

JANUARY 2021



THE SIDEBAR

Newsletter of the Martin County Bar Association

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BARBARA KIBBEY WAGNER

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JAMES "MAC" STUCKEY

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THE SIDE BAR NEWSLETTER

Published monthly, excluding June & July, by the Martin County Bar Association as a service to its membership.

If you have an article, opinion, news or other information for publication in the *SideBar*, please call (772) 220-8018 or email information to: martincountybarassociation@msn.com

The due date for all advertisements, articles and announcements is the 1st of the month preceding publication.

Zoom with Us on January 15, 2021

On Friday, January 15, 2021 the Executive Board of the Martin County Bar Association will hold the first CLE meeting of 2021.

We are pleased to present the MCBA **meet-and-greet with the judges** of the county and 19th Circuit, and – hopefully – a few judges of the Fourth DCA and the US District Court – Southern District are able to join us. The meet-and-greet with the judges will utilize Zoom breakout rooms and include each judge rotating from room to room.

Nineteenth Circuit Chief Judge Lawrence M. Mirman will kick off the program with his annual State of the Circuit Address in which he will provide an overview of changes and goals for 2021. This annual forum provides invaluable information, resources and updates crucial for all attorneys who practice law in the 19th Circuit.

We look forward to an insightful and engaging program with another great turnout. To receive Zoom details, please RSVP by email to: martincountybarassociation@msn.com by Tuesday, January 12, 2021. Zoom details will be sent on January 13, 2021 to all who RSVP.

Happy New Year from the MCBA Executive Board!

Here's to better times ahead for us all!

This past year has been full of challenges and we hope that the coming year brings more certain times for you and your family.

May the New Year bring you happiness, peace, and prosperity.

Wishing you a happy, safe and healthy 2021.

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Message From the President

Martin County Bar President - Barbara Kibbey Wagner, Esq.

HAPPY NEW YEAR, MEMBERS!

Finally, 2021 is here. I don't know about you, but I was so ready to dust off 2020 and begin a new day and a new year.

First, I just want to thank all of our members and the Judiciary for making our transitions to virtual "luncheons" not only seamless but also fun and interactive. The feedback from our speakers and our members has been positive, so- THANK YOU! Whether or not we can all be in person, we still have a great roster of events for 2021.

For 2021, we have tentatively planned the following for our membership:

- 1. WELCOME JUDGE WARONICKI and INVESTITURE:** We are tentatively planning Judge Brett Waronicki's investiture at the Martin County Courthouse April 9, 2021. We are so happy to welcome him to the bench.
- 2. January Luncheon** - Annual Judge's Meet-and-Greet via Zoom. Get your hot topics and questions ready!
- 3. February Luncheon** - Personal Injury Attorney Willie Gary and special guests will be joining us for a unique and interactive presentation.
- 4. March Luncheon** - Fourth District Court of Appeal Judge Spencer Levine will be with us to answer all of our questions and to give us insight into the latest legal landscapes.
- 5. April Luncheon** - Special Guest, Andrea Andrus Kibbe. Time to polish off your people skills with marketing and advertising guru Andrea Andrus Kibbe. Whether you're in the private or public sector, as lawyers we are marketing ourselves every day. Andrea will teach us how to hone the message we are selling.
- 6. May ANNUAL BANQUET** - we are hoping to do an in-person event and possibly combine our Judicial Reception and Annual Banquet to honor our Judiciary as well as our members. It's time to celebrate!



Barbara Kibbey Wagner
2020-2021 President

As always, it seems the health guidelines fluctuate day-to-day, so we will keep you all abreast of any changes. If you have any questions, comments, or ideas for luncheons or events, please contact me personally at bwagner@Kibbeylaw.com. I welcome any and all feedback! Happy New Year!

Best Regards,

A handwritten signature in blue ink, appearing to read 'Barbara Kibbey'.

Barbara Kibbey, Esq.

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In Memoriam

The following article originally appeared in the Stuart News and is reprinted with permission.

Judge Stewart Hershey's keen mind, fair manner marked 25 years on bench

By Gil Smart

Martin County lost a legal giant late last month.

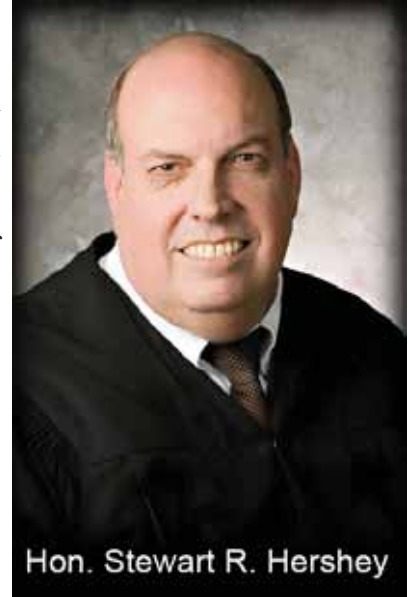
But when I spoke to former colleagues and friends of Martin County Judge Stewart Hershey, they talked, first and foremost, about what a great guy he was.

They spoke of his infectious laugh, his intelligence, his love of politics and travel, friends and family and Gators football.

That's a legacy any man would love to leave behind.

But Hershey, who died Nov. 21 at age 72, must be remembered for so much more.

