

FORUM 8

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Eighth Judicial Circuit Bar Association, Inc.

June 2013

President's Message



By Dawn M. Vallejos-Nichols

Dear Members,

I loved being your President this past year. I absolutely adored it. Thank you so much for the opportunity to serve. Thank you Mac McCarty for impressing upon me what an honor it was to be asked to become President-Elect Designate a few years back

when I was worried about time commitments and workloads (and whether I was the only one dumb enough not to say no). Thank you to all the past presidents I've served with on the Board of Directors who taught me so much over the years regarding commitment to service, leadership style and time management – AuBroncee Martin, Judge Denise Ferrero, John Whitaker, Margaret Stack, Rebecca O'Neill, Elizabeth Collins Plummer, and Mac McCarty. Thank you to all the EJCBA members who have come out to our events this past year and supported their bar association and its causes – it is for you that the board members and officers make time to come to board meetings and committee meetings, put together socials and dinners, offer CLEs, and so much more.

I can't believe how quickly the year has passed and frankly I'm a little resentful that June has arrived and I have to turn over the helm so quickly. When a year begins, you think you have **so much time**. Twelve long months stretch out before you, as do all of the ideas that you contemplate putting into effect during your glorious year. And then you blink and it is May and you are writing your last President's Message,

having to reflect on both the accomplishments of the year and the things that didn't get accomplished (but remain in the works), saying "Where did the time go?" Does that sound like an old person?

From a totally unbiased viewpoint, I think the EJCBA had a rousing and highly successful year! The success of a president, after all, can be measured by the people she surrounds herself with, and my fellow officers and Board of Directors are fantastic and worked great together! Let me just point out a few highlights:

1) I don't know whether you know it but the President-Elect selects the monthly luncheon speakers, not the President.

From our first meeting as a board last summer at our annual retreat, Nancy Baldwin was determined to offer the membership CLE credit for each luncheon. To do that, she brought in speakers (mostly from academia) with international credentials to speak on a wide variety of interesting and thought-provoking issues, from voting rights to canal rights to social networking to autism. Thank you for the great speakers and the additional CLE's, Nancy.

(If you attended any of the lunches and you need your CLE credit information, Nancy currently has the information for the September-December lunches; she will receive the information for the January-May lunches from the Florida Bar sometime this summer. You can contact Nancy at baldwinnt@cox.net.)

2) Law in the Library program – monthly presentations by local lawyers and magistrates on



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The officers of the Eighth Judicial Circuit Bar Association for the year 2012-2013 are:

Dawn M. Vallejos-Nichols
President/Editor
2814 SW 13th Street
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

James H. (Mac) McCarty, Jr.
Past-President
4321NW 51st Dr
Gainesville, FL 32606
(352) 538-1486
mmccarty@lawgators.com

Nancy T. Baldwin
President-Elect
309 NE 1st Street
Gainesville, FL 32601
(352) 376-7034
(352) 372-3464 (fax)
baldwinnt@cox.net

Raymond Brady
President-Elect Designate
2790 NW 43rd St., Ste 200
Gainesville, FL 32606
(352) 373-4141
(352) 372-0770 (fax)
rbrady1959@gmail.com

Sharon Sperling
Treasurer
2830 NW 41st St., Ste. C
Gainesville, FL 32606-6667
(352) 371-3117
(352) 377-6324 (fax)
sharon@sharonsperling.com

Audrie Harris
Secretary
P.O. Box 358595
Gainesville, FL 32635
(352) 443-0594
(352) 226-8698 (fax)
audrie.harris@yahoo.com

Members at Large

Jan Bendik
901 NW 8th Ave., Ste. D5
Gainesville, FL 32601
(352) 372-0519
(352) 375-1631 (fax)
jan.bendik@trls.org

Robert Birrenkott
P.O. Box 117630
Gainesville, FL 32611
(352) 273-0860
(352) 392-4640 (fax)
rbirrenkott@law.ufl.edu

Norm Fugate
P.O. Box 98
Williston, FL 32696
(352) 528-0019
(352) 528-4919 (fax)
norm@normdfugatepa.com

Diana M. Johnson
18 NW 33rd Court
Gainesville, FL 32607
(352) 376-4694
(352) 371-7366 (fax)
djohnson@clayton-johnston.com

Philip N. Kabler
240 NW 76th Dr., Ste. D
Gainesville, FL 32607
(352) 332-4422
(352) 332-4462 (fax)
pnkabler@kmcllp.com

Frank Maloney – Historian
445 E. Macclenny Ave., Ste. 1
Macclenny, FL 32063-2217
(904) 259-3155
(904) 259-9729 (fax)
Frank@FrankMaloney.us

Michael Pierce
203 NE 1st Street
Gainesville, FL 32601
(352) 372-4381
(352) 376-7415 (fax)
mpierce@dellgraham.com

Meshon Trinette Rawls
P.O. Box 117626
Gainesville, FL 32611-7626
(352) 273-0800
(352) 392-0414 (fax)
rawls@law.ufl.edu

Anne Rush
11621 Research Circle
Alachua, FL 32615
arush@rtix.com

Anthony Salzman
500 E. University Ave., Ste A
Gainesville, FL 32601
(352) 373-6791
(352) 377-2861 (fax)
tony@moodysalzman.com

Gloria Walker
901 NW 8th Ave., Ste. D5
Gainesville, FL 32601
(352) 372-0519
(352) 375-1631 (fax)
gloria.walker@trls.org

Contribute to Your Newsletter!

