IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA
Case No.: 4D10-456
L.T. Case No. 08-13474

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellant,

v.

SEMINOLE TRIBE OF FLORIDA,

Appellee.

INITIAL BRIEF OF STATE OF FLORIDA, DEPARTMENT OF REVENUE

On Appeal from a Final Summary and Declaratory Judgment of the Seventeenth Judicial Circuit, in and for Broward County, Florida

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STATEMENT OF THE CASE AND FACTS[1]

The Florida Department of Revenue (Department) appeals the Final Summary and Declaratory Judgment entered below. This case stems from the Department denying the Seminole Tribe of Florida's (Appellee) request for tax refunds on the Appellee's purchases of motor fuel off reservation and trust lands. [R-2-3]

Sections 206.01(24) and 206.41(4)(a), Florida Statutes, impose motor fuel tax at the time of "use" by the consumer. [R-245] Section 206.01(24) says that "use" by the consumer occurs when the consumer places the fuel in the tank of the vehicle for propulsion. [R-245]

The Appellee filed refund requests with the Department for the taxes it paid on off-reservation purchases of motor fuel between January 1, 2004 and February 28, 2005 and between January 1, 2005 and February 28, 2006. [R-2-3] The Department denied the refund requests. [R-3-4]

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[1] Citations to the record on appeal are [R- #] where # is the page number. References to the summary judgment hearing transcript (R-381-406) will be referred to as [R- #, page number] where # is the page number of the Record and page number is the page number of the hearing transcript. References to the deposition of James Raker (R-307-373) will be referred to as [R- #, page number] where # is the page number of the Record and page number is the page number of the deposition transcript. References to Exhibit 12 (R-307-373) will be referred to as [R-307-373, page number] where R-307-373 consists of the filing of the Raker transcript and Exhibit 12 and page number is the page number located in the below left corner of each page (i.e. PL1stPRD 03634) of Exhibit 12.

The Appellee filed suit, contending that regardless of how Florida law defines the "use" of motor fuel, it was requesting tax refunds for the motor fuel it consumed on its reservation and therefore the Indian Commerce Clause exempted those purchases from tax. [R-52-153]

Peter J. Steffens, employed by the Department and involved in the administration of Florida fuel taxes for over 30 years, attested in an affidavit to the Department's consistent position in its administration of Chapter 206, Florida Statutes, with regard to determination of the motor fuel tax. [R-243, 244] Specifically, the Department has long taken the position, consistent with the Florida Statutes, that fuel purchased by the Appellee at retail stations off reservation is "used" at the time of fueling the motor vehicle and does not qualify for tax immunity related to purchase, delivery, and use on tribal lands. [R-244]

The Department of Revenue, in its administration of Chapter 206 recognizes that any fuel placed into the fuel tanks of qualifying tribal owned motor vehicles at retail stations on reservation lands would qualify for a refund of any state and local taxes paid regardless of the fact that vehicles may be operated off the tribal reservation, since "use" occurred on tribal lands. [R-245] The Appellee has for many years filed refunds for the taxes paid on fuel purchased and received on reservation lands for use in motor vehicles owned by the Appellee and its enrolled members. [R-245] This use is determined at the moment the fuel is placed into the

fuel tanks of qualifying vehicles. [R-245] Consistent with the statutory definition of "use" the Department does not reduce the refunds for fuel consumed by tribal owned motor vehicles that later travel off reservation lands. [R-245]

The Department deposed the Appellee's designated corporate representative James Raker. During the years at issue in this case, Raker was the Chief Financial Officer of the Appellee. [R-312; page 13] As CFO of the Appellee, Raker held managerial and supervisory responsibility for finance and accounting, risk management, information technology, and purchasing. [R-312-13; pages 13-15] He testified that the records documenting the Appellee's purchases of motor fuel in Florida only describe where the purchases were made, nothing more. [R-335; page 104] These records were contained in Deposition Exhibit 12. Raker added that these records were the primary records relied upon by the Appellee in establishing and calculating the refund requests. [R-337-38; pages 113-14] Moreover, a third party, Wright Express, provided these records to the Appellee. [R-336, 337; pages 108, 111-12] Wright Express issued the Appellee the credit cards that were used to purchase the motor fuel. [R-314, 335-37; pages 19-20; 105-06 107-08, 111-12]