Click [here](#) for the rest of the article



Hon. Stewart R. Hershey

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Member Spotlight

James “Mac” Stuckey

Education:

Undergrad? IRSC in Fort Pierce, and FAU in Boca Raton

Law School? Notre Dame Law

How long have you been practicing law?

Since November, 1977.

Why did you want to be an attorney?

Didn't know what I wanted to be when I grew up (still don't) and a law degree gave me lots of options. My original career choices of newspaper reporter and English teacher were unbelievably under-compensated (still are), and I wanted to be able to help people but make a good living doing it.

What do you like most about it?

The freedom it gives me to work for good people and make a difference in my community.

What don't you like?

The adversarial system which takes years to resolve issues and costs too much to solve any problem. If we could just admit the truths and not have to advocate half-truths, we could reach solutions while they still matter and before the client runs out of money.

What are the biggest changes you have seen through the years?

Other than technology, which may be the cause of my answer, the decline of cooperation, honesty, and civility among the members of the bar.

How do you define success?

Waking up in the morning and having that matter to other people besides myself.

Who Inspires you?

Historically, Abraham Lincoln and John Kennedy. Personally, my wife, Dr. Kendra Brown, and both my children, Erin and Taylor.



Who has been the most influential person in your career?

Nobody in my family has ever been a lawyer, but I suppose it was my grandmother, Blanche Gallman Stuckey, who always told me I could do anything I wanted to do if I was honest and worked hard.

If you could choose anyone as a mentor, who would you choose?

I am assuming you mean someone still living; I have had many who are not, including Norris Tilton who always told me my clients were all crooks. Since this is fantasy, I choose Chief Justice John Roberts.

What is the best piece of advice you have ever received?

Actually, from the movie Rudy, where the Priest tells Rudy, "I only know two things for sure: There is a God, and I'm not him."

What advice would you give to someone looking to become an attorney?

Talk to lots of attorneys before you go to law school and do not expect to love law school or even the first five years of practice but, when you get a little experience, it should be the best thing you could ever do, or you can do something else exciting with your law degree.

Continued On Next Page . . .

Continued From Previous Page...

If you weren't an attorney, what would you be doing?

Probably a journalist or college professor.

If you could switch places with someone for a day, who would it be?

If time travel was an option, probably Thomas Jefferson. If they must be alive today, probably Bill Gates; I would try to give all his money away that day to save the River.

What's on your bucket list?

Fishing in the Hemingway Marlin tournament.

If you could visit anywhere in the world, where would you go?


Probably Hawaii or Tahiti.

If you could have dinner with any person, alive, dead or fictional, who would it be and where would you go?

Ernest Hemingway at the best restaurant in Paris.


What is something about you (a fun fact) that not many people know about you?

When I was in college, The Stuart News gave me a press pass to attend rock music festivals and plays and write articles about them. Two things: I rode on a helicopter with Janis Joplin during the Palm Beach Pop Festival in 1969 in order to interview her on the way to perform, and I interviewed the cast of "Hair" in Miami after their performance, and they were all in the nude. Boy, was it hard to keep eye contact.



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Solo & Small Firm Committee



“You must be the change you want to see in the world” – Mahatma Gandhi

Welcome to 2021 – Now what?

I hereby resolve to:

1. Celebrate small wins – Give yourself a high 5! Take the time to celebrate settling a case, meeting your monthly financial goals within the first 2 weeks, or getting a new client.

2. Start over – each day – Pretend it is January 1st every day and let each day be the new beginning to living the life you imagine yourself living.

3. Remember your reasons – Remember the “why” you have your goals or resolutions and make sure you are doing it for that reason.

4. Forgive yourself – If things don’t go your way, pick yourself up, dust yourself off and get back on “the horse”.

5. Be consistent – Your resolution should last more than one day. Try one week at first and build from there.

Cheers to 2021! Let’s do it!



Kathy McHale
Chair

Paralegal Committee

Pam Lewis - Chair

Happy New Year everyone! I cannot believe how the time is flying. We are so happy that 2020 is over! Here at Mrachek Law we have been keeping super busy believe it or not. In November we were honored to have Mr. Thomas Bakkedahl as our guest speaker. Mr. Bakkedahl gave us a wonderful and informative view of the role of the prosecutor in the criminal justice system.

I am in the process of obtaining a speaker for January and hope to host a zoom meeting on January 20, 2021. I will email with details! Also, if you would like to be a speaker or know of anyone that would give an interesting lecture, please have them contact me at Plewis@mrachek-law.com.



Pamela Lewis
Chair

Diversity Committee

Erika Powers - Co-Chair
Ricky Armand - Co-Chair

Goodbye 2020 & Happy New Year!



Erika Powers
Co-Chair

Happy New Year! We are all relieved to see 2020 come to a close, and we are optimistic as to all that this new year has in store. 2021 brings with it a great deal of change, from a new President of the United States, to the promise of a return to life as we once knew and enjoyed – hopefully free of face masks, hand sanitizer, social distancing, and temperature checks.

Despite all that continues to shape our daily lives differently than previous years, some things are still the same. Many of us have embraced our new-found norms and have crafted New Year’s resolutions that are all the more relevant this year. Some of the more popular 2021 resolutions are prayer/meditation, prioritizing family, exercising, learning a new skill, and becoming more technologically savvy (one I’m sure that we can all relate to in this new age of Zoom and teleconferencing).

