmental requirement of urinalysis drug testing is a search under the Fourth Amendment and therefore, the Customs Service's testing must meet the necessary level of reasonableness required by the Fourth Amendment.¹⁷⁸ The Court identified the government's purpose, which was to prevent and deter drug use among employees with sensitive employment positions, as a substantial governmental interest.¹⁷⁹ It stated that the substantial governmental interest presented an instance where the special needs doctrine might obviate the need for a warrant or probable cause.¹⁸⁰ Additionally, the Court noted that a warrant will only provide the employee with little or no additional protection of his or her privacy because a warrant will merely tell the employee that a neutral magistrate has authorized a narrow intrusion of privacy.¹⁸¹ The drug screening policy in *Von Raab* is already narrowly and specifically defined, and all em-

170. *Id.* at 661.

171. *Id.*

172. *Von Raab*, 489 U.S. at 661.

173. *Id.* at 662.

174. *Id.*

175. *See id.*

176. *Id.* at 663.

177. *Von Raab*, 489 U.S. at 663.

178. *Id.* at 665; *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616–18 (1989).

179. *Von Raab*, 489 U.S. at 666.

180. *See id.*

181. *Id.* at 667.

ployees are put on adequate notice of the testing.¹⁸² The Court reasoned that the “Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply ‘no special facts for a neutral magistrate to evaluate.’”¹⁸³ Additionally, cases that require a warrant also require probable cause, and probable cause is prominently related to criminal investigations.¹⁸⁴

The Court ultimately found that the government’s need to conduct suspicionless drug tests of its employees outweighs the privacy interests of those employees.¹⁸⁵ In the holding, it reasoned that “[t]he Customs Service is our Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population.”¹⁸⁶ The great problem that the Court spoke of is, of course, the smuggling of illegal drugs into the United States.¹⁸⁷ Additionally, the Customs employees who are directly involved in the handling of illegal drugs or the carrying of firearms, have “a diminished expectation of privacy in respect to the intrusions occasioned by a urine test.”¹⁸⁸

The Court focused on two of the petitioner’s contentions.¹⁸⁹ First, the petitioner argued that the drug-testing program is unjustified because there is no belief by the Customs Service that it will actually find any employees using illegal drugs.¹⁹⁰ Second, the petitioner argued that the method employed by the Customs Service is not sufficiently productive to justify its Fourth Amendment infringement because employees who are on illegal drugs can avoid the detection of those drugs by temporarily abstaining or by tampering with their sample.¹⁹¹

In addressing the first, it is undisputed that drug abuse is one of the worst problems facing society and that no office is immune from potential illegal drug use.¹⁹² Given this reasoning and the government’s compelling interest, the urinalysis requirement for a few narrowly defined jobs cannot be looked at as unreasonable.¹⁹³ The mere possibility that a Custom’s employee

182. *Id.*

183. *Id.* (quoting *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring)).

184. *Von Raab*, 489 U.S. at 667.

185. *Id.* at 668.

186. *Id.*

187. *Id.*

188. *Id.* at 672.

189. *Von Raab*, 489 U.S. at 673.

190. *Id.*

191. *Id.*

192. *Id.* at 674.

193. *Id.*

uses drugs and thus becomes more susceptible to taking bribes to let drugs illegally enter the country safely or steals seized drugs is reason enough to allow the government to drug screen certain employees.¹⁹⁴ The fact that all but a few of the tested employees will test negative does not obviate the need of the drug testing program or the government's compelling interest.¹⁹⁵

With regard to the petitioner's second argument, the Court stated that addicts may not even be able to abstain from the use of illegal drugs for even a short period of time.¹⁹⁶ The court of appeals found that illegal drugs can stay in the blood system for widely varying amounts of time, depending on the person.¹⁹⁷ Therefore, the Court rejected the petitioner's argument because "no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned."¹⁹⁸ Additionally, it is not likely that the employee will be able to tamper with the sample, due to the facility's safeguards.¹⁹⁹

The Court concluded that despite both of the petitioner's arguments, "the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions."²⁰⁰ Further, it found that employees seeking promotions that are covered by the drug testing policy had to go through background investigations, medical exams, and other possible intrusive requirements before being hired, all of which can be expected to lower their privacy expectations when dealing with urinalysis.²⁰¹ Ultimately, the Court's final holding was that even though urinalysis is considered a search under the Fourth Amendment, the drug policy employed by Customs was reasonable because the government's compelling interest in preventing the promotion of drug users to sensitive positions outweighed the privacy interests of those employees.²⁰²

c. *Vernonia School District 47J v. Acton ex rel. Acton*

The Vernonia School District adopted a student athlete drug policy that allows random drug testing of all student athletes in the school district.²⁰³ A

194. *Von Raab*, 489 U.S. at 674.

195. *Id.*

196. *Id.* at 676.

197. *Id.*

198. *Id.*

199. *Von Raab*, 489 U.S. at 676.

200. *Id.*

201. *Id.* at 677.

202. *Id.* at 679; U.S. CONST. amend. IV.

203. *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 648 (1995).

student and his parents unsuccessfully challenged this policy.²⁰⁴ The Vernonia School District decided to implement its drug policy because students began to speak out about their drug use and bragged about the school's inability to address it.²⁰⁵ In the Vernonia School District, the student athletes were some of the heaviest users of drugs in the school.²⁰⁶ This finding sounded alarms for the Vernonia School District because the use of drugs is related to an increase in sports injuries.²⁰⁷ This relation was supported by expert testimony at trial, which demonstrated that there are "deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance."²⁰⁸ The Vernonia School District even implemented classes and speakers designed to deter students from using illicit drugs, but nothing worked.²⁰⁹

The drug testing policy implemented by the Vernonia School District applied to all students wishing to participate in sports programs through the school.²¹⁰ The testing was done without suspicion at the beginning of the season, and additionally, there was a random drawing of ten percent of the athletes on each team, each week, to be tested.²¹¹ The student was required to reveal all prescription drugs before the test and then enter an empty locker room with a monitor of the same sex and provide a sample for testing.²¹² The monitor would stand about twelve to fifteen feet away from the student providing the sample and watch to make sure there was no tampering and listen for normal urination sounds.²¹³ The female students were in a closed stall and could not be seen by the monitor.²¹⁴ In order to ensure the privacy of the student being tested, the laboratory did not know the identity of the student and "[o]nly the superintendent, principals, vice-principals, and athletic directors" received the results, which were kept for no more than a year.²¹⁵ If the student tested positive, a second test was immediately given, and if the second test was negative, there was no further action; however, if the second test was positive, the student and his or her parents were notified immediate-

204. *Id.* at 651, 666.

205. *See id.* at 648.

206. *Id.* at 649.

207. *Id.*

208. *Acton*, 515 U.S. at 649.

209. *Id.*

210. *Id.* at 650.

211. *Id.*

212. *Id.*

213. *Acton*, 515 U.S. at 650.

214. *Id.*

215. *Id.* at 651.

ly.²¹⁶ The student and his or her parents then had two options: first, the student could participate in a six week program which involved being drug tested every week; or second, the student could choose suspension for the remainder of the season and the following season.²¹⁷

The Court in *Vernonia School District 47J v. Acton ex rel. Acton*²¹⁸ made it clear from the beginning of its analysis that a state-compelled urinalysis is a search that must conform to the Fourth Amendment or one of its exceptions.²¹⁹ The Court stated that reasonableness is “the ultimate measure of the constitutionality of a governmental search.”²²⁰ In order to determine whether the search in *Acton* was reasonable, the Court balanced the intrusion on the Fourth Amendment rights of the student against the search’s promotion of a legitimate government interest.²²¹ The Court pointed out that there were no criminal issues, and when law enforcement officers do a search pursuant to discovering evidence of a crime, reasonableness requires a warrant, and a warrant is obtained by a showing of probable cause.²²² The Court further stated that a warrant is not required in all searches done by the government and that in such cases where no warrant is required, there is also no requirement of probable cause.²²³ A search that is done without a warrant and without probable cause can be constitutional “when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.”²²⁴

“The first factor [that must] be considered [in a Fourth Amendment search case] is the nature of the privacy interest upon which the search . . . at issue intrudes.”²²⁵ The Fourth Amendment only protects legitimate privacy interests, not just subjective ones.²²⁶ Additionally, “the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual’s legal relationship with the State.”²²⁷ The *Acton* Court began its examination of this factor by pointing out that the people subject to the drug policy were children, and thus while in school, they were temporarily under the custody

216. *Id.*

217. *Id.*

218. 515 U.S. 646 (1995).

219. *Id.* at 652.

220. *Id.*

221. *Id.* at 652–53.

222. *Id.* at 653 (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989)).

223. *Acton*, 515 U.S. at 653.

224. *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

225. *Id.* at 654.

226. *Id.*

227. *Id.*

of the State and more specifically, the schoolmaster.²²⁸ The students did not lose all constitutional rights at the door of their school, however, and for many purposes, the school acted *in loco parentis*, which allows the school to do what is reasonable in instructing the students to act and behave civilly.²²⁹ The determination of reasonableness cannot ignore “the schools’ custodial and tutelary responsibility for children.”²³⁰ The Court reasoned that students are already subjected to “a lesser expectation of privacy than members of the [general population]” because attending school requires numerous vaccinations and exams that ensure the safety of other children.²³¹ Furthermore, student athletes choose to try out for and join a team, and by doing so, “they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”²³² The student athletes must obtain: additional physicals, which include urinalysis; “they must [have] adequate insurance coverage;” they must “maintain a minimum grade point average;” and finally, they must adhere to any other dress, practice, and conduct rules set by the athletic director.²³³ The Court compared students who participate in sports to adults who work in a heavily regulated industry, finding that both “have reason to expect intrusions upon normal rights and privileges, including privacy.”²³⁴

The *Acton* Court then examined the character of the intrusion.²³⁵ The Court reiterated what the *Skinner* Court previously stated: “that the degree of intrusion depends upon the manner in which production of the urine sample is monitored.”²³⁶ In *Acton*, the Court determined that there were negligible privacy interests that were compromised by the way the urine sample was collected.²³⁷ An additional privacy issue that the Court raised when determining the character of the intrusion was the additional private medical information that could be discovered about the student through urinalysis.²³⁸ The school board in *Acton* only looked for illegal drugs and not medical conditions such as pregnancy, epilepsy, or diabetes.²³⁹ Additionally, the tests did

228. *Acton*, 515 U.S. at 654.

