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## The Law of Intervening and Concurring Cause: *Nason v. Shafranski*, *Stuart v. Hertz*, and Fla. Std. Jury Instr. (Civ.) 401.12 (With Reference to Fla. Std. Jury Instr. (Civ.) 501.5)

By Anne C. Sullivan

### *Nason v. Shafranski* Revisits the Law of Intervening and Concurring Causation

In *Nason v. Shafranski*, 33 So. 3d 117 (Fla. 4th DCA 2010), the Fourth District Court of Appeal revisited the law surrounding when the question of whether an intervening cause is reasonably foreseeable is left to the jury. Within the context of an automobile accident case, the Fourth District Court of Appeal in *Nason* noted that “typically” the question of foreseeability in such circumstances is left to the jury, “but an exception exists when subsequent medical negligence in treating the initial injury is involved.”<sup>1</sup>

As noted by the *Nason* court, “the key case” for the “well-established principle” that “the initial tortfeasor’s remedy against the succeeding negligent health care provider lies in an action for subrogation” is *Stuart v. Hertz Corporation*, 351 So. 2d 703 (Fla. 1977).

In *Nason*, the Fourth District Court of Appeal ultimately reversed a trial court’s “failure to dispel . . . confusion by granting plaintiff’s request for [a] special instruction” and “refusal to give an intervening cause instruction.”<sup>2</sup>

The pertinent facts were recited by the

Fourth District Court of Appeal in the opinion:

During the charge conference, plaintiff complained that throughout the trial, beginning with opening statement, the defendants presented a defense that Dr. Theofilos [the treating doctor after the accident,] was negligent in performing unnecessary surgeries and that he caused plaintiff to suffer physical injury and depression, which were not caused by the collision [in which the plaintiff was initially injured]. Consequently, plaintiff requested the following jury instruction:

When a person has suffered injuries by reason of the negligence of another and exercising reasonable care in securing the services of a competent physician, and in following his advice and instructions his injuries are aggravated or increased by the negligence, mistake or lack of skill of such physician, the law regards the negligence of the wrongdoer in causing the original injury.

Defense counsel countered that the defendants were not claiming that Dr. Theofilos was negligent; their position was that the plaintiff’s injuries did not

See “Intervening and Concurring Cause” page 17

# Message from the Chair

## What I Learned From My Fiction Writing Professor, Part I

All I know about legal writing I learned from my fiction writing professor. Well, maybe not *all* of it; only everything that matters. Years after law school – after I learned to start a statement of the issues with “whether” and to include a short conclusion at the beginning of law firm memos – I realized that most of the essential legal writing skills – the ones that matter to the judges who actually read our work product – were skills about *writing*. Legal writing is just the genre. Yet when law schools teach it, they assume (often falsely) that students already know how to write well; and they should focus only on how to write in the legal context. That’s like teaching people to drive an eighteen-wheeler before they learn to drive a car.

I went to college at Florida State University (I can hear the Gators moaning). I majored in English and Business, with a concentration in creative writing. I took my first fiction writing class in the spring semester of my sophomore year. Our professor began the first class with the declaration, “If you plan on going to med school or law school, don’t take this class. I don’t give A’s.” Because, as it happened, I *did* plan on going to law school, this statement upset me. After all, this was the basic class in my *major*. As the professor – Jerome Stern, who would become one of my mentors – implicitly acknowledged, my GPA was important to me. I couldn’t afford to squander it on some professor with an ax to grind against future professionals.

But Professor Stern said something else to the class that convinced me not to drop it. He told us of his unorthodox grading policy. We would be required to turn in one short story per week. He would grade it, write his comments and suggestions, and return it the following

week. If you didn’t like your grade, you could rewrite it and turn it in again as if it were the first time. You were not guaranteed a better grade, just a new one. Professor Stern also kept generous office hours, so before getting to work on revisions you could consult him for advice on what changes were needed. You could repeat that process as often as you liked, until you were either satisfied with your grade or too exhausted to keep improving it. In the



Raoul Cantero, Chair, 2010-2011

meantime, of course, you still had to turn in the other stories due each week – and were free to consult the professor and revise those as well. I accepted the challenge.

On my first story, I got a C-. I met with Professor Stern, rewrote it, and turned it in again. C+. Meanwhile, my second story received a C. I rewrote the first one and received a B; I rewrote the second and received a B+. I turned in the third and got a C+; I rewrote the first again and got an A-. And on it went for the rest of the semester. I rewrote each story until each one got an A. In the meantime, I also had other classes to worry about – Monism and Quietism in Western Literature and Differential Calculus and Political Philosophy and Accounting. It made for a long semester.

As the semester wore on and I wrote and rewrote my stories, restructuring my plots and rethinking my characters’ motivations, I wasn’t sure whether I was working so hard so I could perfect my stories or to overcome the professor’s distaste of future law students. But in the end, the result was the same. The product was the best it could be. Professor Stern’s grading policy encouraged those willing to work hard to strive for excellence. It also taught me the most important lesson for any writer: all writing is *re-writing*. The first draft should never be the final product– nor the second, or the third, or the fourth.

That second-year fiction writing class was the beginning of my education as a writer – and as a professional. I learned from Professor Stern two critical things: first, excellence does not come easy; it takes a lot of work. And second, it’s worth it. Now when I talk to law students and young lawyers about the profession, I emphasize that it takes hard work to become good at your craft; but the alternative is mediocrity. Perhaps that can be said of any professional – of the pediatrician or the mechanical engineer or the real estate entrepreneur. But I’m sure it’s true of lawyers, and of appellate lawyers in particular.

But that wasn’t all Professor Stern taught me. I still use many other lessons I learned in that first fiction writing class, which I still use in drafting briefs. Years later, Professor Stern taught a course on legal writing, and published an article in the *Florida Bar Journal*. See Stern, “Can Lawyers Write English?” 66 Fla. Bar J. 44 (Oct. 1992). In that article, he demonstrates how many of the skills used in writing fiction can be applied to drafting briefs. But that’s another story. . .

# The Section Recognizes the Honorable Martha Warner for her Service to the Appellate Practice Section

By Kimberly Jones

When the Honorable Martha Warner of the Fourth District Court of Appeal sees a problem in the administration of justice, she is all too eager to dive in and fix it. Upon becoming a judge, she surprised herself to find she had great interest in the administrative side of the judiciary and the mechanics behind how the court system functions. “I try to work on things that make the court system better—not substantive law, but the process,” she said. “When I see something that can be changed for the better, I try to work on it in any way I can.”

The Appellate Practice Section of The Florida Bar has long recognized Judge Warner’s commitment to ensuring that the administration of the court system continually improves and to advancing appellate law and the practice of appellate law. Her dedication to maintaining an efficient judicial system is just one of the many reasons the Section presented the 2009 James C. Adkins Award to Judge Warner during its annual Dessert Reception at the Florida Bar Annual Convention in Boca Raton on June 24, 2010. The Section presents the award to a member of the Florida Bar or the Florida judiciary who has significantly contributed to the field of appellate practice in Florida.

Judge Warner embodies the attributes of an Adkins award winner because, wherever she goes, she identifies an innovative way to improve the field of appellate practice in Florida. During an appellate conference in Washington, D.C., Judge Warner experienced tremendous interaction between attorneys and judges. She realized that the benefits from this interaction could be recreated in Florida, and decided to assist in organizing similar conferences here.



Judge Martha Warner

As chair of the ABA Appellate Judges Conference in November 2009, Judge Warner facilitated the opportunity for Section members to engage with more than 300 appellate judges, staff attorneys, and lawyers from across the nation during the Appellate Judges Education Institute Summit (“AJEIS”) in Orlando. With Judge Warner’s assistance, the Section hosted a joint ABA Section Welcome Reception and actively participated in the four-day Summit, which was developed by the ABA’s Appellate Judges’ Conference, the Council of Appellate Staff Attorneys, and the Council of Appellate Lawyers. As a result of the success of this endeavor, the Section is currently working with the Florida Appellate Judges Conference to present a similar Summit in 2010-2011, which may include several joint AJEIS-APS CLE options and will utilize the Joint Welcome Reception as a template for the upcoming AJC-APS Welcome Reception this fall.

Among her many projects, Judge Warner has also been instrumental

in the Section’s efforts to secure electronic filing in the courts of Florida. She initiated a project at the Fourth District Court of Appeal that led her to connect with the Appellate Court Rules Committee through the Section. The Section now has a subcommittee to handle matters concerning rules for electronic filing. Today, Judge Warner still remains active in the effort to create e-filing mechanisms in our courts.

Prior to her appointment to the Fourth District Court of Appeal, Judge Warner served as a Circuit Court Judge of the Nineteenth Judicial Circuit. She also spent time in private practice before joining the judiciary. Judge Warner initially studied law at the University of Chicago, but transferred to the University of Florida Levin College of Law. Though it is hard to imagine how she finds extracurricular time with her many projects to improve the administration and practice of appellate law, her transplant to the South created an avid Gator fan who enjoys watching events for the National Association for Stock Car Auto Racing. During her downtime, she also likes to fish in the streams of Colorado.

The Section sincerely thanks Judge Warner for her generous service and dedication to the Section and for her significant contributions to the field of appellate practice in Florida.

**Kimberly Jones** is an associate with Phelps Dunbar, L.L.P., where she practices in the Insurance and Re-insurance group. Prior to joining the firm, she worked as a staff attorney at the Florida Supreme Court and the Second District Court of Appeal. She serves on the Executive Council of the Appellate Practice Section and is Chair of the Self-Represented (Pro Se) Litigant Committee.

# *Discussion with the Supreme Court:* **Justices Praise Student Moot Court Finalists and Caution Lawyers**

By Barbara A. Eagan

A tiger cannot change its stripes, but the Appellate Practice Section can change an agenda. This we did for the traditional moot court finals and discussion with the Supreme Court event, held June 24, 2010, in conjunction with The Florida Bar Convention. Section leadership, along with our co-sponsor, the Young Lawyers Division, decided to shake things up this year to improve attendance and respond to comments from the Justices on prior events. As a result of the change, the student participants received a glimpse of practice in the cruel “real world” (the long, nerve-wracking wait for a decision), and Section members received an abundance of information from the Justices regarding serious concerns of the Court.

## **The Old Way**

The Appellate Practice and Young Lawyer Sections have historically co-sponsored the afternoon event. The tradition included the final round of the Robert Orseck Memorial Moot Court Competition, followed by a question and answer session with the Supreme Court. The weary moot court finalists and their entourage typically left, en masse, to commence their well-deserved celebrations following argument, court comments and awards. This left only Appellate Practice Section members and a few members of the Bar to ask questions and hear commentary from the Justices. Change was needed.

## **The New Way**

This year, the moot court arguments (as always) proceeded before a panel comprised of the entire sitting court. The issues at hand, to



paraphrase, involved (1) whether statements on a student group’s sign, displayed at a gay student’s funeral, were protected by the First Amendment and (2) whether a public university may deny official recognition, funding and other benefits to a student organization which requires members to take an oath affirming that homosexuality is “immoral.” The Justices displayed no mercy and took turns zinging pointed questions at the competing students. Each responded impressively with professionalism and aplomb- wowing the audience of seasoned practitioners.