We also prepare for changes in our professional lives as well. As we all adjust to the new rotation of Judges here in the 19th Circuit, we encourage everyone to mark your calendars to attend

the Judges Meet and Greet, scheduled for January 15, 2021, courtesy of yet another much anticipated MCBA Monthly Luncheon CLE. Don’t forget to RSVP by the second Friday of the month!

Let’s face it – practicing law in 2020 was unparalleled. As we embark on another year as members of this diverse legal community and the diverse Treasure Coast community at-large, let us not forget what 2020 has taught us. While technology isn’t perfect, at times it saves us hours of commuting and mileage, and allows us more time to better serve our clients. It also allows us to balance our family time better. Although some of us are anxious to get back into the courtroom, a bit of extra time at our desks will be missed, just perhaps not as much as the mute and video buttons we have all grown to appreciate.



For more information contact **Erika Powers, Esq.** at epowers@jgormanlaw.com or **Ricky Armand, Esq.** at ra@williegary.com.



Ricky Armand
Co-Chair

Tennis Tournament



Ray Robison
Chair

We are hopeful to bring the MCBA Tennis Tournament back in 2021. Please check future SideBar issues for further details on the tournament in 2021. If any questions, please contact Ray Robison (772-287-4444 or robison@foxmcccluskey.com). Thank you to everyone that has expressed interest in playing, as well as our sponsors, SEACOAST BANK and ESQUIRE DEPOSITION SERVICES

Admiralty Law

Joanne Foster - Chair

THE LAW OF SALVAGE

Joanne M. Foster, Florida Board Certified, Admiralty and Maritime Law
Admiralty Committee Chair

Loud are the cries of boaters who find themselves in peril at sea and depend on the quick and professional expertise of the salvor who rescues them from fire or sinking or other maritime calamity. The cries get louder as they later receive a bill for the services of the salvor and discover the costs of such rescue can be horribly steep, leaving the boater to wish he'd never considered a lovely afternoon on the water with his family.

Even worse are the cries of the boater whose boat has sunk at his home dock. He calls the friendly local towing assist guy with whom he has a membership, but soon discovers, unfortunately, that membership does not include pumping out his boat laying on the bottom in just a few feet of water. That's salvage, not towing, and the bill is not fair. In fact, it's highway robbery!

The law of salvage has been long settled by the U.S. courts. The compensation given to the salvor is a reward, not a payment for services rendered. The purpose of the reward is to keep salvors interested in maintaining the equipment and expertise necessary to face the risks that often come with rescues in hazardous conditions at sea. As the courts have explained from early days:

"If property is exposed to peril or hazard at sea and is saved by the voluntary exertion of any persons whatsoever, **"a very ample award** will be bestowed in the courts of justice". *Mason v. Blaireau*, 6 U.S. (2 Cranch) 240, 266 (1804)";

"Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit, or as a remuneration pro opere et labore, **but as a reward given for perilous services**, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property. *The Blackwall*, 77 U.S. 1 (1869)."

There is not a particular formula for how salvage awards are determined. Each award depends on the facts and circumstances of the case and the success of the salvage operation. Now days the circumstances are often considered by the Courts in accordance with the International Convention on Salvage adopted by the United States and in effect since 1996.

Article 13 of the Convention provides various criteria to be considered in fixing the salvage award: the salved value of the vessel; the skill and efforts of the salvors in preventing or minimizing damage to the environment; the measure of success obtained by the salvor; the nature and degree of danger; the skill and efforts of the salvor; the time, expenses and losses of the salvor; promptness in responding to the peril; the availability of equipment intended for the operation; and the state of readiness of the salvor and his equipment.

The criteria listed here apply not only to operations at sea but to local efforts to save boaters in peril. The criteria and formula apply only when there is no contractual obligation by the salvage company to perform the service. For example, salvage of the Costa Concordia off the coast of Italy was a contractual endeavor that cost approximately \$1.5 billion. Payment to a local salvor who voluntarily saves your boat and your family from sinking a few miles offshore could be somewhat more reasonable starting at \$15,000 - \$30,000 or more depending on the size and value of the boat and the effort required to save it. And as always, good marine insurance is likely to provide for the costs of salvage at a price negotiated between the insurer and the salvor.



