

## AGENDA

Value Adjustment Board  
Regular Meeting - July 23, 2013 - 9:00 a.m.  
Ernie Lee Magaha Government Building - First Floor

1. Call to Order.

**(PLEASE TURN YOUR CELL PHONE TO THE VIBRATE, SILENCE, OR OFF SETTING)**

2. Was the meeting properly advertised?
3. Introduction of, and Contact Information for, Value Adjustment Board (VAB) Members and VAB Clerk.

Barry, Steven L.	VAB Member	district5@myescambia.com	(850) 595-4950
Adcox, Gerald W.	VAB Member	adcoximports@aol.com	(850) 439-9209
Boone, Gerald	VAB Member	gboone@escambia.k12.fl.us	(850) 469-6153
May, Lumon J.	VAB Member	district3@myescambia.com	(850) 595-4930
Doyle, Rodger	VAB Member	rodgerdoyle@checkassistflorida.com	(850) 572-6166
Whibbs, Suzanne	Counsel	suzanne@whibbsandstone.com	(850) 434-5395
Childers, Pam	Clerk and Comptroller	pchilders@escambiaclerk.com	(850) 595-4310
Harris, Doris	Deputy Clerk to the Board	dharris@escambiaclerk.com	(850) 595-3918

4. Overview of Sunshine Law (Section 286.011, F.S.), Public Records Law (Chapter 119, F.S.), and Voting Conflicts (Chapter 112, F.S.).

*The Government-In-The-Sunshine Manual, 2013 Edition, A Reference for Compliance with Florida's Public Records Law and Open Meetings Laws*, can be purchased from The First Amendment Foundation, 336 East College Avenue, Suite 101, Tallahassee, Florida 32301. The online manual is available at <http://www.myflsunshine.com/sun.nsf/sunmanual>.

5. Filing Fee Resolution.

Resolution R2012-1, which was adopted by the Value Adjustment Board (VAB) on March 20, 2012, and remains in effect until repealed by the VAB, provides that a petition filed pursuant to Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., shall be accompanied by a filing fee, to be paid to the Clerk of the Circuit Court, in the amount of \$15 for each separate parcel of property, real or personal, covered by the petition.

6. Selection of Private Counsel for 2014.

Recommendation: That the Value Adjustment Board select one of the following Applicants for Private Counsel for 2014 and authorize the Chairman to execute a Contract for Services of Private Counsel, in accordance with Chapter 194.035 (1), Florida Statutes:

- Suzanne N. Whibbs
- Tracey Robinson-Coffee
- Larry A. Matthews
- Brian W. Hoffman

7. Selection of Appraiser Special Magistrate.

Recommendation: That the Value Adjustment Board select one of the following Applicants for Appraiser Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Oswald P. Carrerou, Appraiser
- John A. Robinson, Appraiser
- Steven L. Marshall, Appraiser
- Robert S. Sutte, Appraiser

8. Selection of Attorney Special Magistrate.

Recommendation: That the Value Adjustment Board select one of the following Applicants for Attorney Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Phillip A. Pugh
- Cecilia R. Boyd
- Larry A. Matthews

9. Approval of Minutes.

Recommendation: That the Value Adjustment Board approve the Minutes of the Regular Board Meeting held December 10, 2012, as prepared by Doris Harris, Clerk to the Board's Office.

10. Adjournment.



# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4593**

**3.**

## Value Adjustment Board

**Meeting Date:** 07/23/2013

**Issue:** Introduction of, and Contact Information for, Value Adjustment Board (VAB) Members and VAB Clerk.

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

### Information

#### Recommendation:

Barry, Steven L.	VAB Member	district5@myescambia.com	(850) 595-4950
Adcox, Gerald W.	VAB Member	adcoximports@aol.com	(850) 439-9209
Boone, Gerald	VAB Member	gboone@escambia.k12.fl.us	(850) 469-6153
May, Lumon J.	VAB Member	district3@myescambia.com	(850) 595-4930
Doyle, Rodger	VAB Member	rodgerdoyle@checkassistflorida.com	(850) 572-6166
Whibbs, Suzanne	Counsel	suzanne@whibbsandstone.com	(850) 434-5395
Childers, Pam	Clerk and Comptroller	pchilders@escambiaclerk.com	(850) 595-4310
Harris, Doris	Deputy Clerk to the Board	dharris@escambiaclerk.com	(850) 595-3918

### Attachments

#### VAB Contact List

### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/28/2013

Started On: 06/28/2013 01:36 PM



**2013 VAB Contact Information**  
**Escambia County, Florida**

Last Name, First Name	Title	Email address	Phone number
Barry, Steven L.	VAB Member	<a href="mailto:district5@myescambia.com">district5@myescambia.com</a>	(850) 595-4950
Adcox, Gerald W.	VAB Member	<a href="mailto:adcoximports@aol.com">adcoximports@aol.com</a>	(850) 469-9111
Boone, Gerald	VAB Member	<a href="mailto:gboone@escambia.k12.fl.us">gboone@escambia.k12.fl.us</a>	(850) 469-6153
May, Lumon J.	VAB Member	<a href="mailto:district3@myescambia.com">district3@myescambia.com</a>	(850) 595-4930
Doyle, Rodger "RP"	VAB Member	<a href="mailto:rdoyle06@gmail.com">rdoyle06@gmail.com</a>	(850) 572-6166
Whibbs, Suzanne	VAB Attorney	<a href="mailto:suzanne@whibbsandstone.com">suzanne@whibbsandstone.com</a>	(850) 434-5395
Childers, Pam	Clerk of the Circuit Court	<a href="mailto:pchilders@escambiaclerk.com">pchilders@escambiaclerk.com</a>	(850) 595-4310
Harris, Doris	Deputy Clerk to the Board	<a href="mailto:dharris@escambiaclerk.com">dharris@escambiaclerk.com</a>	(850) 595-3918



# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4594**

**4.**

## **Value Adjustment Board**

**Meeting Date:** 07/23/2013

**Issue:** Overview of Sunshine Law (Section 286.011, F.S.), Public Records Law (Chapter 119, F.S.), and Voting Conflicts (Chapter 112, F.S.).

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

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### **Information**

#### **Recommendation:**

The *Government-In-The-Sunshine Manual, 2013 Edition, A Reference for Compliance with Florida's Public Records Law and Open Meetings Laws*, can be purchased from The First Amendment Foundation, 336 East College Avenue, Suite 101, Tallahassee, Florida 32301. The online manual is available at <http://www.myflsunshine.com/sun.nsf/sunmanual>.

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### **Form Review**

Form Started By: Doris Harris  
Final Approval Date: 06/28/2013

Started On: 06/28/2013 01:37 PM



# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4595**

**5.**

## Value Adjustment Board

**Meeting Date:** 07/23/2013

**Issue:** Filing Fee Resolution.

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

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### Information

#### Recommendation:

Resolution R2012-1, which was adopted by the Value Adjustment Board (VAB) on March 20, 2012, and remains in effect until repealed by the VAB, provides that a petition filed pursuant to Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., shall be accompanied by a filing fee, to be paid to the Clerk of the Circuit Court, in the amount of \$15 for each separate parcel of property, real or personal, covered by the petition.

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### Attachments

Resolution R2012-1

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### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/28/2013

Started On: 06/28/2013 02:13 PM

VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY  
RESOLUTION R2012-1

A RESOLUTION OF THE VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY, FLORIDA; REPEALING AND REPLACING RESOLUTION R2011-1; RE-ESTABLISHING FILING FEES FOR APPEALS TO THE VALUE ADJUSTMENT BOARD; PROVIDING THAT NO FILING FEE SHALL BE REQUIRED FOR PETITIONS APPEALING THE DISAPPROVAL OF HOMESTEAD EXEMPTIONS OR DENIAL OF TAX DEFERRALS; ENACTING PROVISIONS FOR WAIVER OF THE FEE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Value Adjustment Board of Escambia County, Florida (VAB), considers petitions from taxpayers relating to property tax assessments and exemptions; and

WHEREAS, Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), Florida Administrative Code (F.A.C.), authorize Value Adjustment Boards to establish, by resolution, a non-refundable filing fee for submitting a petition; and

WHEREAS the VAB desires to establish such a fee to defray the costs incurred in connection with the administration and operation of the VAB;

NOW, THEREFORE, BE IT RESOLVED BY THE VALUE ADJUSTMENT BOARD OF ESCAMBIA COUNTY, FLORIDA, AS FOLLOWS:

Section 1. The above recitals are true and incorporated herein.

Section 2. Value Adjustment Board Resolution R2011-1 is hereby repealed.

Section 3. In accordance with Section 194.013, Florida Statutes, and Rule Chapter 12D-9.013(k), F.A.C., petitions filed pursuant to Section 194.011, Florida Statutes, shall be accompanied by a filing fee to be paid to the Clerk of the Circuit Court in an amount of \$15.00 for each separate parcel of property, real or personal, covered by the petition and subject to appeal. However, no such filing fee shall be required with respect to an appeal from the disapproval of homestead exemption under Section 196.151, Florida Statutes, or from the denial of tax deferral under Section 197.253, Florida Statutes. Only a single filing fee shall be charged as to any particular parcel of property despite the existence of multiple issues and hearings pertaining to such parcel. For joint petitions filed pursuant to Section 194.011(3)(e) or Section 194.011(3)(f), Florida Statutes, a single filing fee shall be charged. The filing fee for such joint petitions shall be calculated at \$5.00 per parcel and shall be proportionately paid by the affected parcel owners.

Section 4. The filing fee shall be waived with respect to a petition filed by a taxpayer who demonstrates at the time of filing, by an appropriate certificate or other documentation issued by the Department of Children and Family Services and submitted with the petition, that the petitioner is then an eligible recipient of temporary assistance under Chapter 414, Florida Statutes.

Section 5. All filing fees shall be non-refundable and shall be paid to the Clerk of the Circuit Court at the time of filing. If such fees are not paid at that time, the petition shall be deemed invalid and shall be rejected.

Section 6. All filing fees collected by the Clerk shall be allocated and utilized to defray, to the extent possible, the costs incurred in connection with the administration and operation of the VAB.

Section 7. This Resolution shall become effective upon its adoption, and shall remain in effect until repealed, and copies of this Resolution shall be provided to each member of the VAB upon his or her appointment to the VAB.

ADOPTED this 20<sup>th</sup> day of March 2012.

VALUE ADJUSTMENT BOARD  
ESCAMBIA COUNTY, FLORIDA

ATTEST:

By: Gene M. Valentino  
Gene M Valentino, Chairman

Ernie Lee Magaha  
Clerk of the Circuit Court and Comptroller



Ernie Lee Magaha  
Deputy Clerk

This document approved as to form and legal sufficiency.

By [Signature]  
Title VAB Legal Counsel  
Date 3/20/12



# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

AI-4579

6.

## Value Adjustment Board

Meeting Date: 07/23/2013

Issue: Selection of Private Counsel for 2014.

From: Doris Harris, Deputy Clerk to the Board

Organization: Clerk & Comptroller's Office

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### Information

#### Recommendation:

Recommendation: That the Value Adjustment Board select one of the following Applicants for Private Counsel for 2014 and authorize the Chairman to execute a Contract for Services of Private Counsel, in accordance with Chapter 194.035 (1), Florida Statutes:

- Suzanne N. Whibbs
- Tracey Robinson-Coffee
- Larry A. Matthews
- Brian W. Hoffman

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### Attachments

Proposal Summary

Suzanne Whibbs Application

Tracey Robinson-Coffee Application

Larry Matthews Application

Brian Hoffman Application

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### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/26/2013

Started On: 06/26/2013 04:06 PM

<b>2014 VAB Private Counsel Applicants</b>			
Candidate	Proposed Rates	Application Received	Applicant Credentials
Suzanne Whibbs	\$200/hr.	3/8/2013	Local Attorney; Member Florida Bar; Cumberland School of Law, JD; Counsel to Escambia County VAB for past three years; UWF Adjunct Professor. Writing sample provided.
~	~	~	~
Tracey Robinson-Coffee	\$70-\$80/hr.	3/12/2013	Local Attorney; Member Florida Bar; Member Tennessee Bar; Escambia-Santa Rosa Bar Association; St. John's University School of Law, JD. No writing sample provided.
~	~	~	~
Larry A. Matthews	\$125/hr., no min.	*See below	Local Attorney; Member Florida Bar; Florida State University, JD. Writing sample provided.
~	~	~	~
Brian W. Hoffman	\$210/hr., 1/10 increments	5/31/2013	Local Attorney; Member Florida Bar; University of Mississippi School of Law. Writing sample (Real Estate Case Summaries) provided.
~	~	~	~
<b>*Application for Larry A. Matthews not date stamped, but was received prior to May 31, 2013, deadline.</b>			



PAY CHILDERS  
CLEGG OF BOSTON  
HOSKINS & CO. LTD.  
2012 JUN -3 A 8:3  
CLERK OF THE BOARD  
CITY COMMISSIONERS

NE

- none



5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

none

6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

none

7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.

  
\_\_\_\_\_  
SIGNATURE OF APPLICANT

3/6/13  
\_\_\_\_\_  
DATE

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ERR IN ENTERING A FINAL JUDGMENT IN APPELLEE'S FAVOR AND THE TRIAL COURT DID NOT TAKE LANDON'S PROPERTY IN VIOLATION OF LANDON'S CONSTITUTIONAL RIGHTS.**

a) The trial court did not err in failing to protect Appellant's homestead rights pursuant to Fla. Const., Art. X, Sec. 4 as alleged by Appellant Landon. Assuming the subject property was the Appellant Landon's homestead property, the lower court is not under a duty or obligation to protect that right when the pleadings, affidavits and documents submitted to the court show that Appellant Landon's property in 1994 was seized and levied by the IRS due to the fact that Appellant Landon did not pay his taxes. However, the subject property is not the homestead property of the defendant at the time of the present lawsuit. There is no evidence before the trial court that the subject property was Appellant Landon's homestead property. As stated in Appellant Landon's initial brief, he in fact moved from the subject property in 1994 and has never returned to the State of Florida. If the subject property was his homestead property at the time IRS seized and levied the property back in 1994, then it was at that point in time Appellant Landon should have taken action against the IRS for any alleged violation of his constitutional rights in federal court.

b) Appellant Landon was not denied his due process rights when he was allegedly denied a jury trial on the possession issue as he claims. The issue of possession of the property is not an

allegation or claim of the Appellant Landon's complaint to Remove Cloud from Title. The Appellant Landon is misrepresenting to the Court the proper issue before this honorable Court. Appellant Landon is referring to Case 94-1120, Ralls v. Landon, in which Appellant Landon mistakenly claims he was awarded "possession" of the subject property. In that order the court specifically stated "the Defendant vacated the subject premises and relocated...the Plaintiff, therefore, filed a Motion for Voluntary Dismissal of the original Complaint in that ejectment was in effect a moot issue." (V-I, R-55).

The court further stated:

"A review of the Defendant's pleadings consistently show that Defendant has challenged the authority of the Internal Revenue Service to execute on Defendant's property to satisfy a levy for unpaid Federal Income taxes...this Court is of the opinion that under the circumstances of this case, the Defendant cannot allege a cause of action in this Court. The Defendant's underlying claim of the right to the property and therefore the "wrongful eviction" stems from his argument that the Internal Revenue Service lacks the authority to levy against real property and have said property sold at public auction to satisfy delinquent federal income taxes. This Court is of the opinion that once the deed of real estate was issued by the District Director of the Internal Revenue Service, the Defendant's remedy was to challenge the same through the Federal Courts...Therefore, without having set aside the deed of real estate in a Federal Court, this Court is of the opinion that the Defendant cannot state a cause of action in State court." (V-I, R-56-59).

However, the final order in that case is not before this Court and the appeal time for that order has passed. Therefore, Appellee Ralls argues that there have been no due process rights violated

by the trial court.

c) Appellant Landon states the trial court erred by allegedly upholding the sale of Appellant Landon's property when the properties were sold for an amount far below market value in entering a Final Judgment in favor of Appellee. The argument Appellant Landon makes is irrelevant to the entry of the Final Judgment which is the subject of this appeal. Appellee Ralls argues that Appellant Landon is referring back to the IRS seizure and levy against the subject property in 1994. Appellant Landon claims that the IRS sold his property for less than fair market value. However, this is not an issue properly before this Court. These allegations by Appellant Landon should have been pursued against the IRS in Federal Court within the prescribed statutory time requirements.

d) The Appellee Ralls further argues that Appellant Landon was not denied his rights pursuant to the 14<sup>th</sup> Amendment of the U.S. Constitution as presented in his points 2, 3, and 4, which will be addressed as to each point later in this brief.

**II. THE TRIAL COURT DID NOT ERR WHEN IT ALLEGEDLY DENIED APPELLANT'S JURY TRIAL ON CERTAIN FACT ISSUES.**

Appellant was not denied a jury trial. The issue before the lower court were resolved by the parties' motions for summary judgment. Even if the case survived summary judgment, Chancery Courts have authority to quiet title or remove cloud from title to real property. See Trawick's Florida Practice and Procedure, pg. 546.

Jury trials are not available for quiet title actions. See Florida

Real Property Litigation, §1.7. If the defendant to a quiet title action is in possession, then the defendant may demand a jury trial because ejectment becomes a cause of action to remove the defendant.

See Florida Real Property Litigation, §1.19. However, in the present case, Appellant Landon was not in possession of the property and therefore, the quiet title action was one in equity and he was not entitled to a jury trial.

**III. THE TRIAL COURT DID NOT ERR BY ALLEGEDLY REFUSING TO RULE ON APPELLANT'S FEBRUARY 8, 2000 MOTION, ALLEGEDLY RESULTING IN APPELLANT BEING DENIED OPPORTUNITY TO COMPLETE DISCOVERY.**

Appellant Landon argues that the trial court failed to rule on his February 8, 2000 motion for an order declaring admissions directed to Appellee Ralls as being admitted. Appellant Landon never sent a proposed order to the trial court. Nor did the Appellant Landon schedule and notice the motion for hearing. Further, the Appellant Landon failed to argue this point as part of his Motion in Defense to Appellee Ralls's Motion for Summary Judgment. As stated in his November 9, 2000 motion for Rehearing, Appellant Landon stated he informed the court at the motion for summary judgment hearing that there were outstanding motions. The fact that the trial court ruled on the summary judgment motions and entered a final judgment disposed of the outstanding motions. In light of the foregoing, the trial court in fact ruled on the motions Appellant Landon's claims were outstanding at the time the final judgment was entered. Further, on November 9, 2000 Appellant Landon filed Landon's Motion

for Rehearing and it states as follows:

"Landon is bringing this Motion for the following reasons: [1] During the Hearing of Oct. 20, 2000, Landon specifically informed Judge Allen that there were 6 other Motions before the Court that needed to be heard. To repeat, the Motion are as follows: (a) Landon's Motion to Exclude dated July 12, 1999; (b) Landon's Motion to Establish Escrow Account, dated Sep. 27, 1999; (c) Landon's Motion for Order Declaring Admissions Directed to Ralls as Being Admitted, dated Feb. 8, 2000..."

On November 16, 2000, in Judge Allen's Order Denying Defendant's Motion for Rehearing and Motion for Clarification the court stated:

"This matter having come before the Court upon the Defendant's Motion for Rehearing filed November 6, 2000...it is hereby ORDERED AND ADJUDGED that the Defendant's Motion for Rehearing is hereby DENIED...and Defendant's Motion for Clarification is hereby DENIED."  
(V-II, R-282).

**IV. THE TRIAL COURT DID NOT ERR IN GRANTING APPELLEE RALLS' MOTION FOR SUMMARY JUDGMENT**

A. Standard of Review and Summary Judgment

The standard of appellate review applicable to the grant of summary judgment is de novo. \_\_\_\_\_ 760 So.2d 126 (\_\_\_\_\_, 130).

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. Wills v. Sears, Roebuck & Co., 351 So.2d 29, 30 (Fla. 1977). The issue of the case must be one of material fact. \_\_\_\_\_ 758 So.2d 1214 (\_\_\_\_\_, 1217). Issues of material facts are irrelevant to the summary judgment determination and a material

fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case. \_\_\_\_\_  
758 So.2d at 1217.

B. Summary Judgment in the Present Case was proper.

Appellant Landon filed a Complaint to Remove Cloud from Title. Appellee Ralls filed a Motion to Dismiss Complaint which was denied because the trial court found that Appellant Landon had stated a cause of action. Appellant Landon then files a Motion for Summary Judgment (However, according to Appellant Landon's initial brief, he is not appealing the issue of whether the trial court erred in denying his motion for summary judgment). In his motion for summary judgment, Appellant Landon fails to put forth undisputed material facts entitling him to a summary judgment. Appellant Landon failed to put forth any evidence of his entitlement to remove cloud from title. Appellant Landon did not submit any documentation or affidavits to support his complaint or motion. The trial court was proper in denying Appellant Landon's motion for summary judgment.

Appellee Ralls files a Counter-Claim/Cross-Claim to Quiet Tax Title setting forth the required elements to quiet title. Attached to Appellee Ralls' complaint is a copy of the Deed of Real Estate issued by the Internal Revenue Service in favor of Appellee Ralls duly recorded in Santa Rosa County, Florida. Appellee Ralls then files his Motion for Summary Final Judgment and Notice to Take Judicial Notice. In Appellee Ralls' motion, he sets forth the undisputed material facts which include the chain of title regarding

the subject property, the action taken by the IRS in seizing and levying the subject property for tax assessments, describing the Deed granting him the subject property which was duly recorded, stating that all claims rights, title, and interest of Appellant Landon were extinguished by the Tax Deed, and that he is entitled to a judgment as a matter of law.

In support of Appellee Ralls' Motion for Summary Judgment, he requested the trial court, pursuant to Florida Rule of Evidence §90.202, et seq., to take Judicial Notice of a certified copy of Record of Seizure and Sale of Real Estate from the United State Department of Treasury Internal Revenue Service, also known as IRS Form Record 21. When a matter is judicially noticed, it is taken as true without the necessity of offering evidence by party who should ordinarily have done so. Maradie v. Maradie, 680 So.2d 538 (Fla. 1<sup>st</sup> DCA 1996). Therefore, Appellee Ralls was not required to prove each of the facts listed on the IRS Form Record 21. Each fact on the Record is taken to be true and correct.

In opposition to Appellee Ralls' Motion for Summary Judgment, Appellant Landon filed his Defense Against Ralls' Motion for Summary Judgment on October 17, 2000. In Appellant Landon's Defense, he simply asks to the trial court to rely on seven motions previously filed with the court. Six out of the seven motions relate to another defendant known as Weisensee, who won her summary judgment and final judgment entered on February 3, 2000. Appellant Landon failed to put forth any evidence either through supporting documentation or



supporting affidavit to raise any disputed issues of material fact.

Therefore, there were no disputed facts, as shown by the pleadings, supporting affidavits, and evidence in the court record as to Appellee Ralls right to quiet title to the subject property.

Based upon the foregoing, the trial court properly granted Appellee Ralls' motion for summary judgment and denied Appellant Landon's motion for summary judgment. See, Benner v. Royce, 354 So.2d 142 (Fla. 1<sup>st</sup> DCA 1978).

C. The Appellant Landon argues that there are genuine issues of material facts.

The first point or fact that Appellant Landon raises in its initial brief is (a) "possession." Again, the Appellee Ralls argues that the issue of possession relates to an earlier case known as Ralls v. Landon lower court case number 94-1120. This is not a case or issue on appeal before this Court. The 94-1120 case has been adjudicated and was not a proper issue or claim before the trial court.

The other issues mentioned by Appellant include (b) IRS District Director personal approval, (c) manner of service of notices by the IRS, and (d) if the IRS actually seized the properties. These are not issues or facts that were before the lower court and are therefore, not properly before this Court on appeal. The Appellant Landon failed to raise or put forth any evidence as to the invalidity of the Deed of Real Estate issued by the IRS. Appellant Landon first raises

these issues on appeal in his initial brief. Appellant Landon failed to put forth any disputed facts regarding the IRS Form R21 submitted by Appellee Ralls in support of his motion for summary judgment. These allegations by the Appellant Landon are issues that should have been resolved against the IRS in federal court at the time of the seizure and levy back in 1994.

Next Appellant Landon states that (e) whether Appellee Ralls' Quit Claim Deeds were written in accordance with the laws of Florida as an issue. Appellee Ralls is unclear as to which Quit Claim Deeds Appellant Landon is referring to in his brief. However, in order to address the issue, Appellee Ralls in his Motion for Summary Judgment stated the method in which he received title to the property and that such deeds were properly recorded in the public records of Santa Rosa County, Florida. Appellant Landon failed to provide any evidence to contradict such evidence to the lower court in response to the Motion for Summary Judgment. The Appellee Ralls did not submit any affidavits or documents establishing that the deeds did not conform to Florida law. Therefore, the trial court was proper in granting Appellee's motion for summary judgment.

In point (f) Appellant Landon questions if Appellee has "fee simple" ownership. Appellee Ralls set forth in his complaint to Quiet Tax Title and his Motion for Summary Judgment the required elements of law in obtaining fee simple title to the subject real property. Appellant Landon failed to put forth any evidence or facts showing Appellee Ralls did not have fee simple ownership to the

subject property to contradict the facts asserted by Appelle Ralls.

Appellant Landon states there is an issue of (g) whether the IRS can levy trust properties. However, this is not an issue properly before this honorable Court on appeal. Again, Appellant Landon's argument is against the Internal Revenue Service.

The issue of (i) due process raise by Appellant Landon is not an issue properly before this honorable Court on appeal. The trial court properly disposed of the outstanding motions. Appellant Landon failed to set and notice for hearing his outstanding motions.

However, as stated by Appellant Landon, he raised the outstanding motions at the hearing on the parties' motions for summary judgment.

Further, by order of the trial court, it denied Appellant Landon's Motion for Rehearing and Clarification which again encompassed the alleged outstanding motions.

### CONCLUSION

The proper issue before this Court is whether the trial court erred in granting Appellee Ralls' Motion for Summary Judgment and Notice to Take Judicial Notice. The Appellee Ralls argues the trial properly granted Appellee's Motion for Summary and Notice to Take Judicial Notice and properly denied Appellant's Motion for Summary Judgment. The Appellee Ralls demonstrated there were no genuine issues of material fact and that he was entitled to a judgment to quiet tax title as a matter of law. Appellant Landon failed to controvert Appellee Ralls' undisputed facts.

The Appellant Landon has a history of filing non-meritorious lawsuits in state court against Appellee Ralls in which he wishes to challenge the authority of the Internal Revenue Service to execute on property to satisfy a levy for unpaid federal income taxes. The Appellee Ralls has been forced to defend numerous lawsuits and has incurred substantial legal fees as a result. Again, in Appellant Landon's initial brief he raise numerous allegations which are not properly before this Court on appeal. The Appellee Ralls requests that this Court strike those portions of the brief which do not directly relate to the issue on appeal. Furthermore, the Appellee Ralls respectfully requests that this honorable Court affirm the trial court's Final Judgment to quiet tax title in favor of the Appellee Ralls.

# Tracey Robinson-Coffee

## Attorney At Law

8661 Salt Grass Drive  
Pensacola, Florida 32526  
H (850) 944-7646 C (850) 776-7665  
e-mail: [robinsoncoffeetr@bellsouth.net](mailto:robinsoncoffeetr@bellsouth.net)

Honorable Pam Childers  
Clerk of the Circuit Court and Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, Florida 32502-5843


Dear VAB Counsel:

I am submitting my professional portfolio for the Attorney position with the Value Adjustment Board. With my diverse background, interests and experience I am confident that I can significantly contribute to your team of legal professionals. My areas of expertise and qualifications include the following:

- Currently work as Legal Service Provider for Florida Department of Revenue.
- Worked as Director of Licensure for Tennessee Department of Mental Health and Developmental Disabilities.
- Maintained own practice where represented Plaintiff's in Employment and Personal Injury cases from intake, to mediation, to trial. In addition, represented criminal defendants from juvenile cases, to misdemeanor and DUI cases, to more serious felonies including Rape.
- Served as an *Associate Attorney* for Blackburn & McCune, P.C. in Nashville, which focuses on *Civil Litigation*, primarily Plaintiffs work in the areas of *Labor and Employment Law, Personal Injury and Medical Malpractice*.
- More than 3 years of experience as an *Assistant State Attorney* with the Dade County State Attorney's Office, one of the largest in the nation.
- Comprehensive knowledge of law on federal and local level, criminal law, evidence, labor and employment, medical malpractice, personal injury, and more.
- Extensive litigation experience in *preparing and arguing pre-trial motions*, preparing and conducting discovery, analyzing and preempting defense strategy, conducting settlement conferences, and trying cases in *State and Federal Court*.
- Excellent public speaker with experience speaking before both large and small groups.
- Proven abilities in management with experience in supervising, managing, and training attorneys in law and procedures.
- Ability to define issues, propose solutions, and implement changes.
- Demonstrated leadership, communication and negotiating skills.

I sincerely believe that; with my varied legal experience and career goals; I would be an asset to the Valuation Board. My salary requirements would be between \$75.00 to \$80.00 per hour. I hope to hear from you so we can discuss how I can best contribute to your team of legal professionals. I look forward to speaking with you.

Sincerely,

  
Tracey Robinson-Coffee

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
PENSACOLA COUNTY FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

# ***Tracey Robinson-Coffee***

***Attorney At Law***

**8661 Salt Grass Drive  
Pensacola, Florida 32526  
H (850) 944-7646 C (850) 776-7665  
e-mail: [robinsoncoffeetr@bellsouth.net](mailto:robinsoncoffeetr@bellsouth.net)**

# ***Tracey Robinson-Coffee***

## **Attorney At Law**

8661 Salt Grass Drive, Pensacola, Florida 32526  
H (850) 944-7646 C (850) 776-7665, e-mail: robinsoncoffeetr@bellsouth.net

## ***Professional Profile***

High-Caliber, ethical and motivated **Attorney at Law** is seeking Attorney position that will fully utilize my experience. Currently handle high case load as Legal Service Provider for Florida Department of Revenue, Child Support. Operated as the Director of Licensure for the State of Tennessee. Oversaw the licensing of over twenty-one hundred facilities. Responsible for drafting current licensure rules and policy. Succeeded as Managing Partner, Solo Practitioner and as an Associate Attorney for Blackburn & McCune, P.C.; a general practice plaintiff's law firm. Also, possess more than 3 years of experience as an *Assistant State Attorney* for Dade County State Attorney's Office in Florida, one of the largest prosecutors offices in the nation. Work style exhibits maturity, self-confidence, and leadership with an affinity for working long hours to accomplish objectives. Highly organized with ability to prioritize responsibilities and manage multiple cases and projects simultaneously. Excellent writing and editing skills.

Extremely personable **Attorney** with an extensive background working and living in Florida and who maintains the highest levels of professionalism and work ethics in all environments. Strong interpersonal skills with ability to effectively communicate with all types of individuals and all levels of management and personnel.

## ***Education***

### **Doctor of Jurisprudence**

**ST. JOHN'S UNIVERSITY SCHOOL OF LAW**  
Jamaica, New York, 1997

### **Activities:**

*Director of Publications, Criminal Law Institute*  
*Editor-in-Chief of McKenna Journal, "The Traffic Stop."*  
*Elder Law Clinic*

### **Trial Competitions:**

*ATLA Civil Trial Competition*  
*Frank J. Rogers Mock Trial Competition, Semi-Finalist*  
*Frederick Douglas Moot Court Competition*

### **Bachelor of Science in Criminal Justice**

### **Minor: Sociology**

**NORTHEASTERN UNIVERSITY**  
Boston, Massachusetts, 1994

*Honors: Cum Laude, Dean's List, Criminal Justice National Honor Society*

## ***Advanced Training***

### **American Law Institute-American Bar Association**

- *Current Developments in Employment Law*
- *Florida Prosecuting Attorney's Association Training*
- *Driving Under the Influence, Cultivating Child Witness and Evidence*
- *Criminal Law Section of the Florida Bar*

- Prosecutor Trial Training Program

## ***Professional Affiliations***

*Florida Bar Assoc., Tennessee Bar Assoc., Escambia-Santa Rosa Bar Assoc.  
Recruitment Screening Committee at Dade County State Attorney's Office*

## ***Professional and Law Experience***

### **Legal Service Provider**

#### **FLORIDA DEPARTMENT OF REVENUE**

Pensacola, Florida

Sept. 2009 - Current

- **Litigation:** Prepare numerous cases for child support establishment, enforcement and modification hearings. Draft and respond to discovery. Draft motions, orders and other relevant pleadings. Present the State of Florida's case at trial and pretrial hearings.
- **Advisor & Counselor:** Represent Department of Revenue's interest. Advise custodial and non-custodial parents. File petitions, motions and notices.

### **Director of Licensure**

#### **TENNESSEE DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES**

Nashville, Tennessee

April 2007 – Dec. 2007

- **Directive:** Planned and promoted the availability of a comprehensive array of early intervention, treatment, habilitation and rehabilitation services through the licensing process; protected the interest of tax-paying citizens against unlicensed practitioners, unsafe environments, inadequate education and training of personnel, physical abuse and any unscrupulous acts deemed detrimental to the treatment of the general welfare of mental health/developmental disabilities issues or in need of personal support services.
- **Manager & Administrator:** Directed State Office of Licensure with regional offices in Nashville, Knoxville and Memphis. Authorized expenditures. Oversaw and directed training for employees and providers. Coordinated public information. Conferred with public including law enforcement and community groups. Drafted new Licensure rules and amended old rules for legislative approval. Addressed legislative committees.
- **Advisor & Counselor:** Administrator to Licensure IT Program; Communicated to Office of Legal Counsel and drafted memorandums clarifying Licensures position and interpretation of rules. Advised Commissioner on Licensure issues such as suspending admissions.

### **Attorney**

#### **HORNBECK LAW AND THE LAW OFFICE OF TRACEY ROBINSON-COFFEE**

Nashville, Tennessee

Feb. 2003 – April 2007

- **General Practice Law:** Performed all activities involved in a General/ Sole Practitioners Law Office with a primary focus on Criminal Defense, Employment Law, Medical Malpractice and Personal Injury.
- **Litigation:** Prepared both criminal and civil cases from initial client interview through appeal.
- **Manager & Administrator:** Supervised paralegal; maintained firm books, time and client files; ran the day to day operations of a small office.
- **Community Involvement:** Donated attorney time toward pro bono activities; made charitable contributions towards student scholarships, drug rehabilitation programs, Habitat for Humanity, and local youth organizations.



## BLACKBURN & MCCUNE, P.C.

Nashville, Tennessee

Jan. 2001 – Feb. 2003

- **General Practice Law:** Performed all activities involved in a General Practice Plaintiff's Law Firm with a focus on Labor and Employment, Medical Malpractice, Personal Injury and Criminal Defense.
- **Litigation:** Prepared and argued pre-trial motions, prepared and conducted discovery, analyzed and prepared defense strategy in criminal cases, facilitated plea negotiations, and conducted settlement conferences. Tried cases before State and Federal Courts.
- **Advisor & Counselor:** Interviewed, advised, and evaluated witnesses. Assessed and evaluated cases from inception to trial. Prepared witnesses for testimony at depositions, preliminary hearings and trials.
- **Clientele:** Clientele was diverse and consisted of middle class America. Worked extensively with general public concerning assorted legal issues including bankruptcy, family law, consumer finance, real estate, employment, tax, and small business.
- **Legal Research:** Conducted legal research and drafted complaints, memoranda of law, briefs, interrogatories, and other pleadings. Researched, drafted, and litigated pre-trial and post-trial motions.

