Modway, Inc. v. OJ Commerce, LLC

Court of Appeal of Florida, Fourth District

November 24, 2021, Decided

No. 4D21-1147

Reporter
2021 Fla. App. LEXIS 15118 *; 2021 WL 5499826

MODWAY, INC., Appellant, v. OJ COMMERCE, LLC, Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: [*1] Appeal of a nonfinal order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Nicholas Richard Lopane, Judge; L.T. Case No. CACE19-25902.

Core Terms

trial court, personal jurisdiction, venue, parties, quash service, affirmative relief, default, waive, lack of personal jurisdiction, service of process, vacate, motion to vacate, motion to dismiss

Case Summary

Overview
HOLDINGS: [1]-The trial court granted the distributor's motions, both filed on the same day, to quash service and to vacate the default, and the granting of the motion to quash service deprived the trial court of jurisdiction over the distributor until proper service was effected; [2]-By quashing the initial service of process, and requiring new service, the time for serving a response re-commenced; [3]-When the retailer filed an amended pleading, that amended complaint should have been treated as an original pleading to which the distributor had the right to respond; [4]-The trial court needed to conduct an evidentiary hearing before reaching its conclusion that the last 2018 agreement was a novation.

Outcome
Judgment reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] **Standards of Review, De Novo Review**

Whether a defendant has waived the defense of lack of personal jurisdiction is a pure question of law, which the appellate court reviews de novo.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

HN2[] **In Personam Actions, Challenges**

A defendant waives a challenge to personal jurisdiction by seeking affirmative relief because such requests are logically inconsistent with an initial defense of lack of jurisdiction. Affirmative relief is relief for which a defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it.

Civil Procedure > ... > Service of Process > Methods of Service > Personal Delivery

HN3[] **Methods of Service, Personal Delivery**

A challenge to service of process relates to the court's personal jurisdiction over the defendant. Proper service of process is indispensable for the court to obtain personal jurisdiction over a defendant, and when service is not proper, personal jurisdiction is suspended and it lies dormant until proper proof of valid service is submitted.

Counsel: John H. Pelzer of Greenspoon Marder LLP, Fort Lauderdale, for appellant.

Eric C. Edison of Gunster, Yoakley & Stewart, P.A., Fort Lauderdale, for appellee.

Judges: WARNER, J. DAMOORGIAN and KUNTZ, JJ., concur.

Opinion by: WARNER

Opinion

WARNER, J.

Appellant Modway, Inc. ("appellant") appeals an order denying its motion to dismiss for lack of personal jurisdiction and for improper venue. We reverse and remand for the trial court to conduct further review of those challenges. We hold that appellant's previous successful motion to vacate a default and motions to quash service of process did not waive its challenge to personal jurisdiction. *See Babcock v. Whatmore, 707 So. 2d 702, 704 (Fla. 1998)*; *Sierra v. U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr., 299 So. 3d 402, 403 (Fla. 4th DCA 2020)*. Regarding venue, we remand for the trial to determine whether the parties entered a novation which terminated a venue selection clause within their original contract wherein the parties consented to litigate in New Jersey. *Mkt. Traders Inst., Inc. v. Kent, 300 So. 3d 377 (Fla. 4th DCA 2020)*.

Facts

In 2016, OJ Commerce, LLC ("appellee"), an online retailer, contracted with appellant Modway, Inc., a furniture manufacturer and wholesale distributor for the supply of furniture. Their initial **[*2]** contract included a "Consent to Jurisdiction" clause, stating that the parties agreed that any cause of action under the contract would be brought in New Jersey and the parties consented to jurisdiction in New Jersey.

During the course of the parties' dealings, a payment dispute arose in 2016 and 2017. The parties resolved their dispute in two agreements. Through the first agreement dated January 4, 2018, the parties agreed to resume "normal business operations" upon a credit issued by appellant to appellee and appellee's payment of $111,977.33 to appellant. Weeks later, on January 26th, the parties entered into another agreement, expressly revoking the January 4th agreement and stating that they "have come to a resolution to resume conducting normal business operations."

The parties continued to conduct business, but further disputes arose. In December of 2019, appellee filed suit in Broward County, Florida against appellant alleging

various causes of action including breach of contract. Appellee attempted to serve appellant in New Jersey, and subsequently obtained a clerk's default.

Thereafter, appellant filed separate motions on the same day to vacate the clerk's default and to quash **[*3]** service. The trial court granted both motions.

Appellee's subsequent efforts to serve appellant in New Jersey were met with additional motions to quash service, some of which alluded generally to issues regarding jurisdiction and venue. The trial court again quashed service and granted appellant's motion for attorney's fees for challenging that service.

Appellee subsequently amended its complaint to include allegations to authorize service of process on the Secretary of State, claiming that appellant was avoiding service. Appellee then served appellant accordingly.

Appellant moved to quash that service, and to dismiss based on lack of personal jurisdiction and on the venue selection clause within the parties 2016 contract providing that any lawsuit be brought in New Jersey. Appellant attached a supporting affidavit to that motion from a corporate officer who addressed service of process, venue, and personal jurisdiction.

The trial court denied that motion to quash service, and following non-evidentiary hearings, the trial court agreed with appellee that appellant waived its challenge to personal jurisdiction when its previous motions to vacate the default and to quash service failed to **[*4]** address personal jurisdiction in any detail. Regarding venue, the trial court found that the venue clause within the parties initial 2016 contract was not expressly incorporated into their January 26, 2018 contract wherein they agreed to resume normal business operations and thus the contract had no governing venue clause. We reverse and remand for further review of each claim.

Personal Jurisdiction

HN1[↑] Whether a defendant has waived the defense of lack of personal jurisdiction is a pure question of law, which this court reviews de novo. *Snider v. Metcalfe, 157 So. 3d 422, 424 (Fla. 4th DCA 2015)*. We reverse the trial court's finding of waiver for two reasons and remand for the trial court to address the merits of appellant's jurisdictional challenge and to conduct any necessary hearings. *See Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989)*.

First, the earlier motions to vacate the default and to quash service did not seek affirmative relief inconsistent with the defense of personal jurisdiction. *See Babcock v. Whatmore, 707 So. 2d 702, 704 (Fla. 1998)*. Second, until service of process was properly made, the trial court did not obtain jurisdiction over appellant. Therefore, appellant timely raised that defense once service was perfected. *Sierra v. U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr., 299 So. 3d 402, 403 (Fla. 4th DCA 2020)*. We explain each reason below.

Appellant did not seek affirmative relief

HN2[↑] In *Babcock*, our supreme court held that a defendant **[*5]** waives a challenge to personal jurisdiction by seeking affirmative relief because such requests "are logically inconsistent with an initial defense of lack of jurisdiction." *707 So. 2d at 704*. "Affirmative relief" is "relief for which a defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." *Brown v. U.S. Bank Nat. Ass'n, 117 So. 3d 823, 824 (Fla. 4th DCA 2013)* (quoting *Heineken v. Heineken, 683 So. 2d 194, 197 (Fla. 1st DCA 1996)*

(concluding that a motion for attorney's fees did not seek affirmative relief)).

Babcock held that a defendant's motion to vacate a prior final judgment as void was not affirmative relief and therefore did not waive his right to pursue a motion to dismiss for lack of personal jurisdiction. If a motion to vacate a prior *judgment* is not a claim for affirmative relief sufficient to waive the right to assert a lack of personal jurisdiction, then appellant's motion to vacate the clerk's default likewise is not a claim for affirmative relief; nor is it a waiver of a later personal jurisdiction challenge.