At the conclusion of the arguments, the beleaguered students were required to take a seat in the audience, whereupon Outgoing Section Chair, Dorothy Easley, took the podium and gave welcoming remarks. Incoming Chair (and former Supreme Court Justice) Raoul G. Cantero III, along with Chair Elect Matthew J. Conigliaro, proceeded to lead a lively concerns -and issues-discussion, followed by a brief period of questions and answers. Finally, Outgoing Chief Justice Peggy Quince announced the winners of the moot court competition, including Best Team and Best

Oralist. The audience learned the finalists were from Stetson University School of Law and St Thomas University School of Law. The audience also learned many useful things concerning the state of the Court and practice before it, summarized below.

## **What We Learned**

First and foremost, we learned the Court is not pleased with the quality of practice as currently conducted before it. Right out of the box, Justice

Polston observed the moot court participants were *much more polite* than actual attorneys who appear before the Court, to nods from other justices and a hearty second from Justice Pariente. Justice Pariente also noted that, while the students exhibited a thorough knowledge of the record and law, this is often not the case with practitioners. Other justices noted ongoing problems with lack of preparation and admonished attorneys to remember they are members of a profession and their lack of preparation is not to be excused by a client’s unwillingness or inability to pay for proper preparation.

Justice Bell recognized a need for accuracy and candor to the tribunal; and, Justice Perry recognized the need to be courteous and answer fully and truthfully when responding to the Court. The justices also highlighted the disturbing uptick in lawyer discipline, with trust account issues standing at the forefront of the problem, along with the myriad of young lawyers forced to hang their own shingle due to an overabundance of graduates for the current job market. The justices concluded, “we need

*continued, next page*

more good lawyers and more mentoring!”

As the discussion continued, we learned from Chief Justice Quince that funding remains a problem for the court system. Justice Quince commented the legislature consistently falls short in approving adequate funding. Incoming Chief Justice Canady added some comments along these lines, as did Justice Pariente. She concluded with the observation that the judiciary simply cannot absorb more cuts -- the lives of everyone in the state are negatively impacted. Finally, the Justices, for a second year in a row, related their disappointment with the rules committees for not working together, for not being responsive to the Court and for appearing inefficient and dilatory. One Justice suggested committee size has become a problem.

On a lighter note, we learned that electronic filing is coming statewide in 2011 to all Florida appellate courts. The Court expressed optimism that the system will prove to be a user-friendly for all lawyers. The discussion concluded with a brief question and answer period.

## Conclusion

The Section can perhaps explore ways it might assist the Court in addressing its concerns. One remedial measure might include moving for the “Practice Before the Supreme Court Seminar” from Tallahassee, to other more centralized jurisdictions, from time to time. Thus, more cash-strapped practitioners could participate without a great deal of travel expense. Another measure could be the initiation of a formalized appellate mentoring program. Many other solutions probably exist which can be identified with the collaboration of all concerned.

All in all, it appears that the new format resulted in an improved event. However, it is suggested that the event format needs to remain a work in progress to enhance its relevancy and serve the purpose of improving Supreme Court practice. Since moot court participants, and members of the Appellate Practice Section, in the main, were the only parties in attendance; in many respects, the Court (we can hope) was preaching to the proverbial choir.

In some manner we need to expand

the opportunity to participate in this event to other practitioners who regularly appear before the Court. In addition, the depth of the issues discussed by the Justices left little time for questions and answers from the audience. This disappointed some and should be addressed. In sum, with tweaking, the program will hopefully continue to grow and expand in popularity. We deeply thank each of the Justices for giving up their time to enlighten and inform us, and we look forward to future programs.



**Barbara Anne Eagan**, *Eagan Appellate Law, PLLC*, is Florida Bar Board Certified in Appellate Practice and AV-rated by Martindale Hubbell. She is a founding member of the Appellate Practice Section and a current member of its Executive Council. Florida Trend Magazine named Eagan a Legal Elite, Appellate Practice, (2010). Eagan also serves on the Florida Bar Appellate Court Rules Committee, among other activities and distinctions.

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# A Gathering of Friends and Colleagues

By Michael C. Greenberg



on the cake.” Appellate practitioner Roberta Mandel noted that “I’ve been attending the last 20 years and the reception is the highlight of the Florida Bar meetings.”

The Appellate Section is grateful for the activities of June Hoffman who coordinated the event along with Robin Bresky and Valerie Yarbrough and all of the supporters of the event recognized separately in this issue. Thank you, we could not have done it without your generosity. The Section invites all its members to become more involved and get to know fellow practitioners over a slice of key lime pie, strawberry cheesecake, chocolate éclair, crème brulee, raspberry crème puff, chocolate torte, cherry-filled crepe, etc. The Section hopes to see you at the next reception. Until then ... *bon appétit* and *buen provecho*!

*“Those appellate lawyers sure know how to party!!!”* was just one comment made at the Appellate Practice Section’s Dessert Reception, held Thursday evening during The Florida Bar Convention in Boca Raton in June. Over 200 people attended the event including Florida Supreme Court Chief Justice Quince and Justices Labarga and Perry as well as several District Court of Appeal judges.

The reception featured over a dozen different desserts -- from a delightful crème brulee to a zesty mocha torte. However, what really made the evening sweet was the opportunity to visit with colleagues from the Appellate Practice Section and to honor two of them for their tremendous service to the section and community.

Orlando attorney Nicholas Shanin was recognized as the recipient of the section’s Pro Bono Award (the award is to be given to a member of the Appellate Practice Section who has devoted significant pro bono efforts to appellate matters).

Fourth District Court of Appeal Judge Martha Warner was also recognized as the recipient of the section’s

James C. Adkins Award (the Adkins Award is presented to a member of The Florida Bar who has made significant contributions to the field of appellate practice in Florida).

Besides nice music, desserts (including a crème brulee to die for), and the chance to honor some colleagues, there was also the opportunity to visit with fellow practitioners. The personal connections were “the icing



MICHAEL GREENBERG

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# A Day in the Life of a Third DCA Law Clerk: The Arms of an Appellate Judge

By Kimberly J. Kanoff

## I. Introduction: Getting My Foot in the Door at the Third DCA

First, let me introduce myself. My name is Kimberly Kanoff. I am the senior law clerk for the Honorable Judge David M. Gersten of the Third District Court of Appeal in Miami, Florida. This article describes my personal experiences at the Third DCA. It is not exhaustive, and it might differ from the experiences of other law clerks at the court or from those of other law clerks in other courts.

That said, I invite you to spend a day in my shoes as an appellate law clerk.

## II. The General Duties

Before understanding the substantive tasks an appellate law clerk undertakes, it is important to know a clerk's general duties. The general duties of an appellate law clerk can be divided into several key areas: reading, researching, writing, editing, and proofreading. Each area is essential and dependent on the other areas.

### A. Reading

In general, I spend several hours reading for each appeal. I read through the briefs, the transcripts, the record on appeal, appendices when filed, and the applicable law. Sometimes, it takes an hour to review a file; other times, it could take several days to truly comprehend an entire case. At the Third DCA, every judge and his or her law clerk(s) read through the entire file to make sure the result is correct.

The law clerks and judges also read the Third DCA's ready-to-issue circulating opinions. They review current cases from the United States Supreme Court, the Florida Supreme Court, and the other DCAs. I also read the *Miami Daily Business Review*, the



Kimberly Kanoff

*Florida Bar Journal*, the *Florida Bar News*, and *The Record*.

### B. Researching

The level of and time spent on research varies depending on the type of case. Law clerks typically research relevant case law, statutes, rules of court, constitutional provisions, and legislative history. Law clerks may also review law reviews, bar journal articles, and legal treatises that discuss the relevant topics. The research is mostly focused on state law, but in some cases, there is a need to go into federal jurisdictions or other state jurisdictions.

I formulate a research plan to guide my research, analyzing: (1) the precise question(s) I am trying to answer; (2) how it differs from related questions that are not at issue; and (3) the sources I intend to consult to find the answer.

After formulating my research plan, I generate search terms and electronic word-searches that are designed to yield answers to my research problem. I use search terms, individual words or terms that access indexes and tables of content for various sources

of law, when I am unfamiliar with the area of law. On the other hand, I use electronic word-searches, combinations of search terms arranged to enable full-text searches of specific topics, when I know which database I will be searching.

### C. Writing

Writing is also an essential skill for every law clerk. The first step in the writing process is preparing a summary of the case. A law clerk prepares two-to-three page summaries of the oral argument (OA) cases for the three-judge panel. The summary presents the essence of the briefs and the record and is as short as possible without sacrificing accuracy. Since the judges and law clerks work on many cases, and most often weeks ahead of oral argument (OA,) the summary also provides a quick refresher of the case right before OA. Although the judge and law clerk will use the summary to discern the essence of the case, it does not eliminate the need to read the entire file.

After preparing the summary, the next step is to analyze the researched issues in a memorandum that provides a recommendation for the case and supporting discussion of the facts and the law. In our office, we call these memoranda "A&A's," which stands for Advice and Analysis.

Some judges also require their law clerks to prepare secondary memoranda. The primary memoranda are similar to the A&A's in our office, where the law clerk writes extensively on cases that have been assigned to their office. The secondary memoranda, which are usually less intensive, but at times more complex than the A&A's, are written for cases not primarily assigned to that judge.

In addition to writing summaries and memoranda, the law clerks often

## A DAY IN THE LIFE

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prepare draft opinions. For example, after the judge returns from OA and conferences with the other judges on the case, he or she will instruct the law clerks how the opinion should be drafted, what issues are to be addressed, and the outcome of the case. The law clerks will prepare the opinion according to these instructions. The judge then makes the necessary changes. Other times, the judge will prepare the opinion and have the law clerks edit the opinion. Regardless of how the opinion writing process starts, in our office, all hands and eyes are on the opinion at some point.

I also write various special projects for my judge. These projects often relate to lectures on legal issues that my judge decides to tackle.

### D. Editing and Proofreading

As part of the writing process, law clerks understand the importance of editing and proofreading. Everyone in our office will read each draft opinion and make suggestions. Some suggestions are implemented into the opinion, while others are not. The judge, of course, is the final decision maker on every word, comma, and conclusion.

A simple three-page opinion may have undergone six-to-nine drafts

to reach perfection. Our office uses a proofreader's checklist. At least three eyes run through a document for proofreading purposes. This checklist safeguards against typographical and legal or logical errors leaving our office.

In the event a typo does slip through the cracks, we still have an opportunity to correct it before the opinion is published. About a week before the opinions are scheduled to be released, they are circulated around the court for all to review. When Judge Gersten was Chief Judge, we even had a contest among suites to see who could uncover the most typos or other mistakes. The winning suite received a plaque and monthly lunches with Judge Gersten.

### III. The Specific Duties

A law clerk's workload can be broken down into several categories: Oral argument cases, emergency cases, no request cases, and cart work.

#### A. Oral Argument Cases (OA)

Regardless of whether you practice appellate law, most people are familiar with OA cases. Parties can request OA by filing a motion with the court. In the Third DCA, OA is granted to any requesting party. Alternatively, the Court may also *sua sponte* set a case for OA.

Once OA has been requested, the

Clerk of the Court randomly assigns the case to a three-judge panel with one judge as the primary judge on each case. About one month before OA is scheduled, the files are sent to the respective judge's chambers for the law clerks to begin work. Each file usually contains the parties' briefs, record on appeal, and any relevant transcripts.

