ORIGINAL

IN RE: AMENDMENTS TO UNIFORM]
] CASE NO. SC96726
GUIDELINES FOR TAXATION OF COSTS]

BRIEF IN OPPOSITION TO ADOPTION OF REVISED UNIFORM GUIDELINES FOR TAXATION OF COSTS IN CIVIL ACTIONS AS AMENDED

(Corrected Copy[1])

The undersigned, BILL WAGNER[2] submits this Brief in Opposition to the Adoption of the Report of the Civil Procedure Rules Committee proposing a Revised set of "Guideline" for Taxation of Costs as published in the Florida Bar News on November 1, 1999, and the suggested amendments to the published "Guidelines" submitted to the Court by letter of August 2, 2000.

For the reasons set forth below, the undersigned believes that the proposals should not be adopted by the Court without a wider and more complete study by interested agencies, because the document, while identified as "Revised Guidelines" is, in fact, a document that creates substantial substantive rights and obligations not previously authorized by either statute or rule.

If the Court believes that the current Guidelines require revision, then the undersigned suggests that the proposed Guidelines do not suffice in many

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[1] Copy corrected for typing errors appearing in December 11, 2000, submission.

[2] The undersigned brings to this Court the perspective of a plaintiffs' trial lawyer having limited my practice to such representation for 40 years. The undersigned has served as a member of and Chairman of the Civil Procedure Rules Committee, as a member of the Florida Bar Board of Governors, a member (currently Emeritus Member) of the Florida Board of Bar Examiners, a member of the Civil Jury Instruction Committee, a Trustee of the American Inns of Court Foundation, and a member of the Council of the American Law Institute. The undersigned is Board Certified by the Florida Bar in Civil Trial and Aviation Law.

respects. The currently proposed Revision will adversely affect the administration of justice in the trial courts.

The undersigned has been scheduled to participate in oral argument in this matter in January, but should time constraints not allow for a full explanation in argument, the undersigned requests the Court to consider this Brief.

ISSUE: SHOULD SUBSTANCIAL SUBSTANTIVE RIGHTS AND OBLIGATIONS BE CREATED WITHOUT EITHER LEGISLATIVE DIRECTION OR SHOWING OF A BROAD BASIS OF NEED AFTER FULL REVIEW OF ALL GOVERNMENT AND PRIVATE INTERESTS

The first Uniform Guidelines were the initial creation of The Florida Conference of Circuit Judges apparently in response to concerns that different standards were being applied in assessment of lawful costs. The original Guidelines were submitted to the Florida Bar Board of Governors, The Trial Lawyers Section of the Florida Bar, and the Florida Bar's Special Commission to Reduce Court Costs and Delay. Each group endorsed the proposed guidelines. On October 28, 1981, the Florida Supreme Court, by Administrative Order, "granted permission" for the publication of the Guidelines.

The Guidelines did not purport to identify all costs that might be properly awarded to a prevailing party. The Guidelines were silent with regard to recovery of filing fees, witness subpoena service fees and trial exhibits. They principally

addressed the issues which were, at that time, regularly faced by trial judges in resolving disputes regarding the amount of allowable costs which might be collected, and for which there was little clear guidance in appellate decisions. The Conference of Circuit Judges did not create new categories of allowable costs not already sanctioned either by statute or case law. The Guidelines mainly focused upon the two most frequent source of disputes involving taxation of costs: the extent to which the cost of depositions used at trial might be taxed and the extent to which the fees and travel costs of lay and expert witnesses, allowed by statute, could be taxed. The only reference to exhibits concerned the cost of "Xerox" or other machine produced copies. Clearly the Guidelines did not attempt to change the existing law.

The Guidelines were frugal in the allowance of costs, as the statutory and case law has always been. Nevertheless, the main areas of general criticism of the Guideline has always focused on (1) the allowance of the costs of only the original of depositions used in trial, and (2) the requirement of actually counting the pages of depositions which were actually used in the litigation in determining costs actually assessed. Modification of the Guideline would clearly be appropriate, and would not involve modification in the basic law governing costs. Modifications regarding the costs of originals and copies were made necessary by the changes in discovery rules that had eliminated the concept of filing "original" depositions and

the resulting change in pricing for deposition transcripts by the community of Court Reporters. Modification of the perhaps too frugal page counting requirement could have been easily accomplished by allowance of the costs of the entire deposition "unless the portion used was minor in comparison the portion of the deposition not reasonably necessary."