229. *See id.* at 655–56.

230. *Id.* at 656.

231. *Id.* at 657 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring)).

232. *Id.* at 657.

233. *See Acton*, 515 U.S. at 657.

234. *Id.*

235. *Id.* at 658.

236. *Id.* (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 626 (1989)).

237. *Id.*

238. *See Acton*, 515 U.S. at 658.

239. *Id.*

not vary depending on the student, and the school board could only test for the standard illicit drugs.²⁴⁰ Finally, the test results were only to be released to a very limited number of school officials who needed to know the results, and it was made clear that the results were not to be used in any criminal investigation.²⁴¹ The Court did not find the release of prescriptions that were being taken to be “a significant invasion of privacy” because the results could be given to the testing center and not released to anyone who personally knew the student.²⁴²

The final factor examined by the *Acton* Court was “the nature and immediacy of the governmental concern at issue . . . and the efficacy of [the] means for meeting it.”²⁴³ The Courts in *Skinner* and *Von Raab* both held that the government interests were compelling, and the district and court of appeals in *Acton* both took that to mean that the governmental interest must be compelling.²⁴⁴ The Court in *Acton* pointed out that the lower courts were mistaken to think that a compelling governmental interest was a fixed floor, and that a case would be disposed of unless the government could prove it had a compelling interest.²⁴⁵ The Court stated that there must be “an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”²⁴⁶ The Court reasoned that the Vernonia School District had a very important and perhaps compelling interest in keeping their schoolchildren off of drugs.²⁴⁷ Additionally, the Court called to attention that when students use drugs, the effect is felt across the entire school, from the other students to the faculty members.²⁴⁸ Finally, the Court reasoned that this drug screening was narrowly directed to athletes, where “immediate physical harm to the . . . user” himself or to the opposing team’s players was very high.²⁴⁹ The Court additionally mentioned the role model effect that the athletes had on the other students, and how this important is-

240. *Id.*

241. *See id.* (citing *Acton ex rel. Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp 1354, 1364 (D. Or. 1992)).

242. *See id.* at 659–60 (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 626 n.7 (1989)).

243. *Acton*, 515 U.S. at 660.

244. *Id.* at 660–61 (citing *Acton*, 796 F. Supp at 1363).

245. *See id.* at 661.

246. *Id.* (emphasis omitted).

247. *See id.* at 660–61.

248. *Acton*, 515 U.S. at 662.

249. *Id.*

sue was addressed by the athletes being drug tested so they were not able to use illicit drugs.²⁵⁰

The Court stated in *Acton* that it has “repeatedly refused to declare that only the ‘least intrusive’ search practicable can be reasonable under the Fourth Amendment.”²⁵¹ The petitioners in *Acton* argued that the better alternative was suspicionless testing.²⁵² The Court quickly rejected this alternative for numerous reasons.²⁵³ First, the proposal for suspicionless testing has the attached risk that teachers and coaches will be able to arbitrarily impose drug testing on students who are “troublesome but not drug-likely.”²⁵⁴ This risk, as the Court pointed out, could open the school to numerous lawsuits that would be very costly to defend, and further, expensive procedures would need to be put in place before accusatory drug screening could be imposed on a student.²⁵⁵ Additionally, the Court stated that the already busy school teachers would need to add a new responsibility to their already demanding job: spotting drug users.²⁵⁶ Teachers, in general, are not prepared to take on this additional task because “a drug impaired individual ‘will seldom display any outward signs detectable by [a] lay person or, in many cases, even [a] physician.’”²⁵⁷

The Court in *Acton* took into account all of the necessary factors and concluded that the drug testing policy imposed by the Vernonia School District was reasonable and constitutional.²⁵⁸ The Court did point out that there will always need to be a full analysis of the above factors in every suspicionless drug testing case and that future cases will not automatically pass constitutional muster.²⁵⁹ The Court concluded by reiterating that when the government is acting as someone else, such as an employer or a guardian, as in *Acton*, “the relevant question is whether the search is one that a reasonable guardian [or employer] might undertake.”²⁶⁰

250. *Id.* at 663.

251. *Id.* (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 629 n.9 (1989)).

252. *Id.*

253. *Acton*, 515 U.S. at 663.

254. *Id.*

255. *Id.* at 663–64.

256. *Id.* at 664.

257. *Id.* (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 628 (1989)).

258. *Acton*, 515 U.S. at 664–65.

259. *Id.* at 665.

260. *Id.*

d. *Chandler v. Miller*

In *Chandler v. Miller*,²⁶¹ Georgia enacted a law requiring political candidates for designated state office positions to pass a drug test.²⁶² This law did not require an individualized suspicion of the candidates.²⁶³ Georgia was the first and only state to enact such a law, and the Supreme Court of the United States ultimately held the law to be unconstitutional.²⁶⁴

The Georgia regulation required political candidates to submit to a drug test thirty days prior to their qualification as a candidate.²⁶⁵ This test was to be done at an approved facility and only tested for five standard illicit drugs.²⁶⁶ The United States Court of Appeals for the Eleventh Circuit held that this was a constitutional drug testing procedure.²⁶⁷ That court found that there was a special need in performing this type of drug testing, bringing this search into the realm of the special needs doctrine.²⁶⁸ The Eleventh Circuit then proceeded to balance the individual potential candidate's privacy expectations against the governmental interest to see if the need for individualized suspicion would be impractical in this context.²⁶⁹ The court found there was no record of any kind of drug abuse by any elected officials in Georgia and no reason to believe any users or addicts would be uncovered by the testing.²⁷⁰ The court still found the testing was reasonable because the citizens of Georgia place a lot of trust in their elected officials, and those officials are in charge of many important things such as economics, safety, and law enforcement.²⁷¹ The court also noted that a high-ranking government official needs to be honest, clear sighted, and clear thinking, and illegal drug use could cause a candidate to lose those important qualities.²⁷² Additionally, the court stated that high-ranking government officials can be very susceptible to bribes and blackmail, and an illegal drug habit would make an official even more susceptible.²⁷³

261. 520 U.S. 305 (1997).

262. *Id.* at 308.

263. *See id.*

264. *Id.* at 309.

265. *Id.*

266. *Chandler*, 520 U.S. at 309 (explaining that the standard illicit drugs tested for are marijuana, cocaine, opiates, amphetamines, and phencyclidines).

267. *Id.*

268. *Id.* at 311.

269. *Id.*

270. *See id.*

271. *Chandler*, 520 U.S. at 311.

272. *Id.*

273. *Id.* at 311–12.

Upon review, the Supreme Court of the United States first noted that this is a case that falls within the Fourth Amendment analysis because urinalysis has previously been held to be a search under the Fourth Amendment.²⁷⁴ Then, it proceeded to discuss the reasonableness of the search.²⁷⁵ For a search to be considered reasonable under the Fourth Amendment, an individualized suspicion is usually required unless there is a special need for the search and it is outside of the normal need for law enforcement involvement.²⁷⁶ The Court then re-examined the balancing of the private and governmental interests.²⁷⁷ Ultimately, the Court decided that although the government does have a substantial or important interest, there is no “concrete danger demanding departure from the Fourth Amendment’s main rule,” the threats and dangers were only hypothetical.²⁷⁸ The Court did point out that a demonstrated problem is not necessary in all cases, but that the proof of a problem could help to clarify and validate specific hazards.²⁷⁹

An additional focus of the Court was that the legislation does not credibly deter illegal drug use.²⁸⁰ Under the Georgia law, the potential candidate has ample notice that he would need to submit a clean drug test result within thirty days of being approved to run for office.²⁸¹ There was no secret as to the date of the test.²⁸² The Court stated that as long as a candidate is not prohibitively addicted to illegal drugs, he or she will be able to abstain long enough to pass a scheduled drug test, and those who are not able to abstain are very unlikely to become a candidate.²⁸³ The Court reasoned that, unlike in *Von Raab* where it was not feasible to subject the agents to standard office scrutiny, public officials are constantly scrutinized by the public, media, and other government officials.²⁸⁴

The Court ultimately conceded that this testing procedure was relatively noninvasive, and therefore it was not an excessive intrusion on the candidates, and that the government had a significant and important governmental interest.²⁸⁵ Despite this concession, the Court still held that because public

274. *Id.* at 313; U.S. CONST. amend. IV.

275. *Chandler*, 520 U.S. at 313.

276. *See id.* at 313; U.S. CONST. amend. IV.

277. *See Chandler*, 520 U.S. at 314, 318.

278. *Id.* at 318–19.

279. *See id.* at 319.

280. *Id.*

281. *Id.* at 309.

282. *Chandler*, 520 U.S. at 319–20.

283. *Id.* at 320.

284. *Id.* at 321 (citing *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989)).