From The Editor

I'd like to encourage all of our members to contribute to the newsletter by sending in an article, a letter to the editor about a topic of interest or current event, an amusing short story, a profile of a favorite judge, attorney or case, a cartoon, or a blurb about the good works that we do in our communities and personal lives. Submissions are due on the 5th of the preceding month and can be made by email to dvallejos-nichols@avera.com.

About This Newsletter

This newsletter is published monthly, except in July and August, by:

Eighth Judicial Circuit Bar Association, Inc.
P.O. Box 13924
Gainesville, FL 32604
Phone: (352) 380-0333 Fax: (866) 436-5944

Any and all opinions expressed by the Editor, the President, other officers and members of the Eighth Judicial Circuit Bar Association, and authors of articles are their own and do not necessarily represent the views of the Association.

News, articles, announcements, advertisements and Letters to the Editor should be submitted to the **Editor** or **Executive Director** by Email, or on a CD or CD-R labeled with your name. Also, please send or email a photograph with your name written on the back. Diskettes and photographs will be returned. Files should be saved in any version of MS Word, WordPerfect, or ASCII text.

Judy Padgett
Executive Director
P.O. Box 13924
Gainesville, FL 32604
(352) 380-0333
(866) 436-5944 (fax)
execdir@8jcba.org

Dawn Vallejos-Nichols
Editor
2814 SW 13 St
Gainesville, FL 32608
(352) 372-9999
(352) 375-2526 (fax)
dvallejos-nichols@avera.com

Deadline is the 5th of the preceding month

Criminal Background Checks and the EEOC



By Paul Donnelly, Donnelly & Gross, P.A.

Conducting criminal background checks is a standard hiring practice by many employers. In April 2012, the EEOC issued a new Enforcement Guidance for employer criminal background checks. The EEOC now considers the use of criminal background checks when looking at disparate treatment or disparate impact analysis under Title VII, the federal statute prohibiting employment discrimination. The EEOC has determined that because the arrest and incarceration rate for certain groups, specifically African-American and Hispanic men, were disproportionate to the population, the use of criminal background checks in the hiring process may discriminate on the basis of race or national origin.

One recommendation made by the EEOC is that employers not ask about criminal history on their job applications. The EEOC also recommends individual assessments for applicants with criminal histories.

The EEOC's new position was rejected by a District Court in Florida that thoroughly analyzed the issue, holding that a criminal background check is not unlawful when its use is supported by business necessity. *EEOC v. Carolina Freight Carriers Corp.*, 723 F.Supp. 734, 753-54 (S.D. Fla. 1989) (dismissing disparate impact claim based on criminal record check for truck drivers). "It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness." *Id.* at 753.

Title VII preempts state and local law, so an employer who performs background checks in compliance with state or local law could still be in violation of Title VII. The EEOC has defended its interpretation in their guidance, and has even brought enforcement actions against employers who performed criminal background checks to comply with state law.

In this rapidly evolving area, it is best practice for an employer to have a consistent policy on background checks that can be justified by business necessity.

Administrative Orders

Please note that Chief Judge Roundtree signed the revised Administrative Order 9.01(v3), *Assignment of Alachua County Circuit and County Cases to Divisions*, on April 29, 2013. The only revision is under the "Family" section.

Chief Judge Roundtree also signed the revised Administrative Order 1.20(v2), *E-Filing for Attorneys in Civil Cases*, on April 29, 2013. The only change to this Order is the deletion of Section 8, Depositions.

These revised Orders are posted on the court website at www.circuit8.org. If you have any questions, please contact Karen Jordan at (352) 258-1244 or jordank@circuit8.org.

THE LAW OFFICE OF
ALBA & DUBOSE, PA
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PLEASE NOTE OUR NEW LOCATION:
2700 NW 43RD STREET, SUITE D
GAINESVILLE, FLORIDA 32606
- MERIDIEN CENTRE, 2ND FLOOR -

- BY PHONE -
(352) 372-3643

- BY FAX -
(352) 354-4475

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Alternative Dispute Resolution

PETA PETA, Possum Eater

By Chester B. Chance and Charles B. Carter



Actually, PETA would cringe at the idea of the above parody of the old pumpkin eater rhyme. However, PETA is cringing over a recent North Carolina law.

Your faithful cub reporters have previously written articles on the Brasstown, North Carolina "Opossum Drop". As you recall, on New Year's Eve, Clay Logan gently lowers a Plexiglas cage containing a possum from his general store in Brasstown, North Carolina. The possum is then released. The New Year's celebration includes music, the pledge of allegiance, etc.

PETA has been protesting The Drop for years. PETA eventually threw a legal obstacle into the proceedings when an administrative law judge found the North Carolina Department of Natural Resources didn't have the authority to issue a special permit for the possum drop and ruled the agency would have to have the North Carolina General Assembly pass legislation to allow such permits. Well, that's exactly what the General Assembly recently did.