Raker testified that the Appellee itself did not maintain any logs to show when the fuel was purchased, what it was used for on a particular day, or any other information to track data related to the motor fuel. [R-324; pages 58-59] Raker, moreover, even testified that he had no personal knowledge pertaining to certain

matters in his affidavit and that he actually obtained some of the information in his affidavit from someone else. [R-331-32; pages 88-90]

Raker's deposition also revealed other oddities with the Appellee's records regarding the motor fuel purchases. He testified that he had no idea why the Appellee purchased fuel in Alachua County for which it was now claiming a refund. [R-336; page 109; see R-307-373, PL1stPRD 03634] The Appellee does not have a reservation or trust lands in Alachua County. Ultimately, Raker testified that Exhibit 12 – which contained all the records the Appellee relied on to substantiate its refund claims in this case – "does not tell us where those vehicles were, in fact, used. It just tells you where the vehicles were, in fact, refueled." [R-339; page 118]

The Appellee moved for summary judgment, arguing that decisions from the United States Supreme Court and federal law prohibited Florida from imposing the fuel tax upon on off reservation purchases. [R-152-181] In neither its motion for summary judgment nor its complaint did the Tribe argue that any provision of Chapter 206 was invalid or unconstitutional, as the trial court later found. [*See* R-413]

The Appellee filed an affidavit from Raker in support of its motion for summary judgment. [R-165-67] The Department moved to strike the Raker affidavit, contending that it did not provide an admissible evidentiary basis for the

motion for summary judgment and was not based on personal knowledge. [R-259-65] In addition, the Department argued that Raker's affidavit contained self-serving or conclusory statements concerning the relevant issues of law and fact that should be disregard. [R-259-65]

The Department then filed its own motion for summary judgment. [R-201] The Department argued that its denial of the Appellee's refund claim was correct because Section 206.01(24) defines "use" as the placing of fuel in the tank of a motor vehicle. Thus, the Appellee "used" the motor fuel when the fuel was placed into the fuel tanks of various motor vehicles at the time of purchase.

In November 2009, the trial court heard both the Appellee and the Department's respective motions for summary judgment. At that hearing, the trial court observed:

> **The Court:** *I think that if there is use on the reservation that they shouldn't be paying the tax on it. The evidence of the Exhibit, if I do recall, that it was on or off the reservation, I don't have enough to tell me whether it was a, just an official of the Tribe who has a private car that maybe got filled --on or off the reservation.*
>
> *You don't have enough information to tell me if it's a car that is used only on the reservation. I don't know what it's used for, okay? As a general finding I find that --purchased off the reservation but used on the reservation, if it was used on the reservation then it's not subject to the tax, but I think there has to be some evidence of that, and I don't think you gave us any.*

[R-398, pages 31-32]

> **The Court**: *I am also going to rule that since the State hasn't passed a Statute which enables the Tribe to --in such a way that it can determine how much is applicable to use outside the lands that the Statute here does not apply to the Tribe.*

[R-405, page 46]

In January 2010, the trial court issued its order granting the Appellee's motion for summary judgment. [R-415] The trial court first found that the taxable event is the use of the fuel rather than the retail sales transaction. [R-412] The trial court then disregarded Florida's statutory definition of "use" of motor fuel and concluded that the Appellee actually used the motor fuel on its reservations, notwithstanding the dearth of evidence substantiating this claim. [R-412] The trial court concluded that under the protections of the Indian Commerce Clause, the Appellee was entitled to a refund of all of the taxes on fuel purchased at stations off its reservations and trust lands because the Appellee consumed the fuel in its own government vehicles in the performance of tribal government functions, again without any supporting evidence. [R-410-11, 414] The trial court found Florida's motor fuel tax scheme was invalid as applied to the Appellee. [R-413] The Department timely appealed. [R-416]