## DADE COUNTY STATE ATTORNEY'S OFFICE

Miami, Florida

Aug. 1997 – Oct. 2000

- **General Practice Law:** Given broad autonomy and discretion. Facilitated filing decisions and handled case from inception to culmination at trial. Served as an "A" level trial attorney who prosecuted 1st Degree Felonies including Attempted Murders, Armed Robberies, and Sexual Batteries.
- **Litigation:** Conducted more than 25 Jury trials. Prepared and argued pre-trial motions, prepared and conducted discovery, analyzed and preempted defense strategy, conducted plea negotiations, and conducted trials.
- **Management:** Served as *Former Division Chief for Juvenile Division* and in charge of supervising and training Attorneys in law and procedures. Delegated responsibilities and supervised job performances. Managed all cases involving juveniles who were charged with sexual offenses, serious habitual offenders and issues of competency. Was formerly assigned to the *Domestic Violence Unit, Specialized Unit*.
- **Advisor & Counselor:** Advised and counseled witnesses, civilians, and police agencies regarding criminal procedure. Prepared witnesses for testimony at depositions, preliminary hearings and trials. Tried cases before State Circuit Courts, filed briefs, and conducted oral arguments before Court of Appeals.
- **Community Relations:** Consistently built and nurtured professional relationships in the community due to extensive interaction between individuals, agencies, and businesses, and due to strong communication skills.

## Community Affiliations

*Member Bethel A.M.E. Church; Women's Missionary Society; Steward;  
Board of Directors Bethel Youth Development; Girl Scout Troop Leader;  
Founder of Edith Stewart Scholarship*

## **References**

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Child Support Enforcement Hearing Officer  
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2251 N. Palafox Street  
Pensacola, Florida 32501  
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Pensacola, Florida 32502  
(850) 434-7445

Cynthia Tyler  
Tennessee Department of Mental Health and Developmental Disabilities  
Director of Licensure and Review  
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(615) 532-6590

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2205 State Street  
Nashville, TN 37203  
(615) 320-0778

Montrell Finn-Scaife, Esq.  
5910 Margery Ln  
Elkridge, MD 21075  
(571) 242-7324

Larry A. Matthews \*  
Raymond F. Higgins, III

Thomas R. Jenkins, Of Counsel\*

\* Also admitted in Alabama

\* Certified Circuit Court Mediator

\* Board Certified Civil Trial Lawyer



114 E. Gregory Street (32502)  
Post Office Box 13145  
Pensacola, Florida 32591

Telephone: Pensacola (850) 434-2200  
Panama City (850) 769-7200  
Facsimile: (850) 434-2600

Web Address: [www.matthewshigginslaw.com](http://www.matthewshigginslaw.com)

April 30, 2013

Hon. Pam Childers  
Clerk of the Circuit Court & Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, FL 32502-5843

Re: Counsel to the Value Adjustment Board

Dear Ms. Childers:

I have enclosed my application, resume and writing sample. My references include the following:

J. Andrew Talbert, Esq.  
Quintairos, Prieto, Wood & Boyer, P.A.  
114 E. Gregory Street, 2<sup>nd</sup> Floor  
Pensacola, FL 32502  
850-434-6490

Douglas F. Miller, Esq.  
Guy E. Burnette, Jr., P.A.  
109 E. Garden Street, Ste. B  
Pensacola, FL 32502  
850-912-6420

Michael J. Stebbins, Esq.  
504 N. Baylen Street  
Pensacola, FL 32501  
850-434-9922

With best regards, I am

Sincerely,

MATTHEWS & HIGGINS, LLC

A handwritten signature in black ink, appearing to read 'Larry A. Matthews'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Larry A. Matthews  
[Lmatthews@matthewshigginslaw.com](mailto:Lmatthews@matthewshigginslaw.com)

Enclosures

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBAGO COUNTY  
2013 JUN -3 A 8:20  
CLERK OF THE DEPT. FOR  
COUNTY COMMISSIONERS

**APPLICATION  
COUNSEL TO THE ESCAMBIA COUNTY VALUE ADJUSTMENT BOARD**

**PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Larry A. Matthews

SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: \_\_\_\_\_

HOME ADDRESS: 2837 Bay Street, Gulf Breeze, FL 32563

BUSINESS NAME: Matthews & Higgins

BUSINESS ADDRESS: 114 E. Gregory St., Pensacola, FL 32502

PHONE NUMBER(S):

BUSINESS: 434-2200

HOME: 934-5835

FAX: 434-2600

CELL: 384-3476

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? \_\_\_\_\_ YES X NO
3. HOURLY RATE/MINIMUM HOURS: \$125 / no minimum
4. PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. FLORIDA BAR NUMBER: 339601 ADMISSION DATE: 5/11/82

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached resume

C. LIST ANY DISBARMENT, SUSPENSION, OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

None

6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None

7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

Counsel for several governmental entities over my career;  
accounting/CPA (inactive) background; experienced in real  
estate closings; certified mediator

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

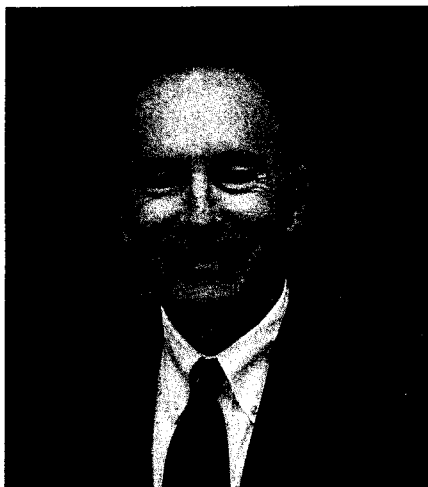
**THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.**



**SIGNATURE OF APPLICANT**

5-3-13

**DATE**



# MATTHEWS & HIGGINS, LLC

Insurance Defense and  
Civil Trial Attorneys

Larry A. Matthews

## EDUCATION

Florida State University Tallahassee, Florida	Juris Doctor Honors	1981
University of Florida Gainesville, Florida	Bachelor of Science, Accounting Honors	1976

## EXPERIENCE

Matthews & Higgins, LLC Pensacola & Panama City, Florida	Shareholder	2012 - present
Bozeman, Jenkins & Matthews, P.A. Pensacola & Ft. Walton Beach, Florida	Shareholder	1993 - 2011
Jenkins & Matthews Pensacola, Florida	Partner	1992 - 1993
Beggs & Lane Pensacola, Florida	Partner	1987 - 1992
Emmanuel, Sheppard & Condon Pensacola, Florida	Associate	1985 - 1987
Holland & Knight Tampa, Florida	Associate	1982 - 1985
Fowler, White et al. Tampa, Florida	Associate	1981 - 1982

## NATURE OF PRACTICE

General civil litigation practice with emphasis in defense of personal injury matters including automobile negligence, professional negligence, premises liability & products liability, employment law and civil rights litigation. Commercial litigation including insurance coverage matters, real property matters & fire and casualty matters. Recent concentration in toxic tort litigation and complex case/class action litigation.

## SPECIAL QUALIFICATIONS

Board Certified Civil Trial Lawyer (Florida)	Certified Public Accountant (inactive)
Certified Circuit Court Mediator (Florida)	

## PROFESSIONAL ORGANIZATIONS

The Florida Bar (1982)	American Board of Trial Advocates
Alabama State Bar (1994)	American Trial Lawyers Association
U.S. District Court, Northern, Middle and Southern Districts of Florida	American Inns of Court
Tax Court	Florida Defense Lawyers Association
The Federal Bar Association	U.S. District Court, Southern District of Alabama

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**Appeal Case No.: 09-13954-B**

**BRIAN MOORE, as Personal  
Representative on behalf of the  
Estate of Bernard P. Rice, deceased,**

**L.T. Case No.: 5:08cv343/RS/MD**

**Appellant,**

**v.**

**NORTH AMERICA SPORTS, INC., a  
foreign corporation d/b/a World  
Triathlon Corporation, also d/b/a  
Ironman Triathlon, and also d/b/a Ford  
Ironman Florida, and f/k/a Ironman  
North America, and USA TRIATHLON,  
a foreign corporation,**

**Appellees.**

---

**BRIEF OF APPELLEES**

**On Appeal from the United States District Court  
Northern District of Florida**

**Larry A. Matthews  
Shane M. Dean  
Jason B. Onacki  
BOZEMAN, JENKINS & MATTHEWS, P.A.  
114 East Gregory Street (32502)  
Post Office Box 13105  
Pensacola, FL 32591-3105  
(850) 434-6223 Telephone  
(850) 434-5242 Facsimile  
Attorneys for Appellees**

Appeal Case No.: 09-13954-B  
L.T. CaseNo.: 5:08cv343/RS/MD

Brian Moore v. North America Sports, Inc.

**CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF  
INTERESTED PERSONS**

***Non-governmental corporate parties to this proceeding:***

1. North America Sports, Inc. has no parent corporation nor does any publicly held corporation own any North America Sports, Inc. stock.
2. USA Triathlon has no parent corporation nor does any publicly held corporation own any USA Triathlon stock.

***Persons and entities known to Appellees to have an interest in the outcome of this action:***

1. Boggs, John N., Esq., Counsel for Appellant
2. Bozeman, Jenkins & Matthews, P.A., Counsel for Appellees
3. The Honorable Miles Davis, U.S. Magistrate Judge
4. Dean, Shane M., Esq., Counsel for Appellees
5. Estate of Bernard P. Rice, Appellant
6. Matthews, Larry A., Esq., Counsel for Appellees
7. Moore, Brian (as Personal Representative of the Estate of Bernard P. Rice).  
Appellant
8. North America Sports, Inc., Appellee
9. Onacki, Jason B., Esq., Counsel for Appellees



Appeal Case No.: 09-13954-B  
L.T. CaseNo.: 5:08cv343/RS/MD

Brian Moore V. North America Sports, Inc.

10. Perwin, Joel S., Esq., Counsel for Appellant
11. Joel S. Perwin, P.A., Counsel for Appellant
12. Santa Maria, Diana, Esq., Counsel for Appellant
13. Diana Santa Maria, P.A., Counsel for Appellant
14. Sims, Dorothy C., Esq., Counsel for Appellant
15. Sims & Stakenborg, P.A., Counsel for Appellant
16. The Honorable Richard Smoak, U.S. District Judge
17. USA Triathlon, Appellee
18. World Triathlon Corporation

I HEREBY CERTIFY the above constitutes a complete list of interest persons  
and entities to this appeal as described in 11th Cir. R. 28-1(b) and 11th Cir. R. 26.1-1.

/s/ Larry A. Matthews  
Larry A. Matthews  
Florida Bar No.: 0339601  
Shane M. Dean  
Florida Bar No.: 499889  
Jason B. Onacki  
Florida Bar No.: 0698016

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellees submit that the issues and arguments are adequately addressed in the briefs and the record is clear; and therefore, they do not request oral argument.

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(C) Whether media coverage prevented Plaintiff from receiving a fair trial.	
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## **STATEMENT OF JURISDICTION**

This Court has jurisdiction of this appeal from a final judgment in a civil case pursuant to the provisions of 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

- A. WHETHER PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND, IF NOT, WAS SUCH ERROR PROCEDURAL AND THEREFORE NOT WARRANT A NEW TRIAL WHERE THE DISTRICT COURT HAD JURISDICTION AT THE TIME JUDGMENT WAS RENDERED.**
- B. WHETHER EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS WAS PROPERLY ADMITTED UNDER THE CIRCUMSTANCES CREATED BY PLAINTIFF, AND IF NOT, DID THE ERROR SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**
- C. WHETHER MEDIA COVERAGE PREVENTED PLAINTIFF FROM RECEIVING A FAIR TRIAL.**
- D. WHETHER PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED WHERE THERE WAS EVIDENCE THAT DECEDENT ENTERED SEVERAL RELEASES AND WAIVERS.**



## **STATEMENT OF THE CASE**

### **(i) Course of Proceedings**

This is an appeal of a final judgment for the Defendants in a wrongful death action. (R-245). The judgment is based on a jury verdict in favor of Defendants rendered at the conclusion of a five-day jury trial on July 10, 2009. (R-213 (civil minutes from trial); R-216 (jury verdict); R-218 (judgment)).

Plaintiff, as Personal Representative of the Estate of Bernard P. Rice, filed a four-count negligence action against World Triathlon Corporation, North America Sports, Inc., USA Triathlon, and Any Other Entity Whose Acts or Omissions Caused or Contributed to the death of Bernard P. Rice. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). The lawsuit was filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. (R-1-2, Exhibit "A" to Defendants' Notice of Removal; R-1-3, Exhibit "B" to Defendants' Notice of Removal).

On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy claimed by Plaintiff exceeded \$75,000 exclusive of interest and costs. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff answered on November 3, 2008, admitting for the first time that the amount in controversy exceeded \$75,000 exclusive of interest and costs. (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Eleven

days later on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal to federal court pursuant to 28 U.S.C. § 1446(b). (R-1). Plaintiff's subsequent Motion to Remand and Motion for Attorneys' Fees and Costs, (R-3), was denied. (R-12).

Judgment was entered in favor of Defendants on July 13, 2009. (R-218). This appeal followed. (R-245).

**(ii) Statement of Facts**

The facts relevant to Plaintiff's four challenges on appeal are as follows:

**A. Removal.** Plaintiff filed a negligence action in the Circuit Court for Bay County, Florida. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). Four Defendants were identified, including World Triathlon Corporation, which was alleged to be a Florida Corporation. (*Id.*). As to the amount in controversy, the Complaint alleged "damages were in excess of \$15,000.00 (fifteen thousand dollars) exclusive of interest where applicable and costs," (R-1-3, Exhibit "B" to Defendants' Notice of Removal)<sup>1</sup>, the state court's minimum jurisdictional amount. (R-12, p 4).

On July 14, 2008, Defendants North America Sports and USA Triathlon filed a Motion to Dismiss, or in the alternative, Motion for More Definite Statement. (R-1-

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<sup>1</sup>Plaintiff incorrectly states that the Complaint alleged damages in excess of \$75,000. *See* Plaintiff's Brief at 30. The Complaint alleges that damages were in excess of \$15,000, not \$75,000, hence the need for the Requests for Admission.

4, Exhibit "C" to Defendants' Notice of Removal; R-1-5, Exhibit "D" to Defendants' Notice of Removal). Thereafter, on September 2, 2008, Plaintiff served a Notice of Dropping World Triathlon Corporation as a party-Defendant, which created diversity of citizenship. (R-1-6, Exhibit "E" to Defendants' Notice of Removal). Only once diversity was established on September 2, 2008, did the issue of the amount in controversy become important. On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy exceeded the \$75,000 removal threshold. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff belatedly served his response to the requests for admissions on November 3, 2008, admitting the amount in controversy met the jurisdictional threshold set by 28 U.S.C. § 1332(a) (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Importantly, under the mandate of *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007), this was the first document from Plaintiff constituting an unambiguous statement that the claimed damages satisfied the amount in controversy necessary for removal. Eleven days later, on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal. (R-1). The trial court denied Plaintiff's Motion to Remand and Motion for Attorneys' Fees and Costs, (R-12), reasoning that under *Lowery* removal before the request for admission would require the District Court to

engage in “impermissible speculation” as to the amount in controversy. (R-12, p 4 citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007)).

**B. Evidentiary Ruling.** Contrary to the record, Plaintiff misstates throughout his brief that he dropped his claim for net accumulations before he presented any evidence on that claim.<sup>2</sup> (R-213 at p 5<sup>3</sup>; R-256<sup>4</sup>). He also misstates that he dropped his claim for net accumulations before Defendants’ attempt to cross-examine Plaintiff’s witness as to evidence highly relevant to the net accumulations claim.<sup>5</sup> Plaintiff is absolutely incorrect. Plaintiff made the claim for lost net accumulations a focus of his voir dire, opening statement, and case-in-chief. (R-256). It was not until the fourth day of trial, and after the two questions on cross-

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<sup>2</sup>Plaintiff offers no citation to the record to support his assertion that he “dropped” the net accumulations claim without introducing any evidence on this element of damages. (Appellant’s Brief at p 10). Nor does he cite to the date (Thursday) when he dropped his net accumulations claim. (*Id.*) See also footnote 6.

<sup>3</sup>Jury Trial Minutes showing Plaintiff presented evidence from economics expert Frederick Raffa, Ph.D.

<sup>4</sup>Plaintiff presented trial testimony regarding claim for net accumulations by reading the Deposition of Frederick Raffa, Ph.D.

<sup>5</sup>Plaintiff presented testimony from his economics expert regarding the basis for his net accumulations claim after Plaintiff presented witness Patricia Rice, whom Defendants cross-examined regarding the wrongful conversion claim by Plaintiff’s father against his son. (R-213 at p 5; R-238 at pp 5-6; R-256).

examination of Plaintiff's mother for which Plaintiff complains, when Plaintiff elected to drop his claim for loss of net accumulations.<sup>6</sup>

Plaintiff claimed loss of net accumulations when he filed suit. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). His discovery was directed towards supporting that claim. (R-256, Deposition of Frederick Raffa, Ph.D read into evidence at trial). Plaintiff's economics expert, who was presented at trial by deposition testimony, opined that Plaintiff lost massive amounts of net accumulations based on Plaintiff's projected earnings as general manager of his father's car dealership. (R-213 at p 6; R-256 at pp 5-11). What Plaintiff did not disclose to Defendants was that shortly after Plaintiff's death, his father, in his capacity as Plaintiff's employer, brought a legal action claiming his son and daughter-in-law wrongfully converted hundreds of thousands of dollars from the family car dealership. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Despite Defendants'

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<sup>6</sup>Defendants are not aware of any record as to the withdrawal of Plaintiff's net accumulations claim until Friday. (R-213 at pp 8-9). However, defense counsel recalls plaintiff making the announcement on Thursday, and will supplement the record with the transcript of proceedings from that date. Nonetheless, Defendants point to the fact that Plaintiff offered evidence supporting his claim for net accumulations by testimony of his economics expert at the close of the third day of trial (July 8) and before he closed his case, (R-213 at p 5; R-256). Plaintiff would not have presented evidence to support his net accumulations claim, nor would Defendants have allowed such evidence, if Plaintiff had dropped his net accumulations claim prior to the testimony of Plaintiff's economics expert.

multiple discovery requests, it was not until the eve of trial that Defendants discovered there was a claim for wrongful conversion against Plaintiff.<sup>7 8</sup> (R-255-2 at p 8 (¶18); R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Among the items in the

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<sup>7</sup>A brief timetable illustrates Plaintiff's failure to timely disclose the highly relevant evidence:

**February 10, 2009.** *First Interrogatories to Plaintiff.* Defendant North America Sports, Inc.'s First Interrogatories: Plaintiff's response served on March 23, 2009, failed to disclose any other claims or litigation involving the Estate and Decedent. (R-255-1 at p 8 (¶18)). Both the Estate and Decedent's widow were named parties in the other litigation alleging wrongful conversion and embezzlement of funds and property, and it is hard to imagine Plaintiff did not have knowledge of this other litigation that began in 2007 prior to the filing of the wrongful death action. (R-173).

**April 30, 2009.** *Deposition of widow:* For the first time, the Decedent's wife reluctantly hinted there may be other litigation involving the Estate. (R-255-2 at p 64, ln 17 - p 66, ln 19). Unfortunately, Plaintiff's counsel directed the widow to not provide any information about the nature of the litigation, the identity of the parties, etc., based on invocation of questionable privileges, and even though the subject matter was public record and otherwise not privileged. (*Id.*).

**May 8, 2009.** *Discovery deadline:* Plaintiff and his counsel obviously knew of the claim involving the Estate in order to invoke a privilege. Despite having knowledge of the other litigation, Plaintiff still failed to supplement his answers to interrogatories to disclose it as required under Fed.R.Civ.P. 26(e)(1)(A).

<sup>8</sup>This is not the only time Plaintiff failed to timely disclose crucial evidence. For example, Plaintiff failed to timely disclose a videotape of Plaintiff from the race until after the discovery deadline and despite Defendants' earlier discovery requests seeking such crucial evidence. (R-74).

probate documents characterizing the son's actions are terms such as "embezzlement," "altered statements," "illegal receipt," and similar terms. (*Id.*). Evidence that Plaintiff's father was so upset as to sue his son's estate and daughter-in-law for wrongful conversion completely undermined Plaintiff's basis for net accumulations. The District Court recognized the relevance of this evidence:

"[E]mbezzlement, that [Decedent's] former employer has accused him of embezzlement, not only his former employer, but arguably sheltered employment with his father, such that they are claiming embezzlement, then I think that raises a - - that is - - has some probative value on the question of projecting out his future earnings on net accumulations.

(R-237 at p 29).

"The jury can conclude if [Decedent] has ripped off his employer for \$400,000, that calls into question whether he would continue to be employed there, and earning that type of salary."

(R-237 at p 40).

However, the District Court denied as untimely the Defendants' motion requesting to use documents concerning the wrongful conversion claim as trial exhibits. (R-237, p 8). The District Court was frustrated with Defendants' request for leave to add this newly discovered evidence the week before trial. (R-237 at pp 6, 10). Nevertheless, Judge Smoak allowed this evidence to come in through testimony, reasoning that cross-examination was:

the less of two evils of totally misleading the jury that all is fine in paradise, if we don't let it in, where at least [if we let it in on cross-examination] at least [Defendants] can try to make of it what [they] will.

(R-237 at p 11).

The District Judge instructed "if these non-party witnesses for some reason get into the issue of [Decedent's] employment, his continued employment, the future accumulation, then I think that opens the door. (R-237 at p 35). The District Judge permitted use of the term "wrongful conversion" to describe the claim made against Plaintiff's Decedent's Estate. (R-237 at p 40).

Following the District Court's instructions, Defendants cross-examined Plaintiff's mother, Patricia Rice, as follows:

MR. DEAN: You mentioned that he had worked and had a job since he was 16, is that right?

PATRICIA RICE: Right.

\* \* \* \* \*

MR. DEAN: Who was he working for at the time of his death?

PATRICIA RICE: He was working for his father.

MR. DEAN: And what is his father's name?

PATRICIA RICE: His dad's name is Pete Rice.

\* \* \* \* \*



MR. DEAN: Are you aware that Mr. Rice, Pete Rice, has filed a claim against your son's estate for wrongfully converting money and property in the amount of \$427,000, as well as some other property?

MS. SANTA MARIA [Plaintiff's counsel]: Objection, Your Honor.

THE COURT: Overruled.

MR. DEAN: Were you aware of that, ma'am?

PATRICIA RICE: I know there's been some allegations, and I know that something is going on. I've never read. I've never been around in Kallispell or talked to any attorneys, or have any information like that.

MR. DEAN: Are you aware that the allegations that you said you were generally aware of, that they included allegations that your son was stealing money and property from your ex-husband and his dad?

MS. SANTA MARIA: Objection, Your Honor.

THE COURT: Sustained. Counsel, remember our sidebar conference.

(R-238 at pp 5-6).

When Patricia Rice responded to Defendants' counsel's question regarding the "wrongful conversion" claim, and after indicating some possible confusion as to the legal terms used, Defendants' counsel clarified his question by using the layman's term "stealing." Even the District Court admitted to not knowing the difference between "wrongful conversion" and "stealing," and presumably neither did the jury. (R-238 at p 11). Nevertheless, no further inquiry was pursued by Defendants' counsel, and the jury was only left with the testimony that Plaintiff's mother was

aware of some claim involving wrongful conversion brought by Plaintiff's father against his son's estate. (R-238 at p 6, ln 7-8). Cross-examination was finished shortly thereafter pursuant to the Court's instruction. (R-238).

Plaintiff moved for mistrial on the basis that Defendants overstepped the District Court's instructions allowing cross-examination. (R-238 at p 9). The District Court denied Plaintiff's Motion for Mistrial at the conclusion of trial. (R-238 at p 14).

**C. Jury Poll.** Media coverage of Plaintiff's lawsuit leading up to and including trial was certainly expected. The fact that a participant would sue an organization putting on a triathlon (2.4 mile swim, 112 mile bike, and 26.2 mile run) for a heart condition or drowning is noteworthy regardless of the venue.

Plaintiff's first motion to transfer venue was filed a month before trial on June 1, 2009 (R-96), followed by a supplemental motion on June 8, 2009 (R-104), and both were based on an article in the Panama City News Herald, which quoted portions of Defendants' Motion to Dismiss filed on July 14, 2008, prior to the removal of the case to federal court. (R-1, Exh. C). The District Judge denied Plaintiff's Motion to Transfer, reasoning that if there was an issue, then it could be addressed at voir dire. (R-148).

Another article appeared in the News Herald on the first day of trial. (R-240). During voir dire, the District Judge addressed the issue of media coverage by asking the prospective jurors if any of them had "heard anything about this case, or seen anything?" (R-277 at p 2). The transcript of voir dire indicates that at least one juror raised his/her hand indicating that they had heard or seen something about the case. (*Id.*). The District Judge then instructed "that article is not evidence(*Id.*). Evidence you're going to hear is going to come here in this courtroom, and that's what this jury has to decide its - - make its decision on." (*Id.*). Judge Smoak then confirmed:

Can all of you set aside what you may have seen or heard about this case and decide this case solely on the evidence that comes in during trial, and follow and apply the law that I will instruct the jury that they must follow?

(R-277 at p 2).

The jurors confirmed they would set aside anything they may have seen or heard about the case, and they would limit their consideration to the evidence presented at trial and the District Court's instructions regarding what law to apply to the evidence. (*Id.*).

The District Court even took further precaution by asking:

For those of you who saw or heard anything about this case, was what you saw or what you heard so strong that you will not be able to set that aside and decide the case solely on the evidence and follow the law?

(R-277 at p 2).

Again, the jurors confirmed that they would limit their deliberation to the evidence presented at trial and follow the law provided by the Judge. (*Id.*).

Additional media coverage occurred for the next four days of trial. (R-236; R-240; R-241; R-242; R-244). However, there is no evidence that any juror ever observed the additional media coverage or in any way violated the District Court's instructions. Further, the District Court evaluated the media coverage each day and found it to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). The District Court relied on its instructions given to the jury during voir dire and ruled "I'm not going to ask the jurors every day - - every time they come in whether they've followed my instructions. I don't think those articles are much to get much stirred about, quite frankly, but we gave them the instruction." (R-228 at p 3, ln 7-8). The District Court refused Plaintiff's request to interrogate the jurors by ruling that the media coverage did not create an "extreme" case. (R-235 at p 7, ln 7-25; R-235 at p 13, ln 1-7). Nevertheless, Judge Smoak reminded the jury of his instructions at the close of Plaintiff's case-in-chief, at the end of the third day of trial:

Now, remember on Monday, part of my instructions were to you that you are to avoid seeing or listening to anything about this case that might appear in the media. There have been some mention, of no particular consequence, but remember my instructions to you on that point and remember the oath you took. Your decision in this case will be based solely on the evidence and by following the law that I instruct you on.

These [parties] need to feel confident and assured that they're going to get a fair trial, both sides, and they don't need to worry about the television or the newspaper.

So if you would - - and I have no doubt that you will - - keep those in mind. The only reason I bring it up because usually these [media sources], they don't have a clue what we're doing down here, but for some reason they get some mention in the newspaper, and I think one of the television stations. Of no particular consequence. And so with that, you all can go on now and we'll see you at 8:30 in the morning.

(R-256 at pp 12-13; R-213 at p 6).

**D. Summary Judgment as to Releases and Waivers.** Plaintiff was required to execute at least two separate waivers and releases (sometimes referred to as "waiver" or "waivers")<sup>9</sup> to participate in the 2006 Ironman Florida ("Florida event"). (R-79-2; R-79-3; R-79-4; R-79-5). Plaintiff entered a waiver when registering online using the internet, (R-79-2; R-79-3), and then entered another waiver as required for his race site registration in Panama City. (R-81 at p 7(¶19), p 13(¶17), p 18(¶¶14-17); R-79-4).

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<sup>9</sup>There was another release required by USA Triathlon for participants to execute if they were not an annual member of USA Triathlon. (R-79-5; R-81 at p 8 (¶¶15-17, 23), p 14 (¶23), p 18 (¶¶15-17)). The majority of the 2200 participants in the Florida event were annual members of USA Triathlon, and therefore USAT only sent 1000 waiver forms for use in race site registration in anticipation of the small number of participants needing to enter that waiver. (R-81 at p 30, ln 7-23, excerpt of Deposition of Kathy Matejka). This was not an issue at trial, although Plaintiff's brief confuses the USAT waiver with the other race site waiver required of all participants in the Florida event.

The online registration was administered by The Active Network, Inc., a company specializing in providing internet registration support for sporting events such as triathlons. (R-81 at p 6(¶14), p 12(¶14)). Plaintiff had to agree with all of the terms of the online registration, including the waiver, to submit the registration for entry into the Florida event. (R-81 at p 6(¶12), p 12(¶12)). Failure to check the box signifying acceptance of the waiver would not allow Plaintiff to continue the online registration process necessary to participate in the Florida event. (R-81 at p 6(¶13), p 12(¶13)).

All participants in the Florida event were also required to complete a race site waiver as a prerequisite to obtaining materials necessary to participate. (R-81 at p 7 (¶¶17, 18, 19), p 8 (¶24), p 13 (¶¶17, 18, 19), p 14 (¶24)). The opposite side of that waiver form required participants to provide emergency medical information. (R-285 at p 5, ln 4 - p 6, ln 10; p 14, ln 11-25). The form was stored in the medical tent, and it was to be provided to medical personnel if a participant required emergency medical treatment. (R-285 at p 15, ln 1 - p 16, ln 10). There were no copies made of these waivers, so if it was given to emergency personnel, there would be no duplicate. (*Id.*).

There was also a third waiver from an earlier triathlon, which was part of Defendants' defense. (R-79-6; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)).

Plaintiff had also participated in a triathlon in California earlier in 2006. (R-81 at p 34 (¶16); R-81 at p 51 (¶16)). As part of his participation in the California event, Decedent signed race site waivers similar to those he completed to participate in the Florida event later that same year. (R-79-6; R-79-7; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)). This waiver expressly applied to all of Defendants' events for the 2006 season, which included the subsequent Florida event. (R-79-6, R-79-7). The Court denied Defendant's motion for directed verdict on the earlier California waiver. (R-213 at p 6).

Defendants raised affirmative defenses relying on the waivers entered by Plaintiff as a bar to his claims. (R-29 (¶¶53, 54); R-30 (¶¶53, 54)). Both Plaintiff and Defendants moved for summary judgment on those affirmative defenses. (R-46, R-79, R-89).

Plaintiff argued: (i) the online waiver was invalid and unenforceable by operation of Montana law; (ii) even if the online waiver were an enforceable bar against Plaintiff's claims, he did not agree to it; and, (iii) the race site waiver was never signed by Plaintiff because it could not be located. (R-46).

Defendants responded to Plaintiff's arguments as part of their own Motion for Summary Judgment. (R-79). Defendants argued: (i) although Plaintiff entered the online waiver while located in Montana, both Florida law and Montana law

commanded that the online waiver be interpreted under Florida substantive law, and under Florida law, the online waiver barred Plaintiff's claims; (ii) Plaintiff's agreement to the terms of the online waiver was evidenced by his submission of it, which could not have occurred without Plaintiff agreeing to all of its terms; and (iii) Plaintiff had to sign the race site waiver in order to receive materials necessary to participate, and if the waiver could not be located, it was because the executed waiver was given to emergency personnel. (R-79).

The District Court refused to grant summary judgment to Defendants on the enforceability of the online waiver on the basis that there was an inadequate showing the Plaintiff had agreed to it. (R-147). The District Court pointed to the hard copy of Plaintiff's online registration as not showing "check mark boxes" nor "check marks" referenced by the registration. (R-147 at pp 7-8). The District Court reasoned that the lack of check mark boxes and check marks meant there was a question of fact as to whether Plaintiff agreed with the online waiver. (R-147 at 8). Judge Smoak ruled that "[w]hether the online waiver was properly executed is clearly in dispute," and therefore the issue must proceed to trial. (R-147 at 8).

The District Court also found there was an issue of fact as to whether Plaintiff entered the race site waivers. (R-147 at 9).



The District Court structured the verdict form so the jury first assessed whether Defendants were liable for negligence, and only if there was a finding of negligence would the jury then determine whether Plaintiff had entered the online and race site waivers. (R-216). The jury's finding that Defendants were not liable for negligence ended the case, and no findings were made as to whether Plaintiff entered the online and race site waivers. (*Id.*).

**(iii) Standard of Review**

Defendants agree with Plaintiff's statements regarding the standards of review applicable to each alleged error.

## **SUMMARY OF ARGUMENT**

The District Court properly denied Plaintiff's Motion to Remand because removal was timely. But even if there was a procedural defect in removal, such a defect does not command a new trial where the federal court had jurisdiction at the time judgment was entered.

Second, the District Court acted within its discretion by ruling that evidence of a wrongful conversion claim by Plaintiff's father against Plaintiff was relevant to challenge the basis for Plaintiff's claim for loss of net accumulations, which relied on the assertion that Plaintiff would work for his father for the rest of his life. The District Court also properly denied Plaintiff's Motion for Mistrial for defense counsel's follow-up question clarifying the claim by Plaintiff's father against Plaintiff.

Third, the District Court gave proper instructions to address media coverage of the case, and the jury confirmed that they would only consider evidence presented at trial in reaching their verdict. Judge Smoak properly considered: (i) the character of the media coverage; (ii) its timing; (iii) its credibility; and (iv) whether it would

influence the jury, as well as his observation of the jury, local knowledge<sup>10</sup>, and other considerations incumbent upon the presiding judge.

Finally, the District Judge properly denied Plaintiff's Motion for Summary Judgment on the grounds that there was evidence that Decedent entered several releases and waivers.

### **ARGUMENT**

**A. PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND IF NOT, SUCH ERROR WAS PROCEDURAL AND THEREFORE DOES NOT WARRANT A NEW TRIAL.**

**i. Defendants timely sought removal under the mandate of *Lowery***

Plaintiff incorrectly argues that the timing for removal starts when the diversity of the parties is established. Plaintiff ignores the requirement that in addition to establishing diversity there must also be an unambiguous statement establishing the amount in controversy. Only when both elements are established does the thirty-day time period for removal begin.

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<sup>10</sup>District Judge Smoak has been on the bench since 2005. *See Biographical Directory of U.S. Judges*. Before that he had an active civil trial practice in the Panama City-area for over thirty years. *Id.* With this background he has an excellent understanding of his community and those factors which may influence a jury.