The North Carolina legislature passed what its sponsors refer to as "The Possum's Right to Work Bill."

The recently passed bill gives the North Carolina DENR authority to issue long-term licenses or short-term permits to "possess wild animals for scientific, educational or exhibition purposes" as long as they are kept humanely. Apparently, that would cover The Drop. The bill's main sponsor was Representative Roger West, who represents Brasstown, North Carolina. The Bill passed both the North Carolina House and Senate the last week in February, 2013.

PETA's take on this legislative end run:

...the bill appears to be simply a way to skirt a judge's recent ruling that outlawed the cruel event, but it's far more insidious than that- it would also strip other wildlife protections and would allow wild animals to be held in captivity for unspecified periods of time, put on display for profit or publicity, and exploited for some unspecified other purpose. (PETA website)

PETA calls the legislation "one of the pettiest pieces of pork-barrel politics we've seen in a long time."

PETA argues opossums are shy animals that are terrified of humans and emotional trauma can result in death days or even weeks after they are released back into the wild. In an ironic turn of events, within a short time after the Possum Drop Bill passed the legislature, one of your cub reporters found a possum in his yard:



Ironically, this possum was not afraid of humans in the form of your intrepid cub reporter; instead, the possum rambled about somewhat aimlessly while the cub reporter crept in close for the photo (pictured above).

PETA had what its website refers to as "TV icon Bob Barker" write letters to Legislators on PETA's behalf. Mr. Barker advised the Legislators of how cruel and inhumane The Possum Drop is. One of the sponsors of the bill, Senator Jim Davis, told the members of the North Carolina Senate to imagine he was talking to a possum and said "would you rather Clay Logan catch you and keep you warm and well-fed, then lowered slowly in a Plexiglas box, or would you rather Bob Barker catch you and spay or neuter you?" Apparently the North Carolina Senate roared with laughter and the Bill then passed with only two senators voting against it.

Mr. Logan said the upcoming New Years Possum Drop would take place with a live possum as the "guest of honor." In addition, all the past Possum Queens have been invited to attend. You may recall from prior articles that the Possum Queens are farm boys who dress up as women.

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The Eighth Judicial Circuit Bar Association
invites you and your guests to join us for our

2013 Annual Reception and Meeting

on

Thursday, June 6, 2013,
6:00 pm until 9:00 pm

at the

UF Levin College of Law

(Martin H. Levin Advocacy Center)

Cocktails and heavy hors d'oeuvres will be served

Reservations required

\$30 for members and non-lawyer guests

\$40 for non-members

RSVP

Yes, I will be attending
I will be bringing _____ guests.

The following individuals will be
attending (please include yourself):

Mr./Ms. _____

Mr./Ms. _____

Mr./Ms. _____

Mr./Ms. _____

I have enclosed \$_____.

I will pay at the door.

Please RSVP by email to execdir@sjcba.org,
by fax to 866-436-5944 or mail to EJCBA,
P. O. Box 13924, Gainesville, FL 32604.
Must be received no later than May 28th

PETA PETA

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Mr. Logan and North Carolina Legislators

Why do your intrepid cub reporters write articles on this issue? Well, because it's typical of the type of emotional issues that occur at mediation every day. Admittedly, and interestingly, the PETA v. The Possum Drop issue is more volatile and more idealistic than most mediation issues. In fact, it's closer to the Middle East crisis in terms of passion. PETA believes the

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The Florida Registered Paralegal ("Frp") Program

The Florida Registered Paralegal ("FRP") Program is a voluntary registration program of The Florida Bar for paralegals. This program started in 2008 and currently has 5,457 members. The FRP designation indicates that one has met the education and work experience or certification requirement for registration and has agreed to adhere to Chapter 20 of the Rules Regulating the Florida Bar. The Florida's Bar's webpage has information about the benefits of being an FRP, the requirements for registration, and a list of all current FRPs. For additional information, visit the Florida Bar's FRP webpage at www.floridabar.org/frp.

President's Message *Continued from page 1*

topics of interest to the public spearheaded by Board Member (and your next President-Elect Designate) Rob Birrenkott, in conjunction with the Alachua County Library District. This was Rob's second year putting together this program and we started off the year with an excellent presentation by former Iowa Supreme Court Justice Marsha Ternus that was open to everyone and well-attended by lawyers, judges and the general public, as well. Other topics included child support issues, bankruptcy, foreclosure, expungements, health care issues, education issues, and more. Several members of our board presented programs, including Sharon Sperling, Mac McCarty and Meshon Rawls.

3) EJCBA sponsored wonderfully successful holiday projects spearheaded by Board Member (and Head Elf) Anne Rush that included gifts for all of the Alachua County Head Start participants and a visit from Santa (Carl Schwait in his beautiful new Santa suit that he can put to good use for many years to come) and food collections for Bread of the Mighty food bank. Also successful were our 3 free socials offered during the year, put together by our Social Committee co-chaired by Audrie Harris and Anne Rush.

4) Once again President-Elect Designate Ray Brady, Chair of the Professionalism Committee and Board Member Phil Kabler, along with Dean Jerry and Dean Inman from the law school, put together an excellent Annual Professionalism Seminar with the dynamic Bruce Rogow as the keynote speaker. The EJCBA rewarded members who paid their membership dues prior to 9/30/12 with free attendance at the seminar; the seminar was very well attended by both members and law students and the reviews were glowing.