285. *Id.* at 318.

safety is not genuinely in jeopardy, this kind of suspicionless search will be barred by the Fourth Amendment even if the search is done in the most convenient way possible.²⁸⁶ The Court stated that this drug testing was merely a symbol and not a special need.²⁸⁷

i. The *Chandler* Dissent

Chief Justice Rehnquist wrote a very compelling dissent and stated that he would rule the Georgia regulation constitutional.²⁸⁸ Chief Justice Rehnquist began by declaring that Georgia should not be faulted, and it should not be held against Georgia that it is the only state to enact a law like the one at issue because it takes one state to step up in order to bring about change or a new, nationwide enactment of similar legislations.²⁸⁹

Chief Justice Rehnquist stated that there are very few people, if any, that would be able to honestly say that illegal drug use is not a major issue that the United States is facing, and a person would have to be very bold to state that illegal drug use could not extend to candidates for public office.²⁹⁰ Chief Justice Rehnquist noted that the record did not show any illegal drug use problems among candidates or high-ranking officials, but that the State of Georgia should not have to wait until illegal drug use among candidates becomes a problem to actually attack it.²⁹¹ If the State was to wait until there was an issue, it could mean that a drug addict was running for a high-ranking official position or that one actually was elected to a position.²⁹² Such a scenario could have devastating effects on the integrity of the electoral procedures or on the office itself. Chief Justice Rehnquist cited to the majority in *Von Raab* to demonstrate that the Supreme Court of the United States had already held a drug testing procedure to be constitutional without the need for a perceived drug problem.²⁹³

Additionally, Chief Justice Rehnquist found that the majority in *Chandler* applied the special needs doctrine differently than they had in *Von Raab* and *Skinner*.²⁹⁴ He stated that the majority incorrectly relied on the notion

286. *Id.* at 323.

287. *Chandler*, 520 U.S. at 322.

288. *Id.* at 328 (Rehnquist, C.J., dissenting).

289. *See id.* at 323–24.

290. *Id.* at 324.

291. *Id.*

292. *Chandler*, 520 U.S. at 324.

293. *See id.* (citing Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 673–74 (1989)).

294. *Id.* at 325 (citing *Von Raab*, 489 U.S. at 669; *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 620 (1989)).

that a candidate is already subject to high levels of scrutiny by the public thereby allowing the public to easily spot his or her drug use.²⁹⁵ Chief Justice Rehnquist pointed out the strangeness of such a holding²⁹⁶ by comparing the candidates to the workers in *Skinner* and the Customs officials in *Von Raab* and stating that it could be easily said that those two groups are under the same sort of scrutiny from their employees and supervisors who work very closely with them on a daily basis.²⁹⁷ Specifically, he stated:

[T]he clear teaching of those cases is that the government is not required to settle for that sort of a vague and uncanalized scrutiny; if in fact preventing persons who use illegal drugs from concealing that fact from the public is a legitimate government interest, these cases indicate that the government may require a drug test.²⁹⁸

Additionally, the privacy interest that is infringed upon by a urinalysis of this kind is negligible just as in the previous cases before this Court.²⁹⁹

Chief Justice Rehnquist concluded his dissent by stating that the Court had previously held that preventing drug use by Customs employees—even off duty—was compelling because they are susceptible to bribery and blackmail.³⁰⁰ The risks for bribery and blackmail are just as high among high-ranking government officials, especially officials who engage in the use of illegal drugs.³⁰¹ Specifically, “when measured through the correct lens of our precedents in this area, the Georgia urinalysis test is a ‘reasonable’ search; it is only by distorting these precedents that the Court is able to reach the result it does.”³⁰²

e. Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,³⁰³ the Board of Education of Pottawatomie County in Oklahoma implemented a drug-testing requirement for students who

295. *Id.*

296. *Id.* at 326.

297. *Chandler*, 520 U.S. at 326 (Rehnquist, C.J., dissenting).

298. *Id.*

299. *Id.*

300. *Id.*

301. *See id.*

302. *Chandler*, 520 U.S. at 327 (Rehnquist, C.J., dissenting).

303. 536 U.S. 822 (2002).

wished to participate in extracurricular activities.³⁰⁴ There were three parts that all students wishing to participate had to consent to: first, a drug test before signing up for an activity; second, “random drug testing while participating;” and third, a drug test anytime there was reasonable suspicion of drug use.³⁰⁵ All tests would only screen for illegal drugs and not for prescription medication or medical conditions of any kind.³⁰⁶

The Supreme Court of the United States’ Fourth Amendment analysis began with the reasonableness of the governmental search and determined that the search was not related to criminal proceedings, and thus, probable cause was not required.³⁰⁷ The respondents’ argument relied on the fact that there was no individualized suspicion required in the testing of the students.³⁰⁸ The Court answered by stating that the Supreme Court had long held that “‘the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion.’”³⁰⁹ Therefore, when there is a “‘special need[] beyond the . . . need for law enforcement,’” and probable cause is impracticable, a suspicionless search could be legal if safety is an issue.³¹⁰

The Court quickly dismissed the privacy issue because a public school is considered a unique and special setting.³¹¹ The Court reasoned that, “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease.”³¹² Additionally, the Court stated that public school students are subject to fewer privacy rights than people outside of the school in order to maintain order within the school.³¹³ Finally, the Court stated that extracurricular activities are regulated beyond that of normal school regulations, and thus, students who participate have a lesser expectation of privacy.³¹⁴

The Court then examined the character of the intrusion.³¹⁵ Urinalysis is a testing procedure that is usually covered by the Fourth Amendment, but the

304. *Id.* at 825.

305. *Id.* at 826.

306. *Id.*

307. *Id.* at 828–29.

308. *Earls*, 536 U.S. at 829.

309. *Id.* at 829 (alteration in original) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)).

310. *Id.* (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

311. *See id.* at 830–31.

312. *Id.* (citing *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 657 (1995)).

313. *Earls*, 536 U.S. at 831.

314. *Id.* at 832 (citing *Acton*, 515 U.S. 646, 657 (1995)).

315. *Id.*

level of the intrusion depends upon the manner in which the urine sample is collected.³¹⁶ Here, a faculty member waited outside of a closed bathroom stall in order to “listen for the normal sounds of urination” and to make sure that the student was not tampering with the sample.³¹⁷ The Court considered this method to be a clearly negligible intrusion.³¹⁸ Additionally, the school kept all of the results private and separate from all other records the school had on the child.³¹⁹ Only faculty members who needed to know the results were given the results.³²⁰ The Court ultimately concluded that the intrusion was minimal because of the nature of the sample collection and because the results were used very limitedly.³²¹

Finally, the Court looked to the nature and immediacy of the school’s concerns and the effectiveness of the drug policy in meeting those concerns.³²² The evidence before the Court suggested that drug use among children had gotten worse since the Court previously faced this issue seven years prior to this decision.³²³ The Court, relying on precedent, concluded that although a demonstrated problem of drug abuse is not required in all cases, the fact that the school board proved the existence of even some drug use in the school was enough to “shore up an assertion of special need for a suspicionless general search program.”³²⁴ Additionally, in this context, individualized suspicion is unnecessary for preventing, deterring, and detecting drug use by students.³²⁵ Teachers are already faced with the difficult task of keeping order and disciplining the students, and therefore, a test which required individualized suspicion would be unnecessarily burdensome.³²⁶ Additionally, an individualized suspicion-based policy could lead to the targeting of certain students and open the school up to further litigation.³²⁷ The Court concluded that “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug

316. *Id.* (citing *Acton*, 515 U.S. at 658).

317. *Id.* (quoting Petition for Writ of Certiorari at 67a, n.35, Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002) (No. 01–332)).

318. *See Earls*, 536 U.S. at 833.

319. *Id.*

320. *Id.*

321. *Id.* at 834.

322. *Id.*

323. *Earls*, 536 U.S. at 834.

324. *Id.* at 835 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

325. *Id.* at 837.

326. *Id.*

327. *Id.*

use.”³²⁸ The Court found the school district’s policy to be “a reasonable means of furthering [its] important interest in preventing and deterring drug use among its schoolchildren,” and therefore, the suspicionless drug testing, although falling within the Fourth Amendment, was not in violation.³²⁹

2. Trends Among the Lower Courts

Courts around the United States are not shying away from upholding suspicionless drug testing under the special needs doctrine.³³⁰ Since 1989, courts around the country have upheld suspicionless testing of Department of Transportation employees,³³¹ teachers,³³² city employees whose jobs implicate public safety,³³³ and government employees who work with at risk youths.³³⁴

In 1989, just a few months after the Supreme Court of the United States decided *Skinner* and *Von Raab*, the United States Court of Appeals for the District of Columbia Circuit upheld suspicionless drug testing for certain employees of the Department of Transportation (DOT).³³⁵ There, the court used the same analysis as in *Skinner* and *Von Raab*.³³⁶ The court determined that “[t]here can be little doubt . . . that the testing plan serves needs other than law enforcement, and therefore need not necessarily be supported by any level of particularized suspicion.”³³⁷ It was ultimately found by the court that the balance of the DOT employees’ privacy interests against the important governmental interest of public safety issues involved with their jobs were identical to those in *Skinner* and was therefore easy to uphold.³³⁸

Nine years later, in a lengthy Fourth Amendment analysis, the United States Court of Appeals for the Sixth Circuit upheld suspicionless drug test-

328. *Earls*, 536 U.S. at 836.

329. *Id.* at 838.

330. *See Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998); *Am. Fed’n of Gov’t Emps. v. Skinner*, 885 F.2d 884, 889, 898 (D.C. Cir. 1989); *Nat’l Fed’n of Fed. Emps.-IAM v. Vilsack*, No. 10-1735(BAH), 2011 WL 1296859, at *19 (D.D.C. Apr. 6, 2011); *Crager v. Bd. of Educ. of Knott Cnty., Ky.*, 313 F. Supp. 2d 690, 697 (E.D. Ky. 2004); *Robinson v. City of Seattle*, 10 P.3d 452, 470 (Wash. Ct. App. 2000).

331. *See Am. Fed’n of Gov’t Emps.*, 885 F.2d at 886, 898.

332. *See Knox Cnty. Educ. Ass’n*, 158 F.3d at 363, 384; *Crager*, 313 F. Supp. 2d at 691, 697.

333. *See Robinson*, 10 P.3d at 470.

334. *See Vilsack*, 2011 WL 1296859, at *1, *19.