The following time line supports the District Court's ruling that removal was timely:

**June 20, 2008:** Complaint served naming World Triathlon Corporation (the only alleged Florida citizen)

**July 14, 2008:** Defendants file Motion to Dismiss

**September 2, 2008:** Plaintiff voluntarily dismisses World Triathlon Corporation

\* \* *(Diversity established)* \* \*

**October 2, 2008:** *With diversity now established*, Defendants serve request for admissions to ascertain whether or not Plaintiff is seeking damages in excess of \$75,000

**November 3, 2008:** Plaintiff admits he is seeking damages in excess of \$75,000 exclusive of fees and costs

\* \* *(Amount in controversy established)* \* \*

**November 14, 2008:** Defendants timely file Petition for Removal

This Court is aware of the many cases addressing the issue of amount in controversy as a basis for federal jurisdiction. This Court, with its decision in *Lowery v. Alabama*, 483 F.3d 1184 (11<sup>th</sup> Cir. 2007), established a bright line standard for removal requiring an unambiguous statement by Plaintiff of the amount in

controversy.<sup>11</sup> No longer are the District Courts or the parties required to speculate as to the amount in controversy, and any speculation is now strictly prohibited.

*Lowery* provides a strict, but easy, framework for establishing the amount in controversy, which if followed no longer places the removing party at risk of remand or sanctions. *Lowery*, 483 F.3d at 1214-15. Under *Lowery*, the District Court and parties need only look at record evidence to determine the amount in controversy, no more and no less:

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<sup>11</sup> With the exception of the two cases discussed below, Plaintiff cites to cases which pre-date *Lowery* or are from outside the Eleventh Circuit. A brief discussion of the inapplicability of these cases follows:

*Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, \*5 (M.D.Fla. July 31, 2007) cited at page 32 of Appellant's Brief. *Foster* is readily distinguishable from the instant case. In *Foster*, there were statements demonstrating that the claimant's alleged wage losses exceeded \$60,000 and a statute showing her entitlement to attorneys fees would exceed \$15,000. *Id.* at \*4-\*5.

*Wagner v. Oerlikon, USA, Inc.*, 2008 WL 2262041, \*1 (M.D.Fla. May 30, 2008) cited at page 32 of Appellant's Brief. *Wagner* is readily distinguishable from the instant case. In *Wagner*, the complaint explicitly alleged a breach of an agreement to pay "Severance Benefits," and the employment agreement defined "Severance Benefits" as a two-year continuation of "any pension, life insurance, health insurance, disability insurance and other employee benefit plans, if any, which the Company may from time to time make available to its executive officers generally." The District Judge held that because the defendants undoubtedly maintained a record of their contributions on behalf of the plaintiff, each category of benefit was peculiarly within the defendants' knowledge at the commencement of the action, and it was obvious to defendants that the amount in controversy exceeded \$75,000.

Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) “an amended pleading, motion, order or other paper,” which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can “first ascertain” that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. See *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 211 (5th Cir.2002) (holding that grounds must be “unequivocally clear and certain”); *Huffman v. Saul Holdings, LP*, 194 F.3d 1072, 1078 (10th Cir.1999) (same). As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith.

*Lowery*, 483 F.3d at 1215, n. 63.

Although a successful wrongful death case typically involves damages exceeding \$75,000, in the instant case the Defendants and the District Court were bound to follow the mandate of *Lowery*. The only unambiguous statement regarding the amount in controversy prior to Defendants’ Request for Admissions was Plaintiff’s allegation that he was seeking damages in excess of \$15,000. (R-1-3, Exhibit “B” to Defendants’ Notice of Removal). The District Court agreed that more was required to establish the amount in controversy:

The complaint seeks damages for Plaintiff’s wife, three minor children, and estate for past suffering, future suffering, loss of support and services of the decedent, mental pain and suffering, medical expenses, and funeral expenses. The complaint alleges only damages in excess of \$15,000, the state court’s minimum jurisdictional amount. Based on Plaintiff’s online application to participate in Defendant’s

event, Defendants were also aware that Plaintiff died at the age of thirty-five, held a bachelors degree, and he was president of a boat dealership. Plaintiff cites numerous authorities to support its argument that Defendants should have known that the amount in controversy based on the allegation of the complaint and the information then available to Defendants without requiring speculation. *See Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, \*5 (M.D.Fla. 2007); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F.Supp. 127, 129 (S.D.Fla. 1985); *Baker v. Firestone & Rubber Co.*, 537 F.Supp. 244, 245-47 (S.D.Fla. 1982); *Lee v. Altamil Corp.*, 457 F.Supp. 979, 981 (M.D.Fla. 1978).

However, the complaint and online application do not provide Defendants with an unambiguous statement sufficient to establish that Plaintiffs' claims potentially exceed \$75,000. *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11<sup>th</sup> Cir. 2007). The nature of the claim is sufficient to conclusively establish the amount in controversy; instead, it requires impermissible speculation. *Id.* at 1220. Defendants did not receive a document clearly indicating that the value of Plaintiff's claim exceed \$75,000 until Plaintiff responded to the Defendants' First Request for Admission on November 3, 2008. *Id.* at 1221. Therefore, the Defendants were able to establish federal jurisdiction by a preponderance of the evidence starting on November 3, 2008 and has thirty days to file a notice of removal. On November 14, 2008, Defendants removed the case to this court in a timely fashion.

(R-12 at pp 4-5).

There was an insufficient basis to establish the amount in controversy for removal until Plaintiff responded to Defendants' Requests for Admission. When that occurred, Defendants timely sought removal.

**ii. If the District Court erred in applying *Lowery*, such error was procedural and does not entitle Plaintiff to a new trial**

Plaintiff had a five-day jury trial and yet asserts that failure to comply with the thirty-day procedural requirement of 28 U.S.C. § 1446(b) entitles him to a new trial in state court. To allow a party a new trial on a procedural error in invoking jurisdiction, when it is undisputed the court had jurisdiction at the time judgment was entered, is not what the law provides. Once a diversity case has been tried in federal court “considerations of finality, efficiency, and economy” overshadow any defects in removal procedure and do not provide a sufficient basis for new trial in state court. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Plaintiff concedes, and in fact argues, there is no question the federal court had jurisdiction at the time judgment was entered. His argument focuses on whether removal was timely. Such error is not a sufficient basis to require a new trial:

To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

*(Id. at 77).*

Plaintiff had his day in court before a court of competent jurisdiction. The alleged procedural defect in invoking removal jurisdiction does not entitle Plaintiff to a new trial.



**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE QUESTIONING OF PLAINTIFF'S WITNESSES AS TO EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS, AND ANY SUCH CLAIMED ERROR DID NOT SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**

Plaintiff's mother's admission of having knowledge of a wrongful conversion claim by Plaintiff's father against his son's estate was properly admitted. Three points support the District Court's ruling: (i) evidence of a wrongful conversion claim was relevant; (ii) Defendants complied with the District Court's instructions; and (iii) if there was error, it did not substantially prejudice the outcome of trial.

**(i) A wrongful conversion claim is highly relevant to the basis for Plaintiff's claim for lost net accumulations**

Plaintiff's claim for lost net accumulations relied substantially on his continually working for his father's car dealership for the rest of his life. (R-256 at p 11, ln 6-15). Evidence suggesting that Plaintiff would have been fired by his father from his sheltered employment seriously challenges Plaintiff's claim for lost net accumulations. (R-237 at pp 29, 40).

A claim for loss of net accumulations to the estate of a 35-year old healthy male can certainly be significant. (R-237 at p 2, ln 22-23). Plaintiff's expert, Dr. Raffa, testified by deposition that Plaintiff was earning \$99,403.00 a year as manager of his father's used car dealership. (R-256 at p 5, ln 8-11). Dr. Raffa extrapolated this significant salary for the remainder of Plaintiff's anticipated working life of 31

years, making the net accumulations claim approximately \$800,000. (R-256 at p 5, ln 8-11; p 6, ln 10-12; p 11, ln 9-15). As the District Court aptly described this “sheltered income,” it was contingent upon Plaintiff remaining in his father’s good graces. (R-237 at p 29, ln 19-25).

The District Court reasoned:

MR. MATTHEWS: [Plaintiff has] based a large portion of his testimony on net accumulation on the fact that Mr. Rice was going to make hundreds of thousands of dollars a year for - - I think he had a 34-year life expectancy, working for his daddy. The fact that his daddy is suing him - - his estate, for embezzlement, which we think there’s pretty strong indication - -

THE COURT: I think that’s fair game for cross-examination.

(R-237 at p 6, ln 14-22).

With the District Court’s ruling that evidence of a wrongful conversion claim by Decedent’s father against his son was relevant if such testimony could be elicited on cross-examination, Defendants proceeded. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16).

**(ii) Defendants complied with the District Court’s instructions**

The District Court permitted defense counsel to question Plaintiff’s mother about her knowledge concerning a wrongful conversion claim between her ex-husband and her son. (R-238 at p 5, ln 12-23). Defendants’ counsel then attempted to clarify his term “wrongful conversion” with the more readily understood term

“stealing” or similar wording which Mrs. Rice was likely to have used or understood. (R-238 at p 5, ln 24 - p 6, ln 5). At this point, the District Court terminated any further inquiry on this issue. (R-238 at p 6, ln 7-8). The fact that Mrs. Rice presumably learned of the claim against her son’s estate (and his wife) from her daughter-in-law, with whom she maintains a close relationship, was not explored further by Defendants’ counsel pursuant to the District Court’s instruction. Defendants finished their cross-examination shortly thereafter. (R-238 at p 6).

**(iii) Any error in admitting evidence concerning the claim for wrongful conversion did not substantially prejudice the outcome of trial**

Assuming *arguendo* that it was error to allow cross-examination on the existence of the wrongful conversion claim, that error is not grounds for reversal because there was no resulting substantial prejudice. *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (5th Cir. 1978) (citing Fed.R.Evid. 103 and Fed.R.Civ.P. 61); *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

At most, the jury heard Plaintiff’s witness admit that “there’s been some allegations [of wrongful conversion], and I know that something is going on.” (R-238 at p 5, ln 19-23). The District Court properly allowed inquiry regarding allegations of “wrongful conversion”, but would not allow any further inquiry. (R-238 at p 5, ln 12 - p 6, ln 8). This was a five-day trial with the focus on liability. A

brief attempt to clarify the term “wrongful conversion” with the more common term “stealing” certainly did not substantially prejudice the outcome of this lengthy trial.

Moreover, Plaintiff dropped his claim for net accumulations the day after Plaintiff’s mother conceded the existence of the wrongful conversion claim. Once Plaintiff dropped his claim, the jury was no longer asked to consider this evidence or its relevance. *CSX Transp., Inc. v. Hensley*, --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009) (Juries are presumed to follow the court’s instructions.); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.).

Finally, any error on the issue of net accumulation complained of by Plaintiff is not a consideration given the jury’s finding of no negligence, with no need to consider damages.

**(iv) Documents concerning the wrongful conversion claim should have been allowed at trial**

Understandably, the District Judge was frustrated that Defendants sought leave to add newly discovered documents evidencing the wrongful conversion claim the week before trial. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62; R-237 at p 9, ln 11 - p 10, ln 18). After hearing arguments the morning of jury selection, the District Court ruled that Defendants could not place those documents in evidence as being untimely. (R-237 at p 11-14). The District Judge did, however, permit Defendants’

counsel to elicit testimony from witnesses on this issue. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16). Just a few examples illustrate why the documents proving the wrongful conversion claim should have been admitted in evidence:

*There was absolutely no possibility of prejudice to Plaintiff by admission of evidence concerning the wrongful conversion claim:* Plaintiff knew about the wrongful conversion claim since its inception in 2007, and certainly cannot complain they were surprised by late notice. Any prejudice concerning late notice of this claim could only damage Defendants' defenses.

*Plaintiff relied on an affidavit from the Montana attorney handling the wrongful conversion litigation:* Plaintiff introduced and relied on an affidavit from the Montana attorney handling the wrongful conversion litigation for Plaintiff. (Doc. 176). That affidavit made the existence of the wrongful conversion litigation the law of the negligence action. The use of the affidavit was an admission under oath by the Plaintiff that the wrongful conversion litigation existed.

*Judicial notice of other court documents:* The District Court should have taken judicial notice of the court documents filed in the Montana court from the wrongful conversion litigation. (R-173-1 at pp 20, 24, 34, 39, 41, 62). *Boyle v. County of Kern*, 2008 WL 220413 (E.D.Cal. 2008) (a court may take judicial notice of court records in another case, including probate cases).

The District Court's ruling forced Defendants to rely on cross-examination of Plaintiff's witnesses without any means of impeaching them in the event their testimony contradicted these court documents. This was a particular risk given the lack of candor by Plaintiff's wife (who was also a named defendant in the wrongful conversion litigation) and the Personal Representative in their discovery

responses. Fortunately, Plaintiff's mother was more candid and conceded the existence of the wrongful conversion claim against Plaintiff. (R-238 at p 5, ln 12-23).

Contrary to Plaintiff's argument, the issue is not necessarily the validity of the amount claimed (albeit, it is relevant), the real issue is the likelihood that Plaintiff would have enjoyed his sheltered income for the remainder of his life. The fact that Plaintiff's father sued his son and daughter-in-law for wrongfully converting hundreds of thousands of dollars provides insight on this issue. It is the existence and nature of the father's claim that is crucial for the jury to consider. The jury should have been allowed to consider both documents and testimony regarding this crucial issue and assign whatever weight to it they deemed appropriate.

**C. MEDIA COVERAGE HAD NO INFLUENCE ON PLAINTIFF RECEIVING A FAIR TRIAL.**

Plaintiff argues Defendant had more media coverage than Plaintiff, and therefore he has been denied a fair trial. Not only does Plaintiff's argument have no basis in law or fact, but it lacks common sense. Even assuming the news media focused more on Defendants' arguments, opening statement, or presentation of evidence, that does not change the fact that the jury heard both parties' cases. Moreover, the District Court properly instructed the jury on media coverage, which instructions the jury is presumed to have been followed. *Estes v. U.S.*, 335 F.2d 609, 615 (5 Cir. 1964) (presumed that jurors did not violate instructions not to read

newspaper articles or listen to broadcasts relative to case in absence of some showing that they did); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.). By agreeing to follow the District Court's instructions, and with no evidence to the contrary, the jury's verdict should stand. Moreover, if Judge Smoak continuously drew the jury's attention to media coverage as Plaintiff suggests he should have done, or if he repeatedly warned the jurors to avoid such coverage, there is a risk it would peek the jurors' curiosity and cause them to actually seek out media coverage instead of avoid it.

Review of the record shows the District Judge took measures to ensure a fair trial by considering: (i) the character of the media coverage; (ii) the timing of the media coverage in relation to the trial; (iii) the credibility of the source to which the coverage was attributed; and (iv) the pervasiveness of the publicity and whether it reached the jury. *Gordon v. U.S.*, 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828, 92 S.Ct. 139, 30 L.Ed.2d 56, and cert. denied, 404 U.S. 828, 92 S.Ct. 140, 30 L.Ed.2d 56 (1971)).

**i. Media coverage was neutral and not likely to influence the jury**

The District Judge found media coverage regarding the case to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). Plaintiff asks

this Court to disagree with the District Judge, but a review of the articles at issue shows them to be nothing more than a factual account of trial. (R-236; R-240; R-241; R-242; R-244).

Even assuming Plaintiff's characterization of the media articles as "decidedly pro-defendant" is correct, then Plaintiff would have this Court believe the jury disregarded what they observed firsthand in trial in lieu of secondhand media accounts. There is no basis in law or the record to support such an assertion.

**ii. Plaintiff claims internet blogs, which lack any credibility, somehow adversely affected his right to a fair trial**

Plaintiff devotes several pages of his brief to citing and arguing that selected internet blogs that appeared in the Panama City News Herald website almost a year before trial is evidence Plaintiff could not receive a fair trial in Panama City. (Appellant's Brief at pp 14-17, 38). Judge Smoak inquired of the jury during voir dire about their exposure to media coverage and its possible effect on either party. (R-277). He was satisfied that whatever media coverage or blogs the jury may have seen or heard would not influence their ability to sit as fair and impartial jurors. Internet blogs posted by a few people on a newspaper website is no basis to show prospective jurors are somehow biased. (R-277; R-256 at pp 12-13).

The District Judge also considered the sources of media coverage in considering its possible influence on the venire. The District Judge relied on his



experience residing in the Panama City-area for over thirty years by finding that jurors “don’t believe anything the News Herald says,” and area residents refer to it as “mullet wrapper.” (R-235 at p 4, ln 10-11). Lacking even less credibility are the blogs Plaintiff quotes throughout his brief. (Appellant’s Brief at pp 14, 15). Incredibly, Plaintiff wants this Court to not only assume that the jurors read the blogs, but that they also assigned some weight to them in their deliberations. Even if the jurors had read the blogs, which is a huge assumption with no basis in fact, the jury expressly agreed to disregard them in reaching their verdict. The blogs could have no possible effect on the jury.

**iii. Plaintiff argues that a television poll somehow influenced the jurors**

Plaintiff argues that a poll taken by a television station somehow influenced the jury. According to the poll, approximately 92% of viewers who called in to participate in the poll agreed with the ultimate jury verdict that Defendants were not liable. (R-236 at p 8). The fact that the television viewers agree with the eventual verdict is not evidence of media influencing the jury, but more likely a reflection of Plaintiff’s case.

**D. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE THERE WAS EVIDENCE THAT PLAINTIFF EXECUTED ENFORCEABLE RELEASES AND WAIVERS.**

As expected with most sporting events, Plaintiff was required to execute a waiver in order to participate in the Florida event. In fact, Plaintiff had to execute two waivers. (R-79-2; R-79-3; R-79-4; R-79-5). If Plaintiff had failed to execute any of those waivers the Defendants would not have been allowed him to compete in the Florida event. (R-81 at p 7(¶¶17, 18, 19), p 13(¶¶17, 18, 19), p 18(¶14). The District Court's denial of Plaintiff's Motion for Summary Judgment was proper for several reasons, including the following: (i) Florida law is the proper law to use in interpreting the online and race site waivers, and Florida law provides that those waivers are enforceable; (ii) evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration; and (iii) evidence shows Plaintiff had to execute race site waivers to participate in the Florida event.

**i. Florida law is the proper law to use in interpreting the online and race site waivers**

Plaintiff argues the District Court should have used Montana or California law to interpret the enforceability of the online waiver entered by Plaintiff, (R-46), but the District Court properly found Florida law applied. (R-147 at p 7).

Plaintiff entered the online waiver while living in Montana. Regardless of what choice of law analysis is used,<sup>12 13</sup> the result is Florida law must be used to interpret the online waiver. If Montana law applies, when interpreting contract provisions such as the online waiver entered by Plaintiff, Montana law requires application of the law of the place where the contract is to be performed, which is Florida. (R-147 at p 7 citing Mont. Code Ann. § 28-3-102). Judge Smoak held:

In Florida, waivers or exculpatory clauses, although not looked upon with favor, are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal.

(R-147 at p 8).

Plaintiff's alternative argument that California law applies when interpreting the online waiver is also misplaced.<sup>14</sup> Even if California law applied, like Florida it

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<sup>12</sup>The District Court applied the doctrine of *lex loci contractus*. (R-147 at p 6).

<sup>13</sup>Florida courts have considered releases and waivers, like the ones entered by Decedent, and treat them as providing services. *Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991). Service contracts are not subject to the rule of *lex loci contractus*, but instead require application of the most significant relationship test. *Fioretti v. Massachusetts General Life Ins. Co.*, 53 F.3d 1228, 1235 (11<sup>th</sup> Cir. 1995). Application of the most significant relationship test requires that the online waiver be interpreted applying Florida law.

<sup>14</sup>Plaintiff incorrectly seeks to rely on a choice of law provision inapplicable to Plaintiff's online waiver. Plaintiff agreed to several terms with Active Network to use Active's online registration process for the Florida event. (R-81 at pp 6-7 (¶¶15, 16), pp 12-13 (¶¶15, 16); R-147 at p 8). One term Plaintiff agreed to was Active's requirement that any dispute between Plaintiff and Active be decided

would uphold the exculpatory clause in the online waiver. *See Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991) (citing *Okura v. United States Cycling Federation*, 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986); *Bennett v. United States Cycling Federation*, 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)).

**ii. Evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration**

Plaintiff had to agree with all of the terms of the online registration, including its waiver, in order to register for the Florida event. (R-81, p 6 (¶12), p 12 (¶12)). This evidence was never refuted. Race Director Shelley Bramblett's trial testimony explaining to the jury how the online registration process works further confirmed her earlier affidavit submitted against Plaintiff's Motion for Summary Judgment.

Plaintiff's Motion for Summary Judgment was properly denied with respect to the online waiver, but Defendants' Motion for Summary Judgment should have been granted based on the undisputed evidence they submitted supporting the existence and enforceability of that waiver. At a bare minimum Defendants should have been

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Footnote 14 continued.

under California law. The District Court recognized that Active's choice of law provision has no application to the terms Plaintiff agreed to with Defendants as part of his online registration for the Florida event, including the online waiver. (R-147 at p 8).

allowed to present their evidence regarding the online waiver to the jury, which is what the District Court allowed.

**iii. Evidence shows Plaintiff signed race site waivers to participate in the Florida event**

Plaintiff also signed a waiver during race site registration in order to participate in the Florida event. (R-81 at p 7 (¶¶17-19), p 8 (¶24), p 13 (¶¶17-19), p 14 (¶24)). Plaintiff argues that the race site waiver never existed because Defendants could not produce it. Plaintiff fails to understand that the mere fact that the race site waiver could not be located does not mean it never existed. Fortunately, the District Court understood this distinction in ruling that “[t]he fact that Defendants cannot provide a signed waiver does not exclude testimony on this matter; it merely goes to the weight of the evidence for the jury to consider.” (R-147 at p 9). At trial, Defendants offered testimony from Race Director Shelley Bramblett, Medical Director Joyce Wilson, and Virginia Jensen, who was the person that oversaw the registration process for the 2006 Florida event, to explain the registration process and that participants simply could not participate in the event without executing the race site waiver because without that step they would not be provided materials necessary to participate in the race.<sup>15</sup> (R-213 at 7; R-285 at p 5, ln 4 - p 6, ln 10). Ms. Bramblett

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<sup>15</sup> Unfortunately, the transcripts of testimony by Race Director Shelley Bramblett and Virginia Jensen are not available at the time this brief is filed.

and Ms. Wilson also explained to the jury what likely happened to the waiver. (R-285 at p 14, ln 11 - p 16, ln 9). Ms. Wilson, as Medical Director, even testified that she physically held the race site waiver in her own hands during the emergency response to Plaintiff in her attempts to assist with the rescue. (*Id.*).

## CONCLUSION

There is no question this is a tragic case. The sympathies for the wife, the children, and the parents, no doubt were present in the jurors' deliberation, and by its very nature made the jury's decision difficult. But after a lengthy trial, the jury reached its decision. That decision should not be disturbed.

It is respectfully submitted that the Judgment of the District Court should be upheld.

Respectfully submitted,

/s/ Larry A. Matthews

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## **CERTIFICATE OF COMPLIANCE**

We hereby certify that this Brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief contains 9,358 words. The Brief, in PDF format, was uploaded to the Eleventh Circuit Court website on the 7th day of December, 2009 at 5:00 p.m.

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### **CERTIFICATE OF SERVICE**

We hereby certify that a true and correct copy of the foregoing was furnished to Diana Santa Maria, Esq., Law Offices of Diana Santa Maria, P.A. 5220 South University Drive University Place, Suite 205C, Ft. Lauderdale, FL 33328 and Joel S. Perwin, Esq., Joel S. Perwin, P.A., Alfred I. DuPont Building, 169 East Flagler St., Suite 1422, Miami, FL 33131, via U.S. Mail, this 7<sup>th</sup> day of December, 2009. The original and six copies of this brief were also furnished to the Clerk, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303, via U.S. Mail, on the 7<sup>th</sup> Day of December, 2009.

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**APPLICATION  
COUNSEL TO THE ESCAMBIA COUNTY VALUE ADJUSTMENT BOARD**

**PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Brian W. Hoffman

SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: \_\_\_\_\_

HOME ADDRESS: 5968 Hermitage Drive, Pensacola, FL 32504

BUSINESS NAME: Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC

BUSINESS ADDRESS: 801 W. Romana Street, Suite A, Pensacola, FL 32502

PHONE NUMBER(S): \_\_\_\_\_

BUSINESS: 850-266-2312

HOME: 850-221-9645

FAX: 850-266-2301

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2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? \_\_\_\_\_ YES X NO

3. HOURLY RATE/MINIMUM HOURS: \$210.00 per hour (bill in 1/10 increments)

4. PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. FLORIDA BAR NUMBER: 0627747 ADMISSION DATE: 04/17/2003

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attachment.

C. LIST ANY DISBARMENT, SUSPENSION, OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None.

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2017 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

5. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS COUNSEL FOR POOR OR IMPROPER PERFORMANCE:

None.

6. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None.

7. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS COUNSEL TO THE VALUE ADJUSTMENT BOARD:

See attachment.

8. PLEASE PROVIDE A WRITING SAMPLE, WHICH MAY CONSIST OF ANY OPINION, LETTER, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL. See attached. Real Estate Case Summaries published in Action Line, Vol. XXXIV, No. 1, Fall 2012

**THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF COUNSEL TO THE VALUE ADJUSTMENT BOARD.**

  
SIGNATURE OF APPLICANT

  
DATE

Question 4 (b):

1) Education:

University of Florida, Gainesville, FL

Bachelor of Science, Finance, *magna cum laude*, May 2000

- GPA: 3.80/4.00
- Honors: Florida Academic Scholar  
Golden Key National Honor Society

University of Mississippi School of Law, Oxford, MS

Juris Doctor, *cum laude*, December 2002

- GPA: 3.29/4.00
- Class Rank: 1/24
- Associate Cases Editor, *Mississippi Law Journal*
- Honors: Dean's List- Spring 2002, Fall 2002  
Outstanding Student: Secured Transactions, Spring 2002

2) Experience:

Legal Employment:

Carver Darden, Kortezy, Tessier, Finn, Blossman & Areaux, LLC  
*Partner*, April 2009 – Present

Shell, Fleming, Davis & Menge, P.A.

*Associate*, January 2003 to December 2008; *Partner*, 2009

Bar Admissions:

All Florida state courts, and U.S. District Court for the Northern and Middle District of Florida

Relevant Experience:

*Fellow* (2012-2014), The Real Property, Probate and Trust Law Section of the Florida Bar

Question 7:

My legal practice focuses significantly on real estate law, including real property litigation (foreclosure actions, partition actions, boundary disputes), as well as commercial and residential closings. My legal practice also includes business litigation matters. My legal experience is well suited for many of the issues that would arise in providing legal advice to the Value Adjustment Board. Specifically, I have significant

experience dealing with ad valorem tax issues in both the closing and litigation context. In addition, I regularly deal with appraisal valuations related to foreclosure litigation. Appraisal valuations in the foreclosure context are critical in the court's determination of whether a deficiency exists after the property is sold at foreclosure sale. In addition to my individual experience, my firm's Pensacola office has five attorneys that all practice real estate law, and are able to provide any additional assistance and support for any issues that may arise as legal counsel for the Value Adjustment Board.

I recently was awarded one of two fellowship appointments for the Real Property Division of The Real Property, Probate and Trust Law Section of the Florida Bar. The fellowship programs is a two year program that involves significant participation in the section, which is focused on the current status of real property law and the drafting of legislative proposals for revisions to Florida law. In addition, the fellows prepare the Florida case summaries for recent and significant cases that are published in ActionLine, the legal publication of The Real Property, Probate and Trust Law Section of the Florida Bar. The benefit of the fellowship program relative to the advertised position as legal counsel for the Value Adjustment Board is that I am apprised of the current status of real property law (both case law and statutory law), and any statutory revisions passed or on the agenda to be addressed by the Florida legislature.



# Section Fellows Announced for 2012 - 2014

By Navin R. Pasem, Esq., Tampa, Florida  
Section Fellow (2010 – 2012)



NOELLE  
MELANSON



TARA RAO



BRIAN  
HOFFMAN



NISHAD KAHN


At the Section's 2012 Legislative Update & Executive Council Meeting, held at The Breakers in Palm Beach, Florida the Section proudly announced the selection of four new attorneys to the Section's Fellowship Program. The Section's third class of Fellows will consist of **Noelle Melanson** of Ft. Myers, **Tara Rao** of Lutz, **Brian Hoffman** of Pensacola and **Nishad Khan** of Orlando. Ms. Melanson and Ms. Rao will serve as Probate and Trust Law Fellows, while Mr. Hoffman and Mr. Khan will serve as Real Property Fellows. The Section received over 65 applications from highly qualified attorneys throughout the state for the 4 positions.

The Section's Fellowship Program was created in 2007, modeled after the successful Fellowship Program of the American Bar Association. The mission of the Fellowship Program is to attract and retain young lawyers to the Section and provide them with the opportunity to participate in the Section's substantive committees, work with the Section's leadership and eventually represent the Section as future leaders. To that end, the Program is open to all lawyers who are members of the Section and (a) have been admitted to the Bar for fewer than 12 years or (b) are younger than 38 years of age. Applicants should also be able to demonstrate that a substantial portion of their practice is focused in the area of real property, probate or trust law. The Section has over 50 active committees representing a wide range of issues directly related to the practice areas of real property, probate and trust law. The Fellowship Program is also designed to supplement and support the efforts of the Section's Membership, Diversity & Law School Liaison Committee.

The Section looks forward to having the newly-selected Fellows become involved with the various substantive committees which fit within their current areas of practice. On the probate and trust law side, Noelle Melanson focuses her practice on estate planning, probate administration and real

estate law. During her tenure as a Fellow with the Section, she plans to become involved in the Estate and Trust Tax Planning committee and the Probate Law and Procedure committee. Tara Rao practices in the areas of probate, guardianship, estate planning, and business planning. She is looking to become involved in the Probate Law and Procedure committee and the Estate and Trust Tax Planning committee. As for the real property fellows, Brian Hoffman practices real property litigation, including representation of lenders in debt enforcement actions. Brian looks forward to becoming more involved in the Real Property Litigation committee, among others. Nishad Khan practices in all areas of real estate with an emphasis on the purchase or sale of both commercial and residential distressed properties. To help bring consistency and a better understanding in these practice areas, he is interested in the Residential Real Estate & Industry Liaison committee, among others.

Fellowships are provided for a two-year term and the Section provides each Fellow with a stipend so they are able to attend each of the four annual Section and Executive Council meetings that take place in various parts of the state. The Section's membership is currently hovering around 10,000 members and the Executive Council has more than 225 active members who serve as the leadership for the Section. After successful completion of the Fellowship Program, the goal is for the Fellows to also join the Executive Council.

The eight attorneys who are now alumni of the Section's Fellowship Program remain largely active with the Section's substantive work with the majority serving on the Executive Council. The next opportunity for applicants interested in the Section's Fellowship Program will be in the spring of 2014. Additional information on the Fellowship Program can be obtained from the current chair of the Fellows and Mentoring committee, Marsha G. Madorsky, at [mmadorsky@carltonfields.com](mailto:mmadorsky@carltonfields.com) or tel. #305-539-7436. 



# Real Estate Case Summaries

Prepared by Brian W. Hoffman, Esq.,  
Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux LLC, Pensacola, FL

**F**or purposes of attaching constructive notice to subsequent purchasers for value, compliance with the recording statute, Section 695.11, Fla. Stat. (2011), is determinative of whether constructive notice attaches. If there is compliance with the recording statute, error by the clerk after the instrument is recorded will not affect constructive notice, irrespective of whether the subsequent purchaser had actual notice in the public records

*Mayfield v. First City Bank of Florida*, 37 Fla. L. Weekly D1848 (Fla. 1st DCA 2012)

The trial court granted summary final judgment of foreclosure in favor of the Plaintiff, First City Bank of Florida ("First City"). Michael D. Mayfield, Bonnie J. Mayfield (collectively the "Mayfields") and Branch Banking and Trust Company ("BB&T"), Defendants in that action, appealed to set aside the summary final judgment of foreclosure.

In October 2009, the Mayfields purchased real property (hereinafter "Lot 2") from Blue Water Bay Real Estate Investments, LLC ("Blue Water"), and the Mayfields granted a purchase money mortgage to Old National Bank, which was subsequently acquired by BB&T. The Mayfields' deed and the BB&T mortgage were recorded in the public records on November 2, 2009. Unbeknownst to the Mayfields, in 2006 Blue Water had previously conveyed Lot 2 to Wright and Associates of Northwest Florida ("W&A"), and W&A had granted a mortgage to First City Bank. The W&A deed and First City mortgage were sent to the clerk of Walton County for recording, and on July 2, 2006, the clerk opened a recording transaction in the computer and affixed an official register book and page number on the original documents, which were then returned to the parties. Shortly after recording those instruments, the clerk realized an error had been made and voided the W&A deed and First City mortgage with the intention of re-recording those instruments to correct the error, which the clerk failed to do and mistakenly recorded similar instruments concerning another parcel of property. Since the W&A deed and First City mortgage were voided those instruments no longer appeared in the Walton County electronic official records except for a brief period of 73 minutes on July 6, 2006.

In 2010, First City filed foreclosure following default by W&A, and named the Mayfields and BB&T as subordinate lien holders in that action. The Mayfields and BB&T filed for summary judgment on the grounds they were bona fide purchasers without notice, and First City filed for summary

judgment contending that it complied with the recording statute, which resulted in constructive notice. The trial court found that although the W&A deed and BB&T mortgage were voided from the public records, they were recorded in accordance with Section 695.11, Fla. Stat. (2011). Since those instruments were recorded, the Mayfields and BB&T were not entitled to protection under Section 695.01, Fla. Stat. (2011) for subsequent purchasers without notice.

The First District Court of Appeal noted that prior Florida cases have found that when a party complies with the recording statute, constructive notice attaches and will not be destroyed by errors committed by the clerk. The Court concluded that under the current version of Section 695.11, Fla. Stat. (2011), constructive notice attaches upon compliance with the recording statute. The Court concluded that since First City complied with the recording statute constructive notice attached at the time of recording, and dismissed the Mayfields and BB&T's argument that the W&A deed and First City mortgage had to remain in the public records to impart constructive notice. The Court noted the harsh result, and that the Mayfields and BB&T may have a cause of action against the clerk of Walton County.

**Where the final judgment of foreclosure specifically adopts the framework of Section 45.031, Fla. Stat. (2011), publication of the notice of sale is required, and failure to so publish is grounds to set aside the foreclosure sale irrespective of the adequacy of the foreclosure bid or whether mistake, fraud or other irregularity was present**

*Simonson v. Palm Beach Hotel Condominium Assoc.* 37 Fla. L. Weekly D1631 (Fla. 4th DCA 2012)

The trial court denied a homeowner's Objection and Motion to Set Aside Judicial Sale on the grounds that no pre-sale publication notice was made pursuant to Section 45.031, Fla. Stat. (2011).