Joanne Foster
Chair



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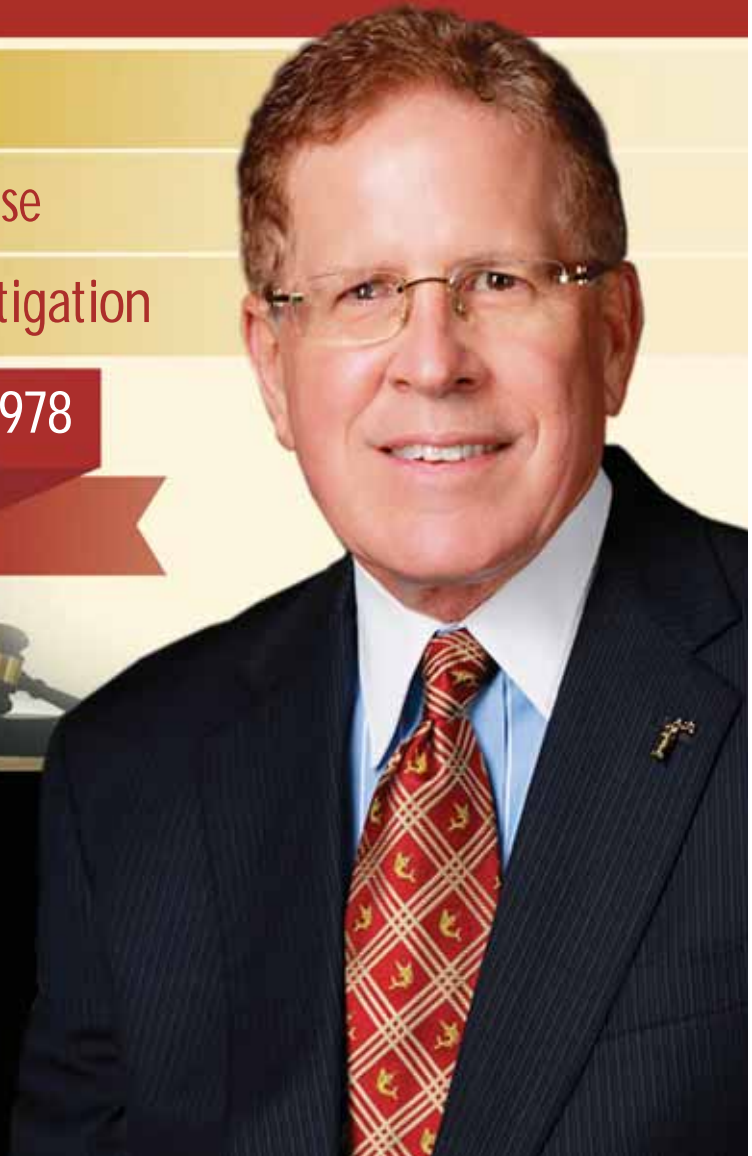
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Foreclosure Committee

Brandon Forgione - Chair

— Case Law Update —



- **Robinson v. Nationstar Mortgage LLC**, 2019 WL 6519041 (Fla. 2d DCA Dec. 4, 2019) – A standing and evidence case. The trial court abused its discretion in granting the plaintiff's motion to reopen evidence to present additional proof of standing, where the original proof was deficient and there was a 3-year delay between the original trial and second trial. Reopening the evidence prejudiced the defendants and did not serve the best interests of justice.
- **Richard v. Asset Management West 15, LLC**, 2019 WL 6519019 (Fla. 2d DCA Dec. 4, 2019) – A damages case. The trial court erred in granting summary judgment for the plaintiff. The affidavit of indebtedness stated the amount due, but was not supported by business records.
- **Tanis v. HSBC Bank USA, N.A.**, 2019 WL 6519225 (Fla. 3d DCA Dec. 4, 2019) – A foreclosure sale case. The trial court properly exercised its discretion in denying an objection to sale based on an alleged failure to receive notice, where the defendants (i) failed to timely file their objection, as required by section 45.031(5), Florida Statutes; and (ii) received at least constructive notice through prior counsel or publication. The court was not obligated to notify the defendant's counsel who did not file a notice of appearance in the action, as required by the Florida Rules of Judicial Administration, even though that counsel previously filed the motion to cancel sale that was granted by the court.
- **Bayview Loan Servicing LLC v. Cross**, 2019 WL 6041092 (Fla. 5th DCA Nov. 15, 2019) – An attorney's fee and prejudgment interest case. The trial court erred in awarding defendant attorneys' fees for litigating the amount of fees (as opposed to entitlement), as the contractual language in the loan documents was too narrow to permit such an award. The trial court also erred in denying the defendant prejudgment interest—the court should have awarded prejudgment interest from the date entitlement was determined.
- **Stacknik v. U.S. Bank, N.A.**, 2019 WL 6041432 (Fla. 2d DCA Nov. 15, 2019) – A negotiability and conditions precedent case. The trial court properly held (i) a note's negative amortization feature did not render it non-negotiable; and (ii) the servicer's letter log was sufficient evidence to prove the mailing of the default notice.
- **U.S. Bank, N.A. v. Zayas**, 2019 WL 5778044 (Fla. 3d DCA Nov. 6, 2019) – A contempt case. The trial court erred in directing the plaintiff to show cause why it should not be held in contempt for failing to produce documents that the court had not previously ordered the plaintiff to produce and that were apparently outside the plaintiff's possession or control.

I hope everyone had a happy and healthy holiday season!

Visit the MCBA website at www.martincountybar.org
for upcoming events, committee meetings and more!



find us online



Martin County Women Lawyers Association

Submitted by Elizabeth Hunter

Thank you to all who joined us in collecting donations for the SafeSpace families! We are lucky to be part of such a generous legal community. We hope you continue to join us in supporting SafeSpace and our other exciting and informative programming planned for 2021. If you are not yet a member of the Martin County Women Lawyers Association, then now is a great time to join us. Feel free to reach out to Kathy McHale, MCWLA Membership Director, for more information at kathy@kmchalelaw.com. Our next CLE meeting will be held on January 12, 2021 at noon (networking begins at 11:45am) and will include a panel presentation anchored by Zorelly Torres-Sanchez on "Immigration, Diversity, and Inclusion - Square Pegs for Round Holes."