335. *Am. Fed’n of Gov’t Emps.*, 885 F.2d at 886, 898.

336. *Id.* at 888.

337. *Id.* at 889.

338. *Id.* at 889, 898.

ing for school employees applying for positions that are safety sensitive.³³⁹ The school board defined safety sensitive positions as ones “where a single mistake by such employee can create an immediate threat of serious harm to students and fellow employees.”³⁴⁰ This “include[d] principals, assistant principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries, and school bus drivers.”³⁴¹ The lower court found that because there was a lack of evidence or history of drug abuse among the positions tested and there were not the same disastrous harm implications as in previous cases, the suspicionless policy should not be upheld.³⁴² Furthermore, the lower court found the urinalysis to be fairly intrusive and “rejected the argument that teachers [have] a diminished expectation of privacy.”³⁴³

The Sixth Circuit disposed of the lower court’s decision finding in favor of suspicionless testing.³⁴⁴ The Sixth Circuit stated that little or no evidence of drug abuse was not an issue because a showing of a problem is not necessary.³⁴⁵ The analysis turned to an examination of the competing privacy interests of the teachers and the government’s interest in child safety.³⁴⁶ The court stated, “[w]e can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators.”³⁴⁷ Additionally, teachers have a direct influence on children and are serving *in loco parentis*.³⁴⁸ The court noted that even a momentary lapse in attention or judgment during recess on the playground, or while eating in the cafeteria, or just while the children are engaging in general horseplay can cause serious harm to the children because “children are active, unpredictable, and in [the] need of constant attention and supervision.”³⁴⁹

The court distinguished this case from *Chandler*.³⁵⁰ It noted that because “teachers are not subject to the same [level of] day-to-day scrutiny as [the] candidates for public office” in *Chandler*, there is a greater need for

339. Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ., 158 F.3d 361, 363, 384 (6th Cir. 1998).

340. *Id.* at 367.

341. *Id.*

342. *Id.* at 370.

343. *Id.* (internal quotation marks omitted).

344. *Knox Cnty. Educ. Ass’n*, 158 F.3d at 384.

345. *Id.* at 374.

346. *See id.* at 373–84.

347. *Id.* at 374–75.

348. *Id.* at 375.

349. *Knox Cnty. Educ. Ass’n*, 158 F.3d at 378.

350. *Id.* at 374–75.

suspicionless testing.³⁵¹ Moreover, teachers work in a very special environment where they are mostly surrounded by students for roughly six hours a day, and the majority of their daily contact is with students who might not be able to detect drug use or abuse.³⁵² If a student does suspect drug use, it is unlikely that he or she would report it because a drug use allegation is very serious and there can be numerous consequences or fear of retaliation.³⁵³ Finally, “unlike candidates for public office who may indirectly affect the lives of children as role models and policymakers, teachers directly influence and supervise children daily.”³⁵⁴

The court concluded that suspicionless drug testing of teachers is justified because of “the unique role they play in the lives of school children and the *in loco parentis* obligations imposed upon them.”³⁵⁵ Additionally, the court pointed out that this urinalysis testing is fairly nonintrusive because there is no random element to this testing.³⁵⁶ All the information collected by the test is protected by extensive privacy safeguards, and privacy levels of teachers are significantly diminished because of the high level of regulation of their jobs and the nature of the work itself.³⁵⁷

Two years later in 2000, a Washington appellate court upheld a Seattle law requiring the drug testing of city employee applicants whose duties can implicate public safety.³⁵⁸ There, the court found a compelling governmental interest in the safety of its citizens that outweighed the minimal privacy intrusions of the urinalysis and that the testing was narrowly tailored.³⁵⁹

In 2004, the case of suspicionless drug testing of teachers was addressed by the United States District Court for the Eastern District of Kentucky.³⁶⁰ There, the court set aside an injunction to stop the suspicionless testing because it said that the plaintiff would not suffer irreparable injury if he were forced to undergo drug testing.³⁶¹ Specifically, the court held:

The justifications for permitting the suspicionless drug testing of teachers (as discussed in *Knox County*), the fact that random

351. *Id.* at 375; *Chandler v. Miller*, 520 U.S. 305, 321 (1997).

352. *Knox Cnty. Educ. Ass’n*, 158 F.3d at 375.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.* at 380.

357. *Knox Cnty. Educ. Ass’n*, 158 F.3d at 379–80.

358. *Robinson v. City of Seattle*, 10 P.3d 452, 470 (Wash. Ct. App. 2000).

359. *Id.*

360. *Crager v. Bd. of Educ. of Knott Cnty., Ky.*, 313 F. Supp. 2d 690, 691 (E.D. Ky. 2004).

361. *Id.* at 703.

tests were upheld in *Earls* and *Vernonia*, the language in *Chandler* and *Skinner*, and the significant drug problem facing Knott County, support the right of the Board to protect its school children and employees through the use of random testing.³⁶²

As recent as April 6, 2011, the United States District Court for the District of Columbia granted summary judgment for the government in favor of the suspicionless drug testing of government employees that work with at risk youths and economically disadvantaged youths.³⁶³ The court held that the employees had a diminished expectation of privacy because of the realities of the work that they were involved in.³⁶⁴ Additionally, the testing procedures were identical to the ones previously upheld in *Von Raab*, therefore the court held them to be negligibly intrusive.³⁶⁵ Ultimately, the court held that the governmental interest outweighed the Fourth Amendment privacy interests of the employees.³⁶⁶

These cases only represent a few of the many suspicionless drug-testing cases that have been decided by courts around the country. This sample demonstrates the willingness to apply the special needs doctrine and the consistency in the findings once the test is applied.

3. The Test

A general test for the special needs doctrine has emerged from the five cases that the Supreme Court of the United States has decided on suspicionless drug testing.³⁶⁷ First, it must be stated that urinalysis is considered a search under the Fourth Amendment because it “intrudes upon expectations of privacy that society has long recognized as reasonable.”³⁶⁸ Once it is established that the search falls within the Fourth Amendment, the search must

362. *Id.* at 702.

363. *See* Nat’l Fed’n of Fed. Emps.–IAM v. Vilsack, No. 10-1735(BAH), 2011 WL 1296859, at *1 (D.D.C. Apr. 6, 2011).

364. *Id.* at *13.

365. *Id.* (citing Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668–74 (1989)).

366. *See id.* at *17.

367. *See* *Chandler v. Miller*, 520 U.S. 305, 313 (1997) (“[P]articlarized exceptions to the main rule are sometimes warranted based on ‘special needs, beyond the normal need for law enforcement.’” (quoting *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989))); *see also* *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 829 (2002); *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 653 (1995); *Von Raab*, 489 U.S. at 679; *Skinner*, 489 U.S. at 619–20 (discussing several cases that recognize a special needs exception).

368. *Skinner*, 489 U.S. at 617.

then be looked at to see if it is reasonable.³⁶⁹ Reasonableness of a search “depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”³⁷⁰ Generally, to be considered reasonable, the search or seizure must be “based on [some] individualized suspicion of wrongdoing”³⁷¹ unless the search or seizure can be said to fall within the scope of the special needs doctrine.³⁷² This special need must be something other than that of crime detection, and obtaining a warrant or gaining probable cause would be impracticable.³⁷³ The privacy intrusion of the drug testing must be examined and then balanced against the recipient’s interest in performing the drug testing.³⁷⁴ The Supreme Court of the United States stated that there must be “an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”³⁷⁵ Once it is determined that the governmental interest is very important and outweighs the privacy interests of the individual being tested, the intrusion on the privacy is justified and does not require any form of individualized suspicion.³⁷⁶

IV. ANALYSIS

A. *Florida vs. Michigan*

This section will demonstrate how the Michigan legislation should have passed constitutional muster, but did not, due to a split court. The section begins by showing why the Michigan legislation failed. Next, the Florida legislation will be analyzed by applying the special needs test presenting the constitutionality of the legislation when analyzed correctly.

369. *Chandler*, 520 U.S. at 313.

370. *United States v. de Hernandez*, 473 U.S. 531, 537 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337–42 (1985)).

371. *Acton*, 515 U.S. at 653 (emphasis omitted).

372. *Skinner*, 489 U.S. at 619.

373. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

374. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989).

375. *Acton*, 515 U.S. at 661 (alteration in original).

376. *Von Raab*, 489 U.S. at 668.

1. Why the Michigan Legislation Failed

In 1999, Michigan attempted to enact a suspicionless drug-testing program of welfare recipients;³⁷⁷ however, the legislation was immediately challenged.³⁷⁸ The Michigan legislation required that all new applicants be required to submit to a drug test and “[a]dditionally, after six months, twenty percent of [parents]” who are up for redetermination would be randomly selected for testing.³⁷⁹ If an applicant or recipient tested positive, he or she was required to undergo a substance abuse assessment, and if the assessment determined he or she needed treatment, the applicant would have to comply with a treatment plan.³⁸⁰ The applicant could still receive funding without going through treatment if he or she had a debilitating illness or injury, had become exempt, or gave credible information about an unplanned event or factor that was the reason why he or she tested positive.³⁸¹

The district court held that the State did not show that public safety would be placed in jeopardy if the recipients and applicants of welfare assistance were not drug tested.³⁸² The court noted that the goal of Michigan’s government assistance program is to help families become financially self sufficient, but substance abuse is a persistent problem and is a major barrier to employment and thus, self sufficiency.³⁸³ This finding was discarded by the district court as not concerning public safety, but was noted as an understandable concern.³⁸⁴ The State argued that there is strong evidence that shows parents who are substance abusers are more likely to abuse and neglect their children, and the State has a strong interest in protecting the children from abuse or neglect, especially when a main goal of the assistance program is to assist so that children can remain safe in their own homes.³⁸⁵ The court quickly decided to refute this argument by stating that a drug test is not aimed at actually addressing the issue of child abuse or neglect.³⁸⁶ The court made a case analogy to *Chandler* and stated that both applying for welfare and running for state office were voluntary activities, even more so when

377. MICH. COMP. LAWS § 400.571 (1999), *invalidated by Marchwinski I*, 113 F. Supp. 2d 1134, 1144 (E.D. Mich. 2000), *rev’d*, 309 F.3d 330 (6th Cir. 2002), *vacated and reh’g en banc granted*, 319 F.3d 258 (6th Cir. 2003).