SUMMARY OF ARGUMENT

The Appellee's purchases of motor fuel off its reservation and trust lands are subject to Florida's motor fuel tax. In Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005), the United States Supreme Court held that Indian tribes are subject to non-discriminatory state taxes imposed upon activities that occur off reservations. As plainly set out by statute, the Appellee's "use" of the motor fuel it was seeking a refund for occurred off the reservation. Thus, the plain language of Florida's motor fuel tax statute and the explicit jurisprudence of the United States Supreme Court both provide that the Appellee must pay the fuel taxes at issue in this case and is not entitled to any refund. Under the Supreme Court's existing caselaw, moreover, there is no basis under the Indian Commerce Clause to preempt Florida's definition of when motor fuel is "used." The trial court should therefore be reversed and this case remanded with instructions to grant the Department's motion for summary judgment.

An alternative basis for reversal also exists because the trial court committed harmful error by granting the Appellee's motion for summary judgment solely on the evidence provided in the Raker affidavit. This affidavit was not based on personal knowledge and could not properly form the basis for summary judgment in favor of the Appellee.

ARGUMENT

I. State taxation of transactions that occur off the Appellee's reservations does not violate tribal sovereignty and the Indian Commerce Clause provides no basis to invalidate Florida's motor fuel tax.[2]

The decisive issue in this case is whether the Appellee's off-reservation purchases of motor fuel are subject to Florida's motor fuel tax. The plain language of Florida's motor fuel tax statute and the explicit jurisprudence of the United States Supreme Court provide that the Appellee must pay state motor fuel tax when the Appellee placed the fuel in the tanks of its vehicles off its reservation and trust lands.

Supreme Court jurisprudence on state taxation of Indian tribes falls into two categories based solely on the location of the activity being regulated: off-reservation or on-reservation. The Supreme Court has consistently held that state taxes transactions occurring off-reservation are valid. *E.g.,* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99 (2005) (state's motor fuel tax was permissible when assessed against non-Indian distributors who delivered fuel *to* reservation gas stations, because it arose out of transactions occurring *off* the

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[2] **Standard of Review:** The standard of review of a trial court's grant of summary judgment is de novo. Fla. Bar v. Greene, 926 So. 2d 1195, 1200 (Fla.2006); Johnson v. Boca Raton Cmty. Hosp., Inc., 985 So. 2d 593, 595 (Fla. 4th DCA 2008).

reservation); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 464 (1995) (income of tribe members residing off the reservation, even if they earned that income on the reservation, was subject to state tax); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 163-64 (1980) (court implied that a state could tax tribe member's car to the extent it was used off the reservation); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) (state taxes on tribe's ski resort located outside the boundaries of the reservation were permissible). Consequently, the rule that Indian tribes and their members are generally immune from state taxation "*does not operate outside Indian country*." Chickasaw Nation, 515 U.S. at 464 (emphasis added).

Indeed, Wagnon – the most recent of the relevant Indian Commerce Clause cases from the Supreme Court – is particularly helpful in this case.[3] Wagnon, like this case, involved off-reservation state taxation of Indian tribes. 546 U.S. at 112-114. The Court found that in cases involving state taxation of Indian tribes off the reservation, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 546 U.S. at 113 (citations omitted). In contrast, "States are categorically barred from placing the legal

[3] Although Wagnon is the most recent, relevant Supreme Court case in this area, the trial court failed to cite the case in its order.

incidence of an excise tax *on a tribe or on tribal members* for sales made *inside Indian country* without congressional authorization." Id. at 101-102.