Upon receiving the completed case files, I usually divide the cases between my co-clerk and myself. Then, we begin to review the briefs, record, and transcripts and prepare a summary on each case.

Once the summaries are completed and proofed, we distribute them to each judge on the panel. Summaries are expected to be distributed at least two weeks prior to the scheduled OA date. This time frame usually provides the judges sufficient time to prepare the case for OA. However, some judges prefer to receive their cases earlier than the two weeks and will work on the cases without the completed summary.

After the cases are summarized, the law clerks research the relevant law and make recommendations. Sometimes, if the case is complex, Judge Gersten may have both law clerks prepare independent memoranda. Then, we discuss the case and argue our positions. This process allows the judge to have a better understanding of the cases before entering OA.

On the day of OA, the law clerks are eager to see how the attorneys argue their cases and the questions the judges may have about the case. The law clerks have two options: (1) they can sit in the courtroom off to the side, careful not to interact with attending counsel; or (2) they can watch OA from their desks on our court intranet system. I usually choose the second option unless the live OA server is down for the morning.

After OA, I meet with Judge Gersten and co-clerk to discuss the disposition of the cases. Usually, he has distinct instructions for the cases. And, so the writing process begins.

When I have written the first draft

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of an opinion and my co-clerk has edited it, I give it to the judge for his review. No matter how long or short, he edits every opinion, often to the point that it is unrecognizable from the draft he received. Additionally, he may want more research on issues during the writing process. The job, he states, “is to get it right.”

Once the opinion has been finalized, it is sent to the other two judges on the panel as a “proposed opinion” for their approval. At this stage, the panel judges have the opportunity to make suggestions. These suggestions may be incorporated into the opinion or they may turn into dissents or concurrences. Sometimes, the decision may change completely once all the judges read the proposed opinion and have given their input.

Once all three judges sign off on the opinion, the opinion returns to the chief of the panel and the chief judge for additional approval. The opinion then circulates around the entire court, where the law clerks and judges review it again for consistency, typographical errors, proper citation, and content accuracy. Thereafter, the clerk’s office issues the opinion to the public on the Third DCA’s website, and it is published in Florida Law Weekly and ultimately in the Southern Reporter and on Westlaw and LexisNexis.

## **B. Emergencies**

Appellate law clerks are also on call for emergency duties on the weeks their judges sit on the bench. Certain petitions are filed and handled as emergency petitions. The panel judges dispose of these emergency petitions in a timely manner. The emergency petitions may include: petitions for writ of habeas corpus, mandamus, prohibition, quo warranto, certiorari, motions to stay a trial court’s order, and other original proceedings.

After the petition is docketed and assigned a primary judge, the panel may order a response or immediately

rule on the petition. A law clerk’s job for emergencies is similar to the oral argument cases. When the judge requires it, he or she reviews the file, researches the relevant law, and makes a recommendation. Some judges handle emergencies on their own, while other judges involve their law clerks. Often, the emergency is not a true emergency, but the petition is still disposed of timely, and the clerk’s office immediately issues an order, notifying the parties of the disposition.

## **C. No Request Cases**

Another type of case that law clerks are responsible for are the no request cases. In a no request case, the parties have not requested OA.

At the beginning of each month, the Clerk randomly assigns no request cases to a panel of three judges. One judge is assigned the primary judge for the case. Similar to the OA cases, each judge receives the case files with the briefs, record on appeal, appendices, and/or transcripts. Unlike the OA cases, the law clerks are not required to prepare summaries on the no request cases. However, some judges may request legal memoranda on these cases. In our chambers, the judge may or may not assign the law clerks to write an A&A on the cases. If the judge is familiar with legal issues presented and the facts are not complex, the judge will decide the case without an A&A. Regardless, the non-OA opinions travel the same review route as the OA opinions. However, at any point, any panel judge may request the case be set for OA.

## **D. Cart Work**

In addition to OA cases, emergency petitions, and no request cases, the law clerks may also be responsible for various matters that come to the suites via the “cart.” Mostly, these are motions. Each day, motions are placed on a cart located inside the judge’s chambers. Some of the motions that arrive on the cart only need one judge to review. Typically, these motions can include: motions for extension of time or motions to withdraw as

counsel. Many motions toll the time schedule of proceedings in the court until they are disposed of. Depending on the judge’s preference, a law clerk may review these motions and make a recommendation to their judge.

In addition to the one-judge motions, there are several motions that require three judges to make their ruling. These motions include: motions for rehearing, clarification, written opinion, certification, and various criminal matters, such as a public defender withdrawal motion.

Much of the cart work involves post-conviction motions, including summary rule 3.800 and 3.850 motions (“Rule 3 motions”). Defendants often file Rule 3 motions pro se, making them difficult to read and understand. These typically require record research to verify factual allegations and A&A’s on specific legal issues. These motions may also require draft opinions and will go through the same opinion writing procedure as OA and no request cases.

## **E. Supervising Interns and Other Administrative Tasks**

In addition to handling different types of cases, an appellate law clerk may also have supervisory and administrative tasks. Law clerks act as supervising attorneys to many law student interns each year. Landing an internship in our office is often a challenge, but highly rewarding. While the law clerks can do the summaries and A&A’s on their own in half the time, we are lucky to have the opportunity to train future lawyers. Thus, we assign them the task of preparing a summary.

In our office, we typically have two interns at any given time. The more time they spend in the office, the more they learn. I always tell our interns to expect a vast improvement in their research and writing skills, and in many instances, I have had former interns tell me how grateful they are for their improved skills.

I also have had the opportunity to serve the court administratively when my judge was the chief judge of our court. During this time, I helped coordinate several programs includ-

ing: The Third DCA Family Picnic and the Get Fit, Get Healthy Campaign. I was also responsible for editing "The Beacon," a newsletter for the court to keep up-to-date with our court family. I attended various meetings, and I reviewed contracts for the court. These additional duties made the task of appellate law clerk even more exciting.

#### IV. Conclusion

Now that I have described a day in

my life as an appellate law clerk, one can certainly understand why what started out as a one-year stint, is still going strong five years later. My judge always says, "He has the best job in law." If that statement is true, then I believe that my job is the second best job in law.

At the end of each day, I close down my computer, clean off my desk, and prioritize my workload for the next day. Every day brings a new challenge, and I am grateful to have the opportunity to be part of one of the

best courts in the State of Florida.

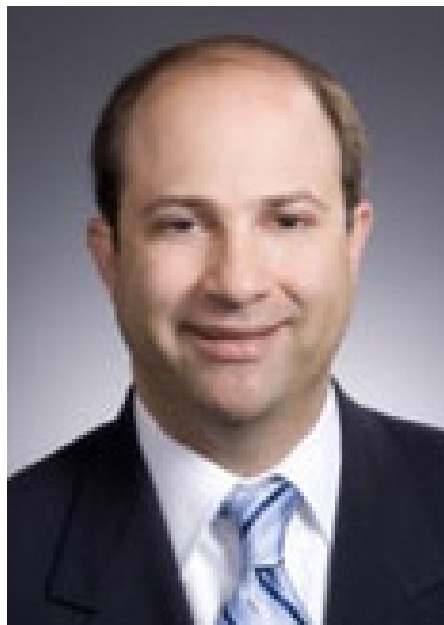
**Kimberly J. Kanoff** is a senior attorney for the Honorable David M. Gersten at the Third District Court of Appeal in Miami, Florida. Ms. Kanoff is adjunct faculty at Ave Maria School of Law, where she teaches Appellate Practice, a coach for the St. Thomas University School of Law Mock Trial Team, and co-chair of the Dade County Bar Association Appellate Practice Committee. She can be reached at [kanoffk@flco](mailto:kanoffk@flco)

## Pro Bono Award: Nicholas Shannin Takes More Than One

By Kimberly Jones<sup>a</sup>

For Nicholas A. Shannin, devoting countless hours to pro bono service is a natural choice. In fact, for a long time he did not realize there was a different way of life. "It seemed natural to me that lawyers would do pro bono work and it seemed unnatural that a lawyer would eschew the opportunity to do what could be the best work that a lawyer accomplishes," said Shannin. Even when considering the state of pro bono service in Florida, Mr. Shannin's humble nature and natural tendency to help others is unmistakable. He is self-deprecating and unable to talk about his own accomplishments without emphasizing the important work and impact of the Legal Aid Society of the Orange County Bar Association on pro bono representation in Orlando.

For instance, when he graduated from the University of Florida Levin College of Law, he joined a civil litigation firm in Orlando. On his first day as a new attorney, he was informed that he would be a member of the Orange County Bar Association and would therefore undertake a couple of pro bono matters a year. The Orange County Bar Association requires its members to participate in pro bono activities, either by accepting two pro bono cases a year or donating to the Legal Aid Society. "I



Nicholas Shannin

did it because everybody did it," Mr. Shannin shared with a laugh. It was not until several years later that he realized not all firms or bar associations require attorneys to donate pro bono services. Yet upon discovering this, Mr. Shannin did not cease volunteering his resources to the Legal Aid Society. It is for this reason that during the June 24, 2010, Florida Bar Annual Convention, the Section proudly presented this year's Pro Bono Award to Nicholas A. Shannin

of Page, Eichenblatt, Bernbaum, and Bennett, P.A., in recognition of his outstanding commitment to serving the legal needs of those who cannot afford representation.

Many appellate practitioners know Mr. Shannin for his outstanding appellate advocacy, which began on the Moot Court team in law school. However, it is often in the trial court that he truly demonstrates the balance between being a successful lawyer and passionate advocate. As a court-appointed Guardian Ad Litem through the Legal Aid Society, Mr. Shannin has represented more than fifty indigent children in juvenile dependency cases in the circuit and appellate courts. Many of these children have been abused, abandoned, and neglected and lack the resources or knowledge to navigate these proceedings. Mr. Shannin avidly assists these children by investigating and researching their circumstances to discover the dispositions that are in the children's best interests. He still receives cards and notes from his clients, including a family of five children whom he assisted in securing housing so they could stay together in one household and not be separated.

He also provides his expertise as a Florida Bar Board Certified Appellate

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## NICHOLAS SHANNIN

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Attorney to the Legal Aid Society by acting as co-counsel in extraordinary writ petitions and appeals and by being available as a resource to the Society for any appellate questions that arise. "It is such a unique thing to do as an attorney who does appellate work. These are not the type of clients we ever have the chance to represent or will ever see anything like," Mr. Shannin said. "It is critical—these are children and how they are going to be and how they will grow up hangs in the balance of how the appellate court rules."

In addition to his pro bono representation, he has been an active member of the Board of Trustees for the Legal Aid Society for the past decade. During his tenure as President of the Board, Mr. Shannin organized the Breakfast of Champions, which generated over \$100,000 in funding for the Legal Aid Society and stands as the most successful fundraising event in its history thus far. Mr. Shannin is extremely proud of the work of the Society, touting that 1,200 attorneys volunteer to assist the staff of the society in approximately twenty percent of its cases. The other eighty percent of the case load is handled by the Society's staff attorneys. "Anytime a practicing attorney grumbles about pro bono time spent, it pales in comparison to the sacrifices these staff attorneys make daily," said Mr. Shannin.