378. *Marchwinski I*, 113 F. Supp. 2d at 1144.

379. *Id.* at 1136.

380. *Id.*

381. *Id.* at 1137.

382. *Id.* at 1140.

383. *Marchwinski I*, 113 F. Supp. 2d at 1140.

384. *Id.*

385. *Id.* at 1141.

386. *Id.*

running for state office, and the *Chandler* Court held the testing in its case was unconstitutional.³⁸⁷ The ultimate holdings, in both *Chandler* and *Marchwinski I*, were that suspicionless drug testing in those cases was unconstitutional because the State did not show a special need grounded in public safety.³⁸⁸

The case was appealed to the United States Court of Appeals for the Sixth Circuit, which granted review of the case, ultimately reversing the district court's decision.³⁸⁹ The court pointed out that the program eligibility manual for the Michigan assistance program states that having strong family relationships is made harder by substance abuse, and there are more barriers to employment when substance abuse is involved; therefore, the State of Michigan will drug test their recipients.³⁹⁰ On appeal, the petitioner heavily pushed the argument that Michigan's interest in preventing child abuse and neglect was enough of a special need to warrant suspicionless drug testing.³⁹¹ The court emphasized that "although public safety must be a component of a state's special need, it need not predominate."³⁹² The court found that the district court erred in holding that only a public safety concern is sufficient for a special need.³⁹³ The proper standard, as the court set out, for reviewing this type of case is "whether Michigan has shown a special need, of which public safety is but one consideration."³⁹⁴

The Sixth Circuit laid out numerous reasons as to why there was a sufficient special need for Michigan to engage in suspicionless testing.³⁹⁵ The court was presented with a multitude of studies that supported the notion that the use and abuse of controlled substances negatively impacts the ability of a person to gain and preserve employment and be a responsible and capable parent.³⁹⁶ Additionally, the studies presented to the court showed that the use of controlled substances was higher among welfare recipients than the general public.³⁹⁷ Furthermore, substance abuse greatly contributes to child abuse and neglect, and illegal drugs are a significant barrier to financial self-

387. *Id.* at 1143.

388. *Marchwinski I*, 113 F. Supp. 2d at 1143.

389. *Marchwinski v. Howard (Marchwinski II)*, 309 F.3d 330, 332 (6th Cir. 2002), *vacated and reh'g en banc granted*, 319 F.3d 258 (6th Cir. 2003).

390. *Id.*

391. *Id.* at 333.

392. *Id.* at 335.

393. *Id.*

394. *Marchwinski II*, 309 F.3d at 335.

395. *Id.* at 335–36.

396. *Id.* at 335.

397. *Id.* at 335–36.

sufficiency.³⁹⁸ The court had “no doubt that the safety of the children of families in Michigan’s Family Independence Program is a substantial public safety concern that must be factored into the determination of whether Michigan has shown a special need to this drug testing program.”³⁹⁹ Finally, the court pointed out the public safety concerns that are inherently attached to illegal drug use and trafficking.⁴⁰⁰ The court stated that it is “beyond cavil” that the State has a sufficient special need of ensuring that taxpayers’ money does not go to the promotion of illegal activity, especially when that activity “undermines the objectives of the program . . . [and] directly endangers both the public and the children the program is designed to assist.”⁴⁰¹

When conducting the standard balancing test involved in any special needs analysis of the plaintiff’s privacy versus the government’s interest, the Sixth Circuit stated that it must evaluate the “asserted privacy interest of the plaintiffs by looking at the character and invasiveness of the privacy intrusion and the nature of the privacy interest.”⁴⁰² The court further stated, before conducting the balancing, that “[i]mportant to the determination of the reasonableness of the expectation of privacy is the extent of [the] regulation of the welfare ‘industry,’ the pervasiveness of the testing practice in other areas of life and the voluntary or involuntary nature of the procedure.”⁴⁰³ First, the court found that the privacy intrusion is limited because the sample is collected in private without observation, the test is only for illicit drugs and no additional information, only those who need to know the results can obtain them, and the results are not used for any criminal proceedings.⁴⁰⁴ Second, when the court examined the nature of the privacy interest, it concluded that the plaintiffs have a clearly “diminished expectation of privacy” because welfare is heavily regulated and recipients are required to “relinquish important and . . . private information” in order to receive benefits, which makes the recipients aware that a condition of receiving benefits comes with a diminished privacy expectation.⁴⁰⁵ The court concluded by stating that it does not matter whether it views this drug testing procedure as a requirement to receive benefits or as enforcing the requirement that reci-

398. *Id.* at 336.

399. *Marchwinski II*, 309 F.3d at 336.

400. *Id.*

401. *Id.*

402. *Id.* (citing *Veronica Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 654 (1995)).

403. *Id.* at 336 (citing *Acton*, 515 U.S. at 657; *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 627 (1989); *Wyman v. James*, 400 U.S. 309, 325 (1971)).

404. *Marchwinski II*, 309 F.3d at 336–37.

405. *Id.* at 337.

ipients not use illegal drugs, the State had shown sufficient cause for the testing.⁴⁰⁶

After being reversed at the appellate level, an en banc review of the case was granted.⁴⁰⁷ The members of the en banc review court were equally divided on the issue and pursuant to a previous Sixth Circuit ruling, the district court judgment was affirmed.⁴⁰⁸ This case was not appealed any further and died due to a split circuit court.⁴⁰⁹ It was a case that would have surely been granted certiorari to be heard by the highest court in Michigan and was well primed to be argued before the Supreme Court of the United States due to its controversial and important nature. The Sixth Circuit decision should have been affirmed for the same reason that the Florida law is constitutional, which will be discussed in length in the next section.

2. Why the Current Florida Legislation Is Constitutional

In order to determine if the current Florida legislation is constitutional, the special needs test will be applied in a five step process. First, it must be determined that the search in question actually falls within the Fourth Amendment's grasp. Second, it will be determined that the search is reasonable. Third, the extent of the invasion on the welfare applicant's privacy will be analyzed. Fourth, the significant or important governmental interest will be analyzed. Finally, the privacy interest and the interest of the government will be balanced to ultimately determine that the search is constitutional.

a. *The "Special Needs" Test Applied*

i. Does the Search Fall Within the Fourth Amendment?

The first step is the easiest step to analyze in the instant case. The Florida legislation is requiring urine samples when applying for government funds,⁴¹⁰ and it is well settled case law that urinalysis is considered a search on two levels.⁴¹¹ First, the actual taking of the sample of urine, and second, the examination of the urine are both normally protected under the Fourth

406. *Id.* at 338.

407. *Marchwinski v. Howard (Marchwinski III)*, 60 F. App'x 601, 601 (6th Cir 2003) (en banc).

408. *Id.*

409. *See id.*

410. FLA. STAT. § 414.0652 (2011).

411. *See Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617 (1989).

Amendment.⁴¹² Florida will be taking the urine samples from all welfare recipients who wish to receive cash benefits and then will examine the urine for any illicit drugs.⁴¹³

ii. Is the Search Reasonable?

The drug testing of Temporary Cash Assistance recipients is reasonable under the Fourth Amendment's special needs doctrine. The method used by the government does not need to be the least intrusive in order to be considered reasonable under the Fourth Amendment.⁴¹⁴ Suspicion based testing is the alternative to suspicionless testing and this alternative can have devastating effects. As stated by the court in *Acton*, suspicion based testing can result in caseworkers arbitrarily imposing testing on applicants, which can open the DCF to unwanted and very costly lawsuits from applicants who feel as if they were discriminated against in the application process because they were chosen by a caseworker to receive a non-mandatory drug test.⁴¹⁵ Furthermore, the caseworkers are supposed to further the goals of the TANF program, not play detective during the application process to try to determine if an applicant might be using illegal drugs.⁴¹⁶ The *Skinner* court duly stated that to a lay person or even a doctor, some drug users are very hard to discover, because often, users will not show any signs of use.⁴¹⁷ Because use is so hard to detect, the caseworkers, who already have limited interactions with the families they are assigned to, will lose focus on the important issues of making sure that the dependent children in the home are well nourished, not abused or neglected, and the home is in livable condition, because they will be concerned with detecting minute signs of drug use by the parent recipients.⁴¹⁸ DCF lists ways that a case manager, while on an in-home visit, can determine the presence of drug use in the home, but they are hardly effective or likely.⁴¹⁹ DCF tells the case managers to look for such signs as drug paraphernalia, the parents admitting to using drugs, or the parent showing physical signs of drug use.⁴²⁰ These obvious signs are highly unlikely during a

412. *Id.*

413. FLA. STAT. § 414.0652.

414. *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 663 (1995) (citing *Skinner*, 489 U.S. at 629 n.9).

415. *See id.* at 663–64.

416. *About TANF*, *supra* note 27.

417. *Skinner*, 489 U.S. at 628.

418. *See Child Welfare & Substance Abuse: Known Factors that Increase Risk*, *supra* note 64, at 3.

419. *See id.*

420. *Id.*

scheduled home visit in which the recipient has ample notice and time to hide any signs of drug use in the home. DCF admits that drug use is very often under-recognized by caseworkers who interview the parents.⁴²¹ These minimally effective alternatives are not an efficient way of combating the problem of finding drug abuse among people seeking government assistance.