Regarding on-reservation activity, states are generally without power to tax reservation land or tribe members' activities thereon, absent express congressional authority. County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 258 (1992). The dispositive question in determining whether an Indian tribe is subject to state law is the location of the activity the state attempts to regulate. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (the reservation boundary "remains an important factor to weigh in determining whether state authority has exceeded the permissible limits."). Therefore, a state may not tax a tribe member's income derived wholly from reservation sources, McClanahan v. State Tax Commission of Arizona, 411 U.S. 164. 179-80 (1973); tribe members' personal property located on the reservation, Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 480-81 (1976); sales of products to Indians on the reservation, Id.; motor vehicles owned by tribe members for the times used on the reservation, Colville Indian Reservation, 447 U.S., at 163-64; or motor fuel sold by a tribe to tribe members on a reservation, Chickasaw Nation, 515 U.S., at 462.

As a general matter, however, state laws apply to Indian tribes, and Indian tribe members are subject to state law "unless such application would interfere

with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). While state tax law is particularly scrutinized when applied to activities of tribe members on reservation property, "tribal activities conducted outside the reservation present different considerations," and a state's taxing authority is broader. Id. Tribe members are therefore subject to all manners of tax laws, criminal sanctions, and other state laws when they *leave* the reservation. Nevada v. Hicks, 533 U.S. 353, 362 (2001).

The Appellee is subject to the state motor fuel taxes imposed by Florida because the taxable purchase and "use" occurred off the reservation. There is no dispute that all of the motor fuel referenced in the Appellee's complaint was purchased at stations outside of the Appellee's reservations. [*See* R-56] So the relevant question is *where* the taxable event occurred. Florida law provides the tax here on the "use" of motor fuel, "use" being a term wholly defined by the statute as "the placing of motor or diesel fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion thereof." § 206.01(24), Fla. Stat.

Supreme Court decisions under the Indian Commerce clause give deference to state legislative decisions in areas such as defining when motor fuel is "used." Dispositive language in the statute is determinative, and, absent that, courts are to interpret fairly a tax statute as both written and applied. Wagnon, 546 U.S. at 102-

03; *see also* Chickasaw Nation, 515 U.S. at 462 (looking to the law's statutory definitions and plain language to determine when a tax was imposed, relying on the import of the language and the structure of the statute). For instance, in Wagnon, the Court noted that dispositive language within the Kansas statute was determinative, concluding that the distributor of motor fuel was responsible for the tax, and that this conclusion was supported by a fair interpretation of the statute. 546 U.S. at 102-03; *see also* Moe, 425 U.S. at 482 (finding that non-Indian consumer received the benefit of the tax exemption "necessarily follow[ed]" from the Montana tax statute).

The Appellee argued below the statutory definition of "use" should be disregarded and that the appropriate question is where the vehicle is driven *after* the taxable transaction. Yet caselaw from the Supreme Court under the Indian Commerce Clause does not support disregarding state law in this instance. The Appellee, moreover, provided no evidence to show where and when the fuel it purchased off the reservation was consumed in the performance of tribal government functions. [R-330-32, 338-39, 340; pages 85-86; 88-90; 117-118, 125] Thus, as Section II of this brief further discusses, the Appellee never even proved where its vehicles burned the motor fuel for which it was seeking a refund. The Appellee never proved who was driving the vehicles and for what purpose its vehicles were driven.

Finally, the trial court should not have applied the Bracker balancing test.[4] The Bracker balancing test "applies only where a State asserts authority over the conduct of non-Indians engaging in activity on the reservation," which is not an issue in this case.[5] Wagnon, 546 U.S. at 99 [*see* R-155] *quoting* Bracker, 448 U.S. at 144. Such balancing tests have been used in many cases but each involved non-Indian activities on a reservation. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (state could impose taxes on non-Indian oil and gas producer that operated on-reservation). Further, the interest-balancing test has been limited to circumstances where a non-tribal entity is taxed for activity occurring on the reservation, and has no import in this case because the taxable event occurred off the reservation.