5) Our Annual Golf Tournament to benefit The Guardian Foundation, which raises and distributes funds for the Eighth Judicial Circuit's Guardian Ad Litem Program. Board Members Mike Pierce, Gloria Walker, Anne Rush and Past President Mac McCarty hit another hole-in-one with this event, raising \$5,500 to benefit GAL. GO TEE-M!!

I could go on and on. Each and every board member worked hard on the varying committees this year and each deserves your kudos and mine for their commitment and dedication. Thank you Mac McCarty, Nancy Baldwin, Ray Brady, Sharon Sperling (a special thank you to our Treasurer, who keeps the books balanced and the rest of us "in check"), Audrie Harris (special thanks as well to our Secretary for her

attention at the meetings and her always accurate Minutes), Frank Maloney (Historian/photographer – thanks for the great photos, Frank!), Gloria Walker, Phil Kabler, Tony Salzman, Rob Birrenkott, Mike Pierce, Norm Fugate, Meshon Rawls, Anne Rush, Diana Johnson and Jan Bendik. If you see them at the Annual Reception on June 6, please give them your thanks, as well.

One of the things that I had hoped to finally accomplish this year that is still "in the works" is the overhaul of the website. There are many improvements that we want to make and new capabilities that we are trying to incorporate without giving up some valuable actions that we are currently able to perform. The website committee (Sharon, Mac, Judy, Phil and me) met several times to discuss what we believe we need (e.g. the ability to reserve and pay for lunches and other programs on-line for starters) and we have sat through presentations from companies that at first seemed phenomenal, but upon closer inspection we have not yet been able to mesh our needs and desires without having to give up one or more current capability. I want to especially thank our executive director, Judy Padgett, for serving on the committee and following up with the companies involved in our search to make sure that we only enhance what we currently have, and not take away from it. Her follow up with other bar associations and customers to find out how they like the products we have been investigating has also been invaluable. The organization as a whole is committed to getting the improvements done – they are just taking longer than we anticipated. Hang in there!

Being the President of the 8th Judicial Circuit was very special to me in additional ways. At the EJCBA socials, lunches and dinners attended, I greeted many new lawyer members, law student members, UF faculty members, deans, a justice and judges. As the Bar President, I ended up serving on committees that I had no idea I would be serving on (e.g. the Professionalism Committee, the Bench/Bar Committee), which means I had the opportunity to meet and work with people that I normally don't meet or practice in front of. Please know that it was my pleasure to share a table with you... to work alongside you. The level of commitment to this circuit and this community by many members of our legal community and judiciary is simply astounding. And humbling – I felt like I could be doing more.

The two best days of being the President of the

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Eighth Judicial Circuit Bar Association both came in March, 2013. Those were the days that I had the honor and the privilege of presenting judicial robes, on behalf of all of our members, to new Union County Court Judge Bo Bayer and new Gilchrist County Court Judge Sheree Lancaster. (Alachua County Court Judge Phillip Pena was also sworn in during my tenure – unfortunately I was unable to be present and Ray Brady performed the honors.) I'll never forget either investiture – to be able to welcome these new judges to the bench on behalf of all of you on their special days was really inspiring.

In closing, I would like to encourage all of you to undertake a greater role of service – whether it be to your bar organization, your community, or whatever will bring you satisfaction and happiness. Serving this organization has brought me both, and I once again thank you for the opportunity. Your new officers and board will be sworn in at the Annual Reception and Meeting on Thursday evening, June 6 at the Martin H. Levin Advocacy Center at UF's Levin College of Law. I hope to greet you there.

James C. Adkins Inn of Court Welcomes Applications

The James C. Adkins Inn was established 24 years ago to promote professionalism and education in our local bar. The Adkins Inn is currently welcoming applications for membership for the upcoming year. Monthly meetings will begin in September at the Best Western Gateway Grand. For applications and more information, please contact Donna Keim at keim@vicecolelaw.com or Nick Zissimopoulos at nick@rushandglassman.com. Annual dues are \$295. Applications are due no later than June 21, 2013.

Bennett Inn Accepting Applications

The Gerald T. Bennett Inn is now accepting applications for new members. The applications can be found at BennettInn.org and are due on June 18th, 2013. Please contact Mary K. Wimsett at mkwimsett@adoptionlawfl.com with any questions or concerns.

Recent Events of the North Central Florida Chapter of the Federal Bar Association

by Jamie Shideler

The Open World Rule of Law delegation from Russia was in Gainesville from April 20-27. The group was led by a Russian federal judge, and included lawyers and legal academics who visited Gainesville to get a close-up look at the U.S. justice system. While in Gainesville, the group visited the Gainesville City Attorney's Office, the Alachua County Jail, the Eighth Judicial Circuit State Attorney's Office, the federal courthouse, and other government offices.

On April 25, 2013, following the tour of the federal courthouse, the FBA hosted a reception for the delegates at Half Cork'd. The reception was a chance for local federal judges, lawyers, and law students to mingle with the delegates and share experiences in the law. The local federal judges in attendance were the Honorable Wm. Terrell Hodges, Senior United States District Judge; the Honorable Gary R. Jones, United States Magistrate Judge; and the Honorable Philip R. Lammens, United States Magistrate Judge.