Despite the supreme court's holding in *Babcock*, the trial court found waiver based on *Golden State Industries, Inc. v. Cueto, 883 So. 2d 817 (Fla. 3d DCA 2004)*. In *Cueto* the defendant was served with process in California and, after a trial was set to determine damages, **[*6]** defendant moved to vacate a default. Attached to the motion to vacate was a proposed answer and affirmative defenses. The trial court denied that motion to vacate as well as the defendant's renewed motion to do so.

Thereafter, the defendant moved to dismiss for lack of personal jurisdiction. The trial court held that the defendant's filing of the motion to vacate the default waived the defense of lack of personal jurisdiction. While citing *Babcock* for general principles, *Cueto* did not adhere to its holding that a motion for relief from judgment does not seek affirmative relief and does not waive a claim of lack of personal jurisdiction. *883 So. 2d at 820-23*.

Cueto also is distinguishable in that the motions to vacate were denied, and there was no successful motion to quash. Here, the trial court granted appellant's motions, both filed on the same day, to quash service and to vacate the default. We conclude that the granting of the motion to quash service deprived the trial court of jurisdiction over appellant until proper service was effected.

Personal jurisdiction timely raised

Once appellee amended its complaint, appellant again challenged service of process. The trial court denied that motion to quash service and ordered **[*7]** appellant to respond. Appellant then appropriately responded with a motion contesting personal jurisdiction, together with an affidavit showing lack of contacts with Florida, and a motion to dismiss for improper venue based upon the contractual clause.

Accordingly, appellant did not waive its jurisdictional challenge, as it timely raised those defenses once service was perfected. Until then the trial court did not obtain jurisdiction over appellant. *HN3*[↑] As we recently explained:

> A challenge to service of process relates to the court's personal jurisdiction over the defendant. "Proper service of process is indispensable for the court to obtain personal jurisdiction over a defendant," *Nat'l Safety Assocs., Inc. v. Allstate Ins. Co., 799 So. 2d 316, 317 (Fla. 2d DCA 2001)*, and when service is not proper, "personal jurisdiction is suspended and it 'lies dormant' until proper proof of valid service is submitted," *Chigurupati v. Progressive Am. Ins. Co., 132 So. 3d 263, 266 (Fla. 4th DCA 2013)* (quoting *Re-Emp't Servs., Ltd. v. Nat'l Loan Acquisitions Co., 969 So. 2d 467, 471 (Fla. 5th DCA 2007)*).

Sierra v. U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr., 299 So. 3d 402, 403 (Fla. 4th DCA 2020).

Thus, by quashing the initial service of process, and

requiring new service, the time for serving a response re-commenced. Also, when appellee filed an amended pleading, which included an alternative basis for service of process, that amended complaint should have been treated as an original pleading to which appellant had the right to respond in accordance **[*8]** with *Florida Rule of Civil Procedure 1.140*. *See* *Orange Motors of Coral Gables, Inc. v. Rueben H. Donnelley Corp. 415 So. 2d 892, 895 (Fla. 3d DCA 1982)* ("Because plaintiff's previous service of process was quashed, plaintiff was required to treat the second amended complaint as the original pleading and serve the defendant.").

Venue

The parties 2016 agreement included a venue clause whereby the parties agreed and consented to litigate issues in New Jersey.[1] Following billing disputes, the parties entered into two agreements in 2018 whereby the parties resumed conducting business with each other.

The trial court determined that last 2018 agreement without a venue selection clause was a novation. *See* *C.V.P. Cmty. Ctr., Inc. v. McCormick 105, LLC, 302 So. 3d 905, 907 (Fla. 4th DCA 2020)*, *rev. denied* *SC20-1494, 2021 Fla. LEXIS 1332, 2021 WL 3523502 (Fla. Aug. 11, 2021)*. Appellant disagrees, arguing that the 2018 agreements modified the original 2016 agreement with its venue clause.

We agree with appellant that the trial court needed to conduct an evidentiary hearing before reaching its conclusion that the last 2018 agreement was a novation. *See* *Kerrigan, Estess, Rankin & McLeod v. State, 711 So. 2d 1246, 1249 (Fla. 4th DCA 1998)*.

Accordingly, for the reasons expressed, we reverse the order that denied appellant's motion to dismiss which raised timely challenges to personal jurisdiction and venue and remand for further review of each claim.

Reversed and remanded.

DAMOORGIAN and KUNTZ, JJ., concur.

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[1] CONSENT TO JURISDICTION; Any lawsuit based upon any cause of action arising between the parties whether under this agreement or otherwise, shall be brought in the court of record in Union County NJ and each party consents to the jurisdiction of these courts in any legal proceeding and waives any objection which they may have to venuing in any legal proceeding in these courts, including any claim that the legal proceeding has been brought in an inconvenient forum.

El Brazo Fuerte Bakery 2 v. 24 Hour Air Serv., Inc.

Court of Appeal of Florida, Fourth District

November 24, 2021, Decided

No. 4D21-531

Reporter
2021 Fla. App. LEXIS 15113 *; 2021 WL 5500398

EL BRAZO FUERTE BAKERY 2, Appellant, v. 24 HOUR AIR SERVICE, INC., Appellee.

Notice: NOT FINAL UNTIL DISPOSITION OF TIMELY FILED MOTION FOR REHEARING.

Prior History: **[*1]** Appeal from the County Court for the Seventeenth Judicial Circuit, Broward County; Jackie Powell, Judge; L.T. Case Nos. COCE16-10481 and CACE20-6601.

Core Terms

county court, multiplier, attorney's fees, hourly rate, reasonable hourly rate, prejudgment interest, entitlement, circuit court, trial court, uncontroverted, specific finding, contingency fee, awarding, internally inconsistent, substantial evidence, defense counsel, expert opinion, billed, opined, fill

Case Summary

Overview
HOLDINGS: [1]-The county court erred by reducing the plaintiff's attorneys' requested hourly rate, and the plaintiff's expert's requested hourly rate, because there was no competent substantial evidence, or specific findings, for such reductions; [2]-The county court erred by making internally inconsistent findings supporting the application of a contingency fee multiplier but then not applying a multiplier; [3]-The county court erred by not awarding prejudgment interest which should have been ordered from the date on which the county court found the plaintiff was entitled to attorney's fees through the date of the amended judgment's rendition.

Outcome
Reversed and remanded with instructions.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN1[] **Standards of Review, Abuse of Discretion**

A Florida court of appeals reviews a trial court's determination as to the amount of attorney's fees and costs for abuse of discretion.

Civil Procedure > ... > Costs & Attorney

Fees > Attorney Fees & Expenses > Reasonable Fees

HN2[] **Attorney Fees & Expenses, Reasonable Fees**

An award of attorney's fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved. Additionally, the award must be supported by expert evidence, including the testimony of the attorney who performed the services.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3[] **Attorney Fees & Expenses, Reasonable Fees**

While trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney testimony submitted at such hearings, they may only reduce attorneys' fees that they deem to be excessive if they make specific findings to support that determination.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN4[] **Attorney Fees & Expenses, Reasonable Fees**

Trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney testimony submitted at such hearings, and may reduce attorneys' fees that they deem to be excessive if they make specific findings to support that determination.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN5[] **Standards of Review, Abuse of Discretion**

With respect to an attorneys' fees award, the standard of review with respect to the application of a multiplier is one of abuse of discretion. A trial court is not required to apply a contingency multiplier, but is required only to consider whether a multiplier is warranted.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees > Contingency Fees

HN6[] **Attorney Fees & Expenses, Reasonable Fees**

With respect to attorneys' fees, in tort and contract cases the trial court should consider the following factors in determining whether a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in Rowe are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the utilization of a multiplier.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN7[] **Standards of Review, De Novo Review**

A trial court's decision concerning a party's entitlement to prejudgment interest is reviewed de novo.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Fees & Expenses

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN8[] **Costs & Attorney Fees, Attorney Fees & Expenses**

Interest accrues on an award of attorney's fees from the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination, even though the amount of the award has not yet been determined.