The Civil Procedure Rules Committee has however not "revised" the Guideline. It has instead attempted to create entire new categories of trial preparation expenses for which a successful litigant will almost automatically receive a judgment against an opponent, with little proof except that the money had been spent.

"After three years of study and extensive consideration and debate" a "subcommittee" of the Civil Procedure Rules Committee presented to this Court what was called "Revised Guidelines" which the sub-committee, with complete candor, "recognized in some cases to be in conflict with existing law". As far as can be determined, a revision had not been sought by the circuit judges, or reviewed by them and there is no indication that the Florida Bar Board of Governors, The Trial Lawyer's Section, or any other entity had been a part of the adoption process. On November 1, 1999, The Florida Bar published the report of the "subcommittee". The undersigned, and apparently others, accepted the invitation in the notice to respond to the proposal

Although the "Revised Guidelines" suggest that full discretion still rests with the trial judge in assessing costs, they nevertheless, "in an effort to insure the greatest uniformity" classify those costs discussed as costs which "should be" assessed and which "should not be assessed." Although this presentation sounds very much like a rule of procedure mandating certain results, reversal of a trial court by an aggrieved party would not carry with it the protection of appellate review, since only a "Guideline" is involved.

A third category, those items which "may be taxed", is an even greater threat to a litigant, because there are absolutely no guidelines as to what circumstances suggest when the costs may be taxed or may be rejected. The proposal apparently is intended to give discretion to the court to award a series of elements of costs without any guidance whatsoever as to when the court should or should not award such costs. Is the court to flip a coin? Is there no standard available against which the court may test its discretion? Could a court ever be reversed for awarding costs in accordance with this section? Could a court be reversed for refusing to award costs under this section? Are these "Guidelines" without any guidelines?

As outlined below and as admitted by the sub-committee, these Guidelines greatly expand the potential cost of litigation and should not be given Supreme Court endorsement until mandated by the legislature, or given the protections afforded by adoption of a formal rule.

Perhaps in recognition of the problems involved in the proposal, this Court asked the sub-committee to consider comments the Court had received in response to publication in The Florida Bar News. The five person sub-committee in its supplemental report, states that although it would "have been the subcommittee's decision not to examine the Revised Guidelines as they had already been debated and approved by the Rules Committee", it nevertheless made certain proposed changes to the original report. The Civil Procedure Rules Committee added its comments, often by divided votes, which contained in many cases arguments questioning the wording of the draft. The supplemental report was submitted to the Court but has not received additional publication or distribution, and was obtained by this writer only because a minority member of the full committee had heard that I was to appear before this Court.

In an odd addition to the last report submitted, the committee notes "The Revised Guidelines sent to the Supreme Court never went before our drafting committee, so some polishing will likely be required." This has cast even further doubt on the sub-committee submission. A further comment, apparently added as an afterthought, suggests that "language be included" addressing the issue of costs allowed by statute or contract, without any guidelines suggested, even as to where the language be added.

It is respectfully submitted that on this record, the Court should reject the proposed amended guidelines pending careful consideration by, at a minimum, the Conference of Circuit Judges, and only then with clear instruction as to whether the drafters of the proposed guidelines are empowered to draft guidelines that "conflict with existing law."

ISSUE: TO WHAT EXTENT SHOULD THE ISSUE OF COSTS BE CLARIFIED BY RULE.

If the Court indeed intends to greatly expand the allowance of costs, as suggested by these proposed "guidelines", it should be done only after careful consideration of the issue of the Courts substantive vs. procedural powers, and, to the extent procedural, should receive the most complete and careful study possible with all of the safeguards governing adoption of Rules, rather than "guidelines."

The issue of what can or cannot be included as "taxable costs" is apparently a mixed creature of statute and common law. There are noticeably few Supreme Court cases on the issue and rules and statutes on the subject are far from clear. See for example FS Sec. 57.041; FS Sec 57.071; FS Sec 92.151; FS 92.231(2); FRCP 1.390(c); Florida Greyhound Lines v Jones, 60 So.2d 396 (Fla. 1952); Loftin vs. Anderson, 66 So.2d 470 (Fla. 1953); City of Miami v. Murphy, 137 So.2d 825 (Fla. 1962); Donner v. Red Top Cab & Baggage Co., 37 So.2d 160, 161, (Fla. 1948).