This legislation is very narrowly defined because it only applies to applicants who wish to receive cash assistance.⁴²² Applicants will be able to receive food stamps, Medicaid, Medicare, disability, and any other government benefit except temporary cash assistance without taking a drug test.⁴²³ This lets the families still have their medical benefits, food, subsidized housing, and any other government assistance they are receiving while the applicant who tested positive is working to get off drugs.⁴²⁴ Additionally, the applicant's family will still be able to receive cash assistance because the legislation allows an applicant who fails a drug test to assign the benefits to another family member or an approved government agent.⁴²⁵

Reasonableness under the Fourth Amendment usually requires individualized suspicion unless there is a special need outside of the normal need for law enforcement.⁴²⁶ It is in the best interest of the applicant for law enforcement or the courts to not get involved in the drug testing proceedings. If DCF was required to obtain a warrant, it would have to go before a judge to explain the facts surrounding the applicant and present evidence that the applicant is using illicit drugs.⁴²⁷ This procedure goes against the legislation's commitment to privacy, its firm stance on not getting law enforcement involved, and not using the results in any sort of criminal proceeding.⁴²⁸ Furthermore, probable cause is not required in cases that do not involve criminal proceedings.⁴²⁹ Therefore, it is not reasonable to require a finding of probable cause in the instant case because no criminal proceedings are involved.⁴³⁰

The *Chandler* Court stated, when talking about the plaintiffs in *Von Raab*, that it was not feasible for the Customs agents to be subjected to a

421. *Id.*

422. *See* FLA. STAT. § 414.0652 (2011).

423. *Drug Testing Policy, supra*, note 7.

424. *See id.*

425. *Id.*

426. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 624 (1989).

427. *See Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

428. *See* FLA. STAT. § 112.0455(11)(a)–(c) (1989).

429. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 828–29 (2002).

430. *See id.* at 829.

standard level of daily scrutiny like that of an office.⁴³¹ A family who is receiving cash assistance is also not subject to any standard level of daily scrutiny; they are merely visited occasionally by a caseworker and subject to very limited scrutiny.⁴³² The *Chandler* Court found it unreasonable to test potential government candidates because of the high level of scrutiny inherent in the position.⁴³³ This level of scrutiny is not present in the case of applicants for cash assistance, just as the high level of scrutiny was not present in *Von Raab*, *Skinner*, *Acton*, or *Earls*.⁴³⁴ TCA recipients, unlike the plaintiffs in *Chandler*, will not be in the public eye and will not be subjected to anything but minimal scrutiny.⁴³⁵ This minimal level of scrutiny makes the alternative—suspicion based testing—impracticable because the caseworkers would only detect the most obvious of addicts or users. Furthermore, the individuals that will have a significant amount of interaction with the recipients of the cash assistance are their children, and as the court in *Knox County Education Ass'n v. Knox County Board of Education*⁴³⁶ stated, children are unlikely to be able to tell whether an individual is using illicit drugs and might be scared to say something because of the unwanted consequences.⁴³⁷

Finally, the drug test, just as the home visitation in *Wyman*, is neither compelled nor forced upon the applicant and the applicant is given ample notice of the requirement to be drug tested prior to choosing whether to proceed with their TCA application.⁴³⁸ DCF notifies the applicant of the drug test requirement and then gives them ten days to get the test.⁴³⁹ If the applicant chooses not to take the drug test, the benefits will simply not be granted; nothing else happens and the applicant is free to reapply or apply and assign the benefits.⁴⁴⁰ Just as the Court in *Wyman* held, not complying with the rules of the government assistance program is a reasonable basis for the government to terminate benefits, and an applicant who is using drugs is not

431. *Chandler v. Miller*, 520 U.S. 305, 321 (1997) (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674 (1989)).

432. See *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 3.

433. *Chandler*, 520 U.S. at 321.

434. See *Earls*, 536 U.S. at 825; *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 665 (1995); *Von Raab*, 489 U.S. at 679; *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 634 (1989).

435. See *Chandler*, 520 U.S. at 321.

436. 158 F.3d 361 (6th Cir. 1998).

437. *Id.* at 375.

438. See *Wyman v. James*, 400 U.S. 309, 320–21 (1971).

439. Gabi Rodriguez, *DCF Holds Workshop on Drug Testing for TCA Recipients*, TALLAHASSEE DEMOCRAT, June 30, 2011, at B2.

440. See *id.*

complying with the drug free policy of the government assistance programs and therefore a drug test is a reasonable means of detecting such non-compliance.⁴⁴¹ The *Wyman* Court appropriately states that the Fourth Amendment should not be used as a wedge by the applicant to impose his or her own terms of the benefits and avoid any questions of any kind, while the government is willing to provide the applicant the means necessary to obtain life necessities.⁴⁴²

iii. The Extent and Character of the Privacy Intrusion

The intrusion on the privacy of the individuals receiving cash assistance is minimal. The Florida legislation requires that the drug testing be done in accordance with the Drug Free Workplace Act (Act) which provides numerous safeguards for the privacy of the people being tested.⁴⁴³ The Act states that “[a] sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.”⁴⁴⁴ The actual sample and private medication information is taken by a trained professional who will not disclose any of the private information without the patient’s written expressed consent.⁴⁴⁵ Most institutions and collection centers do not have anyone in the room when the patient is urinating in the sample cup unless there are extenuating circumstances such as in a jail or drug treatment center.⁴⁴⁶ This sample collection method of unsupervised sample collection in a medical environment by a trained professional was already held by the Court in *Skinner* to not trigger any privacy issues.⁴⁴⁷ Furthermore, the Court in *Acton* stated that a drug testing policy where males stand at a urinal, fully clothed, with a monitor fifteen feet back and where women are in a closed stall with a monitor outside the stall⁴⁴⁸ was a negligible privacy invasion.⁴⁴⁹ The *Acton* drug testing method with negligible privacy implications⁴⁵⁰ is more intrusive on the privacy of the individuals than the current TANF method, because, unlike the *Acton* method, there is no one in the sample collection room with

441. See *Wyman*, 400 U.S. at 318–19.

442. *Id.* at 321–22.

443. See FLA. STAT. § 414.0652 (2011).

444. *Id.* § 112.0455(8)(a) (1989).

445. *Id.* § 112.0455(8)(d), 11(b).

446. See *Drug Test*, ABOUT DRUG TESTING, http://aboutdrugtesting.org/drug_test.htm (last visited Nov. 13, 2011).

447. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 633 (1989).

448. *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 650 (1995).

449. *Id.* at 658.

450. *Id.*

the applicant, giving him or her one of the most private collection methods possible.⁴⁵¹

The testing information gathered from the drug tests is confidential and will not be shared with anyone except the people who need to know the information, such as the DCF which approves the applications.⁴⁵² Similar to the drug testing performed in *Acton*, which looked only for illegal drugs and not medical conditions, and did not vary from person to person,⁴⁵³ the test that TANF applicants will have to take will only test for a set list of drugs, not for any medical conditions, and will not vary from applicant to applicant.⁴⁵⁴ Additionally, the information that is gathered from the applicant, such as prescription medication that might change the outcome of the test will not be conveyed to the applicant's caseworker at DCF; a medical review officer will simply tell the caseworker that the applicant either passed or failed the drug test, leaving the private prescription medication usage intact.⁴⁵⁵ Just as in *Acton*, no one who personally knows the applicant will be informed of any prescription drug usage or medical condition.⁴⁵⁶ Furthermore, just as the test results obtained in *Von Raab*, *Acton*, and *Earls*, any of the results obtained by the DCF will not be used in any form of criminal proceedings.⁴⁵⁷ If a positive test result is attempted to be used against an applicant, the result will be automatically deemed inadmissible as evidence.⁴⁵⁸

Welfare recipients have a special relationship with the State of Florida when they apply for TANF, which in turn diminishes their expectation of privacy. By applying, an applicant is essentially saying that he or she is unable to financially care for his or her family at the current time and needs the assistance of the government.⁴⁵⁹ Just as the student athletes in *Acton*, who "voluntarily subject[ed] themselves to a degree of regulation even higher than that imposed on students generally,"⁴⁶⁰ welfare applicants voluntarily⁴⁶¹

451. See FLA. STAT. § 112.0455(8)(a) (1989); *Drug Test*, *supra* note 446.

452. FLA. STAT. § 112.0455(11)(b).

453. *Acton*, 515 U.S. at 658.

454. See *Drug Testing Policy*, *supra* note 7.

455. See *id.*

456. See *id.*; see also *Acton*, 515 U.S. at 659–60.

457. FLA. STAT. § 112.0455(11)(c) (1989); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. *Earls*, 536 U.S. 822, 829 (2002); *Acton*, 515 U.S. at 658; Nat'l Treasury Emps. Union v. *Von Raab*, 489 U.S. 656, 663 (1989).

458. FLA. STAT. § 112.0455(11)(c).

459. See *Temporary Cash Assistance: Eligibility Rules*, *supra* note 38.

460. *Acton*, 515 U.S. at 657.

461. The applicants will not lose their food stamps, Medicaid, or subsidized housing benefits, so the risk of becoming homeless and starving is not an issue when the applicant is unable to directly receive cash benefits. See FLA. DEP'T OF CHILDREN & FAMILIES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES STATE PLAN RENEWAL, OCT. 1, 2008–SEPT. 30, 2011, 17

apply for assistance from the government and have many additional requirements placed on them that are not placed on individuals who do not receive assistance.⁴⁶² The *Acton* Court compared students who participate in sports to adults who work in a heavily regulated industry, and welfare applicants can be added to the comparison because they all “have reason to expect intrusions upon normal rights and privileges, including privacy.”⁴⁶³ Adults in families that receive cash assistance are required to “work or participate in work related activities for a specified number of hours per week depending on the number of work-eligible adults in the family and the age of the children”⁴⁶⁴ and supply the DCF with personal information such as their social security number, assets and income, proof of their relationship with the dependent children, and proof of their children’s immunizations and school attendance.⁴⁶⁵ This mandatory work participation and required divulgence of personal information is analogous to the additional requirements of a minimum grade point average, specific dress code, required practices, and additional conduct rules required of the student athletes in *Acton*, which led the Court to state that because of the additional requirements set in place there is a “reason to expect intrusions upon normal rights and privileges, including privacy.”⁴⁶⁶

iv. The Governmental Interest and Public Safety Implications

The State of Florida has numerous important and even compelling interests in drug testing welfare applicants, and as stated by case law, these interests do not need to be compelling, just “important enough to justify the particular search.”⁴⁶⁷ The important interests of the State of Florida can be broken down into five different interests: first, combating the higher use of drugs among people receiving government assistance;⁴⁶⁸ second, preserving

(effective Oct. 1, 2008). Additionally, the applicant can assign his or her benefits to another person for their children, which will ensure that their children are able to be clothed properly and have a home to live in. FLA. STAT. § 414.0652(3)(c) (2011).