Counsel: Gregory Light and Anthony Gonzalez of Light & Gonzalez, PLLC, Plantation, for appellant.

No appearance for appellee.

Judges: GERBER, J. CIKLIN and ARTAU, JJ., concur.

Opinion by: GERBER

Opinion

GERBER, J.

The plaintiff, after prevailing in the underlying breach of contract action, appeals from the county court's final judgment on the plaintiff's motion to determine the amount of attorney's fees to which it was entitled. The plaintiff argues the county court erred in three respects: (1) by reducing the plaintiff's attorneys' hourly rates, and the plaintiff's expert's requested hourly rate, absent competent substantial evidence, or specific findings, for such reductions; (2) by making internally inconsistent findings supporting the application of a contingency fee multiplier but then not applying a multiplier; and (3) by not awarding prejudgment interest from the date on which the county court found the plaintiff was entitled to attorney's fees.

We agree with each of the plaintiff's arguments. After providing a brief procedural history, we will address each argument in turn. **[*2]**

Procedural History

The plaintiff filed a breach of contract claim against the defendant in county court. After two years of litigation and a non-jury trial, the county court entered a $3,394.00 final judgment in the plaintiff's favor. The plaintiff filed a motion for entitlement to prevailing party attorney's fees under the contract. The county court entered an order granting the plaintiff's motion for entitlement to attorney's fees.

The plaintiff then filed its motion to determine the amount of attorney's fees to which it was entitled and its expert's fees. The motion identified the plaintiff's expert's opinions:

> [Plaintiff's counsels'] reasonable hourly rate is $350.00.
>
> [A] reasonable amount of hours spent on this case was 111.65 ....
>
> Plaintiff's total lodestar amount of attorney's fees is $39,217.50.
>
> Plaintiff's counsel is entitled to a contingency fee multiplier of 250% to the contingent portion of the Plaintiff's [counsels'] attorney's fees, bringing the total amount of reasonable attorney's fees to $90,043.75.

The county court held a hearing to determine the fees amount. The plaintiff presented two witnesses: one of the plaintiff's two attorneys who had worked on the litigation, and **[*3]** the plaintiff's fees expert.

The plaintiff's attorney testified as follows. The plaintiff retained the two-attorney law firm to pursue its claim. The plaintiff retained the firm on a partial contingency basis, whereby the plaintiff agreed to pay the firm a flat $2,000 attorney's fee. The plaintiff also agreed that, if: (1) it ultimately prevailed in the litigation, and (2) the county court determined it was entitled to recover its attorney's fees, then the firm would seek to recover the two attorneys' reasonable hourly rate aggregated by a contingency fee multiplier. The two attorneys ultimately spent 121.2 hours on the litigation up until the date when the county court granted the plaintiff's motion for entitlement to attorney's fees. The firm's detailed records documenting the hourly work performed incurred were introduced into evidence.

The plaintiff's attorney testified regarding how the work performed satisfied the factors identified in *Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)*, as modified by *Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990)*. The plaintiff's attorney further testified that the firm would not have taken the case on a partial contingency basis without the possibility of a multiplier. The plaintiff's attorney also testified that both he and his partner **[*4]** had been practicing for about a year and a half and charged a $350 hourly rate.

On cross-examination, defense counsel questioned the plaintiff's attorney about the firm's various billing entries, but did not question their $350 hourly rate.

The plaintiff's expert testified as follows. He was a twenty-five year former judge and charged a $600 hourly rate. He had reviewed the court file and the firm's records and bills, and created a deductions list for duplicative entries, travel time, and work which could have been performed by clerical staff. He opined that 7.5 hours should be deducted from the total hours billed, but the remaining 112.05 hours billed were reasonable. He further opined $350 was a reasonable hourly rate for the plaintiff's attorneys, and the result which the firm obtained was excellent. He also opined the relevant market required a contingency fee multiplier to obtain competent counsel for this type of action, for which he believed a 250% (i.e., 2.5) multiplier was warranted. He also testified he had spent eleven hours preparing for the hearing.

Defense counsel requested the county court's permission to testify as the defendant's expert witness. The county court denied **[*5]** the request because defense counsel had not given notice that the defendant would be presenting evidence at the hearing. However, the county court permitted defense counsel, for appellate purposes, to proffer what his testimony would have been, in the context of his closing argument. During the unsworn proffer/closing, defense counsel stated his belief that the market rate for attorneys with less than two years' experience was $225 per hour, and that the plaintiff's claim did not justify a multiplier based on the results obtained.

The plaintiff's attorney's closing argument cited case law, including *State Farm Fire & Casualty Co. v. Palma, 555 So. 2d 836 (Fla. 1990)*, for the proposition that litigation over a claim in the hundreds of dollars still may result in an attorney's fee award in the tens of thousands if the amount of hours expended was reasonable. The plaintiff's attorney also requested prejudgment interest on the attorney's fees award to run from the date when the county court granted the plaintiff's motion for entitlement to attorney's fees. The plaintiff's attorney then provided the county court with a proposed judgment, which contained blanks for the

county court to fill in findings for the reasonable hourly rate and hours for both the **[*6]** plaintiff's attorneys and its expert. The proposed judgment also contained proposed findings to justify a multiplier, including a blank for the county court to fill in a multiplier amount. The proposed judgment also contained a blank for the county court to fill in a prejudgment interest amount.

The county court deferred ruling at the hearing. Later, the county court entered its judgment, using the plaintiff's attorney's proposed judgment as a template. The county court found the plaintiff's attorneys were entitled to the 112.05 hours which its expert had opined were reasonable, but at only a $175 hourly rate — that is, one-half of the $350 rate which its expert opined was reasonable. The county court also found the plaintiff's expert was entitled to only 8.8 hours at a $225 hourly rate — that is, less than the eleven hours at a $600 hourly rate to which the expert had testified. Regarding a multiplier, the county court did not strike the proposed findings to justify a multiplier, but filled in a zero for the multiplier amount. The county court also did not award the plaintiff any prejudgment interest on the attorney's fee award.

The plaintiff filed a motion for rehearing, followed by **[*7]** an amended motion. The amended motion asserted that the county court, without explanation, had reduced the plaintiff's attorneys' uncontroverted reasonable hourly rate as requested from $350 to $175, and reduced the plaintiff's expert's uncontroverted hourly rate from $600 to $225. The county court entered an order denying the amended motion for rehearing without explanation.

This appeal followed. As stated above, the plaintiff argues the county court erred in three respects: (1) by reducing the plaintiff's attorney's requested hourly rate, and the plaintiff's expert's requested hourly rate, absent competent substantial evidence, or specific findings, for such reductions; (2) by making internally inconsistent findings supporting the application of a contingency fee multiplier but then not applying a multiplier; and (3) by not awarding prejudgment interest from the date on which the county court found the plaintiff was entitled to attorney's fees.