Also in April, the FBA sent a representative to Washington, D.C. to join members from across the country to lobby Congress on funding the judiciary and filling federal judicial vacancies. The ongoing sequestration issues have forced furloughs in federal public defender offices, including Gainesville. Many divisions are eliminating criminal proceedings on Fridays because of inadequate staff and resources. Additionally, 10% of federal judgeships sit vacant waiting for Congress and the President to nominate and confirm new judges.

Local FBA president-elect Ron Kozlowski of Turner O'Connor Kozlowski, P.L. joined about 20 other lawyers and the FBA chief lobbyist to fan out across the Capitol and meet with those responsible for filling vacancies. Most pledged to do what they could to push ahead with filling vacancies. Congress also is expected to consider a formal request for supplemental funding for the judiciary to offset sequester cuts. Currently, public defenders are subject to a maximum of 15 furlough days for the remainder of the year, and many are being forced to take them.

A Defaulting Party's Due Process Rights

By Siegel, Hughes & Ross

A default judgment can be entered to establish liability and to award liquidated damages under a well-pled cause of action; however, a trial, or at the very least, an evidentiary hearing, is necessary to establish unliquidated damages. See *Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660, 663-64 (Fla. 5th DCA 1983); *1445 Washington Ltd. P'ship v. Lemontang*, 19 So.3d 1079, 1081 (Fla. 3d DCA 2009). This is to ensure that a defaulting party receives due process before a court may award unliquidated damages. *Bowman*, 432 So.2d at 662-63.

The first determination to be made by the court when a party seeks an award of damages against a defaulting party is whether the damages sought are liquidated or unliquidated. The *Bowman* court laid out specific guidelines for this:

Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded; i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law. Since every negotiable instrument must be 'an unconditional promise or order to pay a sum certain in money' ..., actions for the sums directly due on negotiable instruments are, by definition, actions for liquidated damages. However, damages are not liquidated if the ascertainment of their exact sum requires the taking of testimony to ascertain facts upon which to base a value judgment.

Id.

Subsequent case law continues to expand on

this issue. It appears that the determining factor, as initially set out in *Bowman*, is whether or not testimony or evidence is necessary in order for the court "to ascertain facts upon which to base a value judgment." *Id.* at 662. In *Szucs v. Qualico Dev., Inc.*, 893 So.2d 708, 712 (Fla. 2d DCA 2005), it was clear that the Court found that the plaintiff's complaint for damages against the defendant for breach of fiduciary duty, conversion, and civil theft would require the taking of evidence, and was therefore a claim for unliquidated damages.

Similarly, in *Watson v. Internet Billing Co.*, 882 So.2d 533, 534-35 (Fla. 4th DCA 2004), the court found that the plaintiff sought unliquidated damages pursuant to its complaint for conversion and unjust enrichment. The plaintiff alleged that the defendant failed to pay media clients who published advertising developed by the plaintiff. *Id.* at 534. A default was entered in the trial court and a final judgment was then entered without a hearing or a trial. *Id.* The appeals court reversed and held that the damages were unliquidated, because "evidence would be required to ascertain what sums if any the firm had retained by improperly withholding payment to a media client that had published the advertising." *Id.* See also *Roggemann v. Boston Safe Dep. & Trust Co.*, 670 So.2d 1073, 1075 (Fla. 4th DCA 1996) (holding that "a 'reasonable attorney's fee' is an unliquidated item of damages because testimony must be taken to ascertain facts upon which a judge or jury can base a value judgment").

In the event that the damages sought against a defaulting party are unliquidated, a defaulting party's due process entitlement includes "notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages." *Bowman*, 432 So.2d at 663. As explained in *Bowman*, this right is provided for by Florida Rule of Civil Procedure 1.080(h)(1) and the last sentence in Rule 1.440(c).

Fla. R. Civ. P. 1.080 provides that:

A copy of all orders or judgments shall be transmitted by the court or under its direction to all parties at the time of entry of the order or judgment. No service need be made on parties against whom a default has been entered except orders setting an action for trial as prescribed in rule 1.440(c)... (emphasis supplied).



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Investing in Our Community

By Marcia Green

Three Rivers Legal Services, Inc. is the local provider of free civil legal services to the indigent residents of the Eighth Judicial Circuit. Contrary to what you might believe, there is no *assurance* that our low income community receives *civil legal services*. Unlike criminal defendants who have the right to legal representation as ruled in *Gideon v. Wainwright*, low income individuals can find themselves without access to advice, access to representation or access to the courts in civil legal matters.

Here are some real stories – stories of families and individuals in our communities who needed and received help from Three Rivers Legal Services staff and *pro bono* attorneys within the civil legal system:

A formerly self-employed businessman found himself audited by the IRS for business expense deductions taken several years prior. But the man, now suffering from severe mental illness, had become homeless and was living out of his car. He no longer had the documents to support his deductions nor the ability to understand and communicate with the IRS. However, with a volunteer attorney stepping in and advocating on his behalf, this individual was able to recreate a time line to justify his expenses and present his case to the tax court. His deficiencies were reduced to a manageable amount and his penalties were abated.