462. See *Florida TANF Program Assistance Overview*, TANF.US, <http://www.tanf.us/florida.html> (last visited Nov. 13, 2011).

463. *Acton*, 515 U.S. at 657 (citing *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 620–21 (1989)).

464. *Florida TANF Program Assistance Overview*, *supra* note 462.

465. *Temporary Cash Assistance: Eligibility Rules*, *supra* note 38.

466. *Acton*, 515 U.S. at 657 (citing *Skinner*, 489 U.S. at 627).

467. *Id.* at 661.

468. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

the safety of the dependent children in the families;⁴⁶⁹ third, removing the barrier to self sufficiency that drugs places on recipients;⁴⁷⁰ fourth, helping to assure that the children in these families are not at an increased risk of developing future drug use or addiction;⁴⁷¹ and fifth, the public safety implications of drug use.⁴⁷²

The first governmental interest is combating the documented problem of drug use among people receiving governmental assistance.⁴⁷³ Although proof of a problem is not a necessary factor, such evidence can be used to help in the analysis.⁴⁷⁴ As stated by Chief Justice Rehnquist in his compelling dissent of the *Chandler* decision, very few people would be able to honestly say that illegal drug use is not a major problem in the United States.⁴⁷⁵ Statistically, drug use is higher among recipients of government assistance than those not receiving government assistance.⁴⁷⁶ By implementing this drug screening program, the government is trying to combat a well documented epidemic of illegal drug use that is even more prevalent among people receiving government assistance. In 2008, 7.5% of all people aged eighteen to fifty-four admitted into a substance abuse treatment facility reported that their main source of income was government assistance.⁴⁷⁷ By blindly distributing government funds, the government is simply subsidizing the habits of a group that is statistically more likely to abuse drugs. People receiving government assistance are also more likely to abuse some of the most serious drugs such as heroin and cocaine.⁴⁷⁸ Additionally, recipients of government assistance are 10% less likely to successfully complete a drug rehab program than people who are not on government assistance.⁴⁷⁹ One way to try to prevent the continued use of illegal drugs by people receiving

469. See *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 1.

470. See *Substance Abuse Treatment Admissions Receiving Public Assistance*, *supra* note 50.

471. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 825 (2002).

472. See *Am. Fed'n of Gov't Emps. v. Skinner*, 885 F.2d 884, 890, 892 (D.C. Cir. 1989).

473. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

474. *Chandler v. Miller*, 520 U.S. 305, 319 (1997).

475. *Id.* at 324 (Rehnquist, C.J., dissenting).

476. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

477. *Substance Abuse Treatment Admissions Receiving Public Assistance*, *supra* note 50, at 1.

478. *Id.*

479. *Id.*

government assistance is to do what Florida is doing, condition the government assistance on successfully passing a drug test.⁴⁸⁰

The Court in *Chandler* ruled against suspicionless drug testing because it could not discover a concrete danger that required the Court to depart from the standard rule of the Fourth Amendment.⁴⁸¹ This is not the case among the recipients of government assistance because, as stated above, there is concrete evidence of a drug problem among the recipients that is statistically higher than that of the general population that does not receive government assistance.⁴⁸² Those statistics of higher drug use among people receiving government assistance is an example of the proof of a concrete problem that the *Chandler* Court needed to help clarify and validate specific hazards.⁴⁸³ This is not a problem that is going to solve itself, and as Chief Justice Rehnquist stated in his compelling dissent in *Chandler*, the government should not have to wait to act until the problem is large enough that it has an even greater devastating effect on the country and the people involved.⁴⁸⁴

The second governmental interest is child safety.⁴⁸⁵ Every applicant for TANF cash assistance has at least one dependent child under his or her care.⁴⁸⁶ The Court in *Wyman* stated:

The focus [of the assistance program] is on the child and, further, it is on the child who is dependent. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights.⁴⁸⁷

Additionally, the court in *Knox County Education Ass'n* stated that there are "few governmental interests more important to a community than that of insuring the safety and security of its children."⁴⁸⁸ The *Knox County Education Ass'n* court deemed drug testing people who apply for teaching positions to be constitutional because teachers have a lot of interaction with

480. See FLA. STAT. § 414.0652 (2011).

481. *Chandler v. Miller*, 520 U.S. 305, 318–19 (1997).

482. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

483. *Chandler*, 520 U.S. at 319.

484. See *id.* at 324 (Rehnquist, C.J., dissenting).

485. See *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 1.

486. *Florida TANF Program Assistance Overview*, *supra* note 462.

487. *Wyman v. James*, 400 U.S. 309, 318 (1971).

488. *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 374–75 (6th Cir. 1998).

the children in their classes and have a major influence on them.⁴⁸⁹ Courts continuously compare teachers to parents, holding teachers to a drug-free standard which should also be placed on parents.⁴⁹⁰ It would be impractical to implement a nationwide drug testing procedure for all parents, but not impractical to test parents who apply for cash assistance. Families who are receiving government assistance are statistically more likely to have recently used serious drugs than families who are not receiving government assistance.⁴⁹¹ The parents who apply for assistance are asking the government to give them money to help support their children, and the more children a family has, the more money they will receive.⁴⁹² The government needs to ensure that the money that is given for each child is actually going to help that child and not used to subsidize a drug habit.

When parents are using drugs, the effects are devastating. One of the main goals of the TANF program is to have children be cared for in their own homes,⁴⁹³ and this goal is not accomplished when parents are using or abusing drugs. Children who live in homes where their parents abuse drugs are “three times more likely to be abused, . . . four times more likely to be neglected,” and more likely to develop mental health problems.⁴⁹⁴ A child who is being abused and neglected is not being cared for and should be immediately removed from his or her home, which completely goes against the important goal of the TANF program of having children be cared for in their own homes. To achieve this goal of a child having a safe home to grow up in, it is essential that his or her parents not use or abuse illicit drugs.

The third governmental interest is to help the families receiving governmental assistance become self sufficient, which is hindered by illegal drug use.⁴⁹⁵ Parents who come to the DCF and ask for TANF assistance have fallen on hard times and are seeking the assistance of the government with the goal of becoming self sufficient in order to be able to adequately provide for their children.⁴⁹⁶ Just as an employer who pays an employee to do a job for him, the government expects something in return for its temporary financial assistance. The government can be said to be acting as an employer, a guardian, or simply a provider for the families in need of cash assistance.

489. *Id.* at 375.

490. *See id.*

491. *Substance Use Among Persons in Families Receiving Government Assistance*, *supra* note 57.

492. *See Temporary Cash Assistance: Eligibility Rules*, *supra* note 38.

493. SUMMARY ANALYSIS, CS for HB 353, at 2.

494. *Child Welfare & Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 1.

495. *See About TANF*, *supra* note 27.

496. *See id.*

The Court in *Acton* posed the important question that must always be asked in cases of this nature, which is “whether the search is one that a reasonable guardian, [employer, or provider] . . . might undertake.”⁴⁹⁷ It is very likely that reasonable guardians or providers would request proof that someone seeking financial help from them is not on drugs to make sure that their money is not going to waste on the purchase of drugs and that the children of the family are not subjected to drug use in their home. It is also reasonable and very common for employers to ask potential employees to submit to a drug test to ensure that they will not be under the influence of illegal drugs while performing the tasks they were hired to perform, which would increase the risk of error and have devastating physical and/or financial impacts on the company and other employees.

There is no longer an entitlement to government assistance,⁴⁹⁸ and therefore the government set time limitations and requirements on the part of the recipients.⁴⁹⁹ The point of the current TANF funds are to ensure that the applicant’s family can become self sufficient, and a major part of becoming self sufficient and no longer requiring government cash assistance is having and maintaining a job.⁵⁰⁰ The likelihood of getting a job decreases tremendously when the applicant uses drugs, even casually, because roughly eighty-four percent of jobs require some form of drug testing.⁵⁰¹ By allowing TANF cash assistance recipients to continue to receive benefits while using illicit drugs, the government is not helping them achieve their ultimate goal of self sufficiency. In Florida, cash assistance is limited to a lifetime total of only forty-eight months, and if a recipient is still not self sufficient after those forty-eight months have expired, the recipient is on his or her own and will no longer receive cash assistance.⁵⁰² This will only make the recipient’s situation worse because he or she will still have a drug problem, which will continue to act as a major barrier to employment, but will no longer have cash benefits from the government. A person who is under the influence of drugs while receiving cash benefits will likely not use all of the money for its intended purpose and will no longer have it in the future if it is needed again. Under the new Florida legislation, the local DCF office will assist an applicant who has tested positive to get the help needed by directing him or her to

497. *Vernonia Sch. Dist. 47J v. Acton ex rel. Acton*, 515 U.S. 646, 665 (1995).

498. 42 U.S.C. § 601(b) (1996).

499. *Florida TANF Program Assistance Overview*, *supra* note 462.