After entering a judgment of foreclosure for \$66,314.12, the trial court set the date of the foreclosure sale for several months later. The Final Judgment of Foreclosure stated that "the clerk of this Court shall sell the subject property at public sale . . . to the highest bidder for cash . . . in accordance with section 45.031, Florida Statutes". A third party purchaser was the high bidder at the online public auction for \$100,100.00. On the same date as the sale, the condominium association filed a motion to vacate and

*continued, next page*



set aside the foreclosure sale because the Notice of Sale had not been published. The third party purchaser then moved to confirm the sale. At the hearing to confirm the sale, counsel for the condominium association and the third party purchaser presented the trial court with an agreed order admitting publication had not occurred and confirming the sale. One day after that hearing, the homeowner received the signed order that directed the clerk to issue a Certificate of Sale to the purchaser. The homeowner served and filed Objections to Judicial Sale and Motion to Set Aside Judicial Sale. Two days after the agreed order was entered the clerk issued the Certificate of Sale that contained language stating that the Notice of Sale had been published as shown by the Proof of Publication.

At the hearing on the Motion to Set Aside Judicial Sale, the homeowner argued that Section 45.031, Fla. Stat. (2011) requires advance notice of a sale, while the purchaser and condominium association argued that Section 45.031 does not provide a mandatory framework, and further argued that the homeowner failed to demonstrate that the foreclosure bid was grossly or startlingly inadequate, and that the inadequacy of the bid resulted from some mistake, fraud, or other irregularity in the sale. The Fourth District Court of Appeal reviewed the requirements of Section 45.031 and confirmed the plain reading of that statute supports the interpretation that a foreclosure sale should not be confirmed if the notice of sale was not published. The Court acknowledged the purchaser and condominium association's argument that Section 45.031 is not the exclusive procedure for scheduling a foreclosure sale, but deemed that issue moot since the final judgment of foreclosure explicitly adopted the statutory framework of Section 45.031. The Court also dismissed the argument that the trial court must find the foreclosure bid grossly inadequate and resulting from mistake, fraud or other irregularity to set aside the sale. Failure to publish the notice of sale is sufficient by itself to set aside the sale, irrespective of the foreclosure bid, when final judgment specifically adopts the framework of Section 45.031. *See also HSBC Bank, N.A. v. Nixon*, 37 Fla. L. Weekly D2011 (Fla. 4th DCA 2012) (adhered to ruling in *Simonson* and reversed trial court order denying motion to vacate sale for failure to publish notice of sale as required by Section 45.031(3), Fla. Stat.).

**In a betterment action, where it is undisputed that a third party made the improvements to the subject**

**property and that the party claiming betterment never had title to the property improved, it is then irrelevant whether the party claiming betterment actually believed it held title to the property improved. In such instance, evidence of improvements made by a third party to the subject property would be properly excluded**

*Centennial Homeowners Assoc. Inc. v. Dolomite Co. Inc.*, 37 Fla. L. Weekly D1763 (Fla. 3rd DCA 2012)

The trial court granted Dolomite Co. Inc.'s ("Dolomite") motion in limine to exclude evidence presented by Centennial Homeowners Association, Inc. ("Homeowners Association") as to improvements made by the developer of the residential community in support of the Homeowners Association's betterment action against Dolomite.

The developer of a residential community made improvements to common areas (the "Common Areas") before the developer abandoned the community. The developer still had title to certain common areas after abandonment. Thereafter, in 1999, Dolomite's predecessor-in-interest purchased the Common Areas at a sheriff's sale. The Homeowners Association then moved to set aside the sale; however, the trial court confirmed the sale after the Homeowners Association was unable to submit proof of ownership of the Common Areas. Dolomite then pursued an ejectment action against the Homeowners Association and obtained final judgment of ejectment, which was affirmed by this Court. The Homeowners Association then filed a betterment action seeking compensation for improvements made to the Common Areas by the developer before the developer abandoned the community. Dolomite filed a motion in limine to exclude evidence related to improvements made by the developer, which was granted by the trial court. The jury found that although the Homeowners Association occupied the Common Areas, it did not make any permanent improvements. After the jury made its findings, the trial court entered final judgment in favor of Dolomite. The Homeowners Association did not challenge the jury's findings, but contended that the trial court erred by excluding evidence of improvements made by the developer.

The Third District Court of Appeal found that the evidence of improvements made by the developer were properly excluded, noting that "the betterment cause of action was created to prevent unjust enrichment by compensating a party that has lost an ejectment case for any value of improvements that were made by the losing party and are received by the successful party along with the land." Sec-

***Lots of useful information for you on the  
RPPTL Section website! [www.rpptl.org](http://www.rpptl.org)***



tion 66.014(3), Fla. Stat. (2009) requires the party seeking betterment to establish he or she "made the improvements or purchased the property improved." Since the improvement were undisputedly made by the developer, and since the Homeowners Association never had title, it is irrelevant whether the Homeowners Association actually believed it held good and valid title. Accordingly, the trial court properly excluded the evidence.

**The exception to the local action rule provided for in Section 702.04, Fla. Stat. for a mortgage encumbering property in more than one county, also includes separate and distinct mortgage instruments each encumbering property in different counties, as long as those mortgages both secure the same promissory note, and are accordingly part of one transaction**

*Frym v. Flagship Community Bank*, 37 Fla. L. Weekly D2001 (Fla. 2nd DCA 2012)

The trial court denied Catherine M. Frym's ("Frym") writ of prohibition to restrain the circuit court in and for Pinellas County from exercising jurisdiction in a foreclosure action over property located in Hillsborough County.

In 2006, Frym executed and delivered a promissory note which was secured by two mortgages: one on commercial property in Pinellas County and one on Frym's personal residence in Hillsborough County. In 2009, the Bank filed a complaint in Pinellas County seeking to foreclose on each mortgage. Frym filed a motion to dismiss, alleging that the trial court lacked subject matter jurisdiction to foreclose on the mortgage encumbering land in Hillsborough County. Frym challenged the denial of that motion by filing the current petition for writ of prohibition. Frym claimed that Section 47.011, Fla. Stat. (2011) requires that actions involving property shall only be brought in the county in which the property is located, known as the "local action rule." Section 702.04, Fla. Stat. provides an exception to the local action rule when a mortgage includes lands lying in two or more counties, which allows the foreclosure to proceed in any one of said counties as if it had all the mortgaged land. Frym claimed that exception does not apply in this case because the mortgage in Pinellas County secures only the commercial property, and not her personal residence in Hillsborough County. In support of that position, Frym cited *Hudlett v. Sanderson*, 715 So. 2d 1050, 1052 (Fla. 4th DCA 1998), which ruled that an exception to the local action rule is not applicable to a mortgage which on its face is applicable to property in only one county.

The Second District Court of Appeal noted that although two separate mortgages existed in this case encumbering property in two different counties, both mortgages secured the same promissory note. In contrast, *Hudlett* dealt with three separate promissory notes, each secured by a separate mortgage instrument. The Second District Court of Appeal

confirmed the trial court's reasoning that since the two mortgages secured the same promissory note, both mortgages were part of the same transaction. Therefore, this case falls under the umbrella of Section 702.04, Fla. Stat., and the trial court's denial of the writ of prohibition was proper.

**Summary final judgment cannot be granted in favor of a defendant as to a plaintiff's stated cause of action when such judgment is based on a determination by the trial court that the facts supporting the stated cause of action are actually another cause of action that is barred by the statute of limitations**

*Bistricher v. Palmer*, 37 Fla. L. Weekly D1914a (Fla. 2nd DCA 2012)

The trial court granted summary final judgment in favor of William and Cathy Palmer (the "Palmers"), and against Alex Bistricher, as limited partner of Gulf Island Resort, L.P., and Gulf Island Resort, L.P. ("Bistricher") who had filed a quiet title action against the Palmers.

In March 2008 Bistricher filed a quiet title action challenging the validity of a deed that transferred property to the Palmers in March 2003. Bistricher was a limited partner of a limited partnership that owned several condominium units in one development. The general partner of that limited partnership was a corporation, and Bistricher and two other men were the sole shareholders. Those three shareholders had entered a restrictive covenant agreement whereby the conveyance of any of the condominium units required the signature of all three men. One of the two shareholders filed improper documents with the Florida Secretary of State that made it appear that that one shareholder had authority to sign deeds on behalf of the corporate entity. In March 2003, that one shareholder signed the deed to the Palmers without Bistricher's consent. Bistricher claimed the deed to the Palmers was voidable since it was not signed by a person legally authorized to do so.

The Second District Court of Appeal determined that the sole issue before the court was whether this action to quiet title is barred by the statute of limitations for actions alleging fraud. The Court noted the trial court's findings that the claim in this case, although captioned as a quiet title action, was primarily founded on allegations of fraudulent misconduct. The Court disagreed with the trial court's ruling because the complaint simply does not allege a claim in fraud. The Court concluded that if the Palmers believed the Complaint was not a quiet title action, but a claim for fraud, then the Palmers should have filed a motion to dismiss for failure to state a cause of action. The Palmers could not simply file a motion for summary judgment on the theory that a different complaint would have been barred by the statute of limitations for fraud. Accordingly, the Court reversed and remanded the summary final judgment entered by the trial court in favor of the Palmers. ■



# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4580**

**7.**

## Value Adjustment Board

**Meeting Date:** 07/23/2013

**Issue:** Selection of Appraiser Special Magistrate.

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

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### Information

#### Recommendation:

Recommendation: That the Value Adjustment Board select one of the following Applicants for Appraiser Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Oswald P. Carrerou, Appraiser
- John A. Robinson, Appraiser
- Steven L. Marshall, Appraiser
- Robert S. Sutte, Appraiser

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### Attachments

2013 Special Magistrate Applicants Summary

Oswald Carrerou Application

John Robinson Application

Steven Marshall Application

Robert Sutte Application

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### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/26/2013

Started On: 06/26/2013 04:42 PM

2013 VAB Special Magistrate Applicants				
<u>Candidate</u>	<u>Type SM</u>	<u>Proposed Rates</u>	<u>Date Received</u>	<u>Applicant Credentials</u>
Oswald P. Carrerou	Appraiser	\$95/hr, 4 hrs. min., travel and lodging	3/25/2013	From Winter Haven, FL; SRA; Broker; has served in Highlands, Polk, Brevard, and Alachua Counties
~	~	~	~	~
John Robinson	Appraiser	\$125/hr, 8 hr. min., travel and lodging	3/28/2013	From Ocoee, FL; MAI, CCIM; SM for Escambia County in 2012; has served in Okaloosa, Orange, Seminole, Brevard, Pinellas, Hillborough, Hernando, and Polk Counties
~	~	~	~	~
Steven Marshall	Appraiser	\$149/hr, 8 hrs. min., travel (no lodging)	4/4/2013	From Altamonte Springs, FL; MAI, SRA; SM for Escambia County 2010 and 2011
~	~	~	~	~
Robert Sutte	Appraiser	\$85/hr, 8 hrs. min., normal business expenses+\$ .44/mile travel	5/30/2013	From Winter Park, FL; Broker, CRE, MAI, SRA; licensed in FL and GA; certified General Appraiser Instructor; SM for Escambia County in 2006 and 2007
~	~	~	~	~
Phillip A. Pugh	Attorney	\$160/hr., no min., no travel, no lodging	5/29/2013	Local Attorney; Member Florida Bar; Cumberland School of Law, JD; Board Certified in Real Estate Law
~	~	~	~	~
Cecilia R. Boyd	Attorney	The greater of \$125/hr or highest rate paid any other SM, 3 hrs. min., travel and lodging	5/31/2013	From Panama City, FL; JD, University of Florida College of Law 1993; Member Florida Bar; SM for Escambia County 2012; has served in Bay, Walton, Okaloosa, and Santa Rosa Counties; has served as President, Vice President, and Treasurer for Bay County Bar Association
~	~	~	~	~
Larry A. Matthews	Attorney	\$125/hr., no min., no travel, no lodging	*See below	Local Attorney; Member Florida Bar; Florida State University, JD
~	~	~	~	~
<b>*Application for Larry A. Matthews not date stamped, but was received prior to May 31, 2013, deadline.</b>				



# **Clerk of Circuit Court**

## **Value Adjustment Board**

**Appointment of Special Master Application  
ESCAMBIA County**

**Submitted by:**

**Oswald P. Carrerou, SRA, President**



**A.R.E.A. Real Estate Appraisers, Inc.**

**March 20, 2013**

Post Office Box 334  
1136 First Street South  
Winter Haven, Florida 33882-0334

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

Oswald P. Carrerou, SRA  
Post Office Box 334  
Winter Haven, Florida 33882-0334

March 22, 2013

Honorable Pam Childers  
Clerk of the Circuit Court & Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, Florida 32502-5843

Re: Appointment of Special Magistrate  
Valuation of Real Estate  
ESCAMBIA County

Dear Honorable Childers:

As per your request, I would like to be considered for the Special Magistrate position in Escambia County. As you will note in my resume, I have served as Special Magistrate in several Florida Counties.

I believe that my education, professional experience and past appointments as Special Magistrate will be an asset for the Escambia County Value Adjustment Board. My particular knowledge of Florida Statutes has afforded me the opportunity and expertise to conduct fair and equitable hearings in the best interests of Escambia County residents. I would welcome an opportunity to be of assistance.

Attached please see my professional resume and qualifications. I have resided in Polk County since 1980 and I am President of A.R.E.A. REAL ESTATE APPRAISERS, INC., serving seven counties. I am extremely knowledgeable in the area of ad valorem taxation and, as you can see from my qualifications, I am a member of several national and local real estate organizations.

The total compensation should be \$ 95/hour. My minimum hours are one day (4 hours). If further information is needed, please do not hesitate to contact me, as I look forward to the pending opportunity to work with you.

Sincerely,

  
Oswald P. Carrerou, President  
A.R.E.A. REAL ESTATE APPRAISERS, INC.

Encl: company profile, qualifications, resume

**Special Magistrate Application  
Value Adjustment Board  
Escambia County, Florida**

**PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

**1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:**

NAME: Oswald Carrerou  
SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]  
HOME ADDRESS: PO Box 334, Winter Haven, FL 33882  
BUSINESS NAME: AREA Real Estate Appraisers, INC  
BUSINESS ADDRESS: s/a  
PHONE NUMBER(S):  
BUSINESS: 863-294-2384 HOME: 863-294-2384  
FAX: 863-297-9781 CELL: 863-287-4653

**2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY?** YES x **NO**

**3. APPLICATION FOR:** ATTORNEY SPECIAL MAGISTRATE  
X **APPRAISER SPECIAL MAGISRATE**

**HOURLY RATE / MINIMUM HOURS:** \$95 / 4

**4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:**

A. BAR NUMBER: N/A ADMISSION DATE: N/A

B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

Please see attached resume.

C. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

NONE

**5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:**

A. DESIGNATION: State Certified General Real Estate Appraiser, SRA  
LICENSE OR CERTIFICATION NUMBER: RZ271  
DATE LICENSED OR CERTIFIED: 1982



- B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

NONE

- C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

<u>ORGANIZATION</u>	<u>DESIGNATION</u>	<u>DATE OF DESIGNATION</u>	<u>MEMBERSHIP NUMBER</u>
<u>Appraisal Inst.</u>	<u>SRA</u>	<u>1982</u>	<u>266-25-9531</u>
<u>NAR</u>	<u>Broker</u>	<u>1980</u>	<u>N/A</u>

**NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.**

- D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

Business/Real Estate Degree from Florida State University

Other information on resume

- E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

N/A

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>30 years experience</u>
COMMERCIAL REAL PROPERTY	<u>25 years experience</u>
TANGIBLE PROPERTY	<u>N/A</u>
OTHER (PLEASE SPECIFY)	<u>See Resume</u>

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. COUNTY  
Highlands County, FL

DATES SERVED  
1999-2002, 2004-2008

Polk County, FL  
Brevard County, FL  
Alachua County, FL

2000-2001, 2003-2010  
2009-2012  
2009, 2010, 2011, 2012

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

Still Serving N/A

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

I apply to several counties each year.

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

Extensive experience as a fee appraiser in all types of commercial, residential,  
industrial appraisals. Also computer literate and experienced with AXIA VAB  
software. Ten years of experience as special magistrate in multiple counties.  
Attended the DOR Orlando Special Magistrate Workshop. Attended the DOR  
Tallahassee VAB Procedure.

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

**THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.**

  
SIGNATURE OF APPLICANT

3/26/2017  
DATE



**Applicant's Name: Oswald P. Carrerou, SRA**

Address: Post Office Box 334/1136 First Street South  
Winter Haven, FL 33882-0334

Phone: 863-294-2384 Fax: 863-297-9781

Email: [ozzie.carrerou@arearealestate.com](mailto:ozzie.carrerou@arearealestate.com)

Respondent's Name: Oswald P. Carrerou, SRA, President

Title: A.R.E.A. Real Estate Appraisers, Inc.

1. A.R.E.A. REAL ESTATE APPRAISERS, INC. is an established, full service real estate appraisal and consulting firm, since 1982. The firm is the largest appraisal firm in Polk, Hardee, Highlands and Osceola Counties and currently occupies 3,000 square feet of modern office space in Winter Haven, Polk County, Florida. Support staff maintains full time office hours, Monday-Friday, 8:00-5:30, readily answering phone calls and facsimile responses.

The Principal and Manager of the firm is **Oswald P. Carrerou, SRA**. Mr. Carrerou attended Florida State University, graduating with a Bachelor of Science in Business and Real Estate. He is a Licensed Real Estate Broker, holds the Appraisal Institute SRA designation, is a licensed residential contractor, President of AREA Construction (a Certified General Contracting firm) and has been appointed for years 1999, 2000, 2001, 2003-2008 as Special Magistrate in Highlands County and years 2000, 2001 and 2004-2009 Special Magistrate in Polk County. He is "pro-active" and maintains a conflict resolution work ethic, as well as a problem solving philosophy. Mr. Carrerou heads the commercial appraisal department, which is comprised of five full time licensed commercial appraisers. In addition, he manages and heads the Residential Appraisal Department, consisting of six full time Licensed Residential Appraisers. Office support includes two full time secretaries and two part time assistants.

Research capabilities are throughout the State of Florida; primary research in 16 Central Florida, east/west coast Counties is available through various support research services: Polk, Hardee, Highlands, Lake, Osceola County Property Appraiser's Office, First American Real Estate Solutions, Multiple Listing Passport, Multiple Listing Iris and CoStar Comp Services. Additionally, Hillsborough, Pasco, and Pinellas research is completed in-house through CoStar Comp. Hernando and Citrus Counties research is available through the Property Appraiser's Office.

**2. Contact person, phone number, fax number and internet e-mail address:**

Contact Person: Oswald P. Carrerou, SRA

Phone: 863-294-2384 Fax: 863-297-9781

Email: [ozzie.carrerou@arearealestate.com](mailto:ozzie.carrerou@arearealestate.com)

3. **Key appraisal personnel that will assist the appraiser and their proposed roles:** Key appraisal personnel are: Oswald P. Carrerou, SRA, (ST.Cert.Gen.#RZ0000271) is the Chief appraiser, signing all Commercial and Residential appraisal reports. His role within the company is consulting, quoting, reviewing and overall value analyses of all appraisals. This includes preparation of cost estimates, review of parcel cost estimates, specialized study of assignment effects or influences, market activity, market conditions, trends and adjustments, financing, and feasibility, analysis, opinions and conclusions relating to any and all specialty services as may be required to complete the Scope of Services. Additionally, managing and administration of sub consultants for land planning/engineering, traffic engineering, architectural studies, survey, fixture, furniture and equipment reports, environmental and wetland delineation, cost-to-cure estimates and any other specialty services needed to complete all appraisal assignments.

**SPECIAL MASTER APPOINTMENTS:**

<b>Alachua County:</b>	<b>2009, 2010, 2011, 2012</b>
<b>Highlands County:</b>	<b>1999, 2000, 2001, 2003-2008</b>
<b>Polk County:</b>	<b>2000, 2001, 2004 thru 2010</b>
<b>Brevard County:</b>	<b>2009, 2010, 2011, 2012</b>

On behalf of Polk, Brevard and Highlands County Mr. Carrerou has conducted and adjudicated ad valorem and tangible property disputes. During the course of these legal proceedings, decisions were rendered on property types such as shopping plazas, the two largest malls in Polk County, citrus processing facilities, water plants, hospitals, Assisted Living Facilities, radio towers and various types of residential property (improved and vacant).

4. **Counties with which are qualified as an expert witness:** County and Circuit Courts in Polk and Highlands County, Florida and United States Bankruptcy Court.
5. **Quality control plan:** Oswald P. Carrerou, SRA implements and completes an in-house review Quality Control Plan, that begins in the initial stages of the appraisal process. An important part of the QCP includes pro-activity with project managers, such as scheduled meetings with sub consultants to discuss appraisal methodology. In addition, Mr. Carrerou keeps abreast of recent case law and considers them an integral part of the review and appraisal process. Evaluation of criteria, procedures, assuring conformance with USPAP, FDOT Supplement Standards, any pertinent contracts, scope of work asked to perform will be implemented. Depending on the specific assignment and scope of work requirements for the appraisal, a modified, enhanced or revised review Quality Control Plan may be implemented

Mr. Carrerou will seek innovative ideas to enhance or to revise the QCP Plan to be implemented, setting tight schedules to be adhered to. It is necessary to set up and maintain the review process at each stage of analysis, so quality is consistent. A thorough review of the construction/building plans is conducted initially and throughout the project completion, allowing for changes in the course of the assignment. Rough drafts will be e-mailed to the appraisal manager to allow for additional input and possible changes before final copy is completed. This will enable the project assignment to be delivered on time, if not sooner.



OSWALD. P. CARREROU, SRA  
A.R.E.A REAL ESTATE APPRAISERS, INC.



Commercial Appraisal Department



Oswald Carrerou with Support Staff



Oswald P. Carrerou, SRA, President



Resources and Staff to get the job done



James R. Pruitt, Jr., Commercial Appraiser



Oswald and Leah Carrerou, working together



## PROFESSIONAL QUALIFICATIONS

### OSWALD P. CARREROU, President

A.R.E.A. REAL ESTATE APPRAISERS, INC.,  
State Certified General Contractor CGC 1511393  
State Certified General Real Estate Appraiser RZ271

Mr. Carrerou founded A.R.E.A. Real Estate Appraisers, Incorporated in 1982. He is currently the owner and President of the firm, which specializes in appraising commercial, industrial, agricultural, residential, and special purpose properties. Mr. Carrerou is committed to excellence and quality and is dedicated to providing superior customer service.

State Certified General Real Estate Appraiser,	1990, No. RZ271
President, A.R.E.A. Real Estate Appraisers, Inc.	SINCE 1982
President, Premier Construction, LLC	SINCE 1996
Special Magistrate Appointment:	
Highlands County, Florida	1999 – 2001, 2003 – 2008
Polk County, Florida	2000 – 2001, 2004 – 2010
Brevard County, Florida	2009, 2010, 2011, 2012
Alachua County, Florida	2009, 2010, 2011, 2012

## FORMAL EDUCATION

Florida State University - Tallahassee, Florida  
Bachelor of Science in Business Administration and Real Estate - 1978

## PROFESSIONAL ASSOCIATIONS, DESIGNATIONS & MEMBERSHIPS

APPRAISAL INSTITUTE, SRA Designation - 1982  
STATE CERTIFIED GENERAL REAL ESTATE APPRAISER, Since 1990, #RZ271 (State of Florida)  
STATE CERTIFIED GENERAL REAL PROPERTY APPRAISER, Since 2008, #332706 (State of Georgia)  
STATE CERTIFIED GENERAL CONTRACTOR 1511393  
Florida Association of Realtors  
East Polk County Association of Realtors  
Licensed Real Estate Broker - State of Florida

## EDUCATIONAL CREDITS -(Courses Completed)

Appraisal Institute  
SRA Designation, 1982  
410 Standard of Professional Practice Part a (USPAP)  
430 Standards of Professional Practice, Part "C"  
510 Advanced Income Capitalization  
520 Highest & Best Use and Market Analysis  
530 Advances Sales Comparison and Cost Approach  
Regression Analysis in Appraisal Practice  
707 Technology Forum, Part I  
713 Technology Forum Part II  
Appraisal of Retail Properties  
Subdivision Valuation  
Litigation Appraising

Florida State University  
Real Estate Principles and Practices  
Real Estate Finance  
Real Estate Appraisal  
Advanced Real Estate Appraisal  
Legal Environment of Real Estate  
Real Estate Feasibility Analysis

Florida Department of Revenue, Stephen Keller, Office of General Counsel  
Value Adjustment Board/Special Master Training Seminar  
Value Adjustment Board workshop on drafting new VAB procedures – Tallahassee, May 2009



OSWALD P. CARREROU, TYPES OF APPRAISALS COMPLETED

**AGRICULTURAL & VACANT LAND:**

Citrus Groves, Pasture and Crop Land  
Commercial & Industrial  
Residential  
Conservation/Reserved Wetlands

**RESIDENTIAL:**

Townhome, Villa, Duplex  
Single Family  
Condominium  
Planned Residential Subdivisions

**RESIDENTIAL INCOME PRODUCING:**

Apartment Buildings  
Small Residential Income (1-4 family)  
Proposed and Existing Townhome Developments

**INDUSTRIAL:**

Distribution, Storage & Mini-Storage Warehouses  
Flex-Space Industrial Buildings

**COMMERCIAL:**

Luxury Hotels  
Resort Motels  
Free-Standing & Multi-Story Office Buildings  
Professional Office Condominiums  
Community & Neighborhood Shopping Centers  
Free-Standing & Retail Strip Centers  
Mobile Home and Recreational Vehicle Parks  
Restaurants, Including Fast Food & Drive-Through  
Service Stations, Service Garages & Dealerships

**SPECIAL PURPOSE & OTHER:**

Have provided appraisal services, valuation analysis and consulting services.  
Completing several eminent domain appraisal assignments in Polk and Hillsboro Counties.  
Qualified as an Expert Witness Polk, Hillsboro through testimony in several trials and Order of Taking Hearings.

**EXPERIENCE**

1982 to Present	A.R.E. A. Real Estate Appraisers, Inc., President Single Family, Multiple Family, Condominium, Commercial Appraising (100% time appraising).
6/80 to 4/82	Cypress Gardens Realty, 290 Cypress Gardens Boulevard, Winter Haven, Florida. Single Family, Multiple Family, Condominium, Commercial Appraising (100% time appraising).
8/78 to 6/80	First Federal of Broward, Fort Lauderdale, Florida. Single Family, Multiple Family and Condominiums (100% time appraising).

THIS DOCUMENT HAS A COLORED BACKGROUND • MICROPRINTING • LINEMARK™ PATENTED PAPER		
<b>AC# 6437687</b>		<b>STATE OF FLORIDA</b>
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION FLORIDA REAL ESTATE APPRAISAL BOARD		
		<b>SEQ# L12100303345</b>
<b>DATE</b>	<b>BATCH NUMBER</b>	<b>LICENSE NBR</b>
10/03/2012	128038030	RZ271
The CERTIFIED GENERAL APPRAISER Named below IS CERTIFIED Under the provisions of Chapter 475 FS. Expiration date: NOV 30, 2014		
CARREROU, OSWALD P 1136 FIRST STREET SOUTH WINTER HAVEN FL 33880		
RICK SCOTT GOVERNOR	KEN LAWSON SECRETARY	
DISPLAY AS REQUIRED BY LAW		

**A.R.E.A. Real Estate Appraisers, Inc.**  
**P.O. Box 334**  
**Winter Haven, FL. 33882-0334**  
**863-294-2384/862-297-9781 fax**

**Professional References**

Bank of America  
Attn: Kathryn Candeloro  
100 North Westshore Blvd.  
2<sup>nd</sup> Floor  
Tampa, FL 33609  
813-288-2114

CenterState Bank  
Attn: Sharon Sutphin  
155 N. Lake Shore Way  
Lake Alfred, FL. 33850  
863-294-8178

Citizens Bank & Trust  
Attn: Connie Morris  
2 East Wall St.  
PO Box 7  
Frostproof, FL. 33843  
863-676-4165 xt. 223

Platinum Bank  
Attn: Ruth Marsh  
724 S. Florida Ave  
Lakeland, FL. 33801-5233  
863-616-1234

Dwellworks, LLC  
Attn: Kimberly Strukel  
4700 Richmond Rd  
Suite 500  
Warrensville Heights, OH. 44128  
816-682-4243


## *Certification of Training Taken*

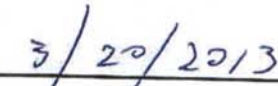
*The Florida Department of Revenue provides this document for a person to certify that he or she, personally and without any assistance, has taken the Department's 2012 Value Adjustment Board Training, excluding the exam, for Real Property Appraiser Special Magistrates.*

*I certify that I,*  
**Oswald Carrerou**  
**Post Office Box 334**  
**Winter Haven, Florida 33882**

*Personally and without any assistance, have carefully reviewed and studied the content of Modules 1 through 7 and Module 11 of the Department of Revenue's 2012 Value Adjustment Board Training, for the purpose of learning such content, but I have not taken the corresponding examination.*

**This certification becomes valid only when signed and dated below by the person who actually took the training as described above. By my dated signature below, I further attest to my preceding statements.**

  
\_\_\_\_\_  
**Signature and Certification of**  
**Oswald Carrerou**

  
\_\_\_\_\_  
**Date**



Special Magistrate Application  
Value Adjustment Board  
Escambia County, Florida

PAH CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: John Robinson

SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: [REDACTED]

HOME ADDRESS: 800 Windergrove Ct, Ocoee, FL 34761

BUSINESS NAME: Property Valuation & Consulting, Inc.

BUSINESS ADDRESS: 204 S. Dillard St., Winter Garden, FL 34787

PHONE NUMBER(S):

BUSINESS: 407-877-0200

HOME: 407-877-3757

FAX: 407-877-8222

CELL: 407-399-9818

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES ☒ NO

3. APPLICATION FOR: ATTORNEY SPECIAL MAGISTRATE  
☒ APPRAISER SPECIAL MAGISTRATE

HOURLY RATE / MINIMUM HOURS: \$125 / 8

4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. BAR NUMBER: \_\_\_\_\_ ADMISSION DATE: \_\_\_\_\_

- B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached qualifications



C. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

N/A

5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. DESIGNATION: MAI, CCIM  
LICENSE OR CERTIFICATION NUMBER: RZ417  
DATE LICENSED OR CERTIFIED: 1990 through 11/30/14

B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

N/A

C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

ORGANIZATION	DESIGNATION	DATE OF DESIGNATION	MEMBERSHIP NUMBER
Appraisal Institute	MAI	May 1989	8135
CCIM Institute	CCIM	November 1999	9080
Florida Real Estate Appraisal Board	Certified General Appraiser	Current through November 30, 2014	RZ417

NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.

D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

MAI - 5 years of appraisal experience and successful completion of required courses (7), demonstration appraisal report and comprehensive examination

CCIM - proof of MAI designation, successful completion of required courses (3) and comprehensive examination

E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

N/A

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

Have heard tangible VAB courses sporadically over  
past 17 years (most recently in 2010).

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

<u>PROPERTY TYPE</u>	<u>EXPERIENCE/SPECIALTY</u>
RESIDENTIAL REAL PROPERTY	<u>18 years including appraisal experience</u>
COMMERCIAL REAL PROPERTY	<u>18 years including appraisal experience</u>
TANGIBLE PROPERTY	<u>5-10 years</u>
OTHER (PLEASE SPECIFY)	<u>vacant land, income-producing and</u> <u>special purpose real estate</u>

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

<u>A. COUNTY</u>	<u>DATES SERVED</u>
<u>✓ Okaloosa</u>	<u>2010, 2011</u>
<u>✓ Escambia</u>	<u>2012</u>
<u>✓ Orange</u>	<u>1994-1996, 1998-1999, 2001-2007, 2009-2012</u>
<u>✓ Seminole</u>	<u>1991-2000, 2002-2003, 2006, 2010, 2011</u>
<u>✓ Brevard</u>	<u>1999-2012</u>
<u>✓ Pinellas</u>	<u>2008-2012</u>
<u>✓ Hillsborough</u>	<u>2008-2012</u>
<u>✓ Hernando</u>	<u>2012</u>
<u>✓ Polk</u>	<u>2012</u>



B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

N/A

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

N/A

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

N/A

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

Full-time real estate appraiser for past 29+ years, specializing in commercial real estate. Part-time real estate broker for past 25 years.

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.