And this is why Mr. Shannin believes that every attorney in Florida should consider adding pro bono representation to their obligations and responsibilities. "Time expands to fill the space available," Mr. Shannin said. "You just have to say that you are going to do it, and once you make the commitment, the time will be there. The opportunity to do pro bono is so rewarding on so many levels, it is well worth that sacrifice. You just don't get that sense of having really made a difference in so many things you do as attorney that you get from a single pro bono case." Mr. Shannin

notes that many attorneys who are involved in legal aid programs, including himself, would be sincerely happy to give any advice to attorneys working on pro bono matters in order to make the job easier.

In addition to his work in Orlando, his devotion to pro bono service has sent him on travels across the nation to promote the Legal Aid Society and to develop innovative tools to implement in the Society's programs. In 2009, with the assistance of The Florida Bar Foundation, Mr. Shannin led a delegation in welcoming hundreds of legal aid advocates from across North America to Orlando during the American Bar Association/National Legal Aid and Defender Association's Equal Justice Conference.

It is clear that Mr. Shannin does not hesitate to step into action when his help is needed. In addition to his work with the Legal Aid Society, he has participated in the Section's Pro Bono Committee by successfully representing an indigent client before the Florida Supreme Court in *McNeil v. Canty*, 12 So. 3d 215 (Fla. 2009). Furthermore, the Florida Supreme Court has recognized his service and awarded him several Pro Bono service pins for his pro bono representation in appellate and trial matters. The Orange County Bar Association also recognized his accomplishments in 2005 by presenting him with the Lawrence Matthews Professionalism Award.

Most importantly, Mr. Shannin

inspires people to also generously donate their expertise through pro bono service. In fact, his leadership and drive to convince those around him to support pro bono services contributed to the selection of Page, Eichenblatt, Bernbaum, and Bennett, P.A. by the Legal Aid Society as the 2010 Legal Aid Law Firm of the Year. When Mr. Shannin is not handling pro bono cases, he concentrates his practice in appellate and trial assistance in all civil litigation matters and assists attorneys with their civil and appellate fee issues as an expert witness and as a Certified Circuit and Appellate Court Mediator.

The Section is proud to honor Mr. Shannin's commitment to the youth of Florida with the 2009 Pro Bono Award, and shares in his hope that every lawyer commit to at least one pro bono matter. "If everyone is doing it, no one questions that you are spending time doing it," Mr. Shannin said. "You have to decide to be different because being different in this case in can be very good."

*Kimberly Jones is an associate with Phelps Dunbar, L.L.P., where she practices in the Insurance and Reinsurance group. Prior to joining the firm, she worked as a staff attorney at the Florida Supreme Court and the Second District Court of Appeal. She serves on the Executive Council of the Appellate Practice Section and is Chair of the Self-Represented (Pro Se) Litigant Committee.*

## Florida Bar Midyear Meeting

September 22 - 25, 2010, Hilton Orlando

### Section Activities

THURSDAY, SEPTEMBER 23

Committee Meetings – 9:00 a.m.–10:30 a.m.

Executive Council – 10:30 a.m.–12:30 p.m.

More information and registration forms  
available at: [www.floridabar.org](http://www.floridabar.org)

# Highlights From Appellate Practice Decisions, 2009-10

By Matthew J. Conigliaro



M. CONIGLIARO

Each year, as the United States Supreme Court winds down its term, packs of court watchers examine the court's latest body of work and dissect its opinions. Because the court issues decisions in each term for all cases heard during that term, the term offers a useful time frame for compiling such assessments.

For those who watch Florida's judiciary, our system offers no clear equivalent. Our appellate courts sit in semiannual terms, but cases are not necessarily heard and decided within predetermined terms, and decisions are not commonly associated with release during a particular term. Nonetheless, shortly after its July term begins, the Florida Supreme Court typically takes a summer recess from hearing arguments and releasing decisions. Several district courts of appeal also take oral argument breaks in July or August. Perhaps this summer respite makes for a good point to stop and review developments from the preceding year.

This article looks at some noteworthy decisions released between August 2009 and July 2010 by the Florida Supreme Court and the district courts of appeal. The article focuses on decisions affecting appellate practice, not substantive decisions. Of course, a discussion of decisions in any category could go on far longer than this space allows, so this article will simply discuss a handful of developments that appellate practitioners may wish to examine, or, in some instances, tuck away for future use. At the end, a few noteworthy quotations from the past year's decisions are included.

## A. Notable Decisions

**1. Judicial Use of Internet Resources.** Can an appellate judge use the Internet to resolve a case? In *Oken v. Williams*,<sup>1</sup> a divided panel of the First District considered whether the respondent's expert was a qualified affiant under Florida's presuit notice requirements. The expert whose qualifications were at issue claimed to be board certified by the American Board of Emergency Medicine and the American Board of Family Medicine, and the majority opinion cited both boards' Internet sites for information concerning their certifications.<sup>2</sup> The petitioners' reply brief also cited the same materials, without any objection from the respondent. The majority defended its use of the Internet information in a footnote, pointing out that the facts gleaned from the web sites could not reasonably be questioned and that the case's result would not have been different without the Internet citations.<sup>3</sup>

In dissent, Judge Browning criticized the majority's reliance on Internet sources.<sup>4</sup> He found their use unacceptable, unprecedented, and not excused by the respondent's decision not to object to the reply brief. Judge Browning suggested that parties should be able to rely on the court to confine its determination to the record and not be penalized for not moving to strike a citation outside the record.

As the competing opinions in *Oken* suggest, parties and appellate judges are citing Internet resources with greater frequency, and judges currently disagree on the point at which reliance on nonlegal authorities outside the record becomes improper. One should expect this issue to become high profile in the coming years, as the nuances regarding when parties and courts may examine, and

cite, Internet resources become more defined. The Florida Supreme Court may soon weigh in, as the respondent in *Oken* successfully petitioned for review and has briefed the Internet citation issue in the high court.<sup>5</sup>

**2. Reliance On Knowledge From Other Litigation.** Surely not as controversial as the Internet research issue discussed above, the Second District in *Coe v. Coe*<sup>6</sup> recently reversed a domestic violence injunction because the trial court relied on knowledge learned in a pending but separate dissolution proceeding between the same parties. The district court held that, to utilize records from another case, a trial judge must give notice of intent to rely upon such records and make them part of the record in the case, as permitted by section 90.204.

**3. Preservation of Error.** The Florida Supreme Court's decision in *Aills v. Boemi*<sup>7</sup> broke no new ground when it set forth the basic elements of preserved error: (1) make a timely, contemporaneous objection, (2) state a legal ground, and (3) raise on appeal the specific contention asserted below.<sup>8</sup> What makes the case significant, both legally and as a matter of Supreme Court practice, is how the court quashed a Second District decision for having reversed a judgment based on an unpreserved argument. The Second District's decision made no mention of any preservation concern, but it did recite the objection at issue.<sup>9</sup>

In the underlying Second District decision, the court ordered a new trial on grounds that the plaintiff's closing arguments presented a theory that had not been pled or tried by consent.<sup>10</sup> The Supreme Court quashed that decision because the defendant objected only by arguing that the

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comments had no basis in the record. The high court viewed the objection as directed at the insufficiency of the evidence and held that the objection lacked the requisite specificity to inform the trial court that the plaintiff's theory had not been pled or tried. Therefore, the unpreserved claim of error could not support reversing the trial court's judgment.

*Aills* reveals an exceptional sensitivity to the precise objection made in the lower court and how well the objection informed the court of the litigant's position. *Aills* also demonstrates that, at least where the district court opinion reveals the objection actually made, conflict can be established between a district court opinion and the Supreme Court's preservation case law where an asserted error is not properly preserved.

**4. Clerks Prematurely Returning Evidence.** Many appellate lawyers have begun work on an appeal only to learn that the trial evidence is not only missing from the appellate record, it is not even in the trial court clerk's possession because the clerk directed the parties to retain their own exhibits immediately after trial. This situation should not happen. In *Johnston v. Hudlett*,<sup>11</sup> the Fourth District held that rule 2.430(f)(2) requires the clerk to retain all exhibits "until 90 days after the judgment becomes final, which means after a final judgment is entered and the time for appeal has expired or an appeal has been taken and disposed of."<sup>12</sup> In Judge Warner's words, "The clerk has no authority to release exhibits to the parties prior to that time."<sup>13</sup> Appellate counsel attending the close of trials might wish to keep a copy of this decision at hand.

**5. Entering Judgment While Extraordinary Writ Petition Pending.** Can a trial court proceed with a case and enter a final judgment

while an extraordinary writ petition directed at an earlier order in the case remains pending before a district court? Assuming no stay is entered pursuant to rule 9.100(h) or otherwise, the answer appears to be yes. In *Baldwin v. State*,<sup>14</sup> the First District held that the lower court retained jurisdiction to proceed to trial and enter judgment while the district court considered a certiorari petition to quash a pretrial order.

**6. Correcting a Misdated Notice of Appeal.** Few experiences can be more gut-wrenching than learning that a notice of appeal filed on the 30th day after rendition was not date-stamped by the clerk of court until a later date. The message usually comes in the form of an appellate court's order to show cause why the appeal should not be dismissed for lack of jurisdiction. Whether date stamps can be challenged as inaccurate was the subject of three district court decisions in this past year.

In *Strax Rejuvenation and Aesthetics Institute, Inc. v. Shield*,<sup>15</sup> the Fourth District held that the clerk's date stamp is "dispositive" regarding the filing date."<sup>16</sup> The court rejected the appellant's efforts to present affidavits verifying that the notice in that case had been timely filed.

The Fifth District soon disagreed. In *Ocr-EDS, Inc. v. S & S Enterprises, Inc.*,<sup>17</sup> the court held that denying a citizen who timely sought an appeal the right to appeal based upon a proven mistake by a clerk's office employee is not consistent with justice or due process.<sup>18</sup> The Fifth District relinquished jurisdiction to the circuit court to conduct an evidentiary hearing and to determine the actual filing date.<sup>19</sup> Shortly thereafter, in another case, the Fourth District stood firm on *Strax* and certified conflict with *Ocr-EDS*.<sup>20</sup> *Strax* and *Ocr-EDS* are now pending before the Florida Supreme Court.