500. *See id.*

501. *See McGuire Woods, But I Have a Prescription!—Employee Drug Tests in the Age of Medical Marijuana*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, July 1, 2011, <http://www.shrm.org/legalissues/stateandlocalresources/pages/butihaveaprescription.aspx>.

502. *Temporary Cash Assistance: Eligibility Rules*, *supra* note 38.

the proper facilities, and assisting in assigning the cash benefits to someone who is drug free and capable of utilizing the cash assistance for the dependent children.⁵⁰³ Additionally, any applicant who does test positive has free access to the Florida Abuse Hotline, which will help them along the long and difficult path to sobriety.⁵⁰⁴

The fourth governmental interest is keeping children off drugs.⁵⁰⁵ In *Acton*, the Court determined that keeping children off of drugs was a very important interest.⁵⁰⁶ Children whose parents use drugs are more likely to do drugs themselves.⁵⁰⁷ Parents are the most prominent figure in a young child's life and the parents' actions are often emulated by their children. When parents are viewed by their children using drugs, the children may look at this as a sign that the parents have a permissive attitude about drug use, and therefore, the child is more likely to use drugs.⁵⁰⁸ Children who live in homes where their parents are addicted are statistically the highest risk group to become future addicts.⁵⁰⁹ Nearly two-thirds of spousal violence is a result of substance abuse, and when children witness domestic violence, or are recipients of abuse, they are 50% more likely to abuse drugs and alcohol in their future.⁵¹⁰ The connection is clear: When parents abuse drugs their children are much more likely to become addicted to drugs.⁵¹¹

Finally, the fifth interest of the government is public safety implications.⁵¹² Public safety implications must be present in the analysis, but they do not need to be a dominating factor.⁵¹³ In addition to the safety implications that the children of parents who use drugs face, crime and drug use go

503. FLA. STAT. § 414.0652(j)(3)(c) (2011); see *About the Agency*, *supra* note 51.

504. See Rodriguez, *supra* note 439.

505. See Vernonia Sch. Dist. 47J v. Acton *ex rel.* Acton, 515 U.S. 646, 661 (1995).

506. *Id.*

507. See *Child Welfare and Substance Abuse: Known Factors That Increase Risk*, *supra* note 64, at 1.

508. See *id.*

509. See *id.*

510. *Id.*

511. *Marchwinski II*, 309 F.3d 330, 336 (6th Cir. 2002), *vacated and reh'g en banc granted*, 319 F.3d 258 (6th Cir. 2003).

512. See, e.g., *Drug Related Crime*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32348> (last visited Nov. 13, 2011).

513. See *generally* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989) (upholding suspicionless drug testing because of potential bribery and blackmail, not public safety); O'Connor v. Ortega, 480 U.S. 709 (1987) (holding the search of a doctor's office at a state hospital without a warrant as reasonable due to efficiency reasons, not public safety); New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding a search of a student's purse as reasonable without requiring a public safety implication).

hand in hand.⁵¹⁴ Drug users are statistically more likely to commit crimes than people who do not use drugs.⁵¹⁵ Additionally, people who are arrested in connection with a crime are often under the influence of some drug or at least test positive for illicit drugs.⁵¹⁶ The trafficking and distribution of drugs, which is a necessary part of the drug industry, generates serious violence within communities and the United States as a whole.⁵¹⁷ As previously stated, it is much harder for a family to become self sufficient when the parents are using drugs because drugs are a barrier to employment and a very expensive habit that could force the continuance of the family's reliance on governmental assistance. The public safety implication lies in the time after the family has exhausted their lifetime cash assistance benefits and no longer has money coming in but still has an expensive drug habit.⁵¹⁸ Studies show that many addicts commit crimes in order to purchase drugs when they do not have a source of income or if that income source is not sufficient to fuel their habit.⁵¹⁹ The government, by implementing this drug testing procedure, will assist in helping those who test positive with planning a recovery program and avoiding the potential of the person turning to a life of crime to support a drug habit.⁵²⁰

The *Skinner* Court noted that the mere possession and use of illegal drugs is criminal and can be punished, but the more dangerous effects are the tasks that the user performs while on the drugs.⁵²¹ The Court stated that the government is able to take all reasonable and necessary steps to prevent or deter users of illicit drugs from performing those sensitive tasks while under the influence.⁵²² The problem lies that the drug that inhibits the user is concealed within the body and the Court stated that it may be necessary to examine the excrements in order to uncover the existence of that substance.⁵²³ There are fewer tasks more sensitive than that of safely raising a family, especially when young children are involved and this task should not be performed while under the influence of illicit drugs, especially when the family is unable to survive without government assistance.

514. See *Drug Related Crime*, *supra* note 512.

515. *Id.*

516. *Id.*

517. *Id.*

518. See *id.*

519. See *Drug Related Crime*, *supra* note 512.

520. FLA. STAT. § 414.0652(2)(i) (2011).

521. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 633 (1989).

522. *Id.*

523. *Id.*

v. The Balancing of the Interests

The final step of the special needs analysis is the balancing of the privacy interests of those who apply for temporary cash assistance and the important governmental interests present.⁵²⁴ The *Skinner* Court concluded that the compelling governmental interest in their case would be hindered if the plaintiffs could only be drug tested if facts were present that gave rise to reasonable suspicion⁵²⁵ and the same is true with the Florida legislation.⁵²⁶ The already proven diminished privacy expectations of people receiving government assistance does not outweigh the potential catastrophic implications that drug use and abuse can have on a family, especially the children and the barrier that the drug use places in front of employment.

The *Von Raab* Court reasoned that the Nation's first line of defense against drug importation is the Customs employees and the important government interest of those workers performing that job well outweighs the worker's privacy.⁵²⁷ The parents in families who receive government assistance are on the front line of getting that family off of government assistance and on to the path of self sufficiency. The important governmental interest in helping families succeed on their own and ensuring a safe environment for the children of that family is severely hindered by the use of drugs. Therefore, this governmental interest far surpasses that of the diminished expectation of privacy that the families have.

The showing of a strong public safety implication and statistical showing of increased drug use by parents receiving government assistance were just the kinds of facts that were missing from the analysis made by the Court in *Chandler*.⁵²⁸ This showing of numerous public safety implications and important government interests would have tipped the scales in the other direction in *Chandler* because this is not a case of drug testing as a symbol; it is a case of a documented special need.⁵²⁹

During the balancing step of the analysis, the Supreme Court of the United States in *Earls* also looked at the nature and immediacy of the regulation.⁵³⁰ It was concluded that even some drug use was enough to establish an assertion of a special need to implement a suspicionless drug testing pro-

524. *Id.* at 619.

525. *Id.* at 633.

526. FLA. STAT. § 414.0652 (2011).

527. Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989).

528. See *Chandler* v. Miller, 520 U.S. 305, 323 (1997).

529. *Id.* at 313-14.

530. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 834 (2002).

gram, where the people being tested, students, already have a diminished expectation of privacy.⁵³¹ This is nearly identical to the problem facing Florida, except for the fact that there is a showing of increased drug use among the group of people being tested, in addition to that group having a diminished expectation of privacy.⁵³²

The deterrence and effectiveness factors present in suspicionless drug testing lend their weight to the government's side in this balancing test.⁵³³ The Court in *Chandler* wanted a showing of deterrence, which was not present because potential candidates knew that they were going to be tested and could prepare accordingly.⁵³⁴ A person does not plan to lose his or her job and be unable to support his or her family, as a potential candidate plans to run for office. Applying for government assistance is something that is the result of unexpected hard times that have fallen on a family, and the parents would have minimal time to get the drugs out of their systems before needing the assistance of the government. There is no secret of the date of the test in *Chandler*,⁵³⁵ but the date that a family needs to apply for government assistance is not known and cannot be calculated in advance.⁵³⁶ This lends to the effectiveness of the Florida legislation. People who are currently receiving cash assistance will be grandfathered in and will not have to submit to a drug test;⁵³⁷ but the next time they apply, they will need to be drug free.⁵³⁸ Therefore, the legislation may have a major deterrent effect.

The scale clearly tips to the side of the government because the Supreme Court of the United States has continually held suspicionless drug tests to be constitutional where the plaintiffs have diminished levels of privacy and the government has valid important interests in conducting the search.⁵³⁹

V. CONCLUSION

The drug testing program implemented by Florida is constitutional. The testing is in response to statistical data that shows that people receiving gov-

531. *Id.* at 835 (citing *Chandler*, 520 U.S. at 319).

532. *See id.*

533. *See, e.g.*, *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 629, 633 (1989).

534. *Chandler v. Miller*, 520 U.S. 305, 319–20 (1997).

535. *Id.*

536. *See Drug Testing Policy*, *supra* note 7.

537. *Id.*

538. *Id.*; *see also* FLA. STAT. § 414.0652(1)–(2) (2011).

539. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 837 (2002); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 679 (1989); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 634 (1989).

ernment assistance are more likely to use drugs. This program is not a class animus, or an attack on the poor; it is simply the government addressing a known problem and being accountable to the tax payers by not subsidizing the drug habits of people receiving government assistance. This program promotes accountability among the potential applicants by forcing them to pass a drug test and in turn furthering the ultimate goal of self sufficiency.

The special needs doctrine has opened the door for the government to try to alleviate the problem of government assistance funds being used for the purchase of drugs and drug users receiving government funds. This narrowly tailored legislation is satisfied by numerous important and even compelling interests, which all justify the ultimate goal of the government providing assistance to families in order to keep the family safe and help them become self sufficient. In light of all of the factors, the negligible intrusion, the numerous important government interests, and the diminished expectation of privacy of people receiving government assistance, the search performed by the State of Florida is justified under the special needs doctrine of the Fourth Amendment. It must be stated that this analysis does not lend itself to the notion that the special needs doctrine can be easily applied to any form of suspicionless drug testing; an individual analysis of each case must be made in order to uphold the integrity of the Fourth Amendment.