The BROWARD BARRISTER

NOVEMBER, 1973
Volume 2
Number 11

PUBLISHED BY THE BROWARD COUNTY BAR ASSOCIATION
Executive Offices, 735 Northeast Third Avenue, 305/764-8040, Fort Lauderdale, Florida 33304

General Meeting . Thursday, November 29th

JOINT MEETING WITH
BROWARD COUNTY MEDICAL ASSOCIATION

Cocktails 7:30 P.M. (cash bar)

Meeting 8:00 P.M.

OCEAN SIDE HOLIDAY INN

3000 East Las Olas Boulevard, Fort Lauderdale, Florida

SPEAKER: DR. MILTON P. HELPERN
Medical Examiner for the City of New York

PLEASE USE THE ENCLOSED CARD FOR RESERVATIONS

Young Lawyers' Section Meeting

WEDNESDAY, NOVEMBER 28, 1973
12:00 Noon

THE GOVERNORS' CLUB HOTEL
235 Southeast First Avenue
Fort Lauderdale, Florida

SPEAKER: ROBERT J. BECKHAM

Decent Developments in the Field of Comparative Negligence.

Please send your reservation with check to Drake Batchelder. A card is enclosed for your convenience.

Bankruptcy Practice and the New Rules CLE Seminar

December 14, 1973

GALT OCEAN MILE HOTEL
Fort Lauderdale, Florida

Please register with The Florida Bar CLE, Tallahassee, Florida 32304. The Registration fee is $25.00.

Uniform Probate Code

The Probate Division of the Committee on Circuit Courts is doing an extensive and in-depth study of the proposed Uniform Probate Code. The members of the committee have attended hearings by the study commission in Orlando, Miami and Tampa.

This is a subject of great concern to attorneys, financial institutions, and title companies, and the committee needs your help. IF YOU HAVE ANY PARTICULAR CHANGES, COMMENTS AND/OR SUGGESTIONS on any part of the Code, please submit these with reasons therefor in writing by December 5, 1973 to:

James D. Camp, Jr., P.O. Box 941, Fort Lauderdale, Florida 33302; Nicholas J. DeTardo, 4747 Hollywood Blvd., Hollywood, Florida 33021 or Norma Howard, 735 Northeast Third Avenue, Fort Lauderdale, Florida 33304.

The members of the Committee are:

George Pallotto, Chairman, Committee on Circuit Courts; James D. Camp, Jr, Probate Division and J. Peter Freidrich, Co-Cairman, Probate Division.

Sub-Chairmen to study the Sections of the Code are:

Maurice O. Rhinehardt, Section 731; J. Peter Freidrich, Section 732; John N. Tolar, Section 733, Parts 1-5; Richard Roth, Section 733, Parts 6-10; Paul A. Gore, Section 734, 737; James D. Camp, Jr., Section 735 and William G. Miller, Jr., Section 735.

Other members are:

Patrick Bailey, Curtin R. Coleman II, Judge Paul M. Marko III, Judge Leroy H. Moe and Nicholas J. DeTardo, ex-officio member.

Contributions to the committee have been made by:

Edward McDonald, John Mendez, O. Morton Weston and W. Bruce Fairchild, Trust Officer First National Bank in Fort Lauderdale.

You are admonished to provide the committee with your critique immediately.

History of Young Lawyers Section

The Young Lawyers Section of the Broward County Bar Association was primarily the brain child of Ron Anselmo. A committee of the then members of the Board of Governors of the Young Lawyers Section of the Florida Bar — Ron Anselmo, Russ Murphy and

Broward County Bar Association
735 N.E. Third Avenue
Fort Lauderdale, Florida 33304
764-8040

OFFICERS

President ..... Nicholas J. DeTardo
President-Elect ..... William F. Leonard
Secretary ..... George A. Patterson
Treasurer ..... Ray Ferrero, Jr.
Past President ..... L. Fred Austin
Executive Secretary ..... Norma Howard

Jim Blosser and several other interested young lawyers, including Michael Brinkley, George Moraitis and Drake Batchelder, set out to organize the Section.