Goretta Hall
MCWL President

Wishing each and every one of you a very happy 2021! And please remember to support our annual sponsors! We appreciate their continued support and commitment to our community.

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Employment Law

Hot employment law issues for 2021 – An Employer’s Perspective

Submitted by: David Miklas, Esq. – representing employers only



David Miklas
Co-Chair

Wage and Hour issues are certain to remain a key area that will get Treasure Coast businesses sued in 2021. Beginning January 1, 2021 Florida’s minimum wage increases to \$8.65 per hour, with a minimum wage of at least \$5.63 per hour for tipped employees, in addition to tips. Amendment Two, which voters approved on November 3, will

further raise the state minimum wage to \$10 starting in September 2021.

COVID-19 continues to create challenges for employers, and many may be failing to comply with various laws, including the Americans with Disabilities Act, Title VII of the Civil Rights Act, and the new (April 2020) Families First Coronavirus Response Act (FFCRA).

Typical areas where employers should be seeking legal advice are:

- When an employee tests positive for COVID-19, what other employees may need to be removed from the workplace, and when any of these employees are allowed to return to work;
- What type of questions can an employer ask employees regarding COVID-19 symptoms and exposure;
- What type of accommodations are required under the law for employees, including working from home or changes to the work environment such as installing plexiglass;
- How to handle employees requesting paid child care leave (i.e., leave due to the child’s school being closed or unavailable for reasons relating to COVID-19), which is a new type of leave that most Treasure Coast employers must now provide;

Also, multiple businesses have illegally retaliated against employees for raising health and safety concerns related to COVID. 2021 is certain to see many Department of Labor investigations and lawsuits into such allegations of improper retaliation. For example, employers who terminate employees for complaining about perceived safety concerns (such as wearing masks).



Stuart Address
Co-Chair

Various governmental agencies have been issuing documents that a business should be regularly reviewing, including those issued by the Department of Labor, the Equal Employment Opportunity Commission, and also the Center for Disease Control and Prevention (CDC). As a practical matter, various parts of the CDC’s COVID webpages are updated daily. It is common for me, when I provide legal advice to a business, to check the latest CDC updates while my client is on the phone, due to the frequent and significant changes that these agencies have experienced in their advice.

I have found that many Treasure Coast businesses are trying to do the right thing. They often are not out to illegally treat their employees. However, these are stressful times, and many Treasure Coast businesses simply are not keeping up to date with these key employment law issues. Oftentimes a 30-minute phone call can help the business handle the incident properly, rather than spending tens of thousands of dollars later on legal defense costs to attempt to minimize the damage their actions caused.

Appellate Committee

Donna Eng - Co-Chair
 Carri Leininger - Co-Chair

County Court Appeals: A Sea Change

Submitted By: Carri S. Leininger



Donna Eng
Co-Chair

In this column, we have been tracking the progress of proposed legislation to shift jurisdiction of county court appeals from the circuit courts to the appellate courts. While it is not as exciting or mysterious as tracking the migration of black marlin; it is a sea change.

The Florida Legislature recently amended Florida Statutes section 26.012 eliminating circuit court jurisdiction over most county court appeals. The legislation was approved by Gov. Ron DeSantis on June 20, 2020 and the amended statute becomes effective January 1, 2021. Pursuant to the Article V, section 4(b)(1), most county court rulings will now be appealed directly to the district courts of appeal.

A report was issued in 2019 recommending this change. Likewise, the Florida Supreme Court supported the Legislature’s consideration of an amendment transferring circuit court appellate authority to the district courts of appeal. Most appellate practitioners (and, I suspect, most circuit court judges burdened with the added appellate responsibility) applaud this amendment.

Circuit courts will retain jurisdiction over appeals from final administrative orders of local government code enforcement boards “and of reviews and appeals as otherwise expressly provided by law.”

The DCAs are in the process of preparing for the transfer of circuit court appellate cases. Our DCAs continue to impress with their ability to adapt to the changes thrown in their direction (have you seen the virtual Oral Arguments held by the DCAs and Florida Supreme Court during the pandemic?!) Thus, we expect the transfers to go smoothly.

Now that the Legislature has amended the statute, the Florida Supreme Court, which has rule-making authority, will need to revise the rules of appellate procedure. We recommend reviewing the Florida Law Weekly for updates on amendments to the Florida Rules of Appellate Procedure and checking the Administrative Orders on each DCAs website for directives unique to that DCA. Happy Fishing in 2021!



Carri Leininger
Co-Chair



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Cheers!



Stephen Smith was selected to speak to the Lee County Bar Association's Tort Litigation Practice Section Presentation on Jury Trials in a New Age. Stephen covered topics such as prepping for trials, trial strategy and differences between in-person vs. virtual trials and was approved for CLE credit by the Florida Bar.

Sherrard Law Group is proud to announce that **Trevor Johnson Sherrard** will be joining the Sherrard Law Group. Trevor is a 2020 graduate of St. Thomas University School of Law, and he recently learned that he passed the Florida Bar Exam! Congratulations, Trevor.