  
SIGNATURE OF APPLICANT

3/25/13  
DATE

**QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM**  
**State-Certified General Appraiser #RZ417**

Business Address:

Property Valuation & Consulting, Inc.  
204 S. Dillard Street  
Winter Garden, FL 34787  
(407) 877-0200 Fax: (407) 877-8222

Residence Address:

800 Windergrove Court  
Ocoee, Florida 34761

Education

Auburn University - Auburn, Alabama  
BS in Business Administration, Major: Finance, December 1982  
Melbourne High School - Melbourne, Florida

Appraisal courses sponsored by The Appraisal Institute:

Course 1A, Part 1 - Real Estate Appraisal Principles, Univ. of North Carolina, July 1984  
Course 1A, Part 2 - Basic Valuation Procedures, University of San Diego, June 1985  
Course 1B, Part A - Capitalization Theory and Techniques, Orlando, Florida, May 1986  
Course 1B, Part B - Capitalization Theory and Techniques, Daytona Beach, Florida, September 1986  
Course 2-3 - Standards of Professional Practice, Orlando, Florida, March 1987  
Course 2-1 - Case Studies in Real Estate Valuation, Orlando, Florida, May 1987  
Course 2-2 - Valuation Analysis & Report Writing, Arizona State Univ., February 1988  
Comprehensive Examination, Atlanta, Georgia, August 1988  
Course 6 - Computer Assisted Investment Analysis, College Park, Maryland, June 1990  
Course II520 - Highest & Best Use and Market Analysis, Orlando, Florida, March 1994  
Course 430 - Standards of Professional Practice, Part C, Orlando, Florida, Sept. 1997  
Course 430 - Standards of Professional Practice, Part C, Altamonte Springs, FL, Nov. 2002  
Condemnation Appraising: Principles & Applications, Destin, FL, April 2009

Courses sponsored by the CCIM (Certified Commercial Investment Member) Institute:

Course CI 101 - Financial Analysis for Commercial Real Estate, October 1997  
Course CI 201 - Market Analysis for Commercial Investment Real Estate, May 1998  
Course CI 104 - Investment Analysis for Commercial Investment Real Estate, May 1999  
Comprehensive Examination - Orlando, Florida, November 1999

Courses sponsored by the American Society of Farm Managers and Rural Appraisers

Valuation of 'Conservation Easements' & Other Partial Interests in Real Property, September 2009

Appraisal seminars sponsored by The Appraisal Institute (and South Florida Water Management District):

Rate Extraction/Application, July 1989  
Impact of Environmental Considerations on Real Estate Appraisals, July 1989  
Standards of Professional Practice Update, July 1990  
Appraisal Regulations of the Federal Banking Agencies, November 1990  
Environmental Concerns, September 1991  
Subdivision Analysis, November 1991  
Standards of Professional Practice, October 1992  
Americans with Disabilities Act, February 1993  
Rates, Ratios & Reasonableness, February 1993  
Appraisal Review Overview, August 1993  
ARGUS Beginning Training, October 1993



**QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM**  
**State-Certified General Appraiser #RZ417**  
(Continued)

Appraising Troubled Properties, November 1993  
Limited Appraisal Round Table, June 1994  
Uniform Standards of Professional Appraisal Practice Update\*, June 1994  
(Instructed for Lincoln Graduate Center)  
HUD/FHA Training Session, November 1994  
Principles of Appraisal Review\*, January 1995 (Instructed for Lincoln Graduate Center)  
Analyzing Operating Expenses, March 1995  
Fair Lending and the Appraiser, June 1995  
Farm and Land Appraisal\*, June 1995 (Instructed for Lincoln Graduate Center)  
The Internet and Appraising, February 1997  
Understanding and Using DCF Software: A Comparison of ARGUS, PRO-JECT and  
DYNALASE, December 1997  
USPAP Update Core Law For Appraisers, February 1998  
Econometrics, June 1999  
Public Market for Real Estate, June 1999  
General Appraiser USPAP Update, June 1999  
Client Satisfaction/Retention/Development, June 1999  
Technology Forum, June 1999  
Appraising from Blueprints & Specifications, February 2000  
Current Appraisal Issues in Florida (South Florida Water Management District), May 2000  
Professional Standards USPAP Update/Florida Law for Real Estate Appraisers, August 2000  
Florida State Law and USPAP Review for Real Estate Appraisers, April 2002  
Appraisers and the Gramm-Leach-Bliley Act, April 2002  
Mark-to-Market-The Next FIRREA, April 2002  
Current Appraisal Issues in Florida (South Florida Water Management District), May 2002  
Internet Appraisal Research and the Florida Appraiser, May 2003  
2003 South Florida Water Management District Appraisal Seminar, May 2003  
Appraising A Proposed Property, February 2004  
Florida Appraiser's State Law Update, March 2004  
Course 400 – National USPAP Update Course, March 2004  
Uniform Standards for Federal Land Acquisitions, March 2004  
2004 South Florida Water Management District Appraisal Seminar, May 2004  
Real Estate Finance, Value and Investment Performance, February 2005  
2005 South Florida Water Management District Appraisal Seminar, May 2005  
Subdivision Valuation: A Comprehensive Guide to Valuing Improved Subdivisions, February 2006  
2006 South Florida Water Management District Appraisal Seminar, April 2006  
2006 Scope of Work and the New USPAP Requirements Seminar, June 2006  
2006 New Technology for the Real Estate Appraiser: Cool Tools Seminar, June 2006  
Florida Core Law and National USPAP Update, September 2006  
Business Practices and Ethics, May 2007  
2007 South Florida Water Management District Appraisal Seminar, May 2007  
USPAP Update Course including Florida Law and Supervisor/Trainee Roles & Relationships, April 2008  
2008 South Florida Water Management District Appraisal Seminar, May 2008  
Course-I400 – National USPAP Update Course, July 2010  
Florida Law and Supervisor/Trainee Roles & Rules, July 2010  
Uniform Standards for Federal Land Acquisitions: Yellow Book, February 2011  
Appraising the Appraisal, January 2012  
Business Practices and Ethics, March 2012

**QUALIFICATIONS OF JOHN A. ROBINSON, MAI, CCIM**  
**State-Certified General Appraiser #RZ417**  
(Continued)

Fundamentals of Separating Real Property, Personal Property and Intangible Business Assets, March 2012  
Trial Components: Recipe For Success of Disaster?, August 2012  
USPAP Update Course, November 2012  
Marketability Studies: The Six-Step Process and Basic Applications, March 2013  
Marketability Studies: Advanced Considerations and Applications, March 2013

Real Estate Experience

2000- - President, Property Investment Specialists, Inc., Winter Garden, FL  
1994- - President, Property Valuation & Consulting, Inc., Orlando, FL  
1991-1994 - Vice President/Senior Review Appraiser, First Union Corporation, Orlando, FL  
1990-1991 - Appraisal Review Officer, Southeast Bank, N.A., Orlando, FL  
1986-1990 - Senior Appraiser, SEMCO Services, Inc., Orlando, FL  
1985-1986 - Appraiser, Pardue, Heid, Church, Smith & Waller, Inc., Orlando, FL  
1983-1985 - Appraisal/Property Manager, Sherrill Realty Company, Pensacola, FL

Appraisal experience includes narrative and form report writing and review of single-family and multi-family residential, agricultural, commercial (office, retail, hotels/motels), industrial, special purpose and vacant land properties. Experience includes providing expert witness testimony.

Publications

"Scope of the Appraisal - A Practical Analysis", *The Appraisal Journal*, January 1992, *The Canadian Appraiser*, Winter 1993

Professional Affiliations and Memberships

Member Appraisal Institute (MAI Number 8135)  
Certified Commercial Investment Member (CCIM Number 9080)  
State-Certified General Appraiser, License No. RZ417  
Licensed Florida Real Estate Broker/Salesman - Active Status  
1991 and 1993 Young Advisory Council - Appraisal Institute  
Florida General Appraiser Instructor, License No. GA1000019  
Approved Instructor for Lincoln Graduate Center, San Antonio, Texas  
Approved Instructor for Valencia Comm. College Adult Ed. (R.E. Appraisal), Orlando, Florida  
Selected as Special Master for Orange County (1994-1996, 1998, 1999 and 2001-2007, 2009-2012), Seminole County (1997-2000, 2002-2003, 2006 and 2010-2011), Volusia County (1999-2009), Brevard County (1999-2012), Indian River County (2004-2007), Citrus County (2005, 2006, and 2008-2009), Hillsborough County (2008-2012), Pinellas County (2008-2012), Escambia County (2012), Polk County (2012), Hernando County (2012) and Okaloosa County (2010-2011)

References

Available upon request



AC# 670750

STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION  
FLORIDA REAL ESTATE APPRAISAL BD

SEQ# L12111401109

DATE	BATCH NUMBER	LICENSE NBR
11/14/2012	128147602	RZ417

The CERTIFIED GENERAL APPRAISER  
Named below IS CERTIFIED  
Under the provisions of Chapter 475 FS.  
Expiration date: NOV 30, 2014

ROBINSON, JOHN ALAN  
204 S DILLARD ST  
WINTER GARDEN

FL 34787

RICK SCOTT  
GOVERNOR

DISPLAY AS REQUIRED BY LAW

KEN LAWSON  
SECRETARY



430 N. Michigan Avenue  
Chicago Illinois 60611.4092  
Telephone 312.321.4460  
Facsimile 312.321.4530

November 10, 1999

John A. Robinson, CCIM  
Property Valuation and Consultant, Inc  
331 Northland Avenue  
Suite B-4  
Maitland, FL 32751

*Affiliated with the  
NATIONAL ASSOCIATION  
OF REALTORS®*

Dear John:

***Congratulations on earning your CCIM Designation!***

I sincerely hope that one of your membership goals includes active involvement in our organization. We find that the greatest overall satisfaction is derived from active members who utilize all the services we offer. We cannot effectively serve you as an organization, a networking medium or to have education and career development resource without your active participation. Get involved and feel free to contact me personally with any suggestions, comments or questions you may have about the Institute. Consider getting involved in your local CCIM chapter as well.

The CCIM designation number assigned to you is 9080. You will need this to access the CCIM Web site. Remember, all United States designees are required to be members of National Association of Realtors® (NAR) through a local board or association as either a REALTOR® or Institute Affiliate Member. If you choose Institute Affiliate Membership, simply present a copy of this letter to your local board to certify your CCIM status.

Again, congratulations on this milestone accomplishment in your career, and welcome to the ever-growing roster of CCIM's pledged maintain professional knowledge, expertise, and ethical practice in commercial real estate.

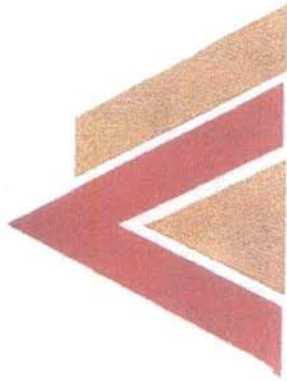
If you have any questions, feel free to contact Cathy Wright, CIREI Designation Supervisor 800/621-7027 ext. 4495.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. Duncan Patterson".

W. Duncan Patterson, CCIM  
2000 CIREI President





**APPRAISAL  
INSTITUTE**

# MEMBERSHIP CERTIFICATE

*This Certifies That*

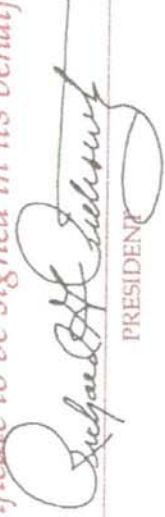
**John Alan Robinson**

*was admitted to membership in the American Institute  
of Real Estate Appraisers as an **MAI Member** (8135)  
on the 22nd day of May, 1989 and by virtue  
of the unification of the American Institute of Real Estate Appraisers  
and the Society of Real Estate Appraisers has become an*

## **MAI Member**

*in the Appraisal Institute and is entitled to all the rights and  
privileges of membership subject only to the limiting  
conditions set forth from time to time in the Bylaws and  
Regulations of the Appraisal Institute.*

*In Witness Whereof, the Board of Directors of the Appraisal Institute has  
authorized this certificate to be signed in its behalf by the President.*

  
PRESIDENT





John A. Robinson, MAI, CCIM  
State-Certified General Appraiser #RZ417  
Richard L. Steeves  
State-Certified General Appraiser #RZ2909  
Lori R. Linqunti  
State-Registered Trainee Appraiser #RI15251  
Ana Arroyo  
State-Certified General Appraiser #RZ3450  
www.PropertyValue.com

April 30, 2012

Mr. [REDACTED] (in representation of [REDACTED] Bank)  
[REDACTED]  
[REDACTED], Orlando, Florida 32801  
[REDACTED].com

RE: An 11.92 Gross/ Net Upland Acre Vacant Site  
West Side of [REDACTED] and North and East Sides of [REDACTED]  
[REDACTED], Winter Haven, Polk County, Florida 33801  
Tax ID # [REDACTED] and [REDACTED]

Dear [REDACTED]:

Per your request, this letter serves to address in a succinct manner the weaknesses of an appraisal report of the referenced property prepared by [REDACTED], with an effective date of the appraisal of July 20, 2011 (the appraisers who signed the report are [REDACTED] and [REDACTED]). The following deficiencies were noted:

The appraisal identifies the type of report format as a restricted or summary. Standards of Professional Practice dictate that the format has to be one or the other, not both. Based on the limited details and analysis in this report, a restricted appraisal is obviously what this report best represents.

The appraisers state that they have not previously provided an appraisal of the property within a 3-year period prior to the July 20, 2011 date of value; however, on page 4 of the report they state that the property was appraised for another lender in July 2008, a three-year period.

A zoning ordinance is referenced permitting 180 multifamily units; however, an assisted living facility at a density of 36 units per acre was considered highly probable based on previous zoning that would indicate 429 potential units. However, the valuation analysis is based on 180 units with no consideration to what is reported as highly probable. The appraisers report \$140,000 was spent to have the site engineered which included surveys, permits and reports. Although this information

204 South Dillard Street, Winter Garden, Florida 34787  
Phone (407) 877-0200 Fax (407) 877-8222



was not known to me in our appraisal of the subject property, this amount was not added to the value conclusion based on the comparable sales and listing data analyzed.

The appraisers did not apply a market conditions adjustment which is questionable given the comment on page 4 that the market has shown depreciation rates under or around 10% over the past 12-18 months. The sales are somewhat current, however (June 2010 to September 2011).

Regarding the comparable sales analyzed by the appraisers, the first comparable sale did not even close until September 2011, *after* the effective date of value of July 2011. Perhaps the property was under contract at the valuation date; however, that information is not provided in the report. In addition, I do not consider the location of Comparable 1 to be similar to the subject location at all due to the market influences of the dynamic S. International Drive tourist area. The appraisers made no adjustments for locational characteristics to Comparable 1. Comparable 2 was a common sale to our appraisal as well; however, the sale price we reported per our verification sources (the broker who handled the sale as well as CoStar data service) was \$1,900,000. It does not appear that the appraisers confirmed this sale with a party to the transaction as the deed does show \$1,590,000. Additionally, the appraisers applied a 10% downward adjustment to the sale price for conditions of sale but state that the adjustment is made for favorable tax credit financing considerations. Our verification source did not reference any seller financing or anything that would require a conditions of sale or financing adjustment for the tax credit considerations of this property. Comparables 3, 4 and 5 are in the Tampa metro area and do not have the same market influences in my opinion as comparables in metro Orlando/Central Florida. Comparable 4 may be marginally worthy of consideration, given it is in a smaller county/population base, somewhat like Winter Haven. However, no maps or details are provided about the sales to have any degree of confidence for determining how appropriate they may be for comparison with the subject. Two of the three listings analyzed are in Orange County in a very upper-end area. The third listing is in Osceola County in the Four Corners area, an area greatly influenced by tourism. All of the comparable listings are superior to the subject location; however, none of the listings were adjusted downward for superior location and Comparable 3 was adjusted upward 5% for an inferior location to the subject. None of the sales or listings used are in Polk County, where the subject is located. Finally, the waterfront adjustments of 25% and entitlements adjustment of 15% (positive and negative) appear somewhat excessive and have no market support.

An underlying concern of this report is the appraisers reference their 2008 value of \$4,500,000 and seem to tie this current valuation analysis to that report in an updated type of fashion. Furthermore, through this process, the appraisers reveal the decline in value since 2008, but again contradict themselves in not applying a time adjustment to the comparable sales. The analysis from the comparable sales indicates a reconciled value of \$14,000 per unit (\$2,520,000 based on 180 units, which is flawed as previously discussed). Furthermore, this value of \$14,000 per unit is shown to reveal a 44% decline from their 2008 value of \$25,000 per unit. This decline is then compared with a time adjustment chart (Exhibit A) based on median housing prices over a 10-year period (2002-2011) on a national scale (source: National Association of Realtors) and results in the opinion that an appropriate downward adjustment to the **2008 value** of \$25,000 is 20% to 30% (resulting in an adjusted value range from \$17,500 to \$20,000 per unit). This time adjustment national chart has no

Mr. [REDACTED]  
April 30, 2012  
Page 3

relevance to the subject property in my opinion. Comparable listings are then analyzed and reconciled at a unit value of \$17,000 (based on a range of adjusted values from \$15,000 to \$17,841 per unit and a median unit value of \$16,747). The final conclusion of \$16,000 per unit or \$2,880,000 is based on consideration of the indication from the comparable sales (\$14,000 per unit), the adjusted value of \$17,500 to \$20,000 per unit from the time adjustment chart methodology (not an acceptable appraisal practice) and the value indication from the comparable listings. The value conclusion is based on the opinion that the apartment market is showing continual signs of improvement, warranting a value towards the mid-point of the referenced range. This appraisal methodology used in the "second valuation analysis" in concluding at a final unit value is not an acceptable appraisal practice. Combined with the inadequacies in the analyses of the comparable sales and listings as stated, the value estimate is not reliable or credible in my opinion.

I trust this letter will suffice for your needs. Let me know if you have any questions or if I can be of additional assistance.

Sincerely,



John A. Robinson, MAI, CCIM  
State-Certified General Appraiser  
License No. RZ417

**Special Magistrate Application  
Value Adjustment Board  
Escambia County, Florida**

**PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:31  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Steven L. Marshall, MAI, SRA

SOCIAL SECURITY NUMBER: [REDACTED]

HOME ADDRESS: 825 Palmer Avenue, Winter Park, Florida 32789

BUSINESS NAME: Clayton, Roper & Marshall, Inc.

BUSINESS ADDRESS: 246 N. Westmonte Drive, Altamonte Springs, Florida 32714

PHONE NUMBER(S):

BUSINESS: (407) 772-2200, x 314

HOME: (407) 628-9577

FAX: (407) 772-1340

CELL: (407) 256-1518

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY?        YES   X   NO

3. APPLICATION FOR:        ATTORNEY SPECIAL MAGISTRATE  
  X   APPRAISER SPECIAL MAGISTRATE

HOURLY RATE / MINIMUM HOURS:   \$149  /  8  

4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. BAR NUMBER:        N/A        ADMISSION DATE:       

- B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached Qualifications  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_





E. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

N/A

6. DESCRIBE EXPERIENCE YOU HAVE APPRAISING TANGIBLE PROPERTY:

See attached Qualifications

7. LIST ANY EXPERIENCE AND/OR SPECIALTY FOR THE FOLLOWING PROPERTY:

PROPERTY TYPE	EXPERIENCE/SPECIALTY
RESIDENTIAL REAL PROPERTY	See attached Qualifications
COMMERCIAL REAL PROPERTY	
TANGIBLE PROPERTY	
OTHER (PLEASE SPECIFY)	

8. IF YOU HAVE PREVIOUSLY SERVED AS A SPECIAL MAGISTRATE, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A.	COUNTY	DATES SERVED
	Osceola	1990-2005
	Orange	1989-1993, 1999-2001
	Santa Rosa	1999-2000, 2002-2005
	Escambia	1999-2000, 2002-2004, 2009, 2010, 2011
	Brevard	1992-1997 (best of my recollection)

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

N/A

---

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

None

---

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

None

---

10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

I had the honor of serving as an Escambia County VAB Special Magistrate in 2011. I heard many petitions involving properties located at Pensacola Beach. I believe I demonstrated exceptional knowledge of applicable case law, valuation techniques and market knowledge. Several participants and observers complimented me for providing high level services to the VAB. I handled each petitioner with dignity and respect. I have worked as a Special Magistrate in five Florida counties since 1989. In 2006, I was Chairperson for the Florida Statute, Chapter 475, Part II, re-write committee. This is the Florida Statute that regulates the appraisal industry in Florida. The updated law, that I helped write, incorporates AQB criteria promulgated by the Appraisal Foundation. I received a Letter of Appreciation from the Chairman of the DBPR for my efforts. I have made seminar presentations, on three separate occasions, to elected property appraiser officials (state-wide meetings) regarding the Valuation Adjustment Board process and the role of the Special Magistrate. Also, I have recently served on a speaker panel regarding the VAB process in a Continuing Education seminar with The Appraisal Institute.



11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.

  
SIGNATURE OF APPLICANT

April 2, 2013  
DATE

STEVEN L. MARSHALL, MAI, SRA

STATE OF FLORIDA CERTIFICATION

THIS DOCUMENT HAS A COLORED BACKGROUND • MICROPRINTING • LINEMARK™ PATENTED PAPER		
AC# 670746		STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION		
FLORIDA REAL ESTATE APPRAISAL BD		SEQ# L12111401105
DATE	BATCH NUMBER	LICENSE NBR
11/14/2012	128146095	RZ155
The CERTIFIED GENERAL APPRAISER Named below IS CERTIFIED Under the provisions of Chapter 475 FS. Expiration date: NOV 30, 2014		
MARSHALL, STEVEN L 246 N WESTMONTE DRIVE ALTAMONTE SPRINGS FL 32714		
RICK SCOTT GOVERNOR		KEN LAWSON SECRETARY
DISPLAY AS REQUIRED BY LAW		

# QUALIFICATIONS OF STEVEN L. MARSHALL, MAI, SRA

## **BUSINESS ADDRESS**

Clayton, Roper & Marshall  
246 North Westmonte Drive  
Altamonte Springs, Florida 32714

Ph: (407) 772-2200, x 314  
Fax: (407) 772-1340  
smarshall@crmre.com

## **PROFESSIONAL DESIGNATIONS AND ASSOCIATIONS**

MAI, SRA	Appraisal Institute
Member	Orlando Board of Realtors
Member	Florida and National Association Realtors
Registered Real Estate Broker	State of Florida
State-Certified General Real Estate Appraiser	State of Florida - Expires November 30, 2014
License Number:	RZ 155
FNMA Number:	1195447

## **EDUCATION**

B.A. Degree, Communication Arts, University of West Florida - 1975

## **REAL ESTATE COURSES UNDER THE DIRECTION OF THE APPRAISAL INSTITUTE**

*(formerly American Institute of Real Estate Appraisers):*

Course I-A	Basic Appraisal Principles
Course I-B	Capitalization Theory and Techniques
Course II	Valuation Analysis and Report Writing Methods & Techniques
Course II-1	Case Studies in Real Estate Valuation
Course VI	Introduction to Real Estate Investment Analysis
Course VIII	Single-Family Residential Appraisal
SPP	Standards of Professional Practice
R-2	Narrative Report Writing

The Appraisal Institute conducts a voluntary program of continuing education for its designated members. MAI's who meet the minimum standards of this program are awarded periodic educational certification. I am currently certified under this program through December 31, 2016.

## **CREDIT FOR COURSES UNDER THE DIRECTION OF THE APPRAISAL INSTITUTE**

*(formerly the Society of Real Estate Appraisers):*

Course 101	Introduction to Appraising Real Property
Course 201	Principles of Income Property Appraising
R-2	Narrative Report Writing

## **COMPLETED EXAMINATIONS FOR REAL ESTATE SECURITIES AND SYNDICATION EDUCATION UNDER THE DIRECTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS**

Series 22	Direct Participation Program Representative
Series 39	Direct Participation Program Principal



**CREDIT FOR THE FOLLOWING SEMINARS SPONSORED BY THE APPRAISAL INSTITUTE\*  
AND OTHER ENTITIES**

*(\*formerly the American Institute of Real Estate Appraisers and the Society of Real Estate Appraisers):*

IRS Valuation - Webinar  
Appraisal Regulations of the Federal Banking Agencies (Title XI FIRREA)  
Federal Home Loan Bank Board - Memorandum R-41b  
Federal Home Loan Bank Board - Memorandum R-41c  
Valuation and Evaluation of Proposed Projects  
Creative Financing/Cash Equivalency  
Investment Feasibility  
Market & Marketability Analysis  
Cash Flow & Risk Analysis  
Narrative Report Writing Seminar  
Standards of Professional Practice  
Environmental Concerns - Hazardous Waste  
Appraiser State Certification Program  
Investment Criteria of Purchasers of Major Commercial Properties  
Hotel Valuation  
Appraising in a Changing Economy  
Using Lotus 1-2-3 in the Appraisal Office  
Electronic Spreadsheet in the Appraisal Office  
Real Estate Appraisal Course Instructor's Clinic  
Appraising Interim Use Properties  
Easement Valuation  
Understanding Limited Appraisals and Reporting Options - General  
Single-Family Construction  
HP-12C Calculator  
From the Appraiser to the Underwriter  
Professional Standards USPAP Update Core Law for Appraisers  
Analyzing Operating Expenses  
Land Management Dept. 1995, 1996 and 1997 Annual Seminar (S. Fla. Water Mgmt. District)  
Argus Financial Software Use Seminar  
The Internet and the Appraiser  
Understanding and Using DCF Software  
Appraising Rural Properties in southeast Florida  
Professional Standards USPAP Update Core Law for Appraisers  
Valuation and the Evolution of the Real Estate Capital Market  
Condemnation Appraising: Basic Principles and Applications  
Condemnation Appraising: Advanced Principles and Applications  
SFWMD Current Appraisal Issues in Florida  
The IRS and FLPs: Where Are We Now  
Determination of Value - What is Fair? A Public Interest Value Program  
Recent Developments in Federal Tax Valuation  
The Real Estate Capital Markets: Case Studies in Valuation  
Section 8/HUD: Rent Comparability Studies  
Government & Public Relations Chapter Forum

Appraisal Review Seminar – General  
Florida Core Law Update  
Subdivision Analysis  
Uniform Standards for Federal Land Acquisitions “The Yellow Book, Tallahassee, Florida  
7-Hour National USPAP Update Course  
Rail Corridor Acquisition Seminar  
Appraising from Blueprints and Specifications  
The Road Less Traveled: Special Purpose Properties  
Business Practices and Ethics  
2006 Scope of Work and the New USPAP Requirements  
Evaluation Commercial Construction  
A Professional's Guide to Conservation Easements  
Case Studies in Commercial Highest and Best Use  
Sovereignty Submerged Land Easements  
Appraisal Curriculum Overview (2 Day General)  
Uniform Standards of Professional Appraisal Practice (2010)  
Fundamentals of Separating Real Property, Personal Property and Intangible Business Assets  
Appraising the Appraisal: Appraisal Review-General  
HUD Multi-Family Accelerated Processing (MAP) - 3rd Party Technical Training Seminar

**EXPERT WITNESS EXPERIENCE**

U.S. Federal Bankruptcy Court  
Circuit Courts of Brevard, Orange, Osceola, Pasco, Santa Rosa, Seminole and Volusia Counties.

**PROFESSIONAL ACTIVITIES**

2006 – 2007 National Board of Directors, Appraisal Institute  
2007 Chairman, Region X (Florida/Puerto Rico) Appraisal Institute  
2006 Vice Chairman, Region X (Florida / Puerto Rico) Appraisal Institute  
2005 – 2006 State Chairman, Florida AQB Criteria Implementation Task Force  
2003 State Chairman – Florida Statute 475 Part II Rewrite Committee  
2000 to 2006: Chairman, State Governmental Affairs, Region X, Appraisal Institute  
2005 Director Region X, Appraisal Institute  
2003 Outstanding Service Award, Appraisal Institute  
1995: Public Relations Committee Chairman, Region X, Appraisal Institute  
1995: Member, National General Appraiser Board Examination Subcommittee  
1990 - 1992: Member, National Public Relations Committee, Appraisal Institute  
1991, 1992, 1999 to 2004: Region 10 Representative for East Florida Chapter, Appraisal Institute  
1989 National Chairman - Young Advisory Council - Society of Real Estate Appraisers  
Member - 1990 National Conference Committee, Society of Real Estate Appraisers  
President, 1990 - Florida Chapter 100, Appraisal Institute  
Member, Board of Directors, 1999-2001, East Florida Chapter, Appraisal Institute  
Member - Board of Directors - 1986-1992 - Central Florida Chapter, Appraisal Institute  
Member - East Florida Chapter, Appraisal Institute (Served on Government Affairs & Admissions Committees)  
Alumni - Leadership Orlando Program - Orlando Chamber of Commerce  
Special Magistrate - Property Appraisal Adjustment Board - Orange, Brevard, Osceola, Santa Rosa, and Escambia Counties, Florida



**PARTIAL LIST OF PAST CLIENTS**

Attorneys' Title Insurance Fund, Inc.	Lincoln Property Company
Banco Popular	Lockheed Martin
BankFirst	Metropolitan Life
Bank of America	M&I Marshall & Ilsley Bank
BB&T	Mercantile Bank
Chicago Title	Mobile Home Communities, Inc.
Citicorp Real Estate	Nara Bank
Citizens Bank of Florida	National City Bank
City of Orlando, Florida	New York Life
City of Pensacola, Florida	Orlando Neighborhood Improvement Corporation
CNL Bank	Orange County
Escambia County	Osceola County
Exxon Company, USA	PNC Bank
Federal Department of Energy	Pensacola Housing Authority
Federal Deposit Insurance Corporation	Prudential Insurance
Federal National Mortgage Association	Regions Bank
First Horizon	St. Joe Company
First Southern Bank	Seminole County
Florida Bank of Commerce	South Florida Water Management District
Florida Community Partners	SunTrust
Florida Department of Environmental Protection	SunTrust Mortgage, Inc.
GMAC	TD Bank
Greater Orlando Chamber of Commerce	Trammell Crow Company
General Services Administration	Trust Company Bank
General Electric Mortgage Insurance Companies	United Southern Bank
Hancock Bank	U.S. Bank
Howard Johnson Company	Wells Fargo
John Hancock Insurance	Westinghouse Electric Company
KeyBank	Zions First National Bank
Key West Redevelopment Agency	ZOM Communities Inc.

**APPRAISAL EXPERIENCE**

I have completed a variety of appraisal and valuation assignments for commercial banks, insurance companies, other financial institutions and asset managers. I have extensive experience in subdivision development, industrial warehouses, apartments, shopping centers, office buildings, condominiums, hotels, mobile home parks, golf courses, retirement centers and undeveloped land. In addition to real estate valuation, past assignments include discounted cash flow analysis, leased fee and leasehold interest, highest and best use studies, market/feasibility studies, investment analysis and other forms of analysis involving investment grade properties.

I have served as a Special Magistrate or hearing officer reviewing property owner disputes regarding county valuations and exemptions in Orange, Brevard, Osceola, Santa Rosa, and Escambia Counties. I am familiar with Florida Statutes, case law, and Florida Department of Revenue rules and procedures regarding real property assessment and tax issues. I have made presentations regarding Value Adjustment Board Hearings to the Property Appraiser's Association of Florida (elected public appraiser) and the International Association of Assessing Officers (IAAO) and The Appraisal Institute.

Special consultation assignments include preparation of appraisal guidelines, procedures, and policy manuals for use by mortgage lenders. I have presented a "Use of Real Estate Appraisals" seminar held for several Florida based financial institutions. I have made presentations to the Florida Department of Revenue, the real estate section of the Orange County Bar Association, the Florida Academy of Trial Lawyers, Building Owners & Managers Association (BOMA), and the Jacksonville Chapter of the Florida Institute of Certified Public Accountants. I participated in a seminar and mock trial regarding valuation of contaminated properties with the American Bar Association - Section of Litigation at their national convention. Recently (2003 – 2005), I chaired a panel of appraisers representing a coalition of prominent national appraisal organizations and prepared a rewrite/update of Florida Statute 475, Part II. This statute is the Florida law pertaining to the real estate appraisal profession.

**STATE OF FLORIDA CERTIFICATION**

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<b>AC# 670746</b>		<b>STATE OF FLORIDA</b>
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION FLORIDA REAL ESTATE APPRAISAL BD		<b>SEQ# L12111401105</b>
DATE	BATCH NUMBER	LICENSE NBR
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MARSHALL, STEVEN L 246 N WESTMONTE DRIVE ALTAMONTE SPRINGS FL 32714		
RICK SCOTT GOVERNOR		KEN LAWSON SECRETARY
DISPLAY AS REQUIRED BY LAW		



## STEVEN L. MARSHALL: REFERENCES

### **Hancock Bank**

Gulfport, Mississippi  
Contact: Leslie North, MAI  
Phone: (228) 563-7942  
E-mail: [leslie\\_north@hancockbank.com](mailto:leslie_north@hancockbank.com)

### **Old Florida National Bank**

315 E. Robinson Street, Suite 100  
Orlando, Florida 32801  
Contact: H.E. (ED) Davis  
Executive Vice President  
Phone: (407) 650-9816  
E-mail: [hedavis@oldfnb.com](mailto:hedavis@oldfnb.com)

### **Keybank Real Estate Technical Services (KRETS)**

4200 West Cypress Street, Suite 490  
Tampa, Florida 33607  
Contact: Janet Gutin,  
Senior Vice President  
Phone: (813) 313-5523  
E-mail: [janet\\_gutin@keybank.com](mailto:janet_gutin@keybank.com)

### **Escambia County, FL (Pensacola)**

Escambia County Clerk's Office  
Escambia County Governmental Complex  
221 Palafax Place, Suite 130  
Pensacola, Florida 32502-5843  
Contact: Doris Harris  
Clerk  
Phone: (850) 595-3918  
E-mail: [dharris@clerk.co.escambia.fl.us](mailto:dharris@clerk.co.escambia.fl.us)

### **BMO Harris Bank, N.A.**

Commercial RE Appraisal Services Unit (CREASU)  
501 E. Kennedy Boulevard, Suite 900  
Tampa, Florida 33602  
Contact: Julie R. Webster  
AVP/Florida Regional Review Appraiser  
Phone: (813) 204-1937  
E-mail: [Julie.Webster@MICorp.com](mailto:Julie.Webster@MICorp.com)

### **Iberia Bank**

2150 Goodlette Road North  
Naples, Florida 34102  
Contact: Ray Melton  
Phone: (239) 403-6621  
E-mail: [Ray.Melton@IberiaBank.com](mailto:Ray.Melton@IberiaBank.com)

### **Wells Fargo**

2859 Paces Ferry Road, Suite 1200  
Atlanta, Georgia 30339  
Contact: Robert J. Franc, MAI  
Phone: (727) 578-8581  
E-mail: [robert.j.franc@wellsfargo.com](mailto:robert.j.franc@wellsfargo.com)

### **SunTrust Bank, Central Florida**

200 South Orange Avenue, Tower 5  
Mail Code 0-1053  
Orlando, Florida 32801  
Contact: Andrew J. Grossmann  
Phone: (407) 237-4718  
E-mail: [andrew.grossmann@suntrust.com](mailto:andrew.grossmann@suntrust.com)

### **Florida Community Bank**

1261 Homestead Road  
Lehigh Acres, Florida 33936  
Contact: Karen Bailey  
Assistant Vice President  
Phone: (239) 368-4021  
E-mail: [Kbailey@fcb1923.com](mailto:Kbailey@fcb1923.com)

### **Florida Department of Environmental Protection**

Bureau of Appraisal / Division of State Lands  
3900 Commonwealth Boulevard, Mail Station #110  
Tallahassee, Florida 32399-3000  
Contact: S. Michael Herran MAI  
Chief Appraiser  
Phone: (850) 245-2658  
E-mail: [mike.herran@dep.state.fl.us](mailto:mike.herran@dep.state.fl.us)

### **Citizens Bank of Florida**

P. O. Box 729  
Oviedo, Florida 32765  
Contact: Terry Vargo  
Senior Vice President  
Phone: (407) 365-5631  
E-mail: [tvargo@mycbfl.com](mailto:tvargo@mycbfl.com)

### **TD Bank**

1501 Main Street; Loc Code SC 963-61, 3rd Floor  
Columbia, SC 29201  
Contact: William C. Crosby  
Chief Appraiser  
Phone: (803) 540-2737  
E-mail: [william.crosby@bankmercantile.com](mailto:william.crosby@bankmercantile.com)

**CNL Bank**

450 S. Orange Avenue  
Orlando, Florida 32801  
Contact: Karen Bowling  
Phone: (407) 992-1703  
E-mail: [kbowling@cnlbank.com](mailto:kbowling@cnlbank.com)

**Everbank**

300 West Adams Street  
Jacksonville, Florida 32201  
Contact: Jim St. John  
Phone: (904) 350-7513  
E-mail: [Jim.stjohn@everbank.com](mailto:Jim.stjohn@everbank.com)

**Orange County School Board**

6501 N. Magic Way, 100A  
Orlando, Florida 32809  
Contact: Timothy Radabaugh, MAI  
Senior Real Estate Manager  
Phone: (407) 317-3700, x 5405  
E-mail: [radabat@ocps.net](mailto:radabat@ocps.net)

**Regions Financial Corporation**

1710 Barton St.  
Longwood, FL 32750-6803  
Contact: Susan E. Baker, MAI  
Vice President  
Phone: (407) 758-4486  
E-mail: [appraisersusan@yahoo.com](mailto:appraisersusan@yahoo.com)

**United Southern Bank**

2701 South Bay Street  
Eustis, Florida 32726  
Contact: Greg Lewis  
Executive Vice President  
Phone: (352) 483-3056  
E-Mail: [greg.lewis@unitedsouthernbank.com](mailto:greg.lewis@unitedsouthernbank.com)

**Surety Bank**

1990 Woodland Boulevard  
Deland, Florida 327203  
Contact: Suzette Hill  
Vice President  
Phone: (386) 734-1647  
E-mail: [shill@mysuretybank.com](mailto:shill@mysuretybank.com)

**BB&T**

Real Estate Support  
4600 New Bern Avenue, Suite 101  
Raleigh, North Carolina 27610-1463  
Contact: Charles R. Wolfe, MAI  
Vice President-Senior Review Officer  
Phone: (919) 212-3736

**Insurance Office of America**

1855 West State Road 434  
Longwood, Florida 32750  
Contact: John Ritenour  
Phone: (407) 998-4101  
E-mail: [john.ritenour@ioausa.com](mailto:john.ritenour@ioausa.com)

**First Southern Bank**

945 South Orange Avenue  
Orlando, Florida 32806  
Contact: Patrick Dunigan  
Phone: (407) 563-0231  
E-mail: [patrick.dunigan@firstsouthernbank.com](mailto:patrick.dunigan@firstsouthernbank.com)

**Florida Hospital**

1919 N. Orange Avenue, Suite E  
Orlando, Florida 32804  
Contact: Jody Barry  
Director of Real Estate  
Phone: (407) 303-1125  
E-mail: [jbarry@ahss.org](mailto:jbarry@ahss.org)

**Lee Vista Center**

P. O. Box 620365  
Orlando, Florida 32862  
Contact: Richard T. Lee  
Chief Executive Officer  
Phone: (407) 857-2835  
E-mail: [24xxldog@bellsouth.net](mailto:24xxldog@bellsouth.net)



**ERNIE LEE MAGAHA  
CLERK OF THE CIRCUIT COURT  
ESCAMBIA COUNTY, FLORIDA**

**VAB - Special Master Hearing Worksheet  
Market Or Classified Use Value**

Petition # 2011-88 Account: 170255828 User: lmacarthur Residential

Relief Granted ☒ Relief Denied ☒ Remanded to PA ☒ No Show Relief Denied ☒

Special Master

Steven L. Marshall

Petitioner Representation

Not Present

Attorney

Agent

Other

New Market Value

0.00

New Assessed Value

0.00

New Exemption Value

0.00

New Taxable Value

0.00

Petitioner's Estimate of Fair Market Value:

**SECTION I. OBJECTIONS OF PETITIONER** (Please check all applicable statements)

The Petitioner objects to the assessment for the following reasons:

- |  |   |
|--|---|
| <input checked="" type="checkbox"/> 1. Increase From prior year(s) assessment  | <input checked="" type="checkbox"/> 13. Allegation of inequity in assessments |
| <input checked="" type="checkbox"/> 2. Financial performance of the property   | <input checked="" type="checkbox"/> 14. Amount of the assessment              |
| <input checked="" type="checkbox"/> 3. Property Condition  | <input checked="" type="checkbox"/> 15. Method of assessment                  |
| <input checked="" type="checkbox"/> 4. External conditions   | <input checked="" type="checkbox"/> 16. Amount of taxes                       |
| <input checked="" type="checkbox"/> 5. Alleged error in factual information  | <input checked="" type="checkbox"/> 17. Non-conforming use                    |
| <input checked="" type="checkbox"/> 6. Appraisal by an independent third party appraiser   | <input checked="" type="checkbox"/> 18. Present use                           |
| <input checked="" type="checkbox"/> 7. Sales analysis by an independent agent  | <input checked="" type="checkbox"/> 19. Financial hardship of the petitioner  |
| <input checked="" type="checkbox"/> 8. Recent sale price _____, or asking price _____ of the property                                      |   |
| Sale Price 0.00  | Asking Price 0.00   |
| <input checked="" type="checkbox"/> 9. Sales comparisons _____, Listings _____, Income _____, Expenses _____, Cost Data _____, Other _____ |   |

☒ 10. Claim that the Property Appraiser failed to consider other criteria in Section 193, Florida Statutes

☒ 11. No stated Reason

☒ 12. Other \_\_\_\_\_

**SECTION II. FINDINGS OF FACT** (Please check all applicable statements)

- ☒ 1. Prior year(s) or future assessments are irrelevant to the assessment under discussion.
- ☒ 2. Prevailing market rates prevail when the actual financial performance is less than market standards.
- ☒ 3. The Property Appraiser must appraise the entire fee simple estate, except classified use properties, which are appraised on the basis of value in use. The Petitioner's information did not address the entire fee simple estate.