Our widowed mother of two had been approved for assistance through a program for low income landowners to build a home on property left to her by her husband. The situation was complicated by her husband's relative whose now abandoned mobile home had been incorrectly situated on the property. The new home could not be built until the mobile home was removed and requests to the relative went unanswered. Time was crucial as the contractor was ready to build and the funding would be given to another applicant if building was not commenced. A volunteer attorney assisted our client in the first step – obtaining clear title to the property through summary administration. After another *pro bono* attorney assisted by negotiating and advocating on behalf of our client to have the old mobile home legally removed, this working mother of two was able to build her new home within the time limits of the special funding requirements.

A woman who had worked most of her life became disabled but was not initially approved for disability benefits. When she could no longer work, she also faced foreclosure on the home she had

been paying on for years. With representation in her disability claim and negotiations with the mortgage company, attorneys and advocates assisted her in securing her disability income, paying her past due mortgage and maintaining her home.

Three Rivers Legal Services, Inc. has staff and *pro bono* attorneys, paralegals and law student interns and volunteers who work on behalf of low income members of our community. With our help, access to the civil legal justice system for individuals and families can result in security, stability and positive outcomes.

When homes are left vacant due to foreclosure, the neighborhood suffers. When families are left homeless, the children have difficulties in school and medical problems increase; the whole class is affected. When the victim of domestic violence cannot get support to leave the abuser, the children are in danger.

Many people believe that our country spends enormous amounts of money on the poor but in reality the amounts are small when compared to government spending in general. Many people believe that the majority of the poor are recipients of public benefits. However, a single individual working in Florida with a full-time minimum wage job is making about \$1350 per month before deductions at a job that generally does not provide paid sick leave or holiday pay and changes in schedules and other income-reducing factors greatly affect the gross and net pay.

Three Rivers relies heavily on the charitable contributions of those who recognize that a donation is actually an investment in the health of our community. You have the ability to make a positive change, locally, in the lives of so many.

Each year, when you complete your Florida Bar dues statement, you have the opportunity to reflect on your commitment to your community. In some respects, what goes on in the community in general has little to do with your daily activities as a lawyer. But in reality, the health of our community at large is affected by the stability of our residents and their access to the civil legal system.

This year, as you pay your annual Florida Bar membership dues, remember the aspirational goal for *pro bono* public service espoused by the Florida Bar in Rule 46.1. If you have been unable to give 20 hours of your time to provide *pro bono* legal services to the poor (or even if you have), please donate at least

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Fla. R. Civ. P. 1.440(c) then provides:

If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080(a). (emphasis supplied).

It should be noted that the rules reference that a trial is necessary to determine unliquidated damages, as opposed to an evidentiary hearing. Numerous Florida cases do so as well. See *Mourning v. Ballast Nedam Const., Inc.*, 964 So.2d 889, 892 (Fla. 4th DCA 2007) (holding that a trial is necessary to establish unliquidated damages); *Lauxmont Farms, Inc. v. Flavin*, 514 So.2d 1133, 1134 (Fla. 5th DCA 1987) (citing to *Bowman* for the proposition that a trial is necessary to determine unliquidated damages after a party has defaulted); *Szucs v. Qualico Dev., Inc.*, 893 So.2d 708, 712 (Fla. 2nd DCA 2005) (affirming the final judgment as to liability, but reversing the final judgment as to damages and remanding for a bench trial on the amount of unliquidated damages).

Other Florida cases state that only an evidentiary hearing is required to ensure a defaulting party's due process entitlement on the issue of unliquidated damages. In *1445 Washington Ltd. Partnership v. Lemontang*, 19 So.3d 1079, 1081 (Fla. 3d DCA 2009), the court explained the requirement of Rule 1.440(c), and then held that "[a]t a minimum, due process requires that a party be given sufficient notice to prepare for a hearing." See also *Sloan v. Freedom Sav. & Loan Ass'n*, 525 So.2d 1000, 1001 (Fla. 5th DCA 1988) (finding that unliquidated damages cannot be awarded after default without notice to the defendant of the hearing or trial where the damages are to be assessed and awarded); *Sec. Bank, N.A. v. BellSouth Adver. & Pub. Corp.*, 679 So.2d 795, 798 (Fla. 3d DCA 1996) (stating that "[i]t is well settled that when a plaintiff obtains a default in a suit for unliquidated damages, the default only establishes liability. It remains necessary for the plaintiff to prove its damages at a hearing after notice to the defaulting party"); *Bodygear Activewear, Inc. v. Counter Intelligence Services*, 946 So.2d 1148, 1151 (Fla. 4th DCA 2006) (holding that the defaulting

party was entitled to an evidentiary hearing to determine unliquidated damages in accordance with [Florida Rule of Civil Procedure 1.440](#)).

In sum, it is well settled that a defaulting party must receive due process rights before a court can award unliquidated damages. The case law is sufficiently straightforward on the issue of liquidated versus unliquidated damages. However, the Florida Rules of Civil Procedure and the case law are more tenuous on the matter of whether a trial is necessary to ensure due process entitlement or whether an evidentiary hearing will suffice. Still, a review of the case law as a whole leads to the conclusion that an evidentiary hearing is sufficient to ensure that the due process rights of a defaulting party are met.