On December 5, 2020 the Martin County Bar Association partnered with the Palm City Chamber of Commerce for a Drive-In movie night.

MCBA members, their families and the public were invited to watch Elf on the big screen. There were food trucks on-site and even Santa made an appearance! Admission was non-perishable food donations for House of Hope. Over 250 pounds of food was collected!

One last thank-you to our sponsors for making this family-fun, socially distanced event possible:



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Bankruptcy Committee

Jon Martin - Co-Chair

Nick Bangos - Co-Chair

BANKRUPTCY in 2021

Submitted by: Jon L. Martin, Esq.



Jon Martin
Co-Chair

Covid 19 created many financial hardships for both consumers and businesses in 2020. Many major retailers including JCPenney, Neiman Marcus, J.Crew, Brooks Brothers and many others ended up in Chapter 11.

Expect more of the same for 2021 as well as a large percentage of small businesses and their owners. Some estimates suggest as many as 40% of family-owned restaurants will go out of business permanently. Many survived this far only because of payroll protection program.

Small businesses with debt between \$2.5 million and \$7.5 million need to act quickly to avoid being closed out of the ability to utilize the expanded parameters in new subchapter V of the Bankruptcy Code under Chapter 11. Sub-Chapter V became effective February 19, 2020.

The expanded parameters to \$7.5 million became effective in response to the pandemic, and is set to expire in March 2021 unless it is extended. It is especially effective for small businesses that have high debt-to-asset ratios on equipment such as trucking and heavy equipment operators.

Consumer and/or individual bankruptcy cases in Chapter 7 and in Chapter 13 actually declined in 2020, believed to be due to extensive early relief in response to the pandemic. Year-over-year filings from October of 2019 to October of 2020 were off 38% nationwide.

Nonetheless, bankruptcy courts and all bankruptcy organizations such as the American Bankruptcy Institute, National Association of Consumer Bankruptcy Attorneys, and The National Consumer Law Center, etc., are preparing for a surge of up to 158% over the massive filings resulting from the real estate collapse in 2008, overwhelming the bankruptcy system in the process.

Senators, Congressmen and assorted research centers are considering another round of bankruptcy reform to address what is perceived as the upcoming onslaught. The HEROES ACT offers several areas of reform thought to improve the chances of debtors keeping their homes and avoiding bankruptcy.

In addition, there appears to be some serious interest in addressing student loan dischargeability in bankruptcy as well as debts for criminal court costs and fees. Medical debt is another major consideration. All require careful consideration because relief for one party in bankruptcy typically results in burdens for another.

Cumulative burdens tend to end up on the taxpayers' backs in the form of bailouts. Lender liability is certain to enter into the calculations. Time alone will tell which of the proposed reforms occur and to what extent.



Nick Bangos
Co-Chair

NEED MORE INFORMATION?

Contact: Martin County Bar Bankruptcy Committee Co-Chairs: Jon Martin 772 834 5021 or Nick Bangos 305 915 1605 or a committee member

Real Estate and Commercial Litigation Update

Florida Real Property and Business Litigation Report

Manuel Farach

Tyson Waters



Manny Farach
Co-Chair

Muransky v. Godiva Chocolatier, Inc., Case Nos. 16-16486 & 16-16783 (11th Cir. 2020) (en banc).

Parties cannot stipulate that a federal court has jurisdiction and the requirement of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), that a plaintiff must plead (and later support) an injury that is concrete, particularized,

and actual or imminent (not just conjectural or hypothetical) applies to statutory claims that set forth damages for a statutory violation, including claims under the Fair and Accurate Credit Transactions Act.

In Re: Amendments to the Florida Rules of Appellate Procedure—2020 Fast-Track Report, Case No. SC20-1374 (Fla. 2020).

The Florida Rules of Appellate Procedure are amended to incorporate the change of county court appeals proceeding directly to district courts of appeal.

Abu-Khadier v. City of Fort Myers, Case No. 2D18-3068 (Fla. 2d DCA 2020).

Government can order the closing of a business, i.e., conduct a temporary taking, but is liable for the taking unless the government can identify background principles of nuisance and property law – such as extensive drug and criminal activity at the business – that support the order of closure and taking.

Kuhnsman v. Wells Fargo Bank, N.A., Case No. 2D19-681 (Fla. 2d DCA 2020).

The “face to face” meeting required under HUD, 24 C.F.R. § 203.604(b) (2016), is subject to a substantial performance standard.

Forty One Yellow, LLC v. Escalona, Case No. 2D18-3730 (Fla. 2d DCA 2020).

Failure to re-establish a lost promissory note is not a bar under res judicata or collateral estoppel to a later foreclosure suit as the focus is whether the foreclosure action, not the promissory note, is barred by the doctrines.



Tyson Waters
Co-Chair

Sunseeker Investments, Inc. v. Enterprise Maintenance and Contracting, Inc., Case No. 1D19-3779 (Fla. 1st DC 2020).

Five factors must be met for collateral estoppel to bar the re-litigation of an issue: (1) the identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issue must have been actually litigated, thus the issue of interest rate not determined in bankruptcy court does not bind a state trial court judge.

SHEDDF2-FL3, LLC v. Penthouse South, LLC, Case No. 3D19-1100 (Fla. 3d DCA 2020).