An organization meeting of all interested young lawyers was called at the Moonraker. After much discussion, it was decided to form the Section primarily for the purpose of supplying a forum where the Young Lawyers of Broward County could meet each other and exchange ideas. The social aspects were stressed. Initially, the only requirements for membership were that you were a member of the Broward County Bar Association and under the age of thirty-six (36). There were no dues and consequently the Section was run on a shoe string. Then in May 1973, the By-Laws were amended to provide for a ten dollar ($10.00) per year dues to cover the expenses of the Section.

Although the Section's primary purpose continues to be social, various community projects have been undertaken by the Section and others are now being instituted, including a Speakers Bureau, 18-year-old Rights and Responsibilities Seminar, Mock Trial Program, and a Consumer Aid Bureau.

The Officers of the Section since its inception have been:

1971-1972: President, Ronald Anselmo; President Elect, Michael Brinkley; Secretary/Treasurer, George Moraitis.

1972-1973: President, Michael Brinkley; President Elect, Drake M. Batchelder; Secretary/Treasurer, George Moraitis.

1973-1974: President, Drake M. Batchelder; President Elect, John Hume; Secretary/Treasurer, E. Hugh Chappell.

The present paid membership of the Section is 89. It is urged that each and every Young Lawyer in Broward County join our ranks.

To join, simply send your check to:

E. Hugh Chappell, Suite 402, Court House Square Building, 200 Southeast Sixth Street, Fort Lauderdale, Florida 33301.

Circuit Court Information

The Circuit Judges in a meeting on September 28, 1973, clarified the matter of emergence hearings in matters pending in the Circuit Court. It was decided that all applications for emergency hearings shall be made to the assigned judge and that upon a showing of the assigned judge's absence or inability to grant said hearing within a reasonable time, application should be made to the assigned judge's alternates. In the absence of said alternates, application should be made to the Court Administrator, Mr. William Freeman, who will assign a specific judge to hear such emergency application. The designated Duty Judge Shall be responsible for emergency matters only after regular court hours and on weekends.

The Circuit Judges further decided to explore the possibility of establishing Satellite Circuit Courts in the north and south ends of the County for the purpose of hearing uncontested matters, ex parte applications and other similar matters. A decision on this matter is expected at the next meeting of the Circuit Judges which is October 26, 1973.

Who Pays?

By Judge B. Paul Pettie, Jr.

Who pays the costs when a criminal defendant is found "Not Guilty"?

"No person charged with a crime is compelled to pay costs before a judgment of a conviction has become final," — Florida Constitution, Article I, Section 19 (1968 Revision).

The Fourth District Court of Appeal in Warren, et al, v. Capuano, 269, SO2d,

380 (1972), (Affirmed by Supreme Court of Florida at 282 SO 2d, 873 (1973), affirmed by summary judgment in an action to recover certain costs expended by a criminal defendant in preparation of his defense where the State Attorney, prior to trial, entered a nolle prosequi of the charges. The trial court taxed the costs and the County refused to pay them. Capuano then filed suit in the Circuit Court. Capuano filed his suit to recover witness fees and mileage, and certain other fees.

The Court relying on the Florida Constitution article quoted above and F.S. Section 939.06 and F.S. Section 48.021, in allowing witness fees and mileage, including per diem of witnesses summoned from another state, Court Reporter fees, and costs of process served by other than the Sheriff when permitted by the Rules of Civil Procedure.

The Court specifically did not allow bail bond premiums and a certain hotel bill.

It should be cautioned, however, that there are some very straingent liminations contained in F.S. 939-07, regarding defendant's witness fees. These include a requirement "that there shall not be more than two (2) witnesses . . . to prove the same fact;" and that for insolvent defendants there must be a request to the Court before a witness is subpoenaed.