PETA PETA

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Possum Drop should be banned and what occurs at the possum drop is a crime against nature. Clay Logan and the supporters of the Possum Drop see it as a harmless tradition. Inter-mixed with these radically opposing differences are radically opposed cultural values. The passion and legal jousting is intense. The issue probably hasn't been resolved through the enactment of the North Carolina legislature. We predict PETA will be back next New Year's Eve protesting, the supporters of the drop will continue to snicker at the PETA representatives, and new battle plans will be formulated. It is just such diametrically opposed viewpoints that make for fascinating mediations for the attorneys involved, for the mediator involved and, yes, even for the parties. But, alas, A.D.R. has not addressed the issue. Some have suggested North Carolina legislature should have better things to do. Some suggest that PETA should have better things to do.

You may question whether the authors might not have better things to do than write articles about The Possum Drop. Apparently, the topic has drawn the attention of the national media, PETA supporters, and the North Carolina Legislature. In other words, no, we do not have anything better to do; and, this tempest in a teapot certainly has its humorous side.

We would like to again thank Dawn Vallejos-Nichols for all her hard work associated with putting the newsletter together. Much appreciated, and well done! *Thanks - right back to you! - ed.*

A Windy Win for EJCBA Charity Golf!

From: *EJCBA Golfwire Services (a/k/a Mac McCarty)*

The Guardian Foundation, Inc., which benefits the Guardian ad Litem Program in the 8th Judicial Circuit, again came out the big winner in this year's edition of the EJCBA Charity Golf Tournament held on April 12, 2013, at the Mark Bostick Golf Course at the University of Florida. \$5,500 was raised to benefit the charity when fifty-six golfers—with abilities ranging from “too good for this tournament” to “so abysmal we considered on-course euthanasia”—battled threatening skies and strong, swirling winds to complete the 18 hole, two-person scramble event. When the flying dust, leaves, tree limbs, and small children had settled, the team of Lucas Taylor and Matt Barker won 1st Place in the Low Gross category with a nine under par 61, while “Team Holthus” finished second with a 63. In the “Magical Low Net” division, Adam Vorhis teamed with Stephanie Mack to finish with a 54 (Note from Golf Committee: “Don't ask us again how to explain the handicapping system—we can't...”), followed closely by Tom Copeland and Bill Crispin's 56. It is rumored that Copeland and Crispin are currently under investigation by the EJCBA Golf Tournament Committee after turning in that score—after some prodding—with a straight face. Ben Steinberg was closest to the pin on #6, Manny Medero's drive on #10 traveled a long, long way to win that prize, and Chip Koval knocked in the longest putt on #18.

Tournament sponsors are the lifeblood of a successful tournament and this year was no

exception. The Dharma Endowment Foundation, Inc. has been a Signature Sponsor every year since this tournament was revived in 2009 and its support is greatly appreciated. In addition, Zaxby's again donated lunch and a combination of Dell Graham, The Resolution Center, and Capital City Bank—NW Alachua County Division provided the on-course refreshments and the post-round reception food and drink. The law firm of McCarty & Naim, P.A., The Dobbins Group, LLC., Dennis Eisinger, Esq. of the law firm of Eisinger, Brown, Lewis, Frankel & Chaiet, P.A., and the law firm of Avera & Smith, LLP all stepped up and donated as sponsors.

As always, prizes in this event are kept to a minimum in order to donate as much as possible to the charity, but special thanks are in order to the University of Florida Golf Coaches, Mark Bostick Golf Course Director of Golf, Scott Hampton, Howard Freeman, the STOP! Children's Cancer Charity, and Stripling & Stripling, P.A. for donating door prizes. Special “Thank You” go to Lua Mellman Lepianka for taking pictures, the EJCBA Golf Tournament Committee (and particularly Tournament Committee Chairperson, Mike Pierce's wife, Emalee and her mother, Anne Heidt who prepared the food for the reception), and to the team of UF Law School student interns who work with Gloria Walker who volunteered to assist with the tournament. We hope that all will support this worthwhile event again next year.



Bob Stripling and golf carts ready to roll near tee time!



Terry Silverman, Rod Smith, Jesse Smith and Ben Steinberg posing as golfers...

Criminal Law



By William Cervone

Having reached the end of the publishing year, let's consider this column to be what it is: a wrap up in pretty summary form by way of news and notes from Tallahassee. Both the courts and the legislature have left us, or at least me, with many things in mid-stream in some ways, not

the best way to start the summer. On the plus side, future topics for more newsletter articles abound.

First, the courts. On the very verge of the deadline for this article the Florida Supreme Court issued an opinion that is important to all criminal practitioners, *Smallwood v. State*, which reverses the 1st DCA on the topic of cell phone searches. Briefly, the Court ruled that police must have a search warrant to look through a cell phone seized incident to arrest. Unlike the 1st DCA, which reached the opposite conclusion because the Florida Constitution requires that United States Supreme Court precedent be followed in search and seizure matters and which felt that a 1973 case, *United States v. Robinson*, controlled, the Supreme Court found that *Robinson* was neither factually nor legally on point because of the nature of a cell phone as opposed to the container it involved, which was a cigarette pack. *Smallwood* merits further discussion, perhaps in the Fall, and a read by all who deal with these issues.