Avoidance of a contract for unconscionability requires both procedural and substantive unconscionability and a settlement agreement cannot be avoided if it is devoid of procedural unconscionability.

Regions Bank v. Squitieri, Case No. 3D20-578 (Fla. 3d DCA 2020).

The COVID-19 pandemic is not a valid basis for a trial court failing to conduct, as required by Florida Statutes Section 77.041(3), a prompt evidentiary hearing on claim of exemptions from garnishment.

Continued On Next Page . . .

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Devino v. 2436 East Las Olas, LLC, Case No. 4D19-1931 (Fla. 4th DCA 2020).

Easements in gross are not favored by the courts and an easement is not presumed to be personal when it may fairly be construed as appurtenant to some other estate.

Universal Property & Casualty Insurance Company v. Deshpande, Case No. 3D19-1566 (Fla. 3d DCA 2020).

An award of attorney's fees of \$441,805.14 with four attorneys billing 469 hours on a garden-variety case while obtaining an award of only \$25,000 is excessive.

Dyck-O'Neal, Inc. v. Herman, Case No. 4D19-3311 (Fla. 4th DCA 2020).

A 1099-A need not be authenticated if a borrower testifies receiving it, but the information contained in the 1099-A itself is hearsay.

Rajabi v. Villas at Lakeside Condominium Association, Inc., Case No. 5D18-852 (Fla. 5th DCA 2020).

Sending a unit owner's disputed monthly payments to the association attorney (who deposited the amounts into his trust account) but not crediting for payments made is a violation of the declaration of condominium.

Bailey v. Women's Pelvic Health, LLC, Case No. 1D19-1444 (Fla. 1st DCA 2020).

Arbitration provisions which cover claims "arising out of or related to" apply not only to claims arising out of the parties' employment agreements, but also to those claims with a significant relationship to the agreements - including those with a contractual nexus.

MV Senior Management, LLC v. Redus Florida Housing, LLC, Case No. 1D20-111 (Fla. 1st DCA 2020).

The Wrongful Act Doctrine basis for awarding attorney's fees applies only to litigation ensuing from a party's wrongful act against a third party.

Murphy Auto Group, Inc. v. Florida Department of Transportation, Case No. 2D19-1236 (Fla. 2d DCA 2020).

Requiring a private landowner to pay for a new drainage system in order for the landowner to connect to a roadway owned by the government is an improper exaction under *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 605-06 (2013).

Piazenko v. Pier Marine Interiors GMBH, Case No. 3D19-2193 (Fla. 3d DCA 2020).

Long-arm jurisdiction in Florida can be either specific under Florida Statute section 48.193(1)(a) or general under section 48.193(2), and specific jurisdiction requires "connexity," i.e., that the defendant does one of the enumerated acts within Florida, and that plaintiff's cause of action "arise from" one of the enumerated acts occurring in Florida.

Triton Stone Holdings, L.L.C. v. Magna Business, L.L.C., Case No. 4D19-2371 (Fla. 4th DCA 2020).

A handwritten agreement detailing the resolution of a limited liability company that does not comport with the previously executed operating agreement for the limited liability company is not effective even if partially acted upon.

IATAI Enterprises, Inc. v. Loyacono, Case No. 3D19-1831 (Fla. 3d DCA 2020).

Florida Rule of Civil Procedure 1.280(b)(5) does not apply to non-parties and a non-party objecting to discovery propounded upon it cannot be compelled to produce a log.

Merle Wood & Associates, Inc. v. Frazer, Case No. 4D19-2238 (Fla. 4th DCA 2020).

A party claiming unjust enrichment must prove the value of the benefit provided to and retained by the defendant; providing evidence of the contractual value of commissions is not sufficient substantial, competent evidence of the unjust enrichment.

Judicial Relations Committee

Jessica Van Valkenburgh - Chair



Jessica M. VanValkenburgh
Chair

2020-2021 JRC Committee Members – Chief Judge Lawrence Mirman, Judge Elizabeth Metzger, Judge William Roby, Gene Zweben and Kathryn McHale

19th Circuit’s Judiciary. Moving forward, the JRC will be planning, implementing and coordinating certain programs designed and focused on improving relationships and overall communications between the Bench and Bar.

Our Purpose: The purpose the MCBA’s Judicial Relations Committee (JRC) is primarily to serve as a liaison between the Martin County Bar Association and the

Please look for our Judicial Speaker Series schedule TBD!

If you are interested in the JRC please contact Jessica VanValkenburgh, Esquire, at jmv@mccarthysummers.com

19th Circuit Judicial Nominating Commission

The MCBA will continue to post updates on the 19th Circuit JNC Commission meetings and deadlines for appointments to fill judicial vacancies as they become available at www.martincountybar.org

For more information, email martincountybarassociation@msn.com

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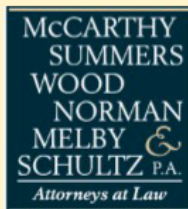
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The Florida Bar Updates / Board of Governors' Report

GREG WEISS - 19TH CIRCUIT BOG REPRESENTATIVE



Keep updated on Florida Bar initiatives and Board of Governors information, meeting minutes and reports by visiting the website regularly!