Subject is a sfr containing 1784 sf. The petitioner purchased the property for \$720,000 March 2005. The petitioner does not want the land to be taxed because it is leased. The petitioner argued the Income approach should be the primary valuation technique. Petitioner argues cost of insurance premiums, BP oil spill, issue not properly accounted for by the P.A. The P.A. relied upon comparable sales data after date of the oil spill. The petitioner did not make a reasonable argument regarding oil issue (oil impact is reflected in the tranaction price of the PA's sale comps), insurance issue or use of the Income Approach valuation technique. P.A. used the Market Approach -- typical methodology of buyers, sellers & lenders to value the subject. Sales indicated a tight range of \$280,000-\$417,456 for value. The assessment is \$237,324 or \$133.03 per square foot and is well supported. the assessment is 67+/- below the actual 2005 purchase price of the subject property.



- ☒ 4. The Property Appraiser lawfully considered the eight criteria enumerated in Section 193.011, Florida Statutes.
- ☒ 5. The Property Appraiser failed to lawfully consider specific criteria of Section 193.011, Florida Statutes, as follows:

- ☐ 6. Properties have different assessments because of different characteristics that comprise the entire property.
- ☐ 7. The assessment of any property other than the subject is immaterial.
- ☐ 8. The assessment was (a)\_\_\_\_, was not (b)\_\_\_\_, shown to be higher than the general level of assessment of "all or substantially all" other property in the County.

- ☐ 9. No evidence overcoming the presumption of correctness was presented.
- ☒ 10. Facts were presented that do (a)\_\_\_\_, do not (b)\_\_\_\_, support a change in the assessment.  
do (a) ☐ do not (b) ☒
- The land is taxable & should be appraised --- as confirmed by VAB attorney.

- ☒ 11. Information was presented that does (a)\_\_\_\_, does not (b)\_\_\_\_, indicated a factual error.

- ☒ 12. The market value of the property is within the discretion of the Property Appraiser and within a reasonable range of values for the property.

- ☒ 13. The assessment was (a)\_\_\_\_, was not (b)\_\_\_\_, developed by generally accepted appraisal methods.  
was (a) ☒ was not (b) ☐

- ☒ 14. The Value Adjustment Board is not empowered to consider the ultimate amount of taxes to be paid in the process of evaluating a petition.

- ☒ 15. The assessment was (a)\_\_\_\_, was not (b)\_\_\_\_, proven to be incorrect.  
was (a) ☐ was not (b) ☒

- ☒ 16. Data was present that does (a)\_\_\_\_, does not (b)\_\_\_\_, support a change in assessment.  
does (a) ☐ does not (b) ☒

Income & expense data & petitioners suggestion that the Income Approach is the best appraisal technique to value a sfr is rejected by the Special Magistrate. Buyers, sellers, lenders & most all market participants rely on the direct Sales Comparison (Market Approach) to value.

- ☒ 17. The sale price of the property should be considered when it is indicative of market value and is within a reasonable range of values for the property.

- ☒ 18. Sale(s) Market Data occurring after January 1st of the assessment year may be presented when insufficient data exists in the prior year and the data presented by the Petitioner is indicative of market value for the legal assessment date.

- ☒ 19. Sale(s) of the subject property is not an arms-length transaction as determined by guidelines in the Florida Administrative Code, Chapter 12D-8.011(1)(m).

- ☒ 20. Comparable sale(s) evidence presented is not an arms-length transaction as determined by guidelines in the Florida Administrative Code, Chapter 12D-8.011(1)(m).

- ☐ 21. The purchase price of property is no a valid objection when it is not indicative of the market value.
- ☐ 22. The market evidence is deficient. One sale does not make a market.
- ☐ 23. Only evidence of the Petitioner's financial hardship was presented. The Value Adjustment Board is not empowered to consider the financial hardship of a Petitioner in evaluating a petition.
- ☐ 24. Market value is generally perceived from the standpoint of the buyer who is typically indifferent cost and expenses of the seller.
- ☐ 25. The Property Appraiser supports the assessment on the market approach to value. An assessment based on the market approach to value completely satisfies all eight criteria enumerated in Section 193.011, Florida Statutes.
- ☐ 26. The present use is not the highest and best use for the property. Accordingly, such use is not a valid basis for objection, unless there is no immediate demand for an alternative highest and best use, as of the legal assessment date.
- ☐ 27. The applicable land use plan controls over local zoning.
- ☐ 28. The petition was complete (a) \_\_\_\_\_, incomplete (b) \_\_\_\_\_.

☐ 29. Other:

### Section III. CONCLUSIONS OF LAW

☐ A. The Petitioner failed to overcome the presumption of correctness accorded the Property Appraiser by law. It was not proven by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

The land is taxable and must be valued as part of the overall property (Turner vs. Bell Chevrolet). The SM has no legal authority to rule otherwise. Petitioner made weak arguments regarding BP oil spill impact, rising insurance premiums and use of the Income Approach. The Income Approach valuation technique is not the primary valuation technique relied upon by buyers, sellers, lenders or other market participants. P.A. has met the criteria in Fl. St. 193.011 and DOR rules regarding valuation of real property. The petitioner did not present competent legal evidence sufficient to make a reasonable argument. The petitioner failed to over the presumption of correctness of the P.A. The P.A. has quality comparables and a highly defensible value estimate of \$237,324. The petitioners request to reduce the value to \$100,000 to \$175,000 (letter to P.A.) dated September 13, 2011). My ruling is to deny the petitioners request for a value reduction.

☐ B. The Petitioner established by a preponderance of evidence that the Property Appraiser failed to properly consider one or more of the eight criteria enumerated in Section 193.011, Florida Statutes. However, the Petitioner did not prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

☐ C. The Petitioner established by a preponderance of evidence that the Property Appraiser's market value was arbitrarily based upon appraisal practices different from appraisal practices generally applied by the Property Appraiser to comparable property within the same class. The Petitioner did not prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the petition be denied and the market value be upheld.

☐ D. The Petitioner established by a preponderance of evidence that the Property Appraiser failed to properly consider one or more of the eight criteria enumerated in Section 193.011, Florida Statutes. The Petitioner did prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the market value be reduced.

☐ E. The Petitioner established by a preponderance of evidence that the Property Appraiser's market value was arbitrarily based upon appraisal practices different from appraisal practices generally applied by the Property Appraiser to comparable property within the same class. The Petitioner did prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the market value be reduced.

☐ F. The Petitioner failed to introduce sufficient evidence to overcome the presumption of correctness accorded the Property Appraiser by law. Petitioner did prove by a preponderance of evidence that the Property Appraiser's market value is in excess of just value. It is recommended that the new market value be approved.

☐ G. During the course of the hearing, the Property Appraiser reduced the market value of the subject property. No basis for a further reduction was determined. The market value by the Property Appraiser is entitled to a presumption of correctness. It is recommended that the new market value be approved.

☐ H. The Property Appraiser's market value is found to be erroneous. The record lacks competent, substantial evidence meeting the just value criteria of Section 193.011, Florida Statutes. The matter is remanded to the Property Appraiser with the following direction:

☐ I. Prior to the hearing, the Property Appraiser reduced the market value of the subject property. No basis for a further reduction was determined. The assessment by the Property Appraiser is entitled to a presumption of correctness. It is recommended that the new assessment be approved.

Signature Required

Steven E. Marshall



---

## ESCAMBIA COUNTY - VALUATION ADJUSTMENT BOARD

---

Special Master: Steven L. Marshall, MAI, SRA

Petitioner: Cordova Community Facility Corporation

Parcel ID: 09-2S-30-0600-000-001  
00-0S-00-9010-001-163

Hearing Date: November 28, 2000

Petition Number: 2000-337  
2000-338

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### STATEMENT OF CASE

The Petitioner, Mr. Paul W. Groom, negotiated an agreement with Property Appraiser, Chris Jones, via Attorney Elliott Messer, regarding the willingness to stipulate to the testimony of the witnesses that were called last year in order to eliminate lengthy hearings.

Therefore, a complete transcript of last year's hearing is hereby attached as an integral part of this document by this specific reference. Also, my six (6) page ruling on the 1999 petition regarding this same case is hereby attached and incorporated by this specific reference as a specific integral accompanying document to this Special Master Ruling.

### BASIC FACTS

The Petitioner seeks to overturn the denial of a non-profit status and resulting exemption from taxation. Mr. Groom believes the properties are exempt under either the governmental or the charitable exemption categories established in the Florida Statutes.

The Property Appraiser's office was represented by Thomas Findley and Elliott Messer, just as last year's petition.

Mr. Groom, when questioned by the Special Master as to why last year's decision was flawed or incorrect, responded -- the properties are owned by a governmental entity (either legally or beneficially) and is used for government purposes.

The reader/user of this Special Master's ruling on this petition is directed to read thoroughly the "Reply of the Property Appraiser" (prepared by Elliott Messer and Thomas Findley). Also attached is an Escambia County Circuit Court Final Judgment regarding the "Service Metro Case" adjudged by Judge Tarbuck on June 2, 2000. Finally, a letter to Mr. Dan Church, c/o Escambia County Property Appraiser, Chris Jones' office, from Stephen Keller, Chief Assistant General Counsel, Department of Revenue, is attached. These three documents provide clear evidence of the proper decision to be made by the Special Master.



## ULTIMATE FACTS

The Petitioner owned the property, leased the property, and then encumbered the property with tax exempt bonds. Escambia County is not presently (or specifically) the owner on January 1. Escambia County does not insure, maintain or manage the property.

The Petitioner/Owner has tried and failed to obtain a Consumer's Certificate of Exemption from the Department of Revenue.

The Property Owner/Developer and the bond holders accrue financial benefits. Rent is paid to bond holders who enjoy profit and benefit associated with such payments.

As discussed in brief testimony by Mr. Groom and Mr. Steve Del Gallo, the sum total of the bond debt greatly exceeds Property Appraiser Jones' estimate of market value (testified as being prepared in compliance with Florida Statutes 193.011 criteria).

As Special Master, I question the argument of "beneficial ownership" when the bond debt exceeds market value by millions of dollars.

## CONCLUSION OF LAW

Just because a non-profit corporation owns real property that is leased to a government entity does not provide the Owner/Petitioner to a governmental exemption.

Clearly, the initial bond proceeds, rental income, and ownership provides substantial profit to the Petitioner/Owner.

As of January 1, the bond debt exceeds the market value of the property. Escambia County will not, if ever, receive a deed to the subject property for 24± years and certainly not this past January 1st.

The bond documents express that the Petitioner is not an agency or instrumentality of the County. The leases between the petitioner and Florida Department of Manager and Services are standardized leases. The leases require the lessor (Petitioners/Owner) covenants to pay taxes on the premises. The lease terms are far short of the bond amortization periods. This circumstance could jeopardize timely payment of the bond debt.

The Florida Constitution does not provide for an exemption for all governmental entities and agencies. Florida Statutes provide the general rule that all real property is subject to tax unless "expressly" exempted. The Petitioner testified in 1999 that they are not a governmental agency.

As of January 1, Escambia County did not own or have financial benefits derived from the Petitioner's real property. Escambia County has not agreed to purchase the property. Escambia County has not agreed to pay any amount to pay off the bonds and obtain the property. Escambia County has an option to do so, but until such option is exercised (highly speculative as to if and when), then title is not conveyed and remains titled in the name of the Petitioner/Owner.

Specifically, Cordova Community Facilities Corporation has existing bond debt (\$8,964,157.05 versus a market value of \$5,285,000). The County would be poorly advised to accept title couple with debit highly in excess of value.

Clearly, Escambia County's only measurable interest is a purchase option which is future oriented, contingent and speculative.

Finally, regarding the Petitioner's claim of a charitable exemption, the fact that the lease stream goes entirely to pay off private bond holders, including the private developers who sold the property to the current title holder, disqualifies the Petitioner's property for a charitable exemption. Another reason to rule against the notion of a charitable exemption is the lack of ability of the owner to obtain a Consumer Certificate of Exemption from the Department of Revenue.

Eligibility for exemption status has not been convincingly demonstrated by the Petitioner. The Petitioner has failed to provide sufficient competent evidence to prevail. The burden of proof is on the Petitioner. Based upon my analysis of the foregoing evidence, testimony, and arguments made on this case, the Petitioner is the legal and beneficial title hold to the real property and is obligated to pay property taxes in keeping with Florida law. The Petitioner and the property do not qualify for an exemption as specified in the Florida Statutes. Therefore, the Petitioner's request for an exemption is denied.

---

Steven L. Marshall, MAI, SRA  
Special Master  
Escambia County Value Adjustment Board  
December 12, 2000





**rpa**

**Real Property Analysts, Inc.**

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PAM CHILDEERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

May 28, 2013

Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, Florida 32502-5843

Re: VAB Special Magistrate Services 2013

Dear Ms. Harris:

If your VAB would like a **"New Look"** to work hard and do a good professional job hearing your important real estate valuation cases it would be my pleasure to work with you. As a heads up, my philosophy is to let the taxpayers have ample time and opportunity to share any and all information that they feel is important regarding their real estate valuations. I have been serving as a Special Magistrate for over 15 years for various counties but I have not had the privilege of serving the Escambia County VAB since 2006 & 2007. I miss an evening walk down Palafox to the marina. I sincerely enjoy getting out of busy Winter Park and visiting historic downtown Pensacola. Please be assured that what ever problems I caused back then will not happen again. My wife Grace of 32 plus years says if I retire she will divorce me. "In sickness and in health not for lunch. " Being semi-retired and to be hopefully competitive a rate of compensation of \$ 85 per hour with a minimum of \$ 680 per day. I am proposing the same rate of expense re-imbursement that the Brevard VAB has been paying me since 1998 of \$ 0.44 per mile traveled and request re-imbursement for other normal business expenses.

Regarding prior magistrate experience, I will again be serving as Special Magistrate for Okaloosa and Walton Counties this coming October and would enjoy working in Escambia County as well. I have also served in Brevard County from 1998 to 2012, Orange County from 1997 to 2011, and during recent years, I also served in Citrus, and Okaloosa. It was selected to serve in Seminole County this year.

Enclosed is a resume, my qualifications, references and a list of real estate subjects I currently teach for the Appraisal Institute and the Florida Realtors. Should you require any additional information, please contact me.

This is not a form letter but a special letter of interest for the Escambia VAB to hopefully carefully consider.

Respectfully Submitted,

*Robert Sutte*

Robert Sutte CRE, MAI, SRA





2433 Lee Road • Winter Park, Florida 32789-1755  
(407) 628-0505 • FAX (407) 628-0523  
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**QUALIFICATIONS  
OF  
ROBERT S. SUTTE, CRE, MAI, SRA**

Since 1962, Mr. Sutte has served as a real estate appraiser and consultant to a wide variety of private and public clients in eighteen states and the District of Columbia. His background includes both real property valuation and real estate counseling on the most efficient and profitable solutions to various real estate problems. Mr. Sutte has had training and experience in the field of finance and experience in designing environmentally acceptable mixed use land development plans.

**RESIDENT OF:** Winter Park, Florida

**EDUCATION:** Bachelor of Science Degree  
Business Administration (Concentration in Finance),  
Drake University, Des Moines, Iowa

**MEMBER OF:** Counselors of Real Estate (CRE)  
Appraisal Institute (MAI, SRA)

**EMPLOYMENT:** Real Property Analysts, Inc.  
2433 Lee Road  
Winter Park, Florida 32789  
(407) 628-0505  
(407) 628-0523 FAX  
[rpa@rpaflorida.com](mailto:rpa@rpaflorida.com)  
[www.rpaflorida.com](http://www.rpaflorida.com)

**APPRAISAL  
EXPERIENCE:**

Mr. Sutte's appraisal experience includes preparation of market value estimates for use in conjunction with sales, acquisitions, leasing, mortgage lending, condemnation, real estate assessment equalization, charitable donations for conservation purposes and estate settlement. All types of commercial, industrial and residential land and almost all types of improved property have been involved. In many instances, the valuation of encumbered ownerships and the appraisal of leasehold or leased fee interests have been part of the appraisal problem.

**ROBERT S. SUTTE, CRE, MAI, SRA (Continued)**

A partial list of property types which have been appraised includes:

Diminution in Value Studies	Outdoor Advertising Signs
Conservation easement encumbrances	Hotels-Motels
Most types of land	Banking facilities
Salt and freshwater islands	RV/Mobile Home Parks
Ocean and Gulf front property	Preparatory schools and colleges
Silviculture and agriculture land	Radio Transmission Facilities
Various types of residential property	Railroad property
Commercial and institutional buildings	Gas stations-convenience stores
Shopping centers and retail stores	Warehouses
Restaurants	Truck terminals
Churches	Manufacturing plants
Nursing homes	Special purpose property

**CONSULTING  
EXPERIENCE:**

Mr. Sutte's consulting experience has encompassed many real estate disciplines. Counseling services rendered have involved guidance on individual property leasing, ownership and development problems. A partial list of types of assignments completed includes:

Estimates of marketability and economic feasibility

Highest and best and most profitable use analysis

Condominium conversion studies

Land planning and development strategies

Analysis of potential zoning and land use changes

Commercial, retail, motel, apartment and industrial space rental surveys

Direct mail and field interview studies to gauge marketability for various types of real estate



**ROBERT S. SUTTE, CRE, MAI, SRA (Continued)**

**LICENSES:** Licensed Real Estate Broker - State of Florida (BK232449)  
State-Certified General Real Estate Appraiser - State of Florida (RZ241)  
State-Certified General Real Property Appraiser - State of Georgia (004009)  
State-Certified General Appraiser Instructor - State of Florida (GA5069)  
State-Certified Real Estate Instructor - State of Florida (ZH1001982)  
AQB Certified USPAP Instructor - The Appraisal Foundation (10485)

**CLIENTS  
SERVED:** Mr. Sutte has appraised and consulted for a variety of clients, including property owners, investors, attorneys, financial institutions, insurance companies, and federal, state and local government agencies. A partial list of clients served and references are available upon request.

**COURT  
TESTIMONY:** Qualified as an expert witness in federal and state courts including the United States Bankruptcy Court Middle District Florida and before boards of appeal. Testimony was provided in connection with market value, condemnation, deficiency judgements, tax abatements, rate setting, and appraiser ethical conduct. In addition, has served as a Special Magistrate for the Value Adjustment Boards of Brevard, Citrus, Escambia, Orange, Santa Rosa, and Walton Counties.

**TEACHING  
EXPERIENCE:** Membership in the national faculty of the Appraisal Institute since 1972, as an instructor for various real estate courses and seminars, including Business Practices and Ethics and certified instructor of the Uniform Appraisal Standards for Federal Land Acquisitions, Washington, D.C., 2000 (the Yellow Book). Appraisal Foundation Appraisal Qualifications Board Certified, Uniform Standards of Professional Appraisal Practice Instructor.

Florida Realtors® faculty member since 1982, as instructor for the Graduate Realtors Institute (GRI) and the Continuing Education Express seminar series. Also served for 9 years as an adjunct faculty member of the College of Extended Studies at the University of Central Florida.





**Robert S. Sutte CRE, MAI, SRA**  
**Special Magistrate References**

Scott Ellis, Clerk of the Circuit Court  
Brevard County  
P.O. Box 999  
Titusville, Florida 32781

Dori Cordle, Administrative Supervisor VAB Clerk  
Walton County Board of County Commissioners  
P.O. Box 1260  
DeFuniak Springs, Florida 32433

Teresa Ward, Deputy Clerk to Board of County Commissioners  
Okaloosa County Clerk of Circuit Court  
302 N. Wilson Street, Suite 203  
Crestview, Florida 32536

Katie Smith, VAB Coordinator  
Clerk of the Value adjustment Board  
Orange County  
P.O. Box 38  
Orlando, Florida 32802

Mary Johnson  
Clerk of the Court  
Santa Rosa County  
6495 Caroline Street, Suite A  
Milton, Florida 32570

Theresa Steelfox, Deputy Clerk  
Clerk of the Circuit Court  
Citrus County  
110 North Apopka Avenue  
Inverness, Florida 34450

Jane Spencer, Deputy Clerk to the Board  
Seminole County Clerk of Circuit Court  
P.O. Box 8099  
Sanford, Florida 32772

Ernie Lee Magaha  
Former Clerk of the Circuit Court  
Escambia County  
223 Palafox Place, Room 114  
Pensacola, Florida 32502

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ROBERT S. SUTTE, CRE, MAI, SRA

**REAL ESTATE EDUCATION INSTRUCTION**

**COURSES**

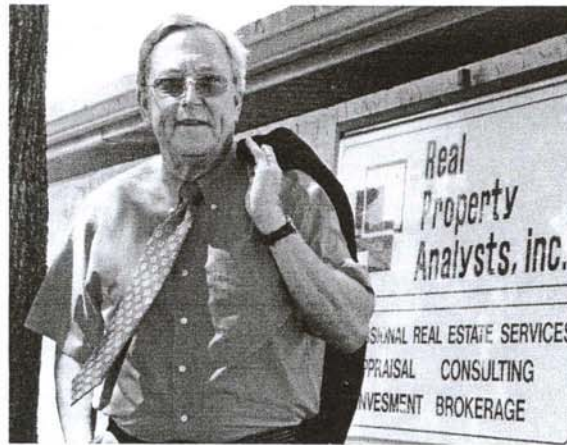
7 Hour National USPAP Update	General Appraiser Market Analysis & Highest and Best Use
3 Hour Florida Law Update	Advanced Sales Comparison & Cost Approaches
15 Hour National USPAP Course	Advanced Market Analysis and Highest and Best Use
Business Practices and Ethics	Advanced Concepts & Case Studies
Basic Appraisal Principles	Residential Sales Comparison and Income Approaches
Basic Appraisal Procedures	Residential Market Analysis and Highest & Best Use
General Applications	Residential Site Valuation and Cost Approach
Advanced Applications	General Appraiser Site Valuation & Cost Approach
	General Appraiser Sales Comparison Approach
	Yellow Book: Uniform Standards Federal Land Acquisitions

**SEMINARS**

Appraising the Appraisal: Appraisal Review-General (7 hours)  
Appraising the Appraisal: Appraisal Review-Residential (7 hours)  
Appraisal of Local Retail Properties (General) (7 hours)  
Litigation Skills for the Appraiser (General) (7 hours)  
Marketability Studies: 6 Step Process & Basic Applications (7 hours)  
A Lenders Perspective: The Role of the Appraisal in the Lending Process (2 hours)  
Spotlight on USPAP: Hypothetical Conditions & Extraordinary Assumptions (2 or 3 hours)  
    Agreement for Services – Instructions for Use (2 hours)  
    Appraisal Review (2 hours)  
    Common Errors and Issues (2 hours)  
    Confidentiality (2 hours)  
    Reappraising, Readdressing, Reassigning: What to Do and Why? (2 hours)  
    Workfiles - Who, What, Where, When, How, and Why? (1 hour)

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Thanks for your consideration! I hope to hear from you. Also, I can be available to SUBSTITUTE on short notice. Will drive if practical. If interested please RSVP:

Address: 2433 Lee Road, Winter Park, FL 32789  
Telephone: 407-628-0505  
Fax: 407-628-0523  
E-mail: [rpa@rpaflorida.com](mailto:rpa@rpaflorida.com)  
Web Site: [www.rpaflorida.com](http://www.rpaflorida.com)

Continuing Education Seminars I teach are listed. Two seminars on the same day or back to back days are much more economical for me and your Association.

Appraising	- 4 Hours (Working with the Appraiser and the Consumer)
Negotiating	- 4 Hours (Negotiating Skills for Today's RE Professional)
Property Management	- 4 Hours (Fundamentals of Prop. Mgmt. For RE Practitioner)
Property Management	- 4 Hours (How to Make the Most of your Prop. Mgmt. Business)
Investing (Residential)	- 4 Hours (Essentials of Single & Multi-Family Investing)
Investing (Commercial)	- 4 Hours (Real Estate Investing Made Easy)
Residential Construction	- 4 Hours (How to Navigate the Maze of Residential Construction)
*Residential Construction	- 4 Hours (Residential Construction from the Inside Out)
*National USPAP Update	- 7 Hours (Update for Standards of Professional Appraisal Practice)
*FL Appr's State Law Update	- 3 Hours (Update of Appraisal Law for Appraisers)

\*Qualify for both Realtor and Appraiser CE.





# Pam Childers

Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4581**

**8.**

## Value Adjustment Board

**Meeting Date:** 07/23/2013

**Issue:** Selection of Attorney Special Magistrate.

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

---

### Information

#### **Recommendation:**

Recommendation: That the Value Adjustment Board select one of the following Applicants for Attorney Special Magistrate for 2013, and authorize the Chairman to execute a Contract for Services of Special Magistrate, in accordance with Chapter 194.035 (1), Florida Statutes:

- Phillip A. Pugh
- Cecilia R. Boyd
- Larry A. Matthews

---

### Attachments

Proposal Summary

Phillip Pugh Application

Cecilia Boyd Application

Larry Matthews Application

---

### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/26/2013

Started On: 06/26/2013 04:53 PM

2013 VAB Special Magistrate Applicants				
<u>Candidate</u>	<u>Type SM</u>	<u>Proposed Rates</u>	<u>Date Received</u>	<u>Applicant Credentials</u>
Oswald P. Carrerou	Appraiser	\$95/hr, 4 hrs. min., travel and lodging	3/25/2013	From Winter Haven, FL; SRA; Broker; has served in Highlands, Polk, Brevard, and Alachua Counties
~	~	~	~	~
John Robinson	Appraiser	\$125/hr, 8 hr. min., travel and lodging	3/28/2013	From Ocoee, FL; MAI, CCIM; SM for Escambia County in 2012; has served in Okaloosa, Orange, Seminole, Brevard, Pinellas, Hillborough, Hernando, and Polk Counties
~	~	~	~	~
Steven Marshall	Appraiser	\$149/hr, 8 hrs. min., travel (no lodging)	4/4/2013	From Altamonte Springs, FL; MAI, SRA; SM for Escambia County 2010 and 2011
~	~	~	~	~
Robert Sutte	Appraiser	\$85/hr, 8 hrs. min., normal business expenses+\$ .44/mile travel	5/30/2013	From Winter Park, FL; Broker, CRE, MAI, SRA; licensed in FL and GA; certified General Appraiser Instructor; SM for Escambia County in 2006 and 2007
~	~	~	~	~
Phillip A. Pugh	Attorney	\$160/hr., no min., no travel, no lodging	5/29/2013	Local Attorney; Member Florida Bar; Cumberland School of Law, JD; Board Certified in Real Estate Law
~	~	~	~	~
Cecilia R. Boyd	Attorney	The greater of \$125/hr or highest rate paid any other SM, 3 hrs. min., travel and lodging	5/31/2013	From Panama City, FL; JD, University of Florida College of Law 1993; Member Florida Bar; SM for Escambia County 2012; has served in Bay, Walton, Okaloosa, and Santa Rosa Counties; has served as President, Vice President, and Treasurer for Bay County Bar Association
~	~	~	~	~
Larry A. Matthews	Attorney	\$125/hr., no min., no travel, no lodging	*See below	Local Attorney; Member Florida Bar; Florida State University, JD
~	~	~	~	~
<b>*Application for Larry A. Matthews not date stamped, but was received prior to May 31, 2013, deadline.</b>				



# LITVAK BEASLEY & WILSON, LLP

ATTORNEYS AT LAW

KRAMER A. LITVAK \*  
ROBERT O. BEASLEY  
PAUL A. WILSON†

226 East Government Street  
Post Office Box 13503  
Pensacola, Florida 32591-3503  
TELEPHONE: (850) 432-9818  
FACSIMILE: (850) 432-9830

PENNY HENDRIX  
PHILLIP A. PUGH ‡§

†ALSO ADMITTED IN ALABAMA  
‡LL.M. IN TAXATION  
\*BOARD CERTIFIED TAX ATTORNEY  
§BOARD CERTIFIED REAL ESTATE ATTORNEY

May 29, 2013

Honorable Pam Childers  
Clerk of the Circuit Court and Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, FL 32502-5843

PAV CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

RE: 2013 Special Magistrate to the Value Adjustment Board

Dear Mrs. Harris:

I would like to be considered for the position of Special Magistrate to the Escambia County Value Adjustment Board for the 2013 tax year. I served as the Special Magistrate to the Santa Rosa County Value Adjustment Board for the 2012 year and have re-applied for that position as well. I have enclosed my resume. I noted a proposed consideration of \$160.00 per hour. I will not bill for travel time and have no minimum hour requirement. My resume provides three references. I appreciate your consideration. Please let me know if you need any additional information. I look forward to hearing from you.

Sincerely,

  
Phillip A. Pugh

Enclosure

# PHILLIP A. PUGH

3 5 2 6 R I V E R V I E W D R I V E P A C E , F L 3 2 5 7 1

8 5 0 . 5 3 0 . 1 8 4 6

## OBJECTIVE

---

To serve my clients to the best of my ability and to be a productive reliable member of my firm and my community.

## EXPERIENCE

---

- |              |   |                       |
|--------------|---|-----------------------|
| 2012         | Special Magistrate<br>Value Adjustment Board  | Santa Rosa County, FL |
| 2010-Present | Litvak Beasley & Wilson, LLP<br><i>Associate Attorney</i>   | Pensacola, FL         |
|              | <ul style="list-style-type: none"><li>■ Real Estate Transactions</li><li>■ Estate Planning, Trust &amp; Probate</li><li>■ Corporate Law</li><li>■ Commercial and Real Estate Litigation</li></ul> |                       |
| 2001-2010    | Emmanuel, Sheppard & Condon<br><i>Associate Attorney</i>  | Pensacola, FL         |
|              | <ul style="list-style-type: none"><li>■ Real Estate Transactions</li><li>■ Estate Planning, Trust &amp; Probate</li><li>■ Corporate Law</li><li>■ Commercial and Real Estate Litigation</li></ul> |                       |

## EDUCATION

---

- |      |  |                 |
|------|--|-----------------|
| 2001 | Cumberland School of Law   | Birmingham, AL  |
|      | <ul style="list-style-type: none"><li>■ Juris Doctorate</li><li>■ Member - Cumberland Law Review</li></ul> |                 |
| 1998 | Florida State University   | Tallahassee, FL |
|      | <ul style="list-style-type: none"><li>■ B.S. – Finance, Magna Cum Laude</li></ul>                          |                 |
| 1996 | University West Florida  | Pensacola, FL   |
|      | <ul style="list-style-type: none"><li>■ Associate of Arts</li></ul>  |                 |

## CERTIFICATIONS

---

- Board Certified in Real Estate Law, Florida Bar

#### COURT ADMITTANCES

---

- Admitted to all Florida State Courts
- Admitted to all Alabama State Courts
- Admitted to the Northern District of Florida Federal Courts

#### COMMUNITY & CIVIC INVOLVEMENT

---

- Member of Woodbine Baptist Church
- Former Director of Angel Food Ministries Program, East Brent Baptist Church
- Home Builders Association of West Florida, Associate Member

#### PROPOSED COMPENSATION

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- \$160 per hour
- Travel time within Escambia County will not be billed
- No minimum hours

#### REFERENCES

---

- T.A. Borowski, Jr., Esq. of Borowski & Traylor, P.A., 25 W. Cedar St., Suite 525, Pensacola, FL 32502. 850-429-2027
- Steven E. Quinnell, Esq. of Elder Law Firm, 101 E. Government St., Pensacola, FL 32502 850-432-4386
- John Trawick, Esq. of Coastal Association Law Group, 139 E. Government St., Pensacola, FL 32502

CECILIA REDDING BOYD, P.A.  
ATTORNEYS AT LAW

211 EAST FOURTH STREET  
POST OFFICE BOX 69  
PANAMA CITY, FLORIDA 32402-0069

TELEPHONE (850) 872-8514  
TELECOPIER (866) 230-8514  
CREDDING1@AOL.COM

CECILIA REDDING BOYD

JAMES A. BOYD, JR.  
OF COUNSEL

May 30, 2013

Honorable Pam Childers  
Clerk of the Circuit Court and Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, FL 32502-5843

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:30  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

RE: Application for Attorney Special Magistrate

Dear Ms. Childers:

Please consider this letter and the enclosed resume in lieu of an application form for the Attorney Special Magistrate position for the Escambia County Value Adjustment Board.