We agree with each of the plaintiff's arguments. We will address each argument in turn.

1. The county court erred by reducing the plaintiff's attorneys' requested hourly rate, and the plaintiff's expert's requested hourly rate, absent competent [*8] substantial evidence, or specific findings, for such reductions.

HN1[↑] Our standard of review is for an abuse of discretion. *See* *Webber v. D'Agostino, 251 So. 3d 188, 191 (Fla. 4th DCA 2018)* ("We review the trial court's determination as to the amount of attorney's fees and costs for abuse of discretion.").

HN2[↑] "An award of attorney's fees must be supported by substantial competent evidence and contain express findings regarding the number of hours reasonably expended and a reasonable hourly rate for the type of litigation involved." *Trovato v. Trovato, 16 So. 3d 290, 291 (Fla. 4th DCA 2009)* (citation omitted). "Additionally, the award must be supported by expert evidence, including the testimony of the attorney who performed the services." *Rakusin v. Christiansen & Jacknin, P.A., 863 So. 2d 442, 444 (Fla. 4th DCA 2003)* (citation omitted).

HN3[↑] "While trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney [testimony] submitted at such hearings, they may only reduce attorneys' fees that they deem to be excessive *if they make specific findings to support that determination*." *Lizardi v. Federated Nat'l Ins. Co., 322 So. 3d 184, 189 (Fla. 2d DCA 2021)* (emphasis added).

In *Lizardi*, where the trial court had not made specific findings as to why it had reduced the requested number of hours or hourly rate, our sister court held:

> Had the trial court ... made specific findings as to why it reduced the requested number of hours or hourly rate, the **[*9]** order would have likely satisfied *Rowe*'s requirements. ... But the order as written, merely stating the hourly rate and reasonable number of compensable hours without any elucidation as to why those figures were used instead of the requested figures, does not comport with the requirements of *Rowe*.

Id. at 189-90.

Our sister court reached the same holding on similar facts in *Westaway v. Wells Fargo Bank, N.A. for Carrington Mortgage Loan Trust, Series 2007- RFC1, Asset-Backed Pass Through Certificates, 230 So. 3d 505 (Fla. 2d DCA 2017)*. In *Westaway*, a defendant who had obtained an involuntary dismissal requested attorney's fees based on a $325 hourly rate. *Id. at 507*. At the fees hearing, the defendant's expert witness "testified that such a rate was reasonable." *Id.* The opposing party did not appear or present any evidence at the hearing, making the defendant's fee request uncontested. *Id.* Nevertheless, the circuit court, expressing its "personal disbelief" that the defendant's attorneys "could reasonably command $325 an hour," instead awarded "$200.00 per hour for 2-5 years of practice[,] and $250.00 per hour for 5-9 years of practice." *Id.*

On appeal, the defendant argued the circuit court had abused its discretion in "sua sponte reducing her attorney's reasonable hourly rate." *Id. at 506*. Our sister court agreed, because "the final judgment include[d] no justification for the hourly rates that **[*10]** the [circuit] court determined were reasonable." *Id. at 508*. Our sister court explained:

> Nothing in the record ... explains why $200 an hour would be a reasonable fee for an attorney with "2-5 years of practice" or why $250 would be a reasonable fee for an attorney with "5-9 years of practice." The sole expert witness in this case did not testify that such hourly rates would be reasonable; [the opposing party] was not represented at the fee hearing, so it could not have suggested them; and we cannot find anything in either the Florida Rules of Professional Conduct or in published case law that ties an attorney's reasonable hourly rate to the time frames articulated by the [circuit] court.

Id.

While the *Westaway* court recognized that, "when evaluating the reasonableness of a requested fee award, judges should not abandon what [they] learned as lawyers or [their] common sense," and "the [circuit] court was not bound by the expert's opinion," the court held:

> [W]e cannot affirm the [circuit] court's award when the record is totally devoid of any evidence to support a conclusion that the award was reasonable. ... [T]he [circuit court] did not indicate that her determination of reasonable hourly rates was rooted **[*11]** in her experience as a lawyer, nor did she explain why the varying rates that she applied were more reasonable than the single rate that [the defendant's] attorneys proposed (and all of the evidence adduced at the fee hearing supported). [The circuit court's] only apparent justification for reducing the hourly rate was her personal opinion of what attorneys should charge based on their number of years in practice. This alone does not constitute competent, substantial evidence.

Id. at 508-09 (internal citations and quotation marks omitted).

Similar to *Lizardi* and *Westaway*, the judgment here does not comport with *Rowe*'s requirements, merely by stating the reasonable hourly rate and hours without any elucidation as to why the county court reduced both the plaintiff's attorneys and expert's hourly rates, and the expert's hours, all of which was supported by competent substantial evidence. The defendant did not present any expert or other evidence to refute the plaintiff's expert's opinion that the plaintiff's attorneys' reasonable hourly rate was $350 for this case, or that the expert's reasonable hourly rate was $600. Nor did the county court "indicate that her determination of reasonable hourly rates was rooted in her **[*12]** experience as a lawyer, nor did she explain why the varying rates that she applied were more reasonable than the single rate[s] that [the plaintiff's] attorneys proposed (and all of the evidence adduced at the fee hearing supported)." *Westaway, 230 So. 3d at 509*. Even defense counsel's proffer/closing argument (which was not properly noticed or sworn) argued that the plaintiff's attorneys' reasonable hourly rate was $225 — that is, $50 more per hour than the rate which the county court awarded.

Thus, we must reverse the county court's judgment. The plaintiff requests that we direct the county court to award the plaintiff's attorney's fees and expert's fees at the hourly rates requested, which would be consistent with the plaintiff's uncontroverted hearing evidence. However, we conclude the appropriate disposition on remand is for the county court either to amend the award as requested, or explain a legal basis for its reduced hourly rates. *HN4*[⬆] As discussed above, although the plaintiff's hearing evidence was uncontroverted, "trial courts are not bound by expert opinions provided at evidentiary hearings or by attorney [testimony] submitted at such hearings," and "may ... reduce attorneys' fees that they deem to be **[*13]** excessive *if they make specific findings to support that determination*." *Lizardi, 322 So. 3d at 189* (emphasis added); *see also Puleo v. Morris, 98 So. 3d 248, 250 (Fla. 2d DCA 2012)* ("[Appellants] ask that on remand we direct the circuit court to award them attorney's fees in amounts consistent with the uncontroverted evidence presented at the hearing. Although the evidence presented by [appellants] at the hearing was uncontroverted, the circuit court is not bound by the time and billing records presented or by the expert witness's testimony about the reasonableness of the fees requested. A trial court may reduce attorney's fees that it determines to be excessive *if it makes the requisite findings to support that determination*.") (emphasis added).

2. The county court erred by making internally inconsistent findings supporting the application of a contingency fee multiplier but then not applying a multiplier:

HN5[⬆] "[T]he standard of review with respect to the application of a multiplier is one of abuse of discretion." *City of Daytona Beach v. A.B., 304 So. 3d 395, 399 (Fla. 5th DCA 2020)* (alteration in original) (citation omitted).

"The trial court is not required to apply a contingency multiplier, but is required only to consider whether a multiplier is warranted." *Nalasco v. Buckman, Buckman & Reid, Inc., 171 So. 3d 759, 762 (Fla. 4th DCA 2015)* (citing *Quanstrom, 555 So. 2d at 831*).