**7. Clerk's Duty to Transmit a Notice of Appeal.** Trial judges have occasionally entered orders directing clerks of court to remove notices

of appeal from the court file. In *G.W. v. Rushing*,<sup>21</sup> the Second District held that notices of appeal are the property of the appropriate district court of appeal and that clerks have a ministerial duty to transmit them to the appellate court, along with any circuit court orders striking them.<sup>22</sup>

**8. Clerks Office Closures.** If a district court of appeal closes its clerk's office on a date not specifically identified in rule 9.420(f) as an official holiday but which happens to be the final date for a litigant to file a notice of appeal, is the notice's due date extended by a day because of the closure? In *Roadrunner Construction, Inc. v. Department of Financial Services, Division of Workers' Compensation*,<sup>23</sup> the First District considered this issue, and over a dissent, held the answer to be no.<sup>24</sup> The court determined that a filing deadline will be extended by a day where the lower tribunal's clerk's office is closed on the due date, not merely where the appellate court's clerk's office is closed.<sup>25</sup>

**9. The Roles of Benevolence and Compassion.** Where a court has discretion to act, are benevolence and compassion, or perhaps pity or mercy, grounds to choose one course over another? The Third District answered this question in the negative in *Republic Federal Bank v. Doyle*.<sup>26</sup> The circuit court in that case continued a foreclosure sale while stating, "I give extensions on these because I don't want anybody to lose their house."<sup>27</sup> The Third District held that the circuit court's ruling constituted an abuse of discretion, explaining that benevolence and compassion do not constitute a lawful, cognizable basis to grant relief to one side to the detriment of another and that "no judicial action of any kind can rest on such a foundation."<sup>28</sup>

**10. Certiorari Limits.** Florida law has long held that when a litigant petitions for a writ of certiorari and asks a court to quash a lower tribunal's order, the court may grant or deny the petition but may not direct the lower tribunal to take any particular

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## HIGHLIGHTS

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action.<sup>29</sup> In *Monroe County v. Carter*,<sup>30</sup> the Third District recently reiterated this principle in the context of circuit courts exercising their certiorari jurisdiction to review administrative action.<sup>31</sup>

11. *Amended Appellate Rules.* During the past year, the Florida Supreme Court amended the Florida Rules of Appellate Procedure in multiple respects. The court amended rule 9.410 to provide procedures to implement section 57.105 and its safe-harbor provisions,<sup>32</sup> created new rules 9.700 through 9.740 to govern mediation in all appellate courts,<sup>33</sup> amended rules 9.040 and 9.100 and added various comments to explain that rule 2.420 governs requests to determine the confidentiality of appellate records and the review of orders excluding or granting access to the press or the public,<sup>34</sup> amended rule 9.146 regarding dependency and termination of parental rights appeals and rule 9.430 regarding a continuing presumption of indigency,<sup>35</sup> and amended rules 9.142 and 9.200 regarding death penalty appeals and exhibits in criminal cases.<sup>36</sup>

## B. Notable Quotations

In addition, our judges turned a few noteworthy phrases in the past year. In *Arce v. Wackenhut Corporation*,<sup>37</sup> Judge Shepherd, writing for the Third District, expressed sympathy for the appellant whose case was lost when the federal government opted not to provide a witness to assist the appellant with his proofs. Judge Shepherd recalled the nobility intended of, but sometimes not seen in, our federal government: “As an agent of the sovereign, the FBI has every right to behave in such a way as to deliver this result. However, it strikes us that this action is uncharacteristic of the ‘Government of the People, by the People and for

the People,’ famously envisioned by Abraham Lincoln in his Gettysburg address over 140 years ago.”

In *Ford Motor Co. v. Hall-Edwards*,<sup>39</sup> Judge Salter of the Third District harkened back to Justice Terrell’s 1951 description of how legal labels must be warranted by the evidence. Holding the trial court to have declared a vehicle a public hazard without a proper basis, Judge Salter wrote: “The label ‘public hazard’ is not to be affixed to an allegedly-dangerous product ‘like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend.’”<sup>40</sup>

Finally, in *Allen v. State*,<sup>40</sup> Judge Monaco of the Fifth District authored a concurrence that lamented the conduct of trial counsel in the case. He explained: “One cannot read the transcript without being saddened. These are obviously good lawyers and zealous advocates. The problem is that they have somehow mistaken a trial notice for a hunting license.”<sup>41</sup>

*Matthew J. Conigliaro is a shareholder with Carlton Fields, P.A., in St. Petersburg. He is board certified in appellate practice by The Florida Bar and currently serves as Chair-Elect of the Appellate Practice Section and Chair of the St. Petersburg Bar Association’s Appellate Practice Section. He maintains an appellate web log focused on Florida appellate law and the Eleventh Circuit Court of Appeals at www.abstractappeal.com.*

## Endnotes:

- 1 23 So. 3d 140 (Fla. 1st DCA 2009), rev. granted, *Williams v. Oken*, 36 So. 3d 86 (Fla. 2010).
- 2 *Id.* at 148-49 & n.2.
- 3 *Id.*
- 4 *Id.* at 150-55 (Browning, J., dissenting).
- 5 See Petitioner’s Brief on the Merits, case no. SC10-92, available at [http://www.floridasupremecourt.org/clerk/briefs/2010/1-200/10-92\\_Ini\\_ada.pdf](http://www.floridasupremecourt.org/clerk/briefs/2010/1-200/10-92_Ini_ada.pdf) (last visited August 26, 2010).
- 6 35 Fla. L. Weekly D1594 (Fla. 2d DCA July 16, 2010).
- 7 29 So. 3d 1105 (Fla. 2010).

- 8 *Id.* at 1108-09.
- 9 *Aills v. Boemi*, 990 So. 2d 540, 546-50 (Fla. 2d DCA 2008), *quashed*, 29 So. 3d 1105 (Fla. 2010).
- 10 *Id.*, 990 So. 2d at 546-50.
- 11 32 So. 3d 700 (Fla. 4th DCA 2010).
- 12 *Id.* at 703-04.
- 13 *Id.* at 704.
- 14 20 So. 3d 991, 991 (Fla. 1st DCA 2009).
- 15 24 So. 2d 666 (Fla. 4th DCA 2009), *rev. granted*, 35 So. 3d 32 (Fla. 2010).
- 16 *Id.* at 669.
- 17 32 So. 2d 665 (Fla. 5th DCA 2010), *rev. pending*, case no. SC10-849 (Fla.).
- 18 *Id.* at 667.
- 19 *Id.*
- 20 *Soledispa v. La Salle Bank Nat’l Ass’n*, 32 So. 3d 769 (Fla. 4th DCA 2010).
- 21 22 So. 3d 819 (Fla. 2d DCA 2009).
- 22 *Id.* at 821.
- 23 33 So. 3d 78 (Fla. 1st DCA 2010).
- 24 *Id.* at 80-81.
- 25 *Id.*
- 26 19 So. 3d 1053 (Fla. 3d DCA 2009).
- 27 *Id.* at 1054 n.1.
- 28 *Id.* at 1054.
- 29 *E.g., Broward County v. G.B. Int’l, Ltd.*, 787 So. 2d 838, 843-44 (Fla. 2001) (citing cases).
- 30 35 Fla. L. Weekly D1638 n.6 (Fla. 3d DCA July 21, 2010).
- 31 *Id.*
- 32 *In re Amendments to Fl. R. App. Pro.*, 35 Fla. L. Weekly S367 (Fla. June 24, 2010) (effective December 1, 2010).
- 33 *In re Amendments to Fl. R. App. Pro. and Fl. R. for Certified and Court-Appointed Mediators*, 35 Fla. L. Weekly S405 (Fla. July 1, 2010) (effective July 1, 2010).
- 34 *In re Amendments to Fl. R. Jud. Admin. 2.420 and Fl. R. App. Pro.*, 31 So. 3d 756 (Fla. 2010) (effective in pertinent part Mar. 18, 2010).
- 35 *In re Amendments to Fl. R. Jud. Admin., Fl. R. Juv. Pro., and Fl. R. App. Pro.—Implementation of Comm’n on Dist. Ct. Appeal Performance and Accountability Recommendations*, 24 So. 3d 47 (Fla. 2009) (effective Nov. 12, 2009).
- 36 *In re Amendments to Fl. R. App. Pro. 9.142 and 9.200*, 20 So. 3d 380 (Fla. 2009) (effective Oct. 15, 2009).
- 37 2010 WL 2670881 (Fla. 3d DCA July 7, 2010).
- 38 21 So. 3d 99 (Fla. 3d DCA 2009).
- 39 *Id.* at 103 & n.6 (quoting *Lee v. Sas*, 53 So. 2d 114, 116 (Fla. 1951)).
- 40 17 So. 3d 897 (Fla. 5th DCA 2009).
- 41 *Id.* at 898 (Monaco, C.J., concurring).

# Are You Certifiable?

By Alina Alonso

Having recently gone through the process of Board Certification in Appellate Practice, colleagues at the Annual Bar Meeting suggested I draft a piece for younger lawyers who may be considering certification. Although my preference would be to not relive the exam – having recently stopped having nightmares – I agreed it would be worthwhile to share what I learned throughout the process.

At the outset, I would be remiss to not highlight that Carol Vaught, the staff liaison for appellate practice certification within The Florida Bar's office of Legal Specialization and Education, is a tremendous resource. She answered my questions about the application process, CLE requirements, exam set-up and everything in between.

## The requirements

Preliminarily, certification applicants are required to have been engaged in the practice of law for at least five (5) years. See R. Regulating Fla. Bar 6-13.3(a).

During the three years preceding the application, at least 30% of the applicant's practice must have been spent in the "substantial and direct involvement in appellate practice sufficient to demonstrate special competence as an appellate lawyer." *Id.* While I doubt anyone reading The Record needs a definition of "Appellate Practice," the Bar defines it as follows for purposes of board certification: "the practice of law dealing with the recognition and preservation of error committed by lower tribunals, and the presentation of argument concerning the presence or absence of such error to state or federal appellate courts through brief writing, writ and motion practice, and oral argument. Appellate practice includes evaluation and consultation regarding potential appellate issues or remedies in connection with proceedings in the lower tribunal prior to the initiation of the appellate process." *Id.* at R. 6-13.2(a).

The rule provides that "for good

cause shown," the appellate practice certification committee may waive 2 of the 3 years for those who have served as appellate judges, clerks, career attorneys or staff attorneys in an appellate court. *Id.* at R. 6-13.3(a). The waiver may be requested at the time the application is completed. There is no waiver for the year immediately preceding the application. *See id.*

To establish "substantial and direct involvement in appellate practice," the applicant must have had "sole or primary responsibility" in at least 25 appellate actions for the filing of principal briefs in appeals or the filing of petitions or responses in extraordinary writ cases. *Id.* "Where primary responsibility is used to meet this requirement, the applicant shall specifically identify any co-counsel and demonstrate to the satisfaction of the appellate practice certification committee that the applicant's level of participation was substantial and direct." *Id.* at R. 6-13.3 (b). In addition to initial and answer briefs, and writ petitions and responses, it appears the certification committee will also consider *amicus* briefs. Further, according to the application guidelines,

the committee will count matters that progress to higher courts as a separate action in each court. However, briefs on the merits following the acceptance of jurisdiction in the FSC will not be considered a separate appellate action.

The applicant must have also had "sole or primary responsibility" in at least 5 appellate oral arguments. *Id.* at R. 6-13.3(c). The applicant may seek a waiver of this requirement "for good cause shown." *Id.*

Because there is a requirement that you have at least 45 appellate certification hours in the 3 years preceding your application, *see id.* at R. 6-13.3(d), my recommendation is that the year before you are considering applying, applicants contact The Bar and request a current CLE report. The application requests attorneys detail their CLE credits as they relate to seminars or courses attended, lectures or panelist presentations, articles or books published, graduate level or approved law school courses taught or attended, and individual study (audio and/or videos, CDs or DVDs). It is particularly important

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## Congratulations to those who recently became Board Certified in Appellate Practice

- Alina Alonso, Miami
- Rosemary Hanna Hayes, Orlando
- Cristina Alonso, Miami
- Elliot Burt Kula, Miami
- Edward Thomas Bauer, Tallahassee
- Lamar Dwight Oxford, Orlando
- Tracy Lee Cooper, Tallahassee
- Daniel Lawrence Wallach, Ft Lauderdale
- Michael Ross D'Lugo, Orlando
- Laura Keats Wendell, Coral Gables

that applicants look into their CLE credits early enough to, for example, request lecture or author credit if they have previously written on spoken on appellate topics. As a shameless plug and request for articles for *The Record*, I would commend those needing CLE credit to write a substantive piece for *The Record* and request appropriate credit from The Bar. Another great way to obtain certification credits is with the monthly telephonic CLEs sponsored by the Appellate Practice Section. See [http://www.flabarappellate.org/cle\\_telephonic.asp](http://www.flabarappellate.org/cle_telephonic.asp).