I have practiced law in Northwest Florida for more than eighteen years. My experience is diverse and includes civil litigation; real estate; probate, wills and trusts; eminent domain; appellate practice; bankruptcy for creditors; corporate transactions; commercial litigation; local government; landlord/ tenant; contracts and general civil matters. I have served as Attorney Special Magistrate for the Santa Rosa County, Walton County, Okaloosa, Escambia and Bay County Value Adjustment Boards.

During the first nine years of my practice of law, I focused primarily on local government law. I have advised elected officials, legislative boards and quasi-judicial boards. I have tried cases before both judges and juries, and I have practiced in the Circuit Courts, the First District Court of Appeal, the Florida Supreme Court, the Federal District Court and Bankruptcy Courts. From 2000 through 2005, I served as a part-time assistant state attorney in addition to maintaining my civil practice. Throughout my practice, I have advised local governments and private clients as to rights and obligations regarding ad valorem taxes, exemptions and classifications.



I would appreciate the opportunity to serve as Attorney Special Magistrate. My proposed hourly rate is the greater of \$125.00 per hour or the highest rate paid to any other Special Magistrate appointed by the Escambia County Value Adjustment Board. I do not charge for travel time, although I seek reimbursement for mileage at the rate set by the Internal Revenue Service. If my appearance in Escambia County is required, I will require a five hour minimum for my services. Please let me know if I may provide any additional information to assist in the selection process.

Please do not hesitate to contact DeAnna Lockamy, Deputy Clerk to the Bay County Value Adjustment Board or Dori Cordle, Deputy Clerk to the Walton County Value Adjustment Board with specific inquiries as to my qualifications and experience. Additional references and writing samples are available on request. I appreciate your consideration.

Very truly yours,



Cecilia Redding Boyd

Enclosure



## CECILIA REDDING BOYD

P. O. Box 69  
Panama City, FL 32402  
(850) 872-8514  
(866) 230-8514 (fax)

211 East Fourth Street  
Panama City, FL 32401  
credding1@aol.com

### LICENSES:

**The Florida Bar.** Admitted May 1994.  
**United States District Court, Northern District of Florida.**  
Admitted 1994.  
**United States District Court, Middle District of Florida.**  
Admitted 2010.  
**United States Circuit Court of Appeals, Eleventh Circuit.**  
Admitted March 1999.  
**Supreme Court of the United States of America.**  
Admitted April 2000.

### EDUCATION:

**University of Florida, College of Law.** Gainesville, Florida. Juris Doctor with honors, 1993.  
**Clemson University.** Clemson, South Carolina. Bachelor of Arts degree in Language and International Trade with a specialization in Spanish and Global Marketing. Cum Laude, 1990.  
**Saint Louis University.** Saint Louis, Missouri. Study abroad program in Madrid, Spain. Spring semester and summer session 1989.  
**George Washington University.** Washington, D.C. Study abroad program in Madrid, Spain. Summer session 1988.

### WORK EXPERIENCE:

**Cecilia Redding Boyd, P.A.** Sole practitioner in a general civil practice firm. 2003 through present.  
**Office of the State Attorney for the Fourteenth Judicial Circuit of Florida.** Part-time assistant state attorney handling civil forfeiture cases and involuntary commitments of violent sexual predators. 2000 through 2005.  
**Bryant and Higby, Chartered.** Attorney for a general civil practice firm in Panama City, Florida. 1994 through 2003.  
**Executive Office of the Governor.** Law clerk for J. Hardin Peterson, General Counsel to Governor Lawton Chiles. Summer 1993.

### LEGAL HONORS AND ACTIVITIES:

**Attorney Special Magistrate for the Walton County Value Adjustment Board.** Appointed in 2009 by the Walton County Value Adjustment Board pursuant to Section 194.035, Florida Statutes. Reappointed in 2010 for a three year term.  
**Attorney Special Magistrate for the Bay County Value Adjustment Board.** Appointed in 2010 to a one year term by the Bay County Value Adjustment Board pursuant to Section 194.035, Florida Statutes. Reappointed for additional one year terms in 2011 and 2012.  
**Attorney Special Magistrate for the Santa Rosa County Value Adjustment Board.** Appointed in 2011 to a one year term by the Santa Rosa County Value Adjustment Board pursuant to Section 194.035, Florida Statutes.

**Attorney Special Magistrate for the Okaloosa County Value Adjustment Board.** Appointed in 2012 to a one year term by the Okaloosa County Value Adjustment Board pursuant to Section 194.035, Florida Statutes.

**Bay County Bar Association.** President 2000, Vice-president 1999, Treasurer 1998.

**Fourteenth Judicial Circuit Judicial Nominating Commission.** Member 1997-2000.

**Florida Municipal Attorneys Association.** 1994-2003.

**The Florida Bar, Young Lawyers Division.** Board of Governors 1997-2004.

**Fourteenth Judicial Circuit Grievance Committee.** Chairman 2000, Member 1997-2000.

**The Florida Bar, Continuing Legal Education Committee.** 2007 - 2009.

COMMUNITY  
SERVICE:

**Girls Incorporated of Bay County.** President 1999, Board of Directors 1995-2000.

**Junior Service League of Panama City, Inc.,** President 2006-2007, Member 1997 through present.

**Delta Delta Delta Alumni Chapter.** President 1998 and 1999.

**Anchorage Children's Home.** Board member 2000-2005.

**Justice Teaching Volunteer.** Trained volunteer to promote an understanding of Florida's justice system in the classroom. January 2007 through present.

**2007 Outstanding Young Woman of the Year.** Nominated by the Junior Service League of Panama City, Inc. and granted the award by the Panama City Junior Women's Club, Inc.

**Azalea Trail Judge.** 2012.

PRACTICE  
AREAS:

Local government law, real property law, ad valorem taxation, employment law, commercial transactions and litigation, business law, appellate law, collections, landlord/tenant, probate, wills and trusts.

REPORTED  
CASES:

*H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District*, 736 So.2d 1167 (Fla. 1999).

*City of Panama City v. City of Springfield*, 700 So.2d 101 (Fla. 1<sup>st</sup> DCA 1997).

*City of Panama City v. Munroe*, 700 So.2d 128 (Fla. 1<sup>st</sup> DCA 1997).

*Turner v. Fitzsimmons*, 673 So.2d 532 (Fla. 1<sup>st</sup> DCA 1996).

*Barron v. Barron*, 654 So.2d 1273 (Fla. 1<sup>st</sup> DCA 1995).

*City of Panama City v. Head*, 797 So.2d 1265 (Fla. 1<sup>st</sup> DCA 2001).

Larry A. Matthews \*  
Raymond F. Higgins, III

Thomas R. Jenkins, Of Counsel\*

\* Also admitted in Alabama  
\* Certified Circuit Court Mediator  
\* Board Certified Civil Trial Lawyer



114 E. Gregory Street (32502)  
Post Office Box 13145  
Pensacola, Florida 32591

Telephone: Pensacola (850) 434-2200  
Panama City (850) 769-7200  
Facsimile: (850) 434-2600

Web Address: [www.matthewshigginslaw.com](http://www.matthewshigginslaw.com)

April 30, 2013

Hon. Pam Childers  
Clerk of the Circuit Court & Comptroller  
Attn: Doris Harris, Deputy Clerk to the Board  
Value Adjustment Board  
221 Palafox Place, Suite 130  
Pensacola, FL 32502-5843

PAM CHILDERS  
CLERK OF CIRCUIT COURT  
ESCAMBIA COUNTY, FL  
2013 JUN -3 A 8:29  
CLERK OF THE BOARD OF  
COUNTY COMMISSIONERS

Re: Value Adjustment Board Special Magistrate

Dear Ms. Childers:

I have enclosed my application, resume and writing sample. My references include the following:

J. Andrew Talbert, Esq.  
Quintairos, Prieto, Wood & Boyer, P.A.  
114 E. Gregory Street, 2<sup>nd</sup> Floor  
Pensacola, FL 32502  
850-434-6490

Douglas F. Miller, Esq.  
Guy E. Burnette, Jr., P.A.  
109 E. Garden Street, Ste. B  
Pensacola, FL 32502  
850-912-6420

Michael J. Stebbins, Esq.  
504 N. Baylen Street  
Pensacola, FL 32501  
850-434-9922

With best regards, I am

Sincerely,

MATTHEWS & HIGGINS, LLC

A handwritten signature in black ink, appearing to read 'Larry A. Matthews', is written over a horizontal line.

Larry A. Matthews  
[Lmatthews@matthewshigginslaw.com](mailto:Lmatthews@matthewshigginslaw.com)

Enclosures

**Special Magistrate Application  
Value Adjustment Board  
Escambia County, Florida**

**PLEASE TYPE OR PRINT  
IF MORE SPACE IS NEEDED, ATTACH ADDITIONAL SHEETS**

1. PLEASE PROVIDE THE FOLLOWING GENERAL INFORMATION:

NAME: Larry A. Matthews  
SOCIAL SECURITY OR TAXPAYER IDENTIFICATION NUMBER: ~~XXXXXX~~  
HOME ADDRESS: 2837 Bay Street, Gulf Breeze, FL 32563  
BUSINESS NAME: Matthews & Higgins  
BUSINESS ADDRESS: 114 E. Gregory St., Pensacola, FL 32502  
PHONE NUMBER(S):  
BUSINESS: 434-2200 HOME: 934-5835  
FAX: 434-2600 CELL: 384-3476

2. ARE YOU AN ELECTED OR APPOINTED OFFICIAL OR EMPLOYEE OF ESCAMBIA COUNTY? YES X NO X

3. APPLICATION FOR: X ATTORNEY SPECIAL MAGISTRATE  
       APPRAISER SPECIAL MAGISTRATE

HOURLY RATE / MINIMUM HOURS: \$125 / no minimum

4. IF YOU ARE A MEMBER OF THE FLORIDA BAR, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. BAR NUMBER: 339601 ADMISSION DATE: 5/11/82

- B. LIST ALL SOURCES OF YOUR KNOWLEDGE, INCLUDING EDUCATION AND EXPERIENCE:

See attached resume

C. LIST ANY DISBARMENT, SUSPENSION OR ANY OTHER DISCIPLINARY ACTION WHICH YOU HAVE RECEIVED FROM ANY ORGANIZED BAR ASSOCIATION:

None  
\_\_\_\_\_  
\_\_\_\_\_

5. IF YOU ARE CURRENTLY A LICENSED FLORIDA REAL ESTATE BROKER OR A CERTIFIED OR LICENSED REAL ESTATE APPRAISER PURSUANT TO CHAPTER 475, FLORIDA STATUTES, PLEASE PROVIDE THE FOLLOWING INFORMATION:

A. DESIGNATION: \_\_\_\_\_

LICENSE OR CERTIFICATION NUMBER: \_\_\_\_\_

DATE LICENSED OR CERTIFIED: \_\_\_\_\_

B. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN FINED, REPRIMANDED, PLACED ON PROBATION, DISCIPLINED OR OTHERWISE PREVENTED FROM CONDUCTING BROKER OR APPRAISAL SERVICES BY THE FLORIDA REAL ESTATE COMMISSION OR THE FLORIDA REAL ESTATE APPRAISAL BOARD:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

C. LIST EACH ORGANIZATION RECOGNIZED BY THE REAL ESTATE APPRAISAL INDUSTRY, OR PROFESSIONALS IN THE APPRAISAL FIELD, IN WHICH YOU ARE CURRENTLY OR HAVE PREVIOUSLY BEEN A DESIGNATED MEMBER:

<u>ORGANIZATION</u>	<u>DESIGNATION</u>	<u>DATE OF DESIGNATION</u>	<u>MEMBERSHIP NUMBER</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

**NOTE: PLEASE PROVIDE SUPPORTING DOCUMENTATION TO VERIFY EACH DESIGNATION. APPLICATIONS WILL NOT BE CONSIDERED UNTIL VERIFICATION IS RECEIVED BY THE OFFICE OF THE CLERK OF THE CIRCUIT COURT.**

D. LIST THE REQUIREMENTS, INCLUDING EXPERIENCE AND EDUCATION, NECESSARY TO OBTAIN EACH DESIGNATION LISTED ABOVE:

\_\_\_\_\_  
\_\_\_\_\_



---

Involvement in commercial litigation, mediations, disputes with insurers/insureds on valuation issues which often included working with experts on valuation.

PROPERTY TYPE	EXPERIENCE/SPECIALTY
RESIDENTIAL REAL PROPERTY	Occasional real estate closings, represent buyer/seller
COMMERCIAL REAL PROPERTY	Occasional real estate closings, <del>represent buyer/seller</del>
TANGIBLE PROPERTY	
OTHER (PLEASE SPECIFY)	

[illegible]

B. IF APPLICABLE, EXPLAIN WHY YOU NO LONGER SERVE AS A SPECIAL MAGISTRATE IN THE ABOVE COUNTIES:

\_\_\_\_\_  
\_\_\_\_\_

C. LIST EACH INSTANCE IN WHICH YOU HAVE BEEN DISMISSED, TERMINATED, OR DENIED APPOINTMENT AS A SPECIAL MAGISTRATE:

\_\_\_\_\_  
\_\_\_\_\_

9. LIST ANY PERSONAL OR BUSINESS RELATIONSHIP YOU HAVE EVER HAD WITH ANY OFFICER OR EMPLOYEE OF THE OFFICE OF THE PROPERTY APPRAISER, OFFICE OF THE CLERK OF THE CIRCUIT COURT, OFFICE OF THE COUNTY ATTORNEY, OR THE VALUE ADJUSTMENT BOARD:

\_\_\_\_\_  
\_\_\_\_\_

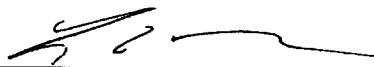
10. LIST ANY ADDITIONAL INFORMATION WHICH QUALIFIES YOU TO SERVE AS A SPECIAL MAGISTRATE:

Certified mediator

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

11. PLEASE PROVIDE A WRITING SAMPLE. THIS SAMPLE MAY CONSIST OF ANY OPINION, LETTER, APPRAISAL, OR OTHER DOCUMENTATION THAT CONTAINS ONE (1) OR MORE WRITTEN PAGE(S) OF ORIGINAL MATERIAL.

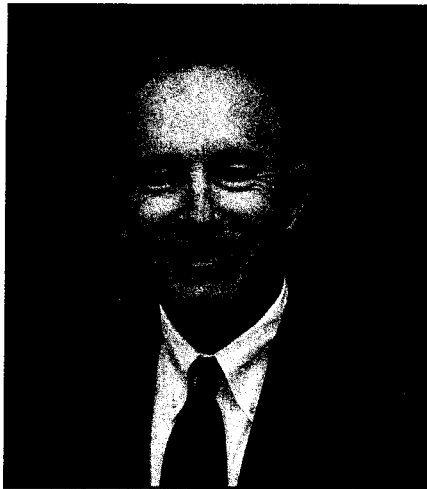
THE UNDERSIGNED CERTIFIES, UNDER PENALTY OF DISQUALIFICATION FROM CONSIDERATION, THAT EACH ITEM CONTAINED IN THIS APPLICATION, OR OTHER DOCUMENT FURNISHED BY OR ON BEHALF OF THE APPLICANT IS TRUE AND COMPLETE AS OF THE DATE IT BEARS. THE UNDERSIGNED AUTHORIZES THE VALUE ADJUSTMENT BOARD TO OBTAIN INFORMATION FROM OTHER SOURCES TO VERIFY EACH ITEM CONTAINED HEREIN. THE UNDERSIGNED ACKNOWLEDGES THAT IF SELECTED HE/SHE WILL FOLLOW ALL REQUIREMENTS AND MANDATES OF LAW IN FULFILLING THE DUTIES OF SPECIAL MAGISTRATE TO THE VALUE ADJUSTMENT BOARD.



SIGNATURE OF APPLICANT

5-3-13

DATE



# MATTHEWS & HIGGINS, LLC

Insurance Defense and  
Civil Trial Attorneys

Larry A. Matthews

## EDUCATION

Florida State University Tallahassee, Florida	Juris Doctor Honors	1981
University of Florida Gainesville, Florida	Bachelor of Science, Accounting Honors	1976

## EXPERIENCE

Matthews & Higgins, LLC Pensacola & Panama City, Florida	Shareholder	2012 - present
Bozeman, Jenkins & Matthews, P.A. Pensacola & Ft. Walton Beach, Florida	Shareholder	1993 - 2011
Jenkins & Matthews Pensacola, Florida	Partner	1992 - 1993
Beggs & Lane Pensacola, Florida	Partner	1987 - 1992
Emmanuel, Sheppard & Condon Pensacola, Florida	Associate	1985 - 1987
Holland & Knight Tampa, Florida	Associate	1982 - 1985
Fowler, White et al. Tampa, Florida	Associate	1981 - 1982

## NATURE OF PRACTICE

General civil litigation practice with emphasis in defense of personal injury matters including automobile negligence, professional negligence, premises liability & products liability, employment law and civil rights litigation. Commercial litigation including insurance coverage matters, real property matters & fire and casualty matters. Recent concentration in toxic tort litigation and complex case/class action litigation.

## SPECIAL QUALIFICATIONS

Board Certified Civil Trial Lawyer (Florida)  
Certified Circuit Court Mediator (Florida)

Certified Public Accountant (inactive)

## PROFESSIONAL ORGANIZATIONS

The Florida Bar (1982)	American Board of Trial Advocates
Alabama State Bar (1994)	American Trial Lawyers Association
U.S. District Court, Northern, Middle and Southern Districts of Florida	American Inns of Court
Tax Court	Florida Defense Lawyers Association
The Federal Bar Association	U.S. District Court, Southern District of Alabama

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**Appeal Case No.: 09-13954-B**

**BRIAN MOORE, as Personal  
Representative on behalf of the  
Estate of Bernard P. Rice, deceased,**

**L.T. Case No.: 5:08cv343/RS/MD**

**Appellant,**

**v.**

**NORTH AMERICA SPORTS, INC., a  
foreign corporation d/b/a World  
Triathlon Corporation, also d/b/a  
Ironman Triathlon, and also d/b/a Ford  
Ironman Florida, and f/k/a Ironman  
North America, and USA TRIATHLON,  
a foreign corporation,**

**Appellees.**

---

**BRIEF OF APPELLEES**

**On Appeal from the United States District Court  
Northern District of Florida**

**Larry A. Matthews  
Shane M. Dean  
Jason B. Onacki  
BOZEMAN, JENKINS & MATTHEWS, P.A.  
114 East Gregory Street (32502)  
Post Office Box 13105  
Pensacola, FL 32591-3105  
(850) 434-6223 Telephone  
(850) 434-5242 Facsimile  
Attorneys for Appellees**

Appeal Case No.: 09-13954-B  
L.T. CaseNo.: 5:08cv343/RS/MD

Brian Moore v. North America Sports, Inc.

**CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF  
INTERESTED PERSONS**

***Non-governmental corporate parties to this proceeding:***

1. North America Sports, Inc. has no parent corporation nor does any publicly held corporation own any North America Sports, Inc. stock.
2. USA Triathlon has no parent corporation nor does any publicly held corporation own any USA Triathlon stock.

***Persons and entities known to Appellees to have an interest in the outcome of this action:***

1. Boggs, John N., Esq., Counsel for Appellant
2. Bozeman, Jenkins & Matthews, P.A., Counsel for Appellees
3. The Honorable Miles Davis, U.S. Magistrate Judge
4. Dean, Shane M., Esq., Counsel for Appellees
5. Estate of Bernard P. Rice, Appellant
6. Matthews, Larry A., Esq., Counsel for Appellees
7. Moore, Brian (as Personal Representative of the Estate of Bernard P. Rice),  
Appellant
8. North America Sports, Inc., Appellee
9. Onacki, Jason B., Esq., Counsel for Appellees



## **STATEMENT OF JURISDICTION**

This Court has jurisdiction of this appeal from a final judgment in a civil case pursuant to the provisions of 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUES**

- A. WHETHER PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND, IF NOT, WAS SUCH ERROR PROCEDURAL AND THEREFORE NOT WARRANT A NEW TRIAL WHERE THE DISTRICT COURT HAD JURISDICTION AT THE TIME JUDGMENT WAS RENDERED.**
- B. WHETHER EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS WAS PROPERLY ADMITTED UNDER THE CIRCUMSTANCES CREATED BY PLAINTIFF, AND IF NOT, DID THE ERROR SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**
- C. WHETHER MEDIA COVERAGE PREVENTED PLAINTIFF FROM RECEIVING A FAIR TRIAL.**
- D. WHETHER PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED WHERE THERE WAS EVIDENCE THAT DECEDENT ENTERED SEVERAL RELEASES AND WAIVERS.**

## **STATEMENT OF THE CASE**

### **(i) Course of Proceedings**

This is an appeal of a final judgment for the Defendants in a wrongful death action. (R-245). The judgment is based on a jury verdict in favor of Defendants rendered at the conclusion of a five-day jury trial on July 10, 2009. (R-213 (civil minutes from trial); R-216 (jury verdict); R-218 (judgment)).

Plaintiff, as Personal Representative of the Estate of Bernard P. Rice, filed a four-count negligence action against World Triathlon Corporation, North America Sports, Inc., USA Triathlon, and Any Other Entity Whose Acts or Omissions Caused or Contributed to the death of Bernard P. Rice. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). The lawsuit was filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida. (R-1-2, Exhibit "A" to Defendants' Notice of Removal; R-1-3, Exhibit "B" to Defendants' Notice of Removal).

On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy claimed by Plaintiff exceeded \$75,000 exclusive of interest and costs. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff answered on November 3, 2008, admitting for the first time that the amount in controversy exceeded \$75,000 exclusive of interest and costs. (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Eleven

days later on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal to federal court pursuant to 28 U.S.C. § 1446(b). (R-1). Plaintiff's subsequent Motion to Remand and Motion for Attorneys' Fees and Costs, (R-3), was denied. (R-12).

Judgment was entered in favor of Defendants on July 13, 2009. (R-218). This appeal followed. (R-245).

**(ii) Statement of Facts**

The facts relevant to Plaintiff's four challenges on appeal are as follows:

**A. Removal.** Plaintiff filed a negligence action in the Circuit Court for Bay County, Florida. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). Four Defendants were identified, including World Triathlon Corporation, which was alleged to be a Florida Corporation. (*Id.*). As to the amount in controversy, the Complaint alleged "damages were in excess of \$15,000.00 (fifteen thousand dollars) exclusive of interest where applicable and costs," (R-1-3, Exhibit "B" to Defendants' Notice of Removal)<sup>1</sup>, the state court's minimum jurisdictional amount. (R-12, p 4).

On July 14, 2008, Defendants North America Sports and USA Triathlon filed a Motion to Dismiss, or in the alternative, Motion for More Definite Statement. (R-1-

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<sup>1</sup>Plaintiff incorrectly states that the Complaint alleged damages in excess of \$75,000. *See* Plaintiff's Brief at 30. The Complaint alleges that damages were in excess of \$15,000, not \$75,000, hence the need for the Requests for Admission.

4, Exhibit "C" to Defendants' Notice of Removal; R-1-5, Exhibit "D" to Defendants' Notice of Removal). Thereafter, on September 2, 2008, Plaintiff served a Notice of Dropping World Triathlon Corporation as a party-Defendant, which created diversity of citizenship. (R-1-6, Exhibit "E" to Defendants' Notice of Removal). Only once diversity was established on September 2, 2008, did the issue of the amount in controversy become important. On October 2, 2008, Defendant USA Triathlon served its First Request for Admissions to Plaintiff, requesting Plaintiff admit the amount in controversy exceeded the \$75,000 removal threshold. (R-1-7, Exhibit "F" to Defendants' Notice of Removal). Plaintiff belatedly served his response to the requests for admissions on November 3, 2008, admitting the amount in controversy met the jurisdictional threshold set by 28 U.S.C. § 1332(a) (R-1-8, Exhibit "G" to Defendants' Notice of Removal). Importantly, under the mandate of *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007), this was the first document from Plaintiff constituting an unambiguous statement that the claimed damages satisfied the amount in controversy necessary for removal. Eleven days later, on November 14, 2008, Defendants North America Sports and USA Triathlon timely filed their Notice of Removal. (R-1). The trial court denied Plaintiff's Motion to Remand and Motion for Attorneys' Fees and Costs, (R-12), reasoning that under *Lowery* removal before the request for admission would require the District Court to



engage in “impermissible speculation” as to the amount in controversy. (R-12, p 4 citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11th Cir. 2007)).

**B. Evidentiary Ruling.** Contrary to the record, Plaintiff misstates throughout his brief that he dropped his claim for net accumulations before he presented any evidence on that claim.<sup>2</sup> (R-213 at p 5<sup>3</sup>; R-256<sup>4</sup>). He also misstates that he dropped his claim for net accumulations before Defendants’ attempt to cross-examine Plaintiff’s witness as to evidence highly relevant to the net accumulations claim.<sup>5</sup> Plaintiff is absolutely incorrect. Plaintiff made the claim for lost net accumulations a focus of his voir dire, opening statement, and case-in-chief. (R-256). It was not until the fourth day of trial, and after the two questions on cross-

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<sup>2</sup>Plaintiff offers no citation to the record to support his assertion that he “dropped” the net accumulations claim without introducing any evidence on this element of damages. (Appellant’s Brief at p 10). Nor does he cite to the date (Thursday) when he dropped his net accumulations claim. (*Id.*) See also footnote 6.

<sup>3</sup>Jury Trial Minutes showing Plaintiff presented evidence from economics expert Frederick Raffa, Ph.D.

<sup>4</sup>Plaintiff presented trial testimony regarding claim for net accumulations by reading the Deposition of Frederick Raffa, Ph.D.

<sup>5</sup>Plaintiff presented testimony from his economics expert regarding the basis for his net accumulations claim after Plaintiff presented witness Patricia Rice, whom Defendants cross-examined regarding the wrongful conversion claim by Plaintiff’s father against his son. (R-213 at p 5; R-238 at pp 5-6; R-256).

examination of Plaintiff's mother for which Plaintiff complains, when Plaintiff elected to drop his claim for loss of net accumulations.<sup>6</sup>

Plaintiff claimed loss of net accumulations when he filed suit. (R-1-3, Exhibit "B" to Defendants' Notice of Removal). His discovery was directed towards supporting that claim. (R-256, Deposition of Frederick Raffa, Ph.D read into evidence at trial). Plaintiff's economics expert, who was presented at trial by deposition testimony, opined that Plaintiff lost massive amounts of net accumulations based on Plaintiff's projected earnings as general manager of his father's car dealership. (R-213 at p 6; R-256 at pp 5-11). What Plaintiff did not disclose to Defendants was that shortly after Plaintiff's death, his father, in his capacity as Plaintiff's employer, brought a legal action claiming his son and daughter-in-law wrongfully converted hundreds of thousands of dollars from the family car dealership. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Despite Defendants'

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<sup>6</sup>Defendants are not aware of any record as to the withdrawal of Plaintiff's net accumulations claim until Friday. (R-213 at pp 8-9). However, defense counsel recalls plaintiff making the announcement on Thursday, and will supplement the record with the transcript of proceedings from that date. Nonetheless, Defendants point to the fact that Plaintiff offered evidence supporting his claim for net accumulations by testimony of his economics expert at the close of the third day of trial (July 8) and before he closed his case, (R-213 at p 5; R-256). Plaintiff would not have presented evidence to support his net accumulations claim, nor would Defendants have allowed such evidence, if Plaintiff had dropped his net accumulations claim prior to the testimony of Plaintiff's economics expert.

multiple discovery requests, it was not until the eve of trial that Defendants discovered there was a claim for wrongful conversion against Plaintiff.<sup>7 8</sup> (R-255-2 at p 8 (¶18); R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62). Among the items in the

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<sup>7</sup>A brief timetable illustrates Plaintiff's failure to timely disclose the highly relevant evidence:

**February 10, 2009.** *First Interrogatories to Plaintiff.* Defendant North America Sports, Inc.'s First Interrogatories: Plaintiff's response served on March 23, 2009, failed to disclose any other claims or litigation involving the Estate and Decedent. (R-255-1 at p 8 (¶18)). Both the Estate and Decedent's widow were named parties in the other litigation alleging wrongful conversion and embezzlement of funds and property, and it is hard to imagine Plaintiff did not have knowledge of this other litigation that began in 2007 prior to the filing of the wrongful death action. (R-173).

**April 30, 2009.** *Deposition of widow:* For the first time, the Decedent's wife reluctantly hinted there may be other litigation involving the Estate. (R-255-2 at p 64, ln 17 - p 66, ln 19). Unfortunately, Plaintiff's counsel directed the widow to not provide any information about the nature of the litigation, the identity of the parties, etc., based on invocation of questionable privileges, and even though the subject matter was public record and otherwise not privileged. (*Id.*).

**May 8, 2009.** *Discovery deadline:* Plaintiff and his counsel obviously knew of the claim involving the Estate in order to invoke a privilege. Despite having knowledge of the other litigation, Plaintiff still failed to supplement his answers to interrogatories to disclose it as required under Fed.R.Civ.P. 26(e)(1)(A).

<sup>8</sup>This is not the only time Plaintiff failed to timely disclose crucial evidence. For example, Plaintiff failed to timely disclose a videotape of Plaintiff from the race until after the discovery deadline and despite Defendants' earlier discovery requests seeking such crucial evidence. (R-74).

probate documents characterizing the son's actions are terms such as "embezzlement," "altered statements," "illegal receipt," and similar terms. (*Id.*). Evidence that Plaintiff's father was so upset as to sue his son's estate and daughter-in-law for wrongful conversion completely undermined Plaintiff's basis for net accumulations. The District Court recognized the relevance of this evidence:

"[E]mbezzlement, that [Decedent's] former employer has accused him of embezzlement, not only his former employer, but arguably sheltered employment with his father, such that they are claiming embezzlement, then I think that raises a - - that is - - has some probative value on the question of projecting out his future earnings on net accumulations.

(R-237 at p 29).

"The jury can conclude if [Decedent] has ripped off his employer for \$400,000, that calls into question whether he would continue to be employed there, and earning that type of salary."

(R-237 at p 40).

However, the District Court denied as untimely the Defendants' motion requesting to use documents concerning the wrongful conversion claim as trial exhibits. (R-237, p 8). The District Court was frustrated with Defendants' request for leave to add this newly discovered evidence the week before trial. (R-237 at pp 6, 10). Nevertheless, Judge Smoak allowed this evidence to come in through testimony, reasoning that cross-examination was:

the less of two evils of totally misleading the jury that all is fine in paradise, if we don't let it in, where at least [if we let it in on cross-examination] at least [Defendants] can try to make of it what [they] will.

(R-237 at p 11).

The District Judge instructed "if these non-party witnesses for some reason get into the issue of [Decedent's] employment, his continued employment, the future accumulation, then I think that opens the door. (R-237 at p 35). The District Judge permitted use of the term "wrongful conversion" to describe the claim made against Plaintiff's Decedent's Estate. (R-237 at p 40).

Following the District Court's instructions, Defendants cross-examined Plaintiff's mother, Patricia Rice, as follows:

MR. DEAN: You mentioned that he had worked and had a job since he was 16, is that right?

PATRICIA RICE: Right.

\* \* \* \* \*

MR. DEAN: Who was he working for at the time of his death?

PATRICIA RICE: He was working for his father.

MR. DEAN: And what is his father's name?

PATRICIA RICE: His dad's name is Pete Rice.

\* \* \* \* \*



MR. DEAN: Are you aware that Mr. Rice, Pete Rice, has filed a claim against your son's estate for wrongfully converting money and property in the amount of \$427,000, as well as some other property?

MS. SANTA MARIA [Plaintiff's counsel]: Objection, Your Honor.

THE COURT: Overruled.

MR. DEAN: Were you aware of that, ma'am?

PATRICIA RICE: I know there's been some allegations, and I know that something is going on. I've never read. I've never been around in Kallispell or talked to any attorneys, or have any information like that.

MR. DEAN: Are you aware that the allegations that you said you were generally aware of, that they included allegations that your son was stealing money and property from your ex-husband and his dad?

MS. SANTA MARIA: Objection, Your Honor.

THE COURT: Sustained. Counsel, remember our sidebar conference.

(R-238 at pp 5-6).

When Patricia Rice responded to Defendants' counsel's question regarding the "wrongful conversion" claim, and after indicating some possible confusion as to the legal terms used, Defendants' counsel clarified his question by using the layman's term "stealing." Even the District Court admitted to not knowing the difference between "wrongful conversion" and "stealing," and presumably neither did the jury. (R-238 at p 11). Nevertheless, no further inquiry was pursued by Defendants' counsel, and the jury was only left with the testimony that Plaintiff's mother was

aware of some claim involving wrongful conversion brought by Plaintiff's father against his son's estate. (R-238 at p 6, ln 7-8). Cross-examination was finished shortly thereafter pursuant to the Court's instruction. (R-238).

Plaintiff moved for mistrial on the basis that Defendants overstepped the District Court's instructions allowing cross-examination. (R-238 at p 9). The District Court denied Plaintiff's Motion for Mistrial at the conclusion of trial. (R-238 at p 14).

**C. Jury Poll.** Media coverage of Plaintiff's lawsuit leading up to and including trial was certainly expected. The fact that a participant would sue an organization putting on a triathlon (2.4 mile swim, 112 mile bike, and 26.2 mile run) for a heart condition or drowning is noteworthy regardless of the venue.

Plaintiff's first motion to transfer venue was filed a month before trial on June 1, 2009 (R-96), followed by a supplemental motion on June 8, 2009 (R-104), and both were based on an article in the Panama City News Herald, which quoted portions of Defendants' Motion to Dismiss filed on July 14, 2008, prior to the removal of the case to federal court. (R-1, Exh. C). The District Judge denied Plaintiff's Motion to Transfer, reasoning that if there was an issue, then it could be addressed at voir dire. (R-148).