In sum, the key facts are that the Appellee purchased and placed fuel in the fuel tank on its vehicles while outside its reservation and trust lands. Because

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[4] At the final hearing, the trial court stated that Bracker *does not apply* to this case. R-398, page 24.

[5] The Wagnon court characterizes the Bracker balancing test as follows: Determining whether state taxation is occurring *on* an Indian reservation should not turn "on mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. This inquiry is "designed to determine whether, in the specific context, the exercise of state authority would violate federal law, unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." Wagnon, 546 U.S. at 101-102. (internal citations and quotes omitted)

Florida law says that the taxable "use" of the motor fuel, as defined by Section 202.01(24), Florida Statutes, occurs off the reservation, the Appellee is subject to the motor fuel tax. Nothing in the Supreme Court's Indian Commerce Clause jurisprudence requires a different result. Indeed, these cases urge deference to state legislative decisions such as the one Florida made about when motor fuel is "used." Thus, there was no basis for the trial court to invalidate Florida's motor fuel statute as it applies to the Tribe.[6]

II. The Raker affidavit filed in support of the Appellee's motion for summary judgment is not based on his personal knowledge, could not properly form the basis for summary judgment, and it was harmful error to deny the Department's motion to strike.[7]

"Summary judgment cannot be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file together with affidavits, if any, conclusively show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c). "[T]he burden is upon the party moving for summary judgment to show

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[6] The trial court found the statute "invalid," effectively rendering it unconstitutional as applied to the Appellee. But the Appellee never pled or argued specifically regarding the unconstitutionality of the statute. Nor did the trial court perform any of the traditional analysis when considering the constitutionality of a statute.

[7] Evidentiary trial decisions based on questions of law receive de novo appellate review. Burkey v. State, 922 So. 2d 1033 (Fla. 4th DCA 2006); Shands Teaching Hosp. v. Dunn, 977 So. 2d 594 (Fla. 1st DCA 2007).

conclusively the complete absence of any genuine issue of material fact." Fini v. Glascoe, 936 So. 2d 52, 54 (Fla.4th DCA 2006) (citation omitted). The trial court based its summary judgment solely on the finding that the Appellee consumed the motor fuel on its reservation as stated in the Raker affidavit. An appellate court has "no alternative but to reverse" when there is no evidence in the record to support a finding of fact. Trueba v. Pawley, 407 So. 2d 945 (Fla. 3d DCA 1981).

The record below did not support the finding of the trial court that the Appellee consumed "substantially all of [the] fuel involved in this case" for government purposes on its reservation. Raker's affidavit was the only evidence that the Appellee filed in support of its motion for summary judgment. This affidavit was not based on Raker's personal knowledge, including, most importantly, where the fuel was consumed and the purpose for which it was consumed. [R-330-32, 338-39, 340; pages 85-86; 88-90; 117-118, 125] Indeed, the trial court even recognized at the summary judgment hearing that "I think there has to be some evidence of [the Appellee's consumption of the fuel], and I don't think you gave us any." [R-398, pages 31-32]

The trial court's reliance on Raker's affidavit, concerning the Appellee's fuel records in granting the motion for summary judgment is not harmless error. Brooks v. State, 918 So. 2d 181, 194 (Fla. 2005) (holding that admission of testimony not based on personal knowledge is not proper and subjects such a ruling

to a harmless error analysis). Indeed, an affidavit filed in support of a motion for summary judgment that is not based on personal knowledge should not result in the granting of such a motion. Florida Dep't of Financial Services v. Associated Industries Ins. Co., Inc., 868 So. 2d 600, 602 (Fla. 1st DCA 2004).