> "Recoverable costs are generally limited to charges imposed by the state for official services rendered with regard to the litigation. Miami v. Murphy, 137 So.2d 825, 827 (Fla. 1962). No single statute or other source list items that are recoverable costs. However, various statutes, rules, and cases set forth specific recoverable costs." Florida Torts § 110.21[1]

The committee's proposal redrafts the format of the original "Guidelines" by meticulously detailing items, which "should be taxed," those that "may be taxed," and those that "should not be taxed." Obviously, the committee has not included certain items which traditionally "must be" taxed as costs, such as filing fees and subpoena fees. These items are not even included in the "may be taxed" category. Styled as "Guidelines" in these circumstances, it gives almost unlimited discretion to the trial court, and if adopted by this Court with inclusion of the comments about "conflict with existing case law" will be considered by judges as almost having the authority of a Rule. If this is intended, the Court should in fact adopt a Rule, to the extent it constitutionally can, so that the full protection of appellate review is available. Those seeking to change the law should give citation to supporting case or statutory authority or present clear and convincing reasons for the law to be changed.

ISSUE: SHOULD THE SCOPE OF RECOVERABLE COSTS BE GREATLY EXPANDED AS PROPOSED BY THE SUBCOMMITTEE

The sub-committee proposal greatly expands not only the scope of recoverable cost, but also the amount allowable from that which is claimed.

The Burden of Proof

Repeatedly the proposal allows the recovery of costs "unless the objecting party demonstrates" that costs should not be recovered. This implies a presumption that the mere expenditure of funds, without further proof, calls for the court to award expenditures as costs, unless an objecting party mounts evidence that the cost item is completely unreasonable. Gone are the references in the cases and in the previous Guidelines that put the burden of proof on the prevailing party to establish that the costs were expended as part of a need to prevail. Intermediate appellate court decisions have commented upon the requirement for submission of proof of an expenditure sought as costs, and upon the requirement that the costs must be related reasonably to the claims or defenses presented. The absence of such qualifying explanatory language in the proposed Guidelines promises to do mischief. Changing the format from "Guidelines" addressing only certain items of costs, to a specific listing of items which "should be" taxed, and "should not be" taxed shifts the emphasis of this proposal away from being guideline into the status

of a Rule, particularly since the proposing document clearly indicates that it includes items which are "in conflict with existing case law."

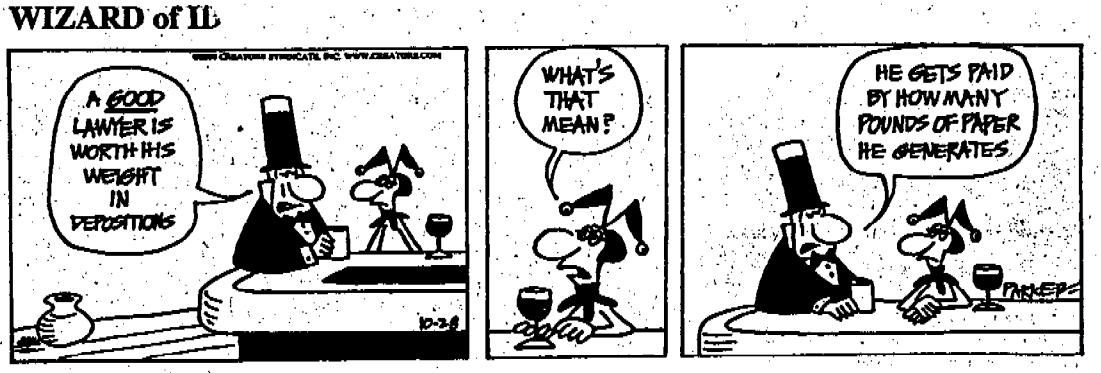
New Items of Costs Authorized

In several areas the proposals of the sub-committee greatly expand the items that might be recovered as costs.

Discovery Depositions

The greatest expansion is in the area of discovery. No longer would depositions be recoverable items of costs only if used at trial or by the court in rulings on summary judgment. Instead, recovery will be allowed for all depositions