## The application process

In my opinion, completing the application is an accomplishment in and of itself. The application, which can be downloaded at [http://www.flabarappellate.org/resources\\_certification.asp](http://www.flabarappellate.org/resources_certification.asp), requires the applicant to provide: (1) attorney references; (2) judicial references; (3) briefs by all parties in their two most recent appeals; and (4) the opinions, including PCAs, issued in each of the 25 decisions referenced in the application. In my experience, if the case was voluntarily dismissed because of a settlement, for example, after the applicant's principal brief was filed, the committee will accept such explanation for the lack of opinion.

The application also requires the attorney to detail each of their 25 appellate matters in reverse chronological order, including the number of hours spent on the matter, names and addresses of opposing counsel, names of the judges on the panel, etc. My best advice to anyone considering seeking board certification – even if years down the line – is to begin cataloguing the information needed for the application as he or she goes along. That is, download the application now and every time you write a brief in a matter, catalogue the information requested in the application, and keep a copy of the briefs and the opinion. Now that they are available in every court, I also think it would be helpful to print the online docket once the case was over. The application is typically due August 31. There is also an applicable fee for both the application and exam, totaling \$400.

Once the application is submitted it is reviewed by the certification commit-

tee. If approved, applicants will receive notice that they are eligible to sit for the examination which typically takes place during March of the year following submission of the application.

## The exam

Substantively, the exam is divided as follows: (1) 70% will involve civil appeals in state court; (2) 20% will involve practice before the Eleventh Circuit Court of Appeals and United States Supreme Court; and (3) the remaining 10% will address sub areas of state and federal criminal appeals, state and federal administrative appeals, family law appeals, probate appeals and worker's compensations appeals. Not all of the sub-areas will necessarily be included in the exam.

In terms of studying strategy, I think everyone learns and processes differently. I will share, however, what seemed to work for me. First, I very strongly recommend the review course offered approximately one month before the exam. If for no other reason, it will make you realize that you may not even know what you don't know. I found the materials and speakers to be very helpful. In fact, I recommend that review course to anyone who has recently started practicing appellate law – even if he or she is not planning on sitting for the exam. Most importantly, I read the rules – over and over and over. Because everyone I spoke to suggested that jurisdiction would be heavily tested, I created a chart for both state and federal courts, detailing which court had jurisdiction over which particular type of order/issue. I also focused on, among other topics, rendition, finality, the process by which appeals or original proceedings are initiated in each of the courts, standards of review, and the differences between federal and state appeals on a number of issues.

Mathematically speaking, I understood that approximately 90% of the exam focused on issues which I likely knew given that my practice consists almost exclusively of civil appeals in our state appellate courts and the Eleventh Circuit. I was sure to review those. But, I found myself increasingly concerned over my lack of familiarity with the remaining 10%. Because of that, I attempted to

memorize anything and everything that I did not know from my practice, including things like that the color of a reply in support of a petition for writ of certiorari in the United States Supreme Court is tan. I wish I were exaggerating. I'm not so sure I'd recommend that approach. Thankfully, in the process of attempting to review everything that could possibly be tested, I inevitably reviewed what was actually tested.

The exam itself consists of multiple choice questions and a mix of short and long essays. The actual exam consists of two, 3-hour sessions. The exam may be handwritten or typed on a personal laptop on which you can download the exam software. The Bar really does a great job of making everything flow smoothly that day, for example, having folks available to help with technical issues involved in using laptops and/or the exam software. I recommend using a laptop if that is something you are comfortable doing because you will be doing a fairly significant amount of writing during the 6-hour exam.

I thought the exam did a fair job of asking questions which allowed the applicants to express their expertise in appellate practice. It had a good balance of procedural and substantive questions. I also believe it stayed true to the apportionment of subjects detailed above. I was, however, very disappointed they did not ask me the color of replies in support of writs of certiorari in the Supreme Court. Tan.

If you have been thinking about applying for board certification, I would strongly encourage you to do so. I think it will not only better your resume, but the process of studying for the exam will surely better your appellate skills.

*Alina Alonso is a shareholder in the Appellate & Trial Support Practice Group of Carlton Fields' Miami office. She formerly served as a staff attorney to the Honorable R. Fred Lewis of the Florida Supreme Court.*



ALINA ALONSO

result from the accident but, instead, from the plaintiff's decision to undergo unnecessary surgery performed by Dr. Theofilos. The trial court declined to give the requested instruction, commenting, "I don't think anything has risen to the point of negligence, mistake or lack of skill."<sup>3</sup>

After the jury sent out a note seemingly expressing confusion as to whether it was supposed to consider the treating doctor's negligence, and whether it could relieve the original defendant/tortfeasor of liability if it found the treating doctor "unscrupulous," plaintiff's counsel urged the court to give the instruction "he had previously requested regarding the defendants' liability for aggravation of injuries caused by subsequent medical treatment."<sup>4</sup>

Finding error in the refusal to read the requested instruction, the *Nason* court stated:

In this case, the jury's confusion was apparent from the note it sent to the judge during deliberations. It sought guidance on how to handle the defendants' evidence that Dr. Theofilos was "unscrupulous." The judge's failure to dispel that confusion

by granting plaintiff's request for the special instruction requires us to reverse and remand for a new trial.<sup>5</sup>

Judge Farmer specially concurred in the result, writing to suggest a format for a jury instruction to teach the legal principle of *Stuart v. Hertz*<sup>6</sup> "in a way readily comprehensible by someone who did not spend three years in law school," e.g., the typical jury member.<sup>7</sup>

To understand Judge Farmer's special concurrence, it is worth reviewing how the law of intervening and concurring causation has developed in Florida. And to do that, one must review the *Stuart v. Hertz* case cited by both the *Nason v. Shafranski* majority and concurrence.

**A Brief Summary of the Development of the Case Law on Original Tortfeasors Being Responsible for Any Subsequent Tortfeasor's Negligence in Offering Medical Treatment to an Injured Party, or, The *Stuart v. Hertz* Line of Cases**

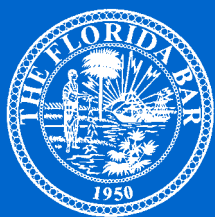
In *Stuart v. Hertz Corporation*, 302 So. 2d 187, 189 (Fla. 4th DCA 1974) ("*Hertz I*"), quashed by *Stuart v. Hertz Corporation*, 351 So. 2d 703

(Fla. 1977), an automobile owned by Hertz collided with an automobile operated by the plaintiff, who was injured. The plaintiff underwent surgery, performed by Dr. Stuart. The plaintiff's artery was severed during surgery, neurologically disabling her. The plaintiff sued Hertz, who filed a third-party complaint against the doctor seeking indemnification for any damages recovered as a result of the neurological injuries only. (See *Stuart v. Hertz Corporation*, 381 So. 2d 1161, 1162 (Fla. 4th DCA 1980) ("*Hertz III*") for these facts.)

The Fourth DCA in *Hertz I* allowed a third-party action for indemnity by Hertz against the doctor.<sup>8</sup> In so holding, the Fourth DCA stated, "There is no question but that a tortfeasor is responsible for all injuries which flow naturally from the original act."<sup>9</sup> The court went on to state:

There is no dispute . . . as to the responsibility of Hertz (and Holbrook) the original (alleged) tortfeasors to the injured plaintiff regardless of the alleged negligence of Dr. Stuart in aggravating the original injury (assuming of course that Hertz and

*continued, next page*



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**INTERVENING AND  
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Holbrook are ultimately found to have been negligent.)<sup>10</sup>

The Supreme Court of Florida quashed the decision in *Hertz I*, holding that a third party action for indemnity could not be brought against the physician, in *Stuart v. Hertz Corp.*, 351 So. 2d 703, 706 (Fla. 1977) (“*Hertz II*”). In *Hertz II*, the Florida Supreme Court stated:

We therefore hold that Hertz Corporation, the initial tortfeasor, may not file a third-party complaint seeking indemnity for the alleged aggravation of the injuries by the negligence of the treating physician. This holding is in conformity with the rule [that] ‘Where one who has suffered personal injuries by reason of the negligence of another exercises reasonable care in securing the services of a competent physician or surgeon, and in following his advice and instructions, and his injuries are thereafter aggravated or increased by the negligence, mistake, or lack of skill of such physician or surgeon, the law regards the negligence of the wrongdoer in causing the original injury as the proximate cause of the damages flowing from the subsequent negligent or unskillful treatment thereof, and holds him liable therefor.’<sup>11</sup>

In *Hertz III*, the Fourth DCA expressed support for Hertz’s bringing a separate lawsuit against the physician for contribution or subrogation.

The fourth decision in this line of cases, *Hertz Corp. v. Stuart*, 422 So. 2d 38, 38 (Fla. 4th DCA 1982), observed, in a bit of an understatement, “This case and its progeny have a long and arduous history in the appellate courts of Florida.”<sup>12</sup> (The “*Hertz IV*” court also acknowledged “the special facts of this very complex litigation.”)<sup>13</sup> The *Hertz IV* case merely reinstated a cause of action for subrogation and declaratory

relief filed by the automobile lessor, Hertz, against the treating physician, Stuart, noting that, “In 1971, Mrs. McCutcheon [plaintiff] was injured in an automobile accident with a Hertz owned car driven by a Hertz lessee. As a result of the auto accident, Mrs. McCutcheon was treated by Dr. Frank Stuart, who, it is alleged, was negligent in his medical treatment and greatly aggravated her initial injuries.”<sup>14</sup>

The fifth decision in the same line of cases, *McCutcheon v. Hertz Corp.*, 463 So. 2d 1226 (Fla. 4th DCA 1985) discussed a separate issue— offers of judgment— but did recognize the principle that Hertz, as the original tortfeasor, was liable for all of the plaintiff’s injuries, including those caused by the alleged negligence of the doctor who treated her after the accident.<sup>15</sup>

In the later, factually unrelated case of *Letzter v. Cephas*, 792 So. 2d 481 (Fla. 4th DCA 2001),<sup>16</sup> the Fourth DCA analyzed a medical malpractice action with what it called “the law of *Stuart v. Hertz*.” The *Letzter* court noted that:

[i]t has long been the law in Florida that when one who is negligent injures another causing him to seek medical treatment, negligence in the administration of that medical treatment is foreseeable and will not serve to break the chain of causation.<sup>17</sup>

In *Letzter*, the plaintiff went to one doctor and was diagnosed with dry gangrene; that doctor told him the affected toe would fall off by itself, but when the plaintiff later complained of pain, and the toe started oozing fluid, the doctor recommended surgery. Before the surgery was scheduled, the plaintiff went to an emergency room and another doctor amputated his foot and performed an arterial bypass. The bypass was a failure, and a below-the-knee amputation was required. The court gave the jury a *Stuart v. Hertz* instruction, but the Fourth DCA surmised that the jury must have rejected the instruction, because the jury apportioned damages, whereas under *Stuart v. Hertz*,

they should only have found the first doctor the legal cause of all of the plaintiff’s injuries, including those caused by the second doctor’s negligence.<sup>18</sup> The court stated that “[t]he foreseeability rule of *Stuart v. Hertz* has expressly been held to apply even when the initial tortfeasor is a physician as well.”<sup>19</sup>

This brings us full-circle to *Nason v. Shafranski*, and, in particular, to the jury instructions on intervening and concurring causation.