Raker testified that the records documenting the purchases by the Appellee of motor fuel in Florida only describe where the purchases were made in the state. [R-335; page 104] He testified that Deposition Exhibit 12 contained the records relied upon by the Appellee in establishing and calculating the Appellee's refund requests. [R-337-38; pages 113-114] The information in Exhibit 12 was provided to the Appellee by a third party. [R-337; pages 111-112] Thus, the use of Exhibit 12 through Raker's testimony was hearsay within hearsay and is reason enough to reverse the summary judgment. *E.g.,* Forester v. Norman Roger Jewell & Brooks Intern., Inc., 610 So. 2d 1369 (Fla. 1st DCA 1992). The trial court, moreover, should not have used the Raker affidavit, which was based on Exhibit 12 and not within his personal knowledge, to grant summary judgment.

The trial court's denial of the Department's motion to strike Raker's affidavit is fundamental error and violates this Court's decision in M.S. v. Department of Children and Families, 6 So. 3d 102 (Fla. 4th DCA 2009). In M.S., this Court held that the admission of records consisting of inadmissible hearsay

records was not harmless error and reversed a final judgment that relied on those records.

Similarly, in Florida Department of Financial Services v. Associated Industries Ins. Co., Inc., 868 So. 2d 600 (Fla. 1st DCA 2004), the First District came to the same conclusion and reversed a summary judgment where an affidavit filed in support of a motion for summary judgment did not meet the "personal knowledge" requirement and explained:

> An affidavit in support of summary judgment may not be based on factual conclusions or conclusions of law. Jones Constr. Co. of Cent. Fla., Inc. v. Fla. Workers' Comp. JUA, Inc., 793 So. 2d 978, 979 (Fla. 2d DCA 2001). "The purpose of the personal knowledge requirement is to prevent the trial court from relying on hearsay when ruling on a motion for summary judgment . . . and to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." Pawlik v. Barnett Bank of Columbia County, 528 So. 2d 965, 966 (Fla. 1st DCA 1988).

Florida Dep't of Financial Services., 868 So. 2d at 602.

The Raker deposition revealed that his affidavit did not provide an "admissible evidentiary basis" for the Appellee's motion. Id. Like the Stiles' affidavit in Florida Department of Financial Services, the Raker affidavit contains self-serving or conclusory statements concerning the relevant issues of law and facts in this case that should be disregarded by the trier of fact.

Affidavits must be based on personal knowledge and must set forth facts relied upon by the affiant. Mere conclusions by the affiant are insufficient, and a

party does not create a fact question merely by placing his assertions in affidavit form. TSI Southeast, Inc. v. Royals, 588 So. 2d 309, 310 (Fla. 1st DCA 1991).

As Raker testified, Deposition Exhibit 12 "does not tell us where those vehicles were, in fact, used. It just tells you where the vehicles were, in fact, refueled." [R-339; page 118] The record in this case reveals that the Appellee did not keep records necessary to answer (and still cannot answer) the questions of who, what, where, and why regarding the motor fuel it purchased off its reservation and trust lands. The Appellee therefore did not meet its burden to show the off-reservation purchases are not subject to Florida's motor fuel tax. The trial court's decision was wholly based on the faulty evidence that was inadmissible hearsay provided by the Appellee through Raker and therefore should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the Final Summary and Declaratory Judgment in favor of the Appellee and remand this case back to the trial court with instructions to grant the Department's motion for final summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, to: **John H. Pelzer, Esquire, Matthew S. Nelles, Esquire and Glen Stankee, Esquire**, Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 East Broward Boulevard, 15th Floor, Post Office Box 1900, Fort Lauderdale, Florida 33301, this 3rd day of May, 2010.

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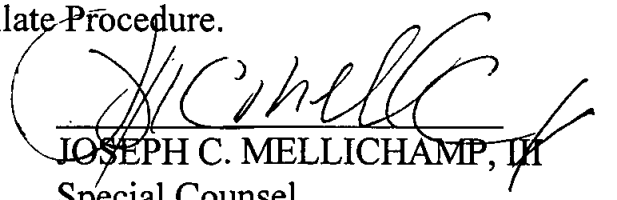
CERTIFICATE OF COMPLIANCE

I certify that (a) this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.



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