HN6[⬆] As our supreme court stated in *Quanstrom*:

> [In] tort and contract cases **[*14]** ... the trial court should consider the following factors in determining whether a multiplier is necessary: (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether

> the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client. Evidence of these factors must be presented to justify the utilization of a multiplier.

555 So. 2d at 834.

Here, the county court did not strike the proposed judgment's *Quanstrom* multiplier findings (which findings were supported by the plaintiff's expert's testimony); however, the county court filled in a zero for the multiplier amount. Thus, the judgment is internally inconsistent on its face, and we cannot discern from the record whether the county court intended to apply a multiplier or not.

For this reason, we must reverse and remand for the county court to further amend the judgment to resolve this inconsistency by either (a) awarding a multiplier, or (b) striking the *Quanstrom* findings justifying the multiplier and explaining why the county court **[*15]** rejected the plaintiff's expert's uncontroverted testimony. *See, e.g., Allen v. Allen, 114 So. 3d 1102, 1103-04 (Fla. 1st DCA 2013)* (reversing internally inconsistent final judgment of dissolution and remanding for the trial court to correct inconsistent provisions relating to child support and the allocation of child-related expenses). We make no comment as to whether a multiplier is appropriate, as that issue is not before us at this time.

3. The county court erred by not awarding prejudgment interest from the date on which the county court found the plaintiff was entitled to attorney's fees.

HN7[↑] "A trial court's decision concerning a [party's] entitlement to prejudgment interest is reviewed de novo." *Sterling Vills. of Palm Beach Lakes Condo. Ass'n v. Lacroze, 255 So. 3d 870, 872 (Fla. 4th DCA 2018)* (alteration in original; citation omitted).

HN8[↑] "[I]nterest accrues [on an award of attorney's fees] from the date the entitlement to attorney fees is fixed through agreement, arbitration award, or court determination, even though the amount of the award has not yet been determined." *Bayview Loan Servicing, LLC v. Cross, 286 So. 3d 858, 863 (Fla. 5th DCA 2019)* (alterations in original) (quoting *Quality Eng'd Installation, Inc. v. Higley S., Inc., 670 So. 2d 929, 930-31 (Fla. 1996)*); *see also Cox v. Great Am. Ins. Co., 203 So. 3d 204, 206 (Fla. 4th DCA 2016)* ("[A]ppellee was ... entitled to interest on the attorney's fees award from th[e] date entitlement was determined.") (citation omitted).

Here, the county court's order granting the plaintiff's motion for entitlement to attorney's **[*16]** fees fixed such entitlement. *Bayview, 286 So. 3d at 863*. Therefore, the plaintiff became entitled to an award of prejudgment interest from that date through the rendition of any new final judgment entered upon remand after further proceedings. *See id.*

Accordingly, we must reverse the county's court's failure to award prejudgment interest, and remand for the county court to further amend the judgment to calculate and award the amount of prejudgment interest on the plaintiff's ultimate attorney's fees award, measured from the date of the order granting the plaintiff's motion for entitlement to attorney's fees through the date of the amended judgment's rendition. *See id.*

Conclusion

In sum, based on the foregoing, we reverse the county court's fees judgment and remand for the county court to enter an amended judgment which: (1) either amends the award as requested, or explains a legal basis for its

reduced hourly rates; (2) either awards a multiplier, or strikes the *Quanstrom* findings justifying the multiplier and explains why the county court rejected the plaintiff's expert's uncontroverted testimony; and (3) calculates and awards the amount of prejudgment interest on the plaintiff's ultimate attorney's fees award, measured **[*17]** from the date of the order granting the plaintiff's motion for entitlement to attorney's fees through the date of the amended judgment's rendition.

Reversed and remanded with instructions.

CIKLIN and ARTAU, JJ., concur.

End of Document

In re Redefinition of Appellate Dists. & Certification of Need for Additional Appellate Judges

Supreme Court of Florida

November 24, 2021, Decided

No. SC21-1543

Reporter
2021 Fla. LEXIS 1879 *; 2021 WL 5504715

IN RE: REDEFINITION OF APPELLATE DISTRICTS AND CERTIFICATION OF NEED FOR ADDITIONAL APPELLATE JUDGES.

Core Terms

district court, recommendations, judicial circuit, district court of appeal, realignment, certification, districts, workload, appellate district, confidence, decrease, certify, public trust, residing, changes, judgeships, new district, disruption, redefining, judicial process, well-qualified, vacancies, factors, sitting, oral argument, court judge, decertification, methodology, attracts, composed

Case Summary

Overview

HOLDINGS: [1]-Consistent with the recommendations of a Court-appointed assessment committee, the Court determined that a sixth appellate district should be created in Florida and that accompanying changes should be made to the existing boundaries of the First, Second, and Fifth districts; [2]-Also consistent with the assessment committee's recommendations, the Court determined that six new appellate judgeships were needed for the continued effective operation of the newly aligned district courts of appeal of Florida; [2]-The primary rationale for the Court's recommendation was that creation of an additional DCA would promote public trust and confidence.

Outcome

The Court, inter alia, certified the need for six additional district court of appeal judgeships, bringing to 70 the total number of judges on the state's district courts of appeal.

LexisNexis® Headnotes

Governments > Courts > Creation & Organization

HN1[] **Courts, Creation & Organization**

Rule of General Practice and Judicial Administration 2.241(d) sets forth public trust and confidence as one of the criteria to be considered when determining the necessity for increasing, decreasing, or redefining appellate districts. The rule sets forth several factors to be evaluated in connection with the public trust and confidence criterion: Public Trust and Confidence. Factors to be considered for this criterion are the extent to which each court: (A) handles its workload in a manner permitting its judges adequate time for

community involvement; (B) provides adequate access to oral arguments and other public proceedings for the general public within its district; (C) fosters public trust and confidence given its geography and demographic composition; and(D) attracts a diverse group of well-qualified applicants for judicial vacancies, including applicants from all circuits within the district. *Fla. R. Gen. Prac. & Jud. Admin. 2.241(d)(5)*.

Constitutional Law > State Constitutional Operation

Governments > Courts > Creation & Organization

HN2[] **Constitutional Law, State Constitutional Operation**

Certification is the sole mechanism established by the Florida Constitution for a systematic and uniform assessment of this need (the State's need for additional district court judges in fiscal year 2022/2023).

Governments > Courts > Creation & Organization

HN3[] **Courts, Creation & Organization**

The Court continues to use a verified objective weighted caseload methodology as a primary basis for assessing judicial need.

Governments > Courts > Creation & Organization

HN4[] **Courts, Creation & Organization**

The certification methodology relies primarily on the relative weight of cases disposed on the merits to determine the need for additional district court judges. *Fla. R. Gen. Prac. & Jud. Admin. 2.240*.

Governments > Courts

HN5[] **Governments, Courts**

Art. V, § 8, Fla. Const., provides that no person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court.

Judges: [*1] CANADY, C.J., and LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur. GROSSHANS, J., concurs in result only. POLSTON, J., dissents with an opinion.

Opinion

PER CURIAM.