**Fla. Std. Jury Instr. (Civ.) 401.12  
(with Reference to Fla. Std. Jury Instr. (Civ.) 501.5)**

The Florida Supreme Court, of course, has recently amended the Standard Jury Instructions in civil cases.<sup>20</sup> See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666 (Fla. 2010).

The instructions on legal, concurring and intervening cause, respectively, state:

**401.12 LEGAL CAUSE**

*a. Legal cause generally:*

**Negligence is a legal cause of [loss] [injury] [or] [damage] if it directly and in natural and continuous sequence produces or contributes substantially to producing such [loss] [injury] [or] [damage], so that it can reasonably be said that, but for the negligence, the [loss] [injury] [or] [damage] would not have occurred.**

*b. Concurring cause:*

**In order to be regarded as a legal cause of [loss] [injury] [or] [damage] negligence need not be the only cause. Negligence may be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with \*689 [the act of another] [some natural cause] [or] [some other cause] if the negligence contributes substantially to producing such [loss] [injury] [or] [damage].**

*continued, next page*

## INTERVENING AND CONCURRING CAUSE

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### c. Intervening cause:

Do not use the bracketed first sentence if this instruction is preceded by the instruction on concurring cause: \*

\* **[In order to be regarded as a legal cause of [loss] [injury] [or] [damage], negligence need not be its only cause.] Negligence may also be a legal cause of [loss] [injury] [or] [damage] even though it operates in combination with [the act of another] [some natural cause] [or] [some other cause] occurring after the negligence occurs if [such other cause was itself reasonably foreseeable and the negligence contributes substantially to producing such [loss] [injury] [or] [damage]] [or] [the resulting [loss] [injury] [or] [damage] was a reasonably foreseeable consequence of the negligence and the negligence contributes substantially to producing it].**<sup>21</sup>

The “Notes on Use” from the Committee on Standard Jury Instructions read, in part:

#### NOTES ON USE FOR 401.12

1. Instruction 401.12a (legal cause generally) is to be given in all cases. Instruction 401.12b (concurring cause), to be given when the court considers it necessary, does not set forth any additional standard for the jury to consider in determining whether negligence was a legal cause of damage but only negates the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage. Instruction 401.12c (intervening cause) is to be given only in cases in which the court concludes that there is a jury issue as to the presence and effect of an intervening cause.

2. The jury will properly consider

instruction 401.12a not only in determining whether defendant's negligence is actionable but also in determining whether claimant's negligence contributed as a legal cause to claimant's damage, thus reducing recovery.

3. Instruction 401.12b must be given whenever there is a contention that some other cause may have contributed, in whole or part, to the occurrence or resulting injury. If there is an issue of aggravation of a preexisting condition or of subsequent injuries/multiple events, instructions 501.5a<sup>22</sup> or 501.5b<sup>23</sup> should be given as well. See *Hart v. Stern*, 824 So. 2d 927, 932-34 (Fla. 5th DCA 2002); *Marinelli v. Grace*, 608 So. 2d 833, 835 (Fla. 4th DCA 1992).

4. Instruction 401.12c (intervening cause) embraces two situations in which negligence may be a legal cause notwithstanding the influence of an intervening cause: (1) when the damage was a reasonably foreseeable consequence of the negligence although the other cause was not foreseeable, *Mozer v. Semenza*, 177 So. 2d 880 (Fla. 3d DCA 1965), and (2) when the intervention of the other cause was itself foreseeable, *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520 (Fla. 1980).<sup>24</sup>

In his special concurrence in *Nason v. Shafranski, Id.*, Judge Farmer suggested the need for a new standard jury instruction just for the *Stuart v. Hertz*-type situation, noting that “Fla. Std. Jury Instr. (Civ.) 401.12c . . . is a generic instruction for concurring or intervening negligence” which is not satisfactory “in cases of liability for later negligent medical treatment.”<sup>25</sup> Thus, Judge Farmer “offer[ed] the following draft of a JI for this subject until a standard one can be approved:”

**The next issue for your consideration is the claim that (defendant) is liable for the negligence of (doctor) (hospital) (nurse) in treating (claimant) for injuries he claims to have suffered in (event). A person**

**responsible for negligently injuring another may also be further liable for the ensuing negligence of any health care provider treating the injured party if:**

**1. injuries caused by the negligence of (defendant) reasonably required medical care or treatment by a health care provider;**

**2. a health care provider gave (claimant) medical care or treatment for injuries caused by (defendant) in (event); and**

**3. (Claimant) did not unreasonably fail to comply with that health care provider's medical advice and instructions.**<sup>26</sup>

## Conclusion

Of course, the standard instructions are presumed correct and are preferred over special instructions. However, it is equally true that it is within the discretion of the trial court judge to read or not to read a requested special jury instruction.<sup>27</sup> With that in mind, it may behoove the appellate practitioner who is called upon as trial support—or any trial attorneys who may find themselves reading *The Record*—to request a special jury instruction, based on an accurate statement of the applicable law, in cases in which there are issues of a defendant's liability for a doctor's negligence in treating a plaintiff for injuries caused by an initial tortfeasor defendant.



A. SULLIVAN

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## INTERVENING AND CONCURRING CAUSE

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### Endnotes:

- 1 *Nason v. Shafranski*, 33 So. 3d at 120.
- 2 *Id.* at 121.
- 3 *Id.* at 119.
- 4 *Id.* at 120.
- 5 *Id.* at 122.
- 6 The concurrence recites that the majority had shown that this principle is “that the law considers the treating doctor’s negligence in rendering medical care to the victim for the initial injuries as part of the consequences caused by the original actor’s negligence that required the medical treatment.” *Nason*, 33 So. 3d at 123, 123 n.2 (further noting that negligence can consist of “a mistake in judgment amounting to medical negligence”).
- 7 See *Nason*, *Id.*, 33 So. 3d at 123. Judge Farmer called the plaintiff’s requested instruction “a correct statement of law on concurring or intervening cause by a subsequent treating doctor,” but noted that it was “hopelessly muddled” in format. *Nason*, 33 So. 3d at 124 (Farmer, J., specially concurring).
- 8 *Stuart v. Hertz Corporation (Hertz I)*, 302 So. 2d at 194.
- 9 *Hertz I* at 189.
- 10 *Hertz I* at 189.
- 11 *Stuart v. Hertz Corp. (Hertz II)*, 351 So. 2d at 707 (citations omitted).
- 12 Citing *City of Lauderdale Lakes v. Underwriters at Lloyds*, 373 So. 2d 944, 945 (Fla. 4th DCA 1979) (“Simply, *Hertz* stands for the proposition that an active tortfeasor may not bring a third party action claiming indemnity against a physician who by malpractice has directly aggravated the aggrieved plaintiff’s injuries”) and *Underwriters at Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702, 704 (Fla. 1980) (“The initial tortfeasor is subject to the total financial burden of the victim’s injuries, including those directly attributable to a doc-

- tor’s malpractice.”) (other citations omitted).
- 13 *Hertz Corp. v. Stuart (Hertz IV)*, 422 So. 2d at 39.
  - 14 *Id.* at 39.
  - 15 *McCutcheon v. Hertz Corp.*, 463 So. 2d at 1227.
  - 16 The *Nason* court discusses *Letzter* in the majority opinion, at 33 So. 3d at 120.
  - 17 *Letzter* at 485.
  - 18 *Id.* at 487.
  - 19 *Id.* at 485.
  - 20 The amendments to Fla. R. Civ. P. 1.985, Standard Jury Instructions, effective October 1, 2009, state, “[t]he forms of Florida Standard Jury Instructions appearing on the court’s Web site at [www.floridasupremecourt.org/jury\\_instructions/instructions.shtml](http://www.floridasupremecourt.org/jury_instructions/instructions.shtml) may be used by the trial judges of this state in charging the jury in civil actions . . .”
  - 21 See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 688-689 (Fla. 2010).
  - 22 a. Aggravation or activation of disease or defect:

If you find that the (defendant(s)) caused a bodily injury, and that the injury resulted in [an aggravation of an existing disease or physical defect] [or] [activation of a latent disease or physical defect], you should attempt to decide what portion of (claimant’s) condition resulted from the [aggravation] [or] [activation]. If you can make that determination, then you should award only those damages resulting from the [aggravation] [or] [activation]. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, then you should award damages for the entire condition suffered by (claimant). See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 782 (Fla. 2010).

- 23 b. Subsequent injuries/multiple events:

You have heard that (claimant) may have been injured in two events. If you decide that (claimant) was injured by (defendant) and

was later injured by another event, then you should try to separate the damages caused by the two events and award (claimant) money only for those damages caused by (defendant). However, if you cannot separate some or all of the damages, you must award (claimant) any damages that you cannot separate as if they were all caused by (defendant). See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 782 (Fla. 2010).

Interestingly, the “Notes for Use” for Fla. Std. Jury Instr. (Civ.) 501.5b state, in part: “1. Instruction 501.5b addresses the situation occurring in *Gross v. Lyons*, 763 So. 2d 276 (Fla. 2000). It is not intended to address other situations. For example, see *Stuart v. Hertz Corp.*, 351 So. 2d 703 (Fla. 1977) . . . The committee recognizes that the instruction may be inadequate in situations other than the situation in *Gross*.” (emphasis supplied). *Id.* 35 So. 3d at 782.

- 24 See *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 689 (Fla. 2010).

- 25 *Nason v. Shafranski, Id.*, 33 So. 3d at 123 (Farmer, J., specially concurring).

- 26 *Id.* at 123-24 (further noting the need for “a specific instruction for this complex legal subject”).

- 27 See, e.g., *Barton Protective Servs., Inc. v. Faber*, 745 So. 2d 968, 974 (Fla. 4th DCA 1999).

See also Fla. R. Civ. P. 1.985, stating:

The forms of Florida Standard Jury Instructions appearing on the court’s website at [www.floridasupremecourt.org/jury\\_instructions/instructions.shtml](http://www.floridasupremecourt.org/jury_instructions/instructions.shtml) may be used by the trial judges of this state in charging the jury in civil actions to the extent that the forms are applicable, unless the trial judge determines that an applicable form of instruction is erroneous or inadequate. In that event the trial judge shall modify the form or give such other instruction as the judge determines necessary to accurately and sufficiently instruct the jury in the circumstances of the action.

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## JUDICIAL PROFILES

### Judge Tony Black Joins the Second DCA

By Raymond T. (Tom) Elligett, Jr.

If the Second District Court of Appeal had a softball team, some might think that team had just picked up a ringer. And they might be correct, except that Judge Tony Black's significant athletic ability did not factor into Governor Crist's selection. Instead it was Judge Black's legal acumen, contemplative approach, and sterling reputation as a trial judge that led to his elevation.