Both of the above requirements of F.S. 939.07 appear to require findings of fact by the trail judge. First he must find that there were not more than two (2) witnesses called to testify repeticiously and second, he must have already determined that the defendant was insolvent.

Therefore, Counsel's procedure should be to file a written motion requesting the Court to tax costs and make specific findings of fact regarding the requirements of F.S. 939.07, if any, and for an Order directing the County to pay said costs together with a certification of such costs to the Board of County Commissioners.

Court Decisions

By Henry J. Prominski

In the case of *Godshall* vs. *Unigard Insurance Company*, 281 So. 2d 499, the Supreme Court of Florida through Justice Boyd, reversed the Fourth District Court of Appeal which had held that granting severance of an insurance defendent was harmless error. The Supreme Court held that in absence of a justiciable issue relating to insurance, severance could not be regarded as harmless error. In the instant case the Plaintiff brought suit for injuries resulting from a traffic accident and her insurance company was severed from the case. This point was appealed and Certiorari was accepted on the conflict with *Stecher* vs. *Pomeroy*, 253 So. 2d 421.

The legitimate purpose of joining an insurance carrier is to facilitate resolution of coverage, discovery, and promote voluntary settlement. The influence on the jury verdict is not a legitimate object of joining the insurance defendent. Absent a question of coverage, the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, there is no valid reason for severence and it should not be granted.

The Supreme Court affirmed the principles enunciated in Stecher, that the insurance carrier is a real party in interest and to allow severance would defeat the insertion before the jury of financial responsibility.

Petition For Modification Of Child Support

Submitted by Judge Lamar Warren

This brings us to the materiality of the income of a divorced mother's new husband. Even in this era of women's liberation and enlightened thinking, it is still the law of this State that a husband has the duty of supporting his wife. Although no legal duty is imposed upon a stepfather to support his stepchildren, the income he receives and his financial circumstances are necessarily material and relevant to the wife's ability to contribute to the support of her children. Such evidence is essential for the trial court to determine the ability of either or both parents ". . . to pay such support as the circumstances of the parties and the nature of the case is equitable." Birge v. Simpson, Fla. App. (1st Dist), 280 So. 2d 482.

The Marital Relationship

The marital relationship, although classified as a "partnership" in terms of demonstrating the equality of the individuals involved, was never intended to be a "partnership" in the ordinary business sense where each party is required "to give an accounting" at the termination of the relationship. This court expressed it rather succinctly in Steinhauer v. Steinhauer, Fla. App. 1971, 252 So. 2d 825. Rey v. Rey, Fla. App. (4th Dist), 279 So. 2d 360.

Judicial Assignments — County Court

Commencing January 1, 1974 by Administrative Order of Chief Judge, John G. Ferris, there will be two divisions of the County Court of Broward County Florida, Criminal Division and Civil Division, with specific judges assigned to each division. The assignments commencing on said date shall be as follows:

Criminal Division: Judge Stanton S. Kaplan, Judge Barbara J. Bridge and Judge B. Paul Pettie.

Civil Division: Judge Hort A. Soper, Judge Morton L. Abram, Judge James R. Holmes and Judge Bobby W. Gunther.

Assignments of new cases between the 2 divisions shall commence November 1, 1973, however all cases pending befort any of the above judges as of January 1, 1974 whether civil or criminal shall be retained by that judge.

That until further notice all 7 judges shall continue the present practice of rotating Arrainment Court and First Appearance Hearings.

Arraignment Judge shall continue to process juvenile traffic cases and in the future all trials on financial responsibility shall also be at a designated time before the Arraignment Judge.

Welcome, New Members

CARL H. BRUEGGEN, III, a native of Kansas City, Missouri, received his undergraduate degree from New York University and his law degree from the University of Missouri. He practices alone in Fort Lauderdale, Florida.