Another article appeared in the News Herald on the first day of trial. (R-240). During voir dire, the District Judge addressed the issue of media coverage by asking the prospective jurors if any of them had "heard anything about this case, or seen anything?" (R-277 at p 2). The transcript of voir dire indicates that at least one juror raised his/her hand indicating that they had heard or seen something about the case. (*Id.*). The District Judge then instructed "that article is not evidence(*Id.*). Evidence you're going to hear is going to come here in this courtroom, and that's what this jury has to decide its - - make its decision on." (*Id.*). Judge Smoak then confirmed:

Can all of you set aside what you may have seen or heard about this case and decide this case solely on the evidence that comes in during trial, and follow and apply the law that I will instruct the jury that they must follow?

(R-277 at p 2).

The jurors confirmed they would set aside anything they may have seen or heard about the case, and they would limit their consideration to the evidence presented at trial and the District Court's instructions regarding what law to apply to the evidence. (*Id.*).

The District Court even took further precaution by asking:

For those of you who saw or heard anything about this case, was what you saw or what you heard so strong that you will not be able to set that aside and decide the case solely on the evidence and follow the law?

(R-277 at p 2).

Again, the jurors confirmed that they would limit their deliberation to the evidence presented at trial and follow the law provided by the Judge. (*Id.*).

Additional media coverage occurred for the next four days of trial. (R-236; R-240; R-241; R-242; R-244). However, there is no evidence that any juror ever observed the additional media coverage or in any way violated the District Court's instructions. Further, the District Court evaluated the media coverage each day and found it to be "about as neutral as you can get." (R-228, at p 3, ln 1-6; R-235 at p 7, ln 20-24). The District Court relied on its instructions given to the jury during voir dire and ruled "I'm not going to ask the jurors every day - - every time they come in whether they've followed my instructions. I don't think those articles are much to get much stirred about, quite frankly, but we gave them the instruction." (R-228 at p 3, ln 7-8). The District Court refused Plaintiff's request to interrogate the jurors by ruling that the media coverage did not create an "extreme" case. (R-235 at p 7, ln 7-25; R-235 at p 13, ln 1-7). Nevertheless, Judge Smoak reminded the jury of his instructions at the close of Plaintiff's case-in-chief, at the end of the third day of trial:

Now, remember on Monday, part of my instructions were to you that you are to avoid seeing or listening to anything about this case that might appear in the media. There have been some mention, of no particular consequence, but remember my instructions to you on that point and remember the oath you took. Your decision in this case will be based solely on the evidence and by following the law that I instruct you on.

These [parties] need to feel confident and assured that they're going to get a fair trial, both sides, and they don't need to worry about the television or the newspaper.

So if you would - - and I have no doubt that you will - - keep those in mind. The only reason I bring it up because usually these [media sources], they don't have a clue what we're doing down here, but for some reason they get some mention in the newspaper, and I think one of the television stations. Of no particular consequence. And so with that, you all can go on now and we'll see you at 8:30 in the morning.

(R-256 at pp 12-13; R-213 at p 6).

**D. Summary Judgment as to Releases and Waivers.** Plaintiff was required to execute at least two separate waivers and releases (sometimes referred to as "waiver" or "waivers")<sup>9</sup> to participate in the 2006 Ironman Florida ("Florida event"). (R-79-2; R-79-3; R-79-4; R-79-5). Plaintiff entered a waiver when registering online using the internet, (R-79-2; R-79-3), and then entered another waiver as required for his race site registration in Panama City. (R-81 at p 7(¶19), p 13(¶17), p 18(¶¶14-17); R-79-4).

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<sup>9</sup>There was another release required by USA Triathlon for participants to execute if they were not an annual member of USA Triathlon. (R-79-5; R-81 at p 8 (¶¶15-17, 23), p 14 (¶23), p 18 (¶¶15-17)). The majority of the 2200 participants in the Florida event were annual members of USA Triathlon, and therefore USAT only sent 1000 waiver forms for use in race site registration in anticipation of the small number of participants needing to enter that waiver. (R-81 at p 30, ln 7-23, excerpt of Deposition of Kathy Matejka). This was not an issue at trial, although Plaintiff's brief confuses the USAT waiver with the other race site waiver required of all participants in the Florida event.



The online registration was administered by The Active Network, Inc., a company specializing in providing internet registration support for sporting events such as triathlons. (R-81 at p 6(¶14), p 12(¶14)). Plaintiff had to agree with all of the terms of the online registration, including the waiver, to submit the registration for entry into the Florida event. (R-81 at p 6(¶12), p 12(¶12)). Failure to check the box signifying acceptance of the waiver would not allow Plaintiff to continue the online registration process necessary to participate in the Florida event. (R-81 at p 6(¶13), p 12(¶13)).

All participants in the Florida event were also required to complete a race site waiver as a prerequisite to obtaining materials necessary to participate. (R-81 at p 7 (¶¶17, 18, 19), p 8 (¶24), p 13 (¶¶17, 18, 19), p 14 (¶24)). The opposite side of that waiver form required participants to provide emergency medical information. (R-285 at p 5, ln 4 - p 6, ln 10; p 14, ln 11-25). The form was stored in the medical tent, and it was to be provided to medical personnel if a participant required emergency medical treatment. (R-285 at p 15, ln 1 - p 16, ln 10). There were no copies made of these waivers, so if it was given to emergency personnel, there would be no duplicate. (*Id.*).

There was also a third waiver from an earlier triathlon, which was part of Defendants' defense. (R-79-6; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)).

Plaintiff had also participated in a triathlon in California earlier in 2006. (R-81 at p 34 (¶16); R-81 at p 51 (¶16)). As part of his participation in the California event, Decedent signed race site waivers similar to those he completed to participate in the Florida event later that same year. (R-79-6; R-79-7; R-81 at p 34 (¶¶16, 17); R-81 at p 51 (¶¶16, 17)). This waiver expressly applied to all of Defendants' events for the 2006 season, which included the subsequent Florida event. (R-79-6, R-79-7). The Court denied Defendant's motion for directed verdict on the earlier California waiver. (R-213 at p 6).

Defendants raised affirmative defenses relying on the waivers entered by Plaintiff as a bar to his claims. (R-29 (¶¶53, 54); R-30 (¶¶53, 54)). Both Plaintiff and Defendants moved for summary judgment on those affirmative defenses. (R-46, R-79, R-89).

Plaintiff argued: (i) the online waiver was invalid and unenforceable by operation of Montana law; (ii) even if the online waiver were an enforceable bar against Plaintiff's claims, he did not agree to it; and, (iii) the race site waiver was never signed by Plaintiff because it could not be located. (R-46).

Defendants responded to Plaintiff's arguments as part of their own Motion for Summary Judgment. (R-79). Defendants argued: (i) although Plaintiff entered the online waiver while located in Montana, both Florida law and Montana law

commanded that the online waiver be interpreted under Florida substantive law, and under Florida law, the online waiver barred Plaintiff's claims; (ii) Plaintiff's agreement to the terms of the online waiver was evidenced by his submission of it, which could not have occurred without Plaintiff agreeing to all of its terms; and (iii) Plaintiff had to sign the race site waiver in order to receive materials necessary to participate, and if the waiver could not be located, it was because the executed waiver was given to emergency personnel. (R-79).

The District Court refused to grant summary judgment to Defendants on the enforceability of the online waiver on the basis that there was an inadequate showing the Plaintiff had agreed to it. (R-147). The District Court pointed to the hard copy of Plaintiff's online registration as not showing "check mark boxes" nor "check marks" referenced by the registration. (R-147 at pp 7-8). The District Court reasoned that the lack of check mark boxes and check marks meant there was a question of fact as to whether Plaintiff agreed with the online waiver. (R-147 at 8). Judge Smoak ruled that "[w]hether the online waiver was properly executed is clearly in dispute," and therefore the issue must proceed to trial. (R-147 at 8).

The District Court also found there was an issue of fact as to whether Plaintiff entered the race site waivers. (R-147 at 9).

The District Court structured the verdict form so the jury first assessed whether Defendants were liable for negligence, and only if there was a finding of negligence would the jury then determine whether Plaintiff had entered the online and race site waivers. (R-216). The jury's finding that Defendants were not liable for negligence ended the case, and no findings were made as to whether Plaintiff entered the online and race site waivers. (*Id.*).

**(iii) Standard of Review**

Defendants agree with Plaintiff's statements regarding the standards of review applicable to each alleged error.

## **SUMMARY OF ARGUMENT**

The District Court properly denied Plaintiff's Motion to Remand because removal was timely. But even if there was a procedural defect in removal, such a defect does not command a new trial where the federal court had jurisdiction at the time judgment was entered.

Second, the District Court acted within its discretion by ruling that evidence of a wrongful conversion claim by Plaintiff's father against Plaintiff was relevant to challenge the basis for Plaintiff's claim for loss of net accumulations, which relied on the assertion that Plaintiff would work for his father for the rest of his life. The District Court also properly denied Plaintiff's Motion for Mistrial for defense counsel's follow-up question clarifying the claim by Plaintiff's father against Plaintiff.

Third, the District Court gave proper instructions to address media coverage of the case, and the jury confirmed that they would only consider evidence presented at trial in reaching their verdict. Judge Smoak properly considered: (i) the character of the media coverage; (ii) its timing; (iii) its credibility; and (iv) whether it would

influence the jury, as well as his observation of the jury, local knowledge<sup>10</sup>, and other considerations incumbent upon the presiding judge.

Finally, the District Judge properly denied Plaintiff's Motion for Summary Judgment on the grounds that there was evidence that Decedent entered several releases and waivers.

### **ARGUMENT**

#### **A. PLAINTIFF'S MOTION TO REMAND WAS PROPERLY DENIED BECAUSE REMOVAL WAS TIMELY, AND IF NOT, SUCH ERROR WAS PROCEDURAL AND THEREFORE DOES NOT WARRANT A NEW TRIAL.**

##### **i. Defendants timely sought removal under the mandate of *Lowery***

Plaintiff incorrectly argues that the timing for removal starts when the diversity of the parties is established. Plaintiff ignores the requirement that in addition to establishing diversity there must also be an unambiguous statement establishing the amount in controversy. Only when both elements are established does the thirty-day time period for removal begin.

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<sup>10</sup>District Judge Smoak has been on the bench since 2005. *See Biographical Directory of U.S. Judges*. Before that he had an active civil trial practice in the Panama City-area for over thirty years. *Id.* With this background he has an excellent understanding of his community and those factors which may influence a jury.



The following time line supports the District Court's ruling that removal was timely:

**June 20, 2008:** Complaint served naming World Triathlon Corporation (the only alleged Florida citizen)

**July 14, 2008:** Defendants file Motion to Dismiss

**September 2, 2008:** Plaintiff voluntarily dismisses World Triathlon Corporation

\* \* *(Diversity established)* \* \*

**October 2, 2008:** *With diversity now established*, Defendants serve request for admissions to ascertain whether or not Plaintiff is seeking damages in excess of \$75,000

**November 3, 2008:** Plaintiff admits he is seeking damages in excess of \$75,000 exclusive of fees and costs

\* \* *(Amount in controversy established)* \* \*

**November 14, 2008:** Defendants timely file Petition for Removal

This Court is aware of the many cases addressing the issue of amount in controversy as a basis for federal jurisdiction. This Court, with its decision in *Lowery v. Alabama*, 483 F.3d 1184 (11<sup>th</sup> Cir. 2007), established a bright line standard for removal requiring an unambiguous statement by Plaintiff of the amount in

controversy.<sup>11</sup> No longer are the District Courts or the parties required to speculate as to the amount in controversy, and any speculation is now strictly prohibited.

*Lowery* provides a strict, but easy, framework for establishing the amount in controversy, which if followed no longer places the removing party at risk of remand or sanctions. *Lowery*, 483 F.3d at 1214-15. Under *Lowery*, the District Court and parties need only look at record evidence to determine the amount in controversy, no more and no less:

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<sup>11</sup> With the exception of the two cases discussed below, Plaintiff cites to cases which pre-date *Lowery* or are from outside the Eleventh Circuit. A brief discussion of the inapplicability of these cases follows:

*Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, \*5 (M.D.Fla. July 31, 2007) cited at page 32 of Appellant's Brief. *Foster* is readily distinguishable from the instant case. In *Foster*, there were statements demonstrating that the claimant's alleged wage losses exceeded \$60,000 and a statute showing her entitlement to attorneys fees would exceed \$15,000. *Id.* at \*4-\*5.

*Wagner v. Oerlikon, USA, Inc.*, 2008 WL 2262041, \*1 (M.D.Fla. May 30, 2008) cited at page 32 of Appellant's Brief. *Wagner* is readily distinguishable from the instant case. In *Wagner*, the complaint explicitly alleged a breach of an agreement to pay "Severance Benefits," and the employment agreement defined "Severance Benefits" as a two-year continuation of "any pension, life insurance, health insurance, disability insurance and other employee benefit plans, if any, which the Company may from time to time make available to its executive officers generally." The District Judge held that because the defendants undoubtedly maintained a record of their contributions on behalf of the plaintiff, each category of benefit was peculiarly within the defendants' knowledge at the commencement of the action, and it was obvious to defendants that the amount in controversy exceeded \$75,000.

Under the first paragraph of § 1446(b), a case may be removed on the face of the complaint if the plaintiff has alleged facts sufficient to establish the jurisdictional requirements. Under the second paragraph, a case becomes removable when three conditions are present: there must be (1) “an amended pleading, motion, order or other paper,” which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can “first ascertain” that federal jurisdiction exists. § 1446(b). Under either paragraph, the documents received by the defendant must contain an unambiguous statement that clearly establishes federal jurisdiction. See Bosky v. Kroger Texas, LP, 288 F.3d 208, 211 (5th Cir.2002) (holding that grounds must be “unequivocally clear and certain”); Huffman v. Saul Holdings, LP, 194 F.3d 1072, 1078 (10th Cir.1999) (same). As we have noted, a removing defendant's counsel is bound by Rule 11 to file a notice of removal only when counsel can do so in good faith.

*Lowery*, 483 F.3d at 1215, n. 63.

Although a successful wrongful death case typically involves damages exceeding \$75,000, in the instant case the Defendants and the District Court were bound to follow the mandate of *Lowery*. The only unambiguous statement regarding the amount in controversy prior to Defendants’ Request for Admissions was Plaintiff’s allegation that he was seeking damages in excess of \$15,000. (R-1-3, Exhibit “B” to Defendants’ Notice of Removal). The District Court agreed that more was required to establish the amount in controversy:

The complaint seeks damages for Plaintiff’s wife, three minor children, and estate for past suffering, future suffering, loss of support and services of the decedent, mental pain and suffering, medical expenses, and funeral expenses. The complaint alleges only damages in excess of \$15,000, the state court’s minimum jurisdictional amount. Based on Plaintiff’s online application to participate in Defendant’s

event, Defendants were also aware that Plaintiff died at the age of thirty-five, held a bachelors degree, and he was president of a boat dealership. Plaintiff cites numerous authorities to support its argument that Defendants should have known that the amount in controversy based on the allegation of the complaint and the information then available to Defendants without requiring speculation. *See Foster v. Resources for Human Development, Inc.*, 2007 WL 2225811, \*5 (M.D.Fla. 2007); *Estevez-Gonzalez v. Kraft, Inc.*, 606 F.Supp. 127, 129 (S.D.Fla. 1985); *Baker v. Firestone & Rubber Co.*, 537 F.Supp. 244, 245-47 (S.D.Fla. 1982); *Lee v. Altamil Corp.*, 457 F.Supp. 979, 981 (M.D.Fla. 1978).

However, the complaint and online application do not provide Defendants with an unambiguous statement sufficient to establish that Plaintiffs' claims potentially exceed \$75,000. *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1219 (11<sup>th</sup> Cir. 2007). The nature of the claim is sufficient to conclusively establish the amount in controversy; instead, it requires impermissible speculation. *Id.* at 1220. Defendants did not receive a document clearly indicating that the value of Plaintiff's claim exceed \$75,000 until Plaintiff responded to the Defendants' First Request for Admission on November 3, 2008. *Id.* at 1221. Therefore, the Defendants were able to establish federal jurisdiction by a preponderance of the evidence starting on November 3, 2008 and has thirty days to file a notice of removal. On November 14, 2008, Defendants removed the case to this court in a timely fashion.

(R-12 at pp 4-5).

There was an insufficient basis to establish the amount in controversy for removal until Plaintiff responded to Defendants' Requests for Admission. When that occurred, Defendants timely sought removal.

**ii. If the District Court erred in applying *Lowery*, such error was procedural and does not entitle Plaintiff to a new trial**

Plaintiff had a five-day jury trial and yet asserts that failure to comply with the thirty-day procedural requirement of 28 U.S.C. § 1446(b) entitles him to a new trial in state court. To allow a party a new trial on a procedural error in invoking jurisdiction, when it is undisputed the court had jurisdiction at the time judgment was entered, is not what the law provides. Once a diversity case has been tried in federal court “considerations of finality, efficiency, and economy” overshadow any defects in removal procedure and do not provide a sufficient basis for new trial in state court. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

Plaintiff concedes, and in fact argues, there is no question the federal court had jurisdiction at the time judgment was entered. His argument focuses on whether removal was timely. Such error is not a sufficient basis to require a new trial:

To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

*(Id. at 77).*

Plaintiff had his day in court before a court of competent jurisdiction. The alleged procedural defect in invoking removal jurisdiction does not entitle Plaintiff to a new trial.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE QUESTIONING OF PLAINTIFF'S WITNESSES AS TO EVIDENCE REBUTTING PLAINTIFF'S CLAIM FOR NET ACCUMULATIONS, AND ANY SUCH CLAIMED ERROR DID NOT SUBSTANTIALLY PREJUDICE THE OUTCOME OF TRIAL.**

Plaintiff's mother's admission of having knowledge of a wrongful conversion claim by Plaintiff's father against his son's estate was properly admitted. Three points support the District Court's ruling: (i) evidence of a wrongful conversion claim was relevant; (ii) Defendants complied with the District Court's instructions; and (iii) if there was error, it did not substantially prejudice the outcome of trial.

**(i) A wrongful conversion claim is highly relevant to the basis for Plaintiff's claim for lost net accumulations**

Plaintiff's claim for lost net accumulations relied substantially on his continually working for his father's car dealership for the rest of his life. (R-256 at p 11, ln 6-15). Evidence suggesting that Plaintiff would have been fired by his father from his sheltered employment seriously challenges Plaintiff's claim for lost net accumulations. (R-237 at pp 29, 40).

A claim for loss of net accumulations to the estate of a 35-year old healthy male can certainly be significant. (R-237 at p 2, ln 22-23). Plaintiff's expert, Dr. Raffa, testified by deposition that Plaintiff was earning \$99,403.00 a year as manager of his father's used car dealership. (R-256 at p 5, ln 8-11). Dr. Raffa extrapolated this significant salary for the remainder of Plaintiff's anticipated working life of 31



years, making the net accumulations claim approximately \$800,000. (R-256 at p 5, ln 8-11; p 6, ln 10-12; p 11, ln 9-15). As the District Court aptly described this “sheltered income,” it was contingent upon Plaintiff remaining in his father’s good graces. (R-237 at p 29, ln 19-25).

The District Court reasoned:

MR. MATTHEWS: [Plaintiff has] based a large portion of his testimony on net accumulation on the fact that Mr. Rice was going to make hundreds of thousands of dollars a year for - - I think he had a 34-year life expectancy, working for his daddy. The fact that his daddy is suing him - - his estate, for embezzlement, which we think there’s pretty strong indication - -

THE COURT: I think that’s fair game for cross-examination.

(R-237 at p 6, ln 14-22).

With the District Court’s ruling that evidence of a wrongful conversion claim by Decedent’s father against his son was relevant if such testimony could be elicited on cross-examination, Defendants proceeded. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16).

**(ii) Defendants complied with the District Court’s instructions**

The District Court permitted defense counsel to question Plaintiff’s mother about her knowledge concerning a wrongful conversion claim between her ex-husband and her son. (R-238 at p 5, ln 12-23). Defendants’ counsel then attempted to clarify his term “wrongful conversion” with the more readily understood term

“stealing” or similar wording which Mrs. Rice was likely to have used or understood. (R-238 at p 5, ln 24 - p 6, ln 5). At this point, the District Court terminated any further inquiry on this issue. (R-238 at p 6, ln 7-8). The fact that Mrs. Rice presumably learned of the claim against her son’s estate (and his wife) from her daughter-in-law, with whom she maintains a close relationship, was not explored further by Defendants’ counsel pursuant to the District Court’s instruction. Defendants finished their cross-examination shortly thereafter. (R-238 at p 6).

**(iii) Any error in admitting evidence concerning the claim for wrongful conversion did not substantially prejudice the outcome of trial**

Assuming *arguendo* that it was error to allow cross-examination on the existence of the wrongful conversion claim, that error is not grounds for reversal because there was no resulting substantial prejudice. *King v. Gulf Oil Co.*, 581 F.2d 1184, 1186 (5th Cir. 1978) (citing Fed.R.Evid. 103 and Fed.R.Civ.P. 61); *Proctor v. Fluor Enterprises, Inc.*, 494 F.3d 1337, 1352 (11th Cir. 2007).

At most, the jury heard Plaintiff’s witness admit that “there’s been some allegations [of wrongful conversion], and I know that something is going on.” (R-238 at p 5, ln 19-23). The District Court properly allowed inquiry regarding allegations of “wrongful conversion”, but would not allow any further inquiry. (R-238 at p 5, ln 12 - p 6, ln 8). This was a five-day trial with the focus on liability. A

brief attempt to clarify the term “wrongful conversion” with the more common term “stealing” certainly did not substantially prejudice the outcome of this lengthy trial.

Moreover, Plaintiff dropped his claim for net accumulations the day after Plaintiff’s mother conceded the existence of the wrongful conversion claim. Once Plaintiff dropped his claim, the jury was no longer asked to consider this evidence or its relevance. *CSX Transp., Inc. v. Hensley*, --- U.S. ----, 129 S.Ct. 2139, 2141, 173 L.Ed.2d 1184 (2009) (Juries are presumed to follow the court's instructions.); *Greer v. Miller*, 483 U.S. 756, 767 n. 8, 107 S.Ct. 3102, 3109 n. 8, 97 L.Ed.2d 618 (1987) (Presume that a jury will follow an instruction to disregard inadmissible evidence.).

Finally, any error on the issue of net accumulation complained of by Plaintiff is not a consideration given the jury’s finding of no negligence, with no need to consider damages.

**(iv) Documents concerning the wrongful conversion claim should have been allowed at trial**

Understandably, the District Judge was frustrated that Defendants sought leave to add newly discovered documents evidencing the wrongful conversion claim the week before trial. (R-173; R-173-1 at pp 20, 24, 34, 39, 41, 62; R-237 at p 9, ln 11 - p 10, ln 18). After hearing arguments the morning of jury selection, the District Court ruled that Defendants could not place those documents in evidence as being untimely. (R-237 at p 11-14). The District Judge did, however, permit Defendants’

counsel to elicit testimony from witnesses on this issue. (R-237 at p 6, ln 14-22; p 7, ln 14-16; p 30, ln 3 - p 32, ln 16). Just a few examples illustrate why the documents proving the wrongful conversion claim should have been admitted in evidence:

*There was absolutely no possibility of prejudice to Plaintiff by admission of evidence concerning the wrongful conversion claim:* Plaintiff knew about the wrongful conversion claim since its inception in 2007, and certainly cannot complain they were surprised by late notice. Any prejudice concerning late notice of this claim could only damage Defendants' defenses.

*Plaintiff relied on an affidavit from the Montana attorney handling the wrongful conversion litigation:* Plaintiff introduced and relied on an affidavit from the Montana attorney handling the wrongful conversion litigation for Plaintiff. (Doc. 176). That affidavit made the existence of the wrongful conversion litigation the law of the negligence action. The use of the affidavit was an admission under oath by the Plaintiff that the wrongful conversion litigation existed.

*Judicial notice of other court documents:* The District Court should have taken judicial notice of the court documents filed in the Montana court from the wrongful conversion litigation. (R-173-1 at pp 20, 24, 34, 39, 41, 62). *Boyle v. County of Kern*, 2008 WL 220413 (E.D.Cal. 2008) (a court may take judicial notice of court records in another case, including probate cases).

The District Court's ruling forced Defendants to rely on cross-examination of Plaintiff's witnesses without any means of impeaching them in the event their testimony contradicted these court documents. This was a particular risk given the lack of candor by Plaintiff's wife (who was also a named defendant in the wrongful conversion litigation) and the Personal Representative in their discovery

**D. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BECAUSE THERE WAS EVIDENCE THAT PLAINTIFF EXECUTED ENFORCEABLE RELEASES AND WAIVERS.**

As expected with most sporting events, Plaintiff was required to execute a waiver in order to participate in the Florida event. In fact, Plaintiff had to execute two waivers. (R-79-2; R-79-3; R-79-4; R-79-5). If Plaintiff had failed to execute any of those waivers the Defendants would not have been allowed him to compete in the Florida event. (R-81 at p 7(¶¶17, 18, 19), p 13(¶¶17, 18, 19), p 18(¶14). The District Court's denial of Plaintiff's Motion for Summary Judgment was proper for several reasons, including the following: (i) Florida law is the proper law to use in interpreting the online and race site waivers, and Florida law provides that those waivers are enforceable; (ii) evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration; and (iii) evidence shows Plaintiff had to execute race site waivers to participate in the Florida event.

**i. Florida law is the proper law to use in interpreting the online and race site waivers**

Plaintiff argues the District Court should have used Montana or California law to interpret the enforceability of the online waiver entered by Plaintiff, (R-46), but the District Court properly found Florida law applied. (R-147 at p 7).

Plaintiff entered the online waiver while living in Montana. Regardless of what choice of law analysis is used,<sup>12 13</sup> the result is Florida law must be used to interpret the online waiver. If Montana law applies, when interpreting contract provisions such as the online waiver entered by Plaintiff, Montana law requires application of the law of the place where the contract is to be performed, which is Florida. (R-147 at p 7 citing Mont. Code Ann. § 28-3-102). Judge Smoak held:

In Florida, waivers or exculpatory clauses, although not looked upon with favor, are valid and enforceable if the intent to relieve a party of its own negligence is clear and unequivocal.

(R-147 at p 8).

Plaintiff's alternative argument that California law applies when interpreting the online waiver is also misplaced.<sup>14</sup> Even if California law applied, like Florida it

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<sup>12</sup>The District Court applied the doctrine of *lex loci contractus*. (R-147 at p 6).

<sup>13</sup>Florida courts have considered releases and waivers, like the ones entered by Decedent, and treat them as providing services. *Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991). Service contracts are not subject to the rule of *lex loci contractus*, but instead require application of the most significant relationship test. *Fioretti v. Massachusetts General Life Ins. Co.*, 53 F.3d 1228, 1235 (11<sup>th</sup> Cir. 1995). Application of the most significant relationship test requires that the online waiver be interpreted applying Florida law.

<sup>14</sup>Plaintiff incorrectly seeks to rely on a choice of law provision inapplicable to Plaintiff's online waiver. Plaintiff agreed to several terms with Active Network to use Active's online registration process for the Florida event. (R-81 at pp 6-7 (¶¶15, 16), pp 12-13 (¶¶15, 16); R-147 at p 8). One term Plaintiff agreed to was Active's requirement that any dispute between Plaintiff and Active be decided



would uphold the exculpatory clause in the online waiver. *See Banfield v. Louis*, 589 So.2d 441, 444-45 (Fla. 4th DCA 1991) (citing *Okura v. United States Cycling Federation*, 186 Cal.App.3d 1462, 1468, 231 Cal.Rptr. 429, 432 (Cal.Ct.App.1986); *Bennett v. United States Cycling Federation*, 193 Cal.App.3d 1485, 239, Cal.Rptr. 55 (Cal.Ct.App.1987)).

**ii. Evidence shows Plaintiff had to agree with the waiver included in his online registration in order to submit the registration**

Plaintiff had to agree with all of the terms of the online registration, including its waiver, in order to register for the Florida event. (R-81, p 6 (¶12), p 12 (¶12)). This evidence was never refuted. Race Director Shelley Bramblett's trial testimony explaining to the jury how the online registration process works further confirmed her earlier affidavit submitted against Plaintiff's Motion for Summary Judgment.

Plaintiff's Motion for Summary Judgment was properly denied with respect to the online waiver, but Defendants' Motion for Summary Judgment should have been granted based on the undisputed evidence they submitted supporting the existence and enforceability of that waiver. At a bare minimum Defendants should have been

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Footnote 14 continued.

under California law. The District Court recognized that Active's choice of law provision has no application to the terms Plaintiff agreed to with Defendants as part of his online registration for the Florida event, including the online waiver. (R-147 at p 8).

allowed to present their evidence regarding the online waiver to the jury, which is what the District Court allowed.

**iii. Evidence shows Plaintiff signed race site waivers to participate in the Florida event**

Plaintiff also signed a waiver during race site registration in order to participate in the Florida event. (R-81 at p 7 (¶¶17-19), p 8 (¶24), p 13 (¶¶17-19), p 14 (¶24)). Plaintiff argues that the race site waiver never existed because Defendants could not produce it. Plaintiff fails to understand that the mere fact that the race site waiver could not be located does not mean it never existed. Fortunately, the District Court understood this distinction in ruling that “[t]he fact that Defendants cannot provide a signed waiver does not exclude testimony on this matter; it merely goes to the weight of the evidence for the jury to consider.” (R-147 at p 9). At trial, Defendants offered testimony from Race Director Shelley Bramblett, Medical Director Joyce Wilson, and Virginia Jensen, who was the person that oversaw the registration process for the 2006 Florida event, to explain the registration process and that participants simply could not participate in the event without executing the race site waiver because without that step they would not be provided materials necessary to participate in the race.<sup>15</sup> (R-213 at 7; R-285 at p 5, ln 4 - p 6, ln 10). Ms. Bramblett

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<sup>15</sup> Unfortunately, the transcripts of testimony by Race Director Shelley Bramblett and Virginia Jensen are not available at the time this brief is filed.

and Ms. Wilson also explained to the jury what likely happened to the waiver. (R-285 at p 14, ln 11 - p 16, ln 9). Ms. Wilson, as Medical Director, even testified that she physically held the race site waiver in her own hands during the emergency response to Plaintiff in her attempts to assist with the rescue. (*Id.*).

## CONCLUSION

There is no question this is a tragic case. The sympathies for the wife, the children, and the parents, no doubt were present in the jurors' deliberation, and by its very nature made the jury's decision difficult. But after a lengthy trial, the jury reached its decision. That decision should not be disturbed.

It is respectfully submitted that the Judgment of the District Court should be upheld.

Respectfully submitted,

/s/ Larry A. Matthews

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## **CERTIFICATE OF COMPLIANCE**

We hereby certify that this Brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This Brief contains 9,358 words. The Brief, in PDF format, was uploaded to the Eleventh Circuit Court website on the 7th day of December, 2009 at 5:00 p.m.

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### CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished to Diana Santa Maria, Esq., Law Offices of Diana Santa Maria, P.A. 5220 South University Drive University Place, Suite 205C, Ft. Lauderdale, FL 33328 and Joel S. Perwin, Esq., Joel S. Perwin, P.A., Alfred I. DuPont Building, 169 East Flagler St., Suite 1422, Miami, FL 33131, via U.S. Mail, this 7<sup>th</sup> day of December, 2009. The original and six copies of this brief were also furnished to the Clerk, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia 30303, via U.S. Mail, on the 7<sup>th</sup> Day of December, 2009.

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Clerk of the Circuit Court and Comptroller, Escambia County

Clerk of Courts • County Comptroller • Clerk of the Board of County Commissioners • Recorder • Auditor

**AI-4597**

**9.**

## Value Adjustment Board

**Meeting Date:** 07/23/2013

**Issue:** Approval of Minutes.

**From:** Doris Harris, Deputy Clerk to the Board

**Organization:** Clerk & Comptroller's Office

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### Information

#### Recommendation:

Recommendation: That the Value Adjustment Board approve the Minutes of the Regular Board Meeting held December 10, 2012, as prepared by Doris Harris, Clerk to the Board's Office.

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### Attachments

December 10, 2012 Minutes

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### Form Review

Form Started By: Doris Harris  
Final Approval Date: 06/28/2013

Started On: 06/28/2013 03:50 PM

MINUTES OF THE REGULAR MEETING OF THE VALUE ADJUSTMENT BOARD  
HELD DECEMBER 10, 2012  
BOARD CHAMBERS, FIRST FLOOR, ERNIE LEE MAGAHA GOVERNMENT BUILDING  
221 PALAFOX PLACE, PENSACOLA, FLORIDA  
(9:00 a.m. – 9:11 a.m.)

Present: Honorable Steven L. Barry, Chairman, Board of County Commissioners  
Gerald W. Adcox, Vice Chairman, District School Board Appointee  
Honorable Gerald Boone, District School Board  
Honorable Lumon J. May, Board of County Commissioners  
Kevin W. White, Board of County Commissioners' Appointee  
Suzanne Whibbs, Private Counsel  
Doris Harris, Deputy Clerk to the Board

AGENDA NUMBER

1. Call to Order

Vice Chairman Adcox called the Meeting of the Value Adjustment Board (VAB) to order at 9:00 a.m.

2. Was the Meeting Properly Advertised?

The VAB was advised by Doris Harris, Deputy Clerk to the Board, that the Meeting was advertised in the Pensacola News Journal on December 8, 2012, in the Board's Meeting Schedule.

3. Election of Chairman and Vice Chairman

Motion made by Mr. White, seconded by Commissioner May, and carried unanimously, electing Commissioner Barry to serve as Chairman from December 2012 through December 2013, pursuant to Section 194.015, Florida Statutes.

Motion made by Mr. White, seconded by Commissioner May, and carried unanimously, electing Mr. Adcox to serve as Vice Chairman from December 2012 through December 2013.

## MINUTES OF THE REGULAR MEETING OF THE VAB – Continued

### AGENDA NUMBER – Continued

#### 4. Approval of Minutes

Motion made by Mr. White, seconded by School Board Member Boone, and carried unanimously, approving the Minutes of the August 1, 2012, Regular Meeting, as prepared by Doris Harris, Clerk to the Board's Office.

#### 5. Certification of the 2012 Tax Roll for Real Property

Motion made by Mr. White, seconded by Commissioner Barry, and carried unanimously, approving the Property Appraiser's Certification of the 2012 Tax Roll for Real Property, in the amount of \$11,697,014,587, to the Florida Department of Revenue.

#### 6. Certification of the 2012 Tax Roll for Tangible Personal Property

Motion made by Mr. White, seconded by School Board Member Boone, and carried unanimously, approving the Property Appraiser's Certification of the 2012 Tax Roll for Tangible Personal Property, in the amount of \$1,738,817,150, to the Florida Department of Revenue.

#### 7. Special Magistrates' Decisions

Motion made by Mr. White, seconded by Commissioner Barry, and carried unanimously, upholding the recommended decisions of the Special Magistrates based on the October 8, 2012, October 12, 2012, and November 7, 2012, Hearings for 2012 Petitions.

#### 8. Adjournment

There being no further business to come before the Value Adjustment Board, Vice Chairman Adcox declared the Meeting adjourned at 9:11 a.m.