Consistent with the recommendations of a Court-appointed assessment committee, this Court has determined that a sixth appellate district should be created in Florida and that accompanying changes should be made to the existing boundaries of the First, Second, and Fifth districts.[1] Also consistent with the

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[1] *Article V, section 9 of the Florida Constitution* provides in pertinent part:

> **Determination of number of judges.—**The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, **[*2]** decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need.

assessment committee's recommendations, the Court has determined that six new appellate judgeships are needed for the continued effective operation of the newly aligned district courts of appeal of this state. The subject of trial court certification of need for additional judges is addressed in a separate opinion.[2]

I. Background

In May 2021, this Court appointed a District Court of Appeal Workload and Jurisdiction Assessment Committee[3] composed of appellate judges, trial court judges, and lawyers to evaluate the necessity for increasing, decreasing, or redefining the appellate districts. The Committee evaluated the operation of the existing districts using the five criteria prescribed in *Rule of General Practice and Judicial Administration 2.241*: effectiveness, efficiency, access to appellate review, professionalism, and public trust and confidence. The Committee filed its final report[4] with the Court on September 30, 2021. By this certification, the Court adopts the Committee's recommendation for a realignment of the state's appellate districts in order to create a sixth district, which we conclude would significantly improve the judicial process.

II. District Realignment

A discussion of the full background **[*3]** and reasoning for the Committee's recommendation concerning a new appellate district is contained in the Committee's final report and recommendations. A majority of the Committee recommended the creation of at least one additional district court, with a plurality supporting the creation of a sixth district and the adjustment of the existing district lines in the manner we certify in this opinion.

The "primary rationale" for this recommendation "is that creation of an additional DCA would promote public trust and confidence." *HN1*[⬆] This rationale is linked specifically to the provisions of *rule 2.241(d)*, which sets forth "public trust and confidence" as one of the criteria to be considered when determining the necessity for increasing, decreasing, or redefining appellate districts. The rule sets forth several factors to be evaluated in connection with the public trust and confidence criterion:

> **Public Trust and Confidence**. Factors to be considered for this criterion are the extent to which each court:
> (A) handles its workload in a manner permitting its judges adequate time for community involvement;
>
> (B) provides adequate access to oral arguments and other public proceedings for the general public within its **[*4]** district;
> (C) fosters public trust and confidence given its geography and demographic composition; and
> (D) attracts a diverse group of well-qualified applicants for judicial vacancies, including applicants from all circuits within the district.

Fla. R. Gen. Prac. & Jud. Admin. 2.241(d)(5).

Regarding these factors, the Committee report observes:

> Specifically, an additional [district court] would help provide adequate access to oral arguments and

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[2] *See In re Trial Court Certification of Need for Additional Judges, No. SC21-1542, 2021 Fla. LEXIS 1880 (Fla. Nov. 24, 2021)*.

[3] *See In re District Court of Appeal Workload and Jurisdiction Assessment Committee, Fla. Admin. Order No. AOSC21-13 (May 6, 2021)*.

[4] District Court of Appeal Workload and Jurisdiction Assessment Committee Final Report and Recommendations, https://www.flcourts.org/DCA-Committee-Report.

other proceedings, foster public trust and confidence based on geography and demographic composition, and attract a diverse group of well-qualified applicants for judicial vacancies including applicants from all circuits within each district.

Assessment Committee Report at 3-4.

We agree with the Committee's conclusion that public trust and confidence will be enhanced by the creation of a sixth district court. We recognize that the rule factors related to public trust and confidence are largely subjective and that they are affected by circumstances that go beyond the number of district courts and the configuration of district boundaries. Nonetheless, we believe that the factors are meaningful considerations and that the Committee has identified a reasonable basis for its proposal.

A salient issue **[*5]** relevant to this criterion is the serious underrepresentation among district court judges of judges from within the Fourth Judicial Circuit, which contains Jacksonville, one of Florida's largest metropolitan areas. Under the current configuration of district courts, the Fourth Judicial Circuit generates 29 percent of the filings of the First District Court, but only two judges—constituting 13 percent of the judges on the First District Court—are from the Fourth Judicial Circuit. Even more striking, the population of the Fourth Circuit—with its 2 out of 15 DCA judges—makes up 37.5% of the population of the current First District.[5] Although no district court configuration will perfectly address every relevant consideration, the configuration proposed in the Committee's plurality plan would help address this geographical anomaly existing in the current district court system.

The creation of a new district court, like any other significant change in the judicial system, would be accompanied by some degree of internal disruption, but we conclude that any such internal disruption in the district courts associated with the creation of a sixth district court would be short-lived and would be **[*6]** outweighed by the benefit of enhanced public trust and confidence.

Appended to this certification is a map showing the geographical areas to be within the recommended, realigned districts. Also appended to this certification is a table showing the counties and judicial circuits affected by the proposed new district boundaries. As shown, the Fourth Judicial Circuit[6] moves from the First District into the Fifth District, composed of the Fourth, Fifth, Seventh, and Eighteenth judicial circuits; the Ninth Judicial Circuit[7] moves from the Fifth District into the Second District, composed of the Ninth, Tenth, and Twentieth judicial circuits; and the Sixth,[8] Twelfth,[9] and Thirteenth[10] judicial circuits move from the Second District to compose a newly created Sixth District Court of Appeal. The boundaries of the Third and Fourth district courts are unaffected by this proposal.

The Court acknowledges that a variety of operational issues with policy and fiscal implications will arise from

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[5] As of January 1, 2019, the population of the Fourth Circuit was 1,264,060 and the population of the First District was 3,346,191.

[6] The Fourth Judicial Circuit is composed of Clay, Duval, and Nassau counties.

[7] The Ninth Judicial Circuit is composed of Orange and Osceola counties.

[8] The Sixth Judicial Circuit is composed of Pasco and Pinellas counties.

[9] The Twelfth Judicial Circuit is composed of DeSoto, Manatee, and Sarasota counties.

[10] The Thirteenth Judicial Circuit is composed of Hillsborough County.

creating an additional district court and revising the territorial jurisdiction of other courts. For example, the Florida Constitution, under *article V, section 4*, requires the appointment of a clerk and a marshal to each district court. **[*7]** A new district court will also require associated administrative, security, and information technology support staff. Additionally, the realigned Second District will require an interim facility in which to operate while a more permanent facility is considered. The Court is prepared to assist the Legislature, as needed, in determining an appropriate level of court system resources associated with the creation of the new district court, the details of which will be dependent upon the policy direction the Legislature establishes. Other potential operational effects on justice system entities are discussed in the Committee's report.

III. Additional Judges

This opinion also fulfills our constitutional obligation to determine the State's need for additional district court judges in fiscal year 2022/2023 and to certify our "findings and recommendations concerning such need" to the Florida Legislature.[11] *HN2*[↑] Certification is "the sole mechanism established by our constitution for a systematic and uniform assessment of this need." *In re Certification of Need for Additional Judges, 889 So. 2d 734, 735 (Fla. 2004)*.

HN3[↑] The Court continues to use a verified objective weighted caseload methodology as a primary basis for assessing judicial need.[12] When applied to the district courts as they **[*8]** currently exist, the methodology does not indicate the need for certification or decertification of additional judgeships. However, the simultaneous consideration of the creation of an additional district court and the realignment of existing district boundaries raises policy considerations with workload implications.