Originally from the Midwest, Judge Black earned an accounting degree from Arizona State University, graduating in 1978. While working for two years in Price Waterhouse's Chicago office, he became a certified public accountant. From there he attended the University of Illinois College of Law, entering private practice in Chicago.

In 1985, at the urging of law school classmate and friend Jim Goodwin, he came to Tampa to work for Macfarlane Ferguson. Judge Black and another Illinois classmate, Bill Jung, formed Black & Jung in 1993, where Judge Black practiced until 2000. Judge Black had a solo practice until 2002, when Jeb Bush appointed him to the circuit bench in Hillsborough County.

While in private practice Judge Black became board certified in Civil Trial Law, and as a mediator. He received an AV rating from Martindale Hubbell and taught business law as an adjunct professor at the University of Tampa. He also represented several NFL football players as a certified sports agent.

Judge Black has served as the President of the Tampa Bay Ameri-



Judge Tony Black

can Inn of Court, and as a director on the boards of the Hillsborough Association for Women Lawyers and the Abe Brown Ministries. His interests include travel and long distance running, having competed in several marathons. This past April, Judge Black completed two marathons on two coasts in one week, completing the Boston Marathon on April 19, and the Big Sur, California Marathon on April 25.

Another recent and significant change for Judge Black was in his marital status, convincing wife Colette to marry him three years ago. At his investiture, he recognized Judge Jim Whatley of the Second District for encouraging him to apply to the Second District, and for introducing him to Colette. Colette now practices with Bay Area Legal Services, and is on the Hillsborough County Bar Association Board of Directors.

Judge Black's comments at his investiture included his view that as an appellate judge he would strive to apply the law according to the constitutions, statutes and precedents. Judge Black is a firm believer in the separation of powers, and is opposed

to, "legislating from the bench."

Both Judge Black and Bill Jung spoke fondly of their law school years at the University of Illinois. And the feeling must be mutual, as Bruce Smith, the Dean of the college of law, traveled to Tampa to speak at Judge Black's investiture.

Judge Black observes that the main difference between judging on the appellate bench versus the trial bench is that as an appellate judge, he has more time to think about his decisions. He appreciates the time to consider his decisions, because he understands that his written opinions are going to be scrutinized and relied upon. He appreciates the difficulty that trial judges face because of the volume of important decisions that have to be made quickly in order to keep the wheels of justice turning.

As far as advice for appellate litigants, Judge Black cautions that as with all aspects of the practice of law, there is no substitute for thorough preparation.

*continued, next page*



Judge Black and his wife Colette in front of the Lone Cypress Tree on the 17 Mile Drive in Pebble Beach, California.



## JUDICIAL PROFILES

Judge Black brings a broad range of experience to the Court. Beyond his accounting and civil litigation experience, he sat as a circuit judge in the felony, family law, and juvenile dependency divisions. And, if they do start DCA softball teams, in the words of John Fogerty, put him in coach, he is ready to play.

**Raymond T. (Tom) Elligett, Jr.**, is a member of the Tampa law firm of Buell & Elligett, P.A. He received his B.A. in mathematics with high honors from the University of Florida in 1975 and his J.D., cum laude, from Harvard University in 1978. He is board certified in appellate practice, a past chair of the Florida Bar Appellate Practice Sec-

tion, and co-author with Judge John M. Scheb of *Florida Appellate Practice and Advocacy* (now in its fifth edition). For more information, see [www.bellawtampa.com](http://www.bellawtampa.com)



TOM ELLIGETT, JR.

### Judge Simone Marstiller Joins the First DCA at an Historic Time

By C.J. Weinman

Judge Simone Marstiller has stepped into the First District Court of Appeal at a time of historical transition at the court. The First District is preparing to move into its new courthouse, and it is also moving rapidly into full use of electronic technology in every aspect of its work. Judge Marstiller is eagerly preparing for both. When she began her new career as an appellate judge in February 2010, she was told not to get too comfortable in her office because she would not be there long. Getting down to business in her new “temporary” office, she quickly mastered the skills needed to work with the electronic records on cases she is reviewing. She makes excellent use of the court’s newly-evolving ability to actually handle appeals without having to rely entirely on cumbersome paper records and the large expanding folders she refers to as “old-fashioned.”

When Governor Crist selected Simone Marstiller to become the third of three new judges appointed to the First District in three months, he invested with the court a unique personality. As I learned more about Judge Marstiller’s personal history and professional experience, I found many clues to how her life and career have developed to make her so well-suited to her new role



Judge Simone Marstiller

as an appellate judge.

Simone Marstiller was born in Liberia where her father worked as an operations supervisor for the Firestone Natural Rubber Company, which owns a rubber plantation there. At age four she entered first grade. She explained that because her education in Liberia was in a private school, she was able to start early. When she was nine years old her family immigrated to St. Peters-

burg, Florida, where she entered the Florida public school system. At that age, she tested at a sixth-grade level, and became a nine-year-old middle schooler. Not being one to especially value conformity with her peers, Judge Marstiller continued through school as the youngest in her classes and graduated from high school at age fifteen. She entered college at age sixteen.

Judge Marstiller earned a Bachelor of Arts degree in Business Administration from Stetson University in Deland. Her daughter, Krystle, was born while Judge Marstiller was in undergraduate school, and as a determined single mom, she completed her degree, and went to work with the ST. PETERSBURG TIMES in advertising sales. During a period of 7 years, before she decided to go to law school “on a whim,” she also worked in the publishing industry for FLORIDA TREND magazine and for GOLF COURSE NEWS, a monthly trade magazine. Because of her experience with GOLF COURSE NEWS, Judge Marstiller claims to be a bit of an expert in such things as seed and sod and ball washers, but she admits to a lack of expertise on the links: “I have a set of clubs and I’ve taken lessons, but I’m still working my way up to actually playing a round.”

*continued, next page*



## JUDICIAL PROFILES

When her daughter was ten years old, Judge Marstiller entered Stetson University College of Law, where she started up the career path that brought her to the First District. Until her last year of law school, Judge Marstiller said, "I wanted to be a lawyer," but her career goals became more defined in her third year when she took an appellate practice class with Judge John Scheb, who is now retired from the Second District. From then on, she became more specific: "All I wanted to do was appellate advocacy." After graduating from law school, she clerked for three years with Judge Emerson R. Thompson at the Florida Fifth District Court of Appeal. Judge Marstiller credits Judge Thompson with teaching her to see the law from a judge's perspective.

While working as an appellate attorney in the Agency for Health Care Administration, Judge Marstiller attended a meeting at the Capitol one day, and she decided then and there, "I want to work here." An opportunity to work in the Governor's office arose a short time later when she saw a job advertisement for a position that "sounded interesting"-- assistant general counsel to the Governor. She applied for the job online, and was granted an interview with Charles Canady, then general counsel for Governor Bush. She got the job. Judge Marstiller says she learned much from working with Charles Canady, now Chief Justice of the Florida Supreme Court, and considers him to be one of her mentors. She greatly respects Chief Justice Canady for his approach to the law and judging.

After brief terms as general counsel and interim secretary of the Florida Department of Management Services, Judge Marstiller was selected to be Governor Bush's Deputy Chief of Staff in 2003. Because of the Governor's confidence in her, he appointed her to be the state Chief Information Officer in the Florida Technology Of-

fice. As CIO, Judge Marstiller gained recognition as a "technology leader" in Florida. A framed article on the wall of Judge Marstiller's office from the "Annual Women Achiever's Edition" of the March-April 2005 IN FOCUS magazine profiled CIO Simone Marstiller under the heading "Female Technology Leaders Have a Message: Find Your Own Vision and Go For It." Judge Marstiller went for it! And the First District is the beneficiary. Judge Marstiller is a big fan of the First District's new electronic records system, and she eagerly advocates for the continued development and use of technology at the court.

During her journey to the First District, Judge Marstiller also served the State of Florida as Secretary of the Department of Business and Professional Regulation, as Associate Deputy General Counsel in the Office of the Attorney General, and as Executive Director of the Florida Elections Commission. At her investiture, Judge Marstiller was commended by former colleagues for her dedication to public service. She was described as a team player, a problem solver, "perky and effervescent" (by Judge Thompson, who also described her as having a "keen wit only tempered by sarcasm"), but she was most highly praised as an admirable attorney known for her commitment to the rule of law and to

the State of Florida.

Judge Marstiller is the twenty-fifth judge to have celebrated an investiture in the white brick First District courthouse in downtown Tallahassee. She will be the last. In the fall of 2010, the First District will be moving into its new courthouse in the SouthWood Office Complex. While appreciating the court's history and her part in it, Judge Marstiller is looking forward to the move as the First District strides into an innovative future with state-of-the-art technology and space to share with the legal community and Florida law schools for meetings and events. She is proud to be part of the First District's history and its future.

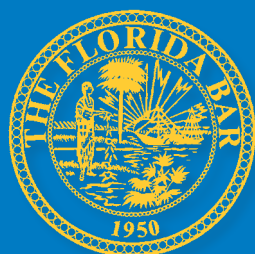


C. J. WEINMAN

**C.J. Weinman** is a long-time judicial attorney with the First District Court of Appeal. She is a former law clerk to Judge James R. Wolf and is currently law clerk to Judge Lori S. Rowe.

C.J. has been a full time professor of legal research and writing at Florida State University College of Law and is currently an adjunct professor in the legal studies undergraduate degree program for Barry University.

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8:30 a.m. – 8:35 a.m.

### Introductions and Opening Remarks

*Steven W. Tepler, Sarasota*

8:35 a.m. – 9:20 a.m.

### Lawyers & Counselors Beware, Oh My! Current Issues (and Minefields) in Conflicts of Interest and Client Fraud

*Carolyn Bell, West Palm Beach; Susan J. Tarbe, Miami; Franklin Zemel, Ft. Lauderdale*

*Moderator: Joseph A. Corsmeier, Clearwater*

9:20 a.m. – 10:05 a.m.

### Ethics of Practice in a Global Economy

*Thomas J. Skola, Miami; Pamela A. Seay, Punta Gorda; Samuel Mandelbaum,*

*Tampa; Theodore R. Walters, Naples*

10:05 a.m. – 10:15 a.m. **Break**

10:15 a.m. – 11:00 a.m.

### Working With Ethically Challenged Attorneys

*Deborah A'Hearn, Largo; Joseph Corsmeier, Clearwater, Franklin Zemel, Ft. Lauderdale*

*Moderator: Bobbi K. Flowers, St. Petersburg*

11:00 a.m. – 11:50 a.m.

### Judicial Roundtable: Q&A

*Distinguished Panel of State & Federal Trial and Appellate Judges*

*The Honorable Darryl C. Casaneuva, 2nd*

*District Court of Appeal*

*The Honorable Marcia G. Cooke, Southern District of Florida*

*The Honorable Paul M. Glenn, Middle District of Florida*

*The Honorable Adalberto Jordan, Southern District of Florida*

*The Honorable Karla R. Spaulding, United States Magistrate*

*Moderators: Loretta Comiskey O'Keeffe, Tampa*

*Pamella A. Seay, Punta Gorda Steven W. Tepler, Sarasota*

11:50 a.m. – 12:00 p.m.

### Closing Remarks

*Steven W. Tepler, Sarasota*

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