Smallwood also transitions us nicely into the last frantic days of the 2013 legislative session on several topics. One is the search of cell phones. Legislation was introduced and debated during the session that would have done exactly what the Florida Supreme Court has now done regarding cell phone searches. Despite the pleas of many, mostly from the law enforcement community, that the legislature really should wait to see what the Supreme Court was going to do, legislation was moving ahead as the session came to an end. That may or may not matter now, although since *Smallwood* leaves some doors cracked (read it or wait until the Fall and I'll tell you) maybe it does. The legislature, of course, cloaked its discussions with the mantle of "individual freedom" and the specter of a governmental plot to take those away, buzzwords that seem to be all too casually used nowadays. Never mind that the legislature is the government.

In other legislative action, and you knew that the year wouldn't end without another piece of the *Graham*

fiasco being added, nothing was done to fix the mess juvenile sentencing for serious offenders in Florida is in. Until the very last few days of the session, all was moving along nicely on a proposal to establish how Florida could sentence juveniles convicted as adults of capital or life felonies. Some liked what was coming, some didn't, but it had all been hashed out and voted on in multiple committee hearings in both chambers. At the 11th hour, however, an amendment was proposed that threw everything into doubt, upset the applecart, and essentially scuttled the work that had been done. In the end nothing passed because of procedural maneuvering by those who had lost earlier votes. We thus continue in limbo on this matter, which ought to be an embarrassment to our legislature but probably isn't.

Something that should also be embarrassing is the way the debate over switching from the *Frye* to the *Daubert* standard was handled. This has come up for many years running and has failed to pass. I won't get into the merits or lack thereof, much less the behind the scenes motivations involved in the debate itself, but this proposed switch was essentially dead by vote after lengthy and sometimes acrimonious debate at the committee level, only to be resurrected by order of leadership with very succinct directions that it was to pass regardless of the vote. And therein lies the problem, or at least one of the problems, with the legislature: a handful of powerful, or to use an admittedly pejorative word, sneaky people can dictate results rendering the voice of the larger membership of the Senate, the House or both meaningless. Keep an eye out over the summer for news about *Frye* or *Daubert*, by the way, because we may all have to adapt on short notice.

And so the year ends. May your summer be quiet and angst free. Even more than yours, may mine be so.

Classified Ad

Professional assistant/legal secretary opening at small, well-established firm in Gainesville specializing in environmental and local government law. Experience and/or education/training, as well as professional references required. Attractive compensation and work environment. Send cover letter and resume to jennifer@springfieldlawpa.com.



Dr. Greg Valcante, Director of UF's Center for Autism & Related Disabilities, speaks at May's Bar Luncheon



EJCBAs President Dawn Vallejos-Nichols presents the Golf Tournament proceeds check to the Guardian Foundation Chair, Susan Faulkner O'Neal, the Guardian Ad Litem Program Director Paul Crawford, and Carole Zegel, Immediate Past Guardian Foundation Chair at the May luncheon.

Advance Directives Clinic Small but Successful

By Marcia Green

Thank you to the volunteer attorneys who turned out for our first Advance Directives Clinic. In April, elder law specialists Shannon Miller, Scott Toney, Judith Paul, Monica Brasington and Larry Ciesla met for the clinic at Pine Grove Apartments in northeast Gainesville. The residents are low income elderly and disabled individuals.

Prior to meeting individually with the clients, Shannon made a presentation to explain Advance Directives. We then prepared and executed documents for ten of the residents. Although our initial idea was to have ten volunteer attorneys, 20 clients and several law student volunteers, we discovered that low income, elderly individuals have transportation difficulties, especially in the late afternoon/early evening. Our success came from going to the residents and we are looking to duplicate the project in other locations.

This project arose as an idea of the Elder Law Section of the Florida Bar with local member Shannon Miller in conjunction with the Florida Department of Elder Affairs and Florida Legal Services.

Our Community

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\$350.00 to Three Rivers Legal Services, Inc., your local legal aid organization. Your donation will help ensure that Three Rivers is able to become an even stronger part of the infrastructure of this community.

Your tax-deductible contribution can be made securely at www.trls.org/invest.html or mailed to Three Rivers Legal Services, Inc., 901 N. W. 8th Avenue, Suite D-5, Gainesville, FL 32601. To volunteer, go to www.trls.org/attorneys.html or contact me at marcia.green@trls.org or 352-372-0519.



Eighth Judicial Circuit Bar Association, Inc.
Post Office Box 13924
Gainesville, FL 32604

June 2013 Calendar

6 EJCBA Annual Reception & Meeting, Martin H. Levin Advocacy Center at the UF Levin College of Law, 6-9 PM

HAVE A GREAT SUMMER! SEE YOU IN SEPTEMBER!

Have an event coming up? Does your section or association hold monthly meetings? If so, please fax or email your meeting schedule let us know the particulars, so we can include it in the monthly calendar. Please let us know (quickly) the name of your group, the date and day (i.e. last Wednesday of the month), time and location of the meeting. Email to Dawn Vallejos-Nichols at dvallejos-nichols@avera.com.