A direct link can be found at The Florida Bar's home page (www.floridabar.org) by clicking the "About The Bar"



Greg Weiss
19th Circuit BOG Rep



MARTIN COUNTY BAR ASSOCIATION RACE TO THE COURTHOUSE



APRIL 17, 2021



New Date Announced for the Race to the Courthouse 5k Run/ Walk. April 17, 2021.



Gene Zweben
Co-Chair

Due to the Corona Virus situation, we have rescheduled the race to Saturday, April 17, 2021. We hope everyone can adjust their schedule and still join us for this incredible race that **raises money for the Legal Aid Society of Martin County and the Martin County Bar Association Scholarship Program.**



Sarah Vickers
Co-Chair

All runners currently registered will have their registrations automatically transferred to the new date. Registration is still open, so sign up now. We are hoping you all can join us and look forward to another great race!

Judge Sponsor: McCarthy, Summers, Wood, Norman, Melby & Schultz, P.A.

Jury Sponsor: Fox McCluskey Bush Robison, PLLC
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Evidence Bag Sponsor: Gloretta H. Hall, P.A.

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ONLINE RESOURCES OFFERED BY THE MCBA

Notice: Your clients and the public at large can now access online courses directly through the MCBA website. They are fast, convenient, and inexpensive - available 24 hours a day, 7 days a week. All instructions are included online and programs can be started/stopped, picking up where you left off, as many times as you like. **Help the MCBA promote this community service while generating income to support local initiatives!**

Florida Online Traffic School Courses:

- Basic Driver Improvement 4-hour course (Traffic Ticket - TCAC)
- First-time Driver 4-hour course
- Advanced Driver Improvement 12-hour course (ADI / Judge-ordered class)
- Florida Mature Driver Program 6-hour course

All traffic courses are approved by the Florida Department of Highway Safety & Motor Vehicles and sponsored by the American Safety Council.

Parent Education and Family Stabilization Online Course:

This 4-hour course is required by Florida law for concerned parties seeking to obtain a final judgment of dissolution of marriage in Florida when minor children are involved. The course is approved by the Department of Children & Families and provided by a division of the University of Continuing Education.

The courses are provided via the American Safety Council which is the leading source for online driver education, workplace safety training, continuing education, online business and security solutions, and more!



Florida Free Legal Answers Program

Did you know that The Florida Bar provides free virtual legal information through its cooperative effort with the American Bar Association to low-income Floridians via the Florida Free Legal Answers Program?

Members of the public can go to: <https://florida.freelegalanswers.org/> to sign up and answer a few questions to see if they qualify to use the service.

Florida lawyers may enroll to join the effort by visiting [https://florida.freelegalanswers.org/](#) clicking on "Volunteer Attorney Registration" and agreeing to the attorney agreement.



19th Judicial Circuit Court of Florida

Court administration, judicial assignments, programs, job opportunities and other resources:

www.circuit19.org

Emergency Hotline / Info: 772.742.9229

Visit

www.martincountybar.org

for resources, links, events and member contact & practice area information.



Florida Bar Appointments / Vacancies

For applications and complete details, visit: **www.floridabar.org**

19th Circuit Appointments / Vacancies

For applications and complete details, visit: **<http://www.circuit19.org/careers.html>**

Track Legal Legislation

For more detailed information on specific legislation being tracked by the Bar, visit the Legislation Committee's webpage on the Bar website at this link:

<http://www.floridabar.org/cmdocs/bd160.nsf/WDOCS>



Martin County Ordinances

All Martin County ordinances may be found on the County website:

<https://www.martin.fl.us>

Click on Departments, County Attorney, County Code & Ordinances.

See ordinance list on right side of web page (ex: Ordinances 800-849).



City of Stuart Ordinances

All City of Stuart ordinances may be found on the City website:

www.cityofstuart.us

Click on link at the bottom of the page.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>January 2021</h1>						
3	4 SideBar Articles Due	5	6	7	8	9
10	11	12 RSVP DEADLINE FOR 1/15 Monthly Meeting MCBA Officers' Meeting MCWL Meeting @ 12 noon	13 Inns of Court	14	15 MCBA Monthly Meeting @ Noon	16
17	18 Martin Luther King Day	19	20	21	22	23
24	25	26	27	28	29	30 <hr/> 31

SAVE THE DATES: See www.martincountybar.org for full 2020-21 calendar including committee meetings, holidays & courthouse closings.

March 26, 2021: Tri-County Appellate Meeting

April 9, 2021: Judge Waronicki Investiture

April 17, 2021: Run to the Courthouse 5K

April 23, 2021: Bench Bar Conference



MARTIN COUNTY BAR ASSOCIATION
PO Box 2197
STUART, FL 34995-2197

Please join us for MCBA's CLE Monthly Meeting, Friday, January 15, 2021

When: **Friday, January 15, 2021**
12:00 Noon to 1:45 p.m*
***Please note this meeting will run longer than usual**

Where: Zoom

Speaker 19th Circuit Chief Judge Lawrence Mirman

Topic: Judges Meet and Greet

CLE: CLE credit has been applied for

**Please RSVP to: martincountybarassociation@msn.com
No later than Tuesday, January 12, 2021**

Zoom call details will be sent no later than January 13, 2021
to members who RSVP.