HN5[↑] *Article V, section 8 of the Florida Constitution* provides that "[n]o person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court." The District Court of Appeal Workload and Jurisdiction Assessment Committee recommended that no existing district court judge's position be decertified while that judge is in office and that no existing district court judge have to change residence in order to remain in office as a result of the realignment of districts. The Committee also recognized that, if such a policy approach were adopted, there might not be sufficient judges residing within included counties to meet the estimated judicial workload of that realigned district. In turn, the number of judges in another district may initially exceed its estimated need after realignment. Although it was not charged with determining **[*9]** the need for additional judges, the Committee used a modified weighted caseload methodology, only slightly different from that used in certification, to estimate judicial need as it considered realignment of existing districts and creation of an additional district. That methodology suggested the need for six appellate judges to meet the workload of realigned districts without a sufficient number of judges who currently reside within the boundaries of the districts.

The Court concurs with the Committee's recommendation that realignment of districts not result in decertification of judges or a requirement for judges to change their residence in order to remain in office.

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[11] *Art. V, § 9, Fla. Const.*

[12] *HN4*[↑] Our certification methodology relies primarily on the relative weight of cases disposed on the merits to determine the need for additional district court judges. *See Fla. R. Gen. Prac. & Jud. Admin. 2.240*.

Thus, we adopt the Committee's methodology to meet the need of districts without sufficient resident judges and in this opinion certify the need for six additional district court judgeships, one in the realigned Second District and five in the realigned Fifth District. This assessment is based on the assumption that each existing judge who resides within a county that was proposed for assignment to a new district court would be considered a judge of the new district court.

The creation of the new judgeships we have certified **[*10]** would result in six district courts of appeal composed of the following judicial officers:

First District: 13 judges (all presently sitting).

Second District: 10 judges (9 presently sitting and 1 to be added).

Third District: 10 judges (all presently sitting).

Fourth District: 12 judges (all presently sitting).

Fifth District: 12 judges (7 presently sitting and 5 to be added).

Sixth District: 13 judges (all presently sitting).

Further, the Court recommends that the legislation implementing the territorial jurisdiction changes specify that vacancies will not be deemed to occur as a result of the changes and recommends that excess judicial capacity in a given district court be addressed over time through attrition, as guided by this Court's annual certification of the need for additional appellate judges. The creation of an additional district and changes to the territorial boundaries of other districts are milestone events that have not occurred since the creation of the Fifth District Court of Appeal in 1979. It will take some time to fully assess the impact of these changes on workload and judicial need for any given court and statewide.

We decertify no district court judgeships. As noted **[*11]** above, the Court recommends that the creation of an additional district and realignment of existing districts not result in decertification of existing judges, pending an opportunity to fully assess workload need over time through future certification processes. In addition, statutory amendments and other relevant circumstances militate against decertification of any appellate court judgeships.

Specifically, the impact of the Coronavirus Disease 2019 (COVID-19) pandemic in the circuit and county courts has been significant. Those operational impacts at the trial court level have a direct bearing on the number of appeals filed in the district courts. An increase in district court workload is anticipated as the trial courts fully return to normal operations.

Another issue requiring consideration, because it influences this Court's ability to accurately project judicial need, is the transfer of circuit court authority to hear appeals from county court final orders and judgments in criminal misdemeanor cases and most civil cases to the district courts of appeal effective January 2021 (Chapter 2020-61, sections 3 and 8, Laws of Florida). These changes are affecting the respective distribution of judicial **[*12]** workload between the circuit and district courts. However, given that this change occurred during the COVID-19 pandemic, it has been difficult to determine the ultimate workload associated with this statutory change.

IV. Certification

In accordance with *article V, section 9 of the Florida Constitution*, we therefore certify the need for six additional district court of appeal judgeships, bringing to 70 the total number of judges on the state's district courts of appeal, and we recommend that the state's judicial districts be aligned as follows:

First District: to contain the First, Second, Third, Eighth, and Fourteenth judicial circuits.

Second District: to contain the Ninth, Tenth, and Twentieth judicial circuits.

Third District: to contain the Eleventh and Sixteenth judicial circuits.

Fourth District: to contain the Fifteenth, Seventeenth, and Nineteenth judicial circuits.

Fifth District: to contain the Fourth, Fifth, Seventh, and Eighteenth judicial circuits.

Sixth District: to contain the Sixth, Twelfth, and Thirteenth judicial circuits.

To implement these proposals, the Court certifies to the Legislature the need to amend chapter 35, Florida Statutes, to create a new district court of appeal and realign the other district court boundaries **[*13]** as described above. As to judges currently residing in the realigned districts, no vacancies in office shall be deemed to occur by reason of the realignment of districts. Consequently, if the certified plan is adopted the two First District judges residing in Duval County shall be judges of the Fifth District (which will include Duval County); the three Second District judges residing in Pinellas County, one residing within Pasco County, one residing in Manatee County, and eight residing in Hillsborough County shall be judges of the Sixth District (which will include those counties); and the six Fifth District judges residing in Orange County shall be judges of the Second District (which will include Orange County).

We recommend no decertification of district court judgeships.

We further certify that the realignment of the state's judicial districts and the certification of six district court judges, as set forth in the appendix to this opinion, are necessary, and we recommend that the Legislature enact the applicable laws and appropriate funds so that the adjustments can be implemented.

It is so ordered.

CANADY, C.J., and LABARGA, LAWSON, MUÑIZ, and COURIEL, JJ., concur.

GROSSHANS, J., **[*14]** concurs in result only.

POLSTON, J., dissents with an opinion.

APPENDIX District Court Need

Go to table1

Recommended Realignment of Districts

Counties and Judicial Circuits Affected

Go to table2

Dissent by: POLSTON

Dissent

POLSTON, J., dissenting.

The majority certifies a need for an additional district court of appeal and 6 additional district court of appeal judges that is not supported by any of the 5 chief judges of the district courts of appeal or by any district court of appeal judge on the District Court of Appeal Workload and Jurisdiction Assessment Committee. I agree with the district court of appeal judges that no changes are justified.

Under our annual certification process for the need for additional judges, no district court requested certification of additional judgeships, and none are justified by the average projected judicial need analysis performed. In the last 20 **[*15]** years, there has been a net addition of 2 district court of appeal judges. One was decertified in the Third District Court of Appeal in 2009, one added to the Fifth District Court of Appeal in 2015, and 2 were added to the Second District Court of Appeal in 2015. No more changes have been needed in the last 6 years, and the answer should be the same now. There is no objective justification for the 6 additional judges certified by the majority.

Instead, the majority approves the Committee's recommendation to create an additional district court of appeal because it believes there should be more judges from Jacksonville as a matter of public trust and confidence. It is the creation of the Sixth District Court of Appeal that provides the rationale for 6 new judges, not needed workload capacity. Two of the 15 judges on the First District Court of Appeal are from Jacksonville, which the majority treats as "serious underrepresentation." Majority op. at 5. Objectively, that is not the case.

Looking specifically at Jacksonville, Duval County had 926 cases filed in fiscal year 2019-20 at the First District.[13] Using the same metrics the Court uses to determine the certified need for judges on district **[*16]** courts of appeal, taking those 926 Duval cases divided by 239, the 3-year average weighted judicial workload per judge (2017-18 to 2019-20) for the First District, there would be a calculated need for 3 judges specifically as to Duval. Arguably the average number should be even higher as eligible judges are based on the presumptive need of 315 average weighted judicial workload per judge after application of the additional judgeships. Based on that number, there would be a calculated need for 2 judges specifically as to Duval. Again, there are already 2 judges from Jacksonville on the First District. So looking at the most recent data, either there is no calculated need for an additional judge from Jacksonville, or perhaps one. Taking an average over 3 years (2017-18 to 2019-20), Duval had 1,178 filings, which would be a calculated need of 4 judges (based on 239, the 3-year average per judge), or 3 judges (based on 315, the average presumptive need per judge). Using this 3-year average, there would be a calculated need for 1 or 2 more Jacksonville judges out of 15. At most, the additional 2 judges from Jacksonville are 13% of the 15 on the First District. Serious underrepresentation **[*17]** cannot be found at 13%.

As the majority notes, Jacksonville is a large metropolitan area. But the Florida Constitution does not provide for redistricting in the court system based on population size as it does for legislative representation, and the Committee properly did not do so. *See generally* *art. III, § 16, Fla. Const.* (providing reapportionment after each decennial census). It is court filings, not population size that matters to how many judges are needed. As noted in the Committee's September 30, 2021, Final Report and Recommendations, page 10, "the number of [district court of appeal] filings, from calendar year 2016 through calendar year 2020 declined each year while Florida's population continued to increase during the same

[13] The information used in this paragraph was obtained from the Committee's report, Appendix D-41, the DCA Workload and Jurisdiction Assessment Committee, DCA Filings and Dispositions by Circuit/County, Fiscal Year 2017-18, 2018-19, and 2019-20; Appendix D-12 District Courts of Appeal Judicial Workload Per Judge and Percent Change; and Certification of Need for Additional Judges FY 2022-23, 2A-1 District Courts of Appeal Fiscal Year 2022-23. Amounts per judge are rounded down, consistent with the annual practice to determine the number of needed positions.

period." The statewide district court of appeal filings per 100,000 population steadily decreased each year from 116 in 2016 to 70 in 2020. Jacksonville's population size is not justification to add a sixth district court of appeal.

Moreover, the relevant portion of the rule setting out the factors for public trust and confidence is whether the court "attracts [a] diverse group of well-qualified applicants for judicial vacancies, including applicants from all circuits within the **[*18]** district." *Fla. R. Gen. Prac. & Jud. Admin. 2.241(d)(5)(D)*. Significantly, the rule requires that the court attracts well-qualified applicants, not that certain applicants must be selected. Jacksonville has outstanding lawyers and judges, and I have the upmost respect for them. It is undisputable that there have been numerous well-qualified Jacksonville applicants to the First District, including making the short list, who were not selected in recent history or by different governors over the last 20 years. But it is the governor's selection, not the inability to attract well-qualified applicants, that is relevant under the rule. *See generally art. V, § 11, Fla. Const.* (the governor fills vacancies in judicial office).

Further, the majority accepts the Committee's certification justification to provide adequate access to oral arguments. Again, this has no basis. The First District has panels that regularly travel to Jacksonville for oral arguments, in addition to Pensacola and Orlando (workers compensation cases). And all of the oral arguments are available live on the internet on the First District's website.

Rule 2.241(b)(8) has not been properly considered by the majority:

> (8) Whether or not an assessment committee is appointed, the supreme court shall balance the potential **[*19]** impact and disruption caused by changes in judicial circuits and appellate districts against the need to address circumstances that limit the quality and efficiency of, and public confidence in, the judicial process. Given the impact and disruption that can arise from any alteration in judicial structure, prior to recommending a change in judicial circuits or appellate districts, the supreme court shall consider less disruptive adjustments including, but not limited to, the addition of judges, the creation of branch locations, geographic or subject-matter divisions within judicial circuits or appellate districts, deployment of new technologies, and increased ratios of support staff per judge.

This rule emphasizes that the Court should consider the disruptive effect of changes and attempt to minimize it by other means first. The cost for a new district court of appeal is very expensive. The September 13, 2021, letter to Judge Scales, Chair of the Committee, from Judge Roberts, Chair of the DCA Budget Commission, notes significant fiscal impacts including facilities, staffing, and operational expenses that would necessitate additional funding without causing significant negative fiscal **[*20]** impact on the current district court budget. The disruptions to the branch are significant. *See* majority op. at 13-15 (describing realignment boundaries and current judges). This certification is analogous to rebuilding a ship for what should be swapping out a couple of deck chairs at most.

Rule 2.241(b)(1) states that the Court "shall certify a necessity to increase, decrease, or redefine judicial circuits and appellate districts when it determines that the judicial process is adversely affected by circumstances that present a *compelling need* for the certified change." (Emphasis added.) There is no compelling need for adding an additional district court of appeal. The majority makes no such finding.

Rule 2.241(b)(2) provides that the Court "may certify a

necessity to increase, decrease, or redefine judicial circuits and appellate districts when it determines that the judicial process would be improved significantly by the certified change." The Committee provides no objective justification that the judicial process will be improved significantly by adding an additional district court of appeal.

The Court's rules and its responsibilities, along with the Legislature, in the certification process are at the direction **[*21]** of the Florida Constitution. As explained by *article V, section 9 of the Florida Constitution*, titled "Determination of number of judges":

> *The supreme court shall establish by rule uniform criteria for the determination of the need for additional judges except supreme court justices, the necessity for decreasing the number of judges and for increasing, decreasing or redefining appellate districts and judicial circuits*. If the supreme court finds that a need exists for increasing or decreasing the number of judges or increasing, decreasing or redefining appellate districts and judicial circuits, it shall, prior to the next regular session of the legislature, certify to the legislature its findings and recommendations concerning such need. Upon receipt of such certificate, the legislature, at the next regular session, shall consider the findings and recommendations and may reject the recommendations or by law implement the recommendations in whole or in part; provided the legislature may create more judicial offices than are recommended by the supreme court or may decrease the number of judicial offices by a greater number than recommended by the court only upon a finding of two-thirds of the membership of both houses of the legislature, **[*22]** that such a need exists. A decrease in the number of judges shall be effective only after the expiration of a term. *If the supreme court fails to make findings as provided above when need exists, the legislature may by concurrent resolution request the court to certify its findings and recommendations and upon the failure of the court to certify its findings for nine consecutive months, the legislature may, upon a finding of two-thirds of the membership of both houses of the legislature that a need exists, increase or decrease the number of judges or increase, decrease or redefine appellate districts and judicial circuits*.

(Emphasis added.)

Specifically, the Florida Constitution authorizes the Legislature to make its own determination regarding appellate districts notwithstanding what the Court determines, with a two-thirds vote of the membership of both houses. Accordingly, if the Court were to determine there is no justification for changes under its rules, the Legislature is free to act according to the Constitution and draw the lines as a policy decision to provide more Jacksonville judges. That is the proper response to the Committee's recommendation.

Because there is not a compelling **[*23]** need or significant improvement to the judicial process as required by *rule 2.241(b)*, I would not certify a new district court of appeal or any additional district court of appeal judges.

I respectfully dissent.

Original Proceeding — Certification of Need for Additional Appellate Judges

Table1 (Return to related document text)

District	District Court Certified Judges
1	0
2	1
3	0
4	0
5	5
6	0
Total	**6**

Table1 (Return to related document text)

Table2 (Return to related document text)

County	Circuit	Current District	Proposed District
Clay	Fourth	First	Fifth
Duval	Fourth	First	Fifth
Nassau	Fourth	First	Fifth
Orange	Ninth	Fifth	Second
Osceola	Ninth	Fifth	Second
Pasco	Sixth	Second	Sixth
Pinellas	Sixth	Second	Sixth
DeSoto	Twelfth	Second	Sixth
Manatee	Twelfth	Second	Sixth
Sarasota	Twelfth	Second	Sixth
Hillsborough	Thirteenth	Second	Sixth

Table2 (Return to related document text)