PAUL FREDERICK CRAMES, a native of New York, received his undergraduate degree from the University of Florida and his law degree from the University of Miami. He is associated with William C. Cramer, Miami, Florida.

PAUL V. DeBIANCHI, a native of New York, received his graduate and law degrees from the University of Miami. He is associated with the firm of Andrews, Lubbers & Obrig in Fort Lauderdale, Florida.

MORRIS ENGELBERG, a native of New York, New York, received his undergrduate degree from Brooklyn College and his law degree from Brooklyn Law School. He is associated with Meyer, Leben, Fixel and Gaines, P.A. in Hollywood, Florida.

M. GAYLE GLASSMEYER, a native of Cincinnati, Ohio, received her undergraduate degree from Florida Atlantic University and her law degree from The American University. She is associated with Gustafson, Caldwell and Stephens in Fort Lauderdale, Florida.

VAL L. OSINSKI, a native of Buffalo, New York, received his undergraduate and law degrees from Wayne State University. He practices alone in Coral Springs, Florida.

SALLY WARREN, a native of Cleveland, Ohio, received her undergraduate and law degrees from the University of Florida. She is employed by Lawyers' Title Guaranty Fund in Fort Lauderdale, Florida.

LARRY F. WITTE, a native of Davenport, Iowa, received his undergraduate and law degrees form Drake University. He is associated with Grimditch and Bentz, P.A., in Pompano Beach, Florida.

Northside Motors—Why Not Apply A Balancing Test?

By Martin H. Cohen

Recently the Florida Supreme Court answered a question concerning many practitioners since *Fuentes* v. *Shevin*, 92 S. Ct. 1983 (1972), holding the Florida replevin law unconstitutional. In *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Fla. 1973), the Supreme Court held that self-help repossession by a creditor does not constitute state action resulting in application of the Fourteenth Amendment Due Process Clause.

The Court's well-documented conclusion concentrates upon an imperceptible threshold called "state action." As the dissent illustrates, the majority opinion adopts a restrictive view of this concept and the dissent a liberal one, i.e. that state action may be found where a legislative enactment condones or encourages one individual's unlawful interference with the property rights of another.

Has either side grasped the real issue? Is the problem one of defining "state action" or one of considering the social and economic effects of the universal practice of self-help repossession? This writer believes that the latter considerations were weighed and sifted in the mind of each member of the Court, but that these factors were carefully concealed under the "state action" rhetoric of the Court's rationable.

Careful logic often obscures the economic or social thought behind legal opinions. Usually this lends weight to the opinion, thus giving life to the rule of *stare decisis* and stability to the law. Sometimes, however, it is not sufficient for either the brief writer or opinion writer to omit discussion of social and economic factors in cases where such factors are of prime importance.

While this writer agrees with the result reached in *Northside Motors*, such concurrence arises in part from observations as to the abuses of the *Fuentes* decision. Similarly, social and economic consequences to debtors versus creditors, such as, for example, the potentially increased cost of credit to the consumer, would have been a proper subject for consideration in *Northside Motors*.

The suggestion herein contained is not really so novel. Certain cases, especially those involving highly subjective concepts, such as Due Process, are grounded in matters of conflicting social and economic rights. In those cases, the courts have sometimes applied a "balancing test" to weigh these conflicting rights. This well-known test acknowledges non-legal considerations, while adhering firmly to available legal precedent. In light of the vast social and economic consequences of self-help repossession, *Northside Motors* would have been an appropriate case for this approach.

Nevertheless, in all fairness to our Supreme Court, it should be noted that the tactic of focussing on the state action question was required under the circumstances of the case. To employ the "balancing test" one must decide that the Due Process Clause applies to the case at hand. However, a determination of the existence of state action, and thus the applicability of the Due Process Clause, would have led to an unwanted result. The Court would have been left with nothing to decide, since *Fuentes* v. *Shevin* would then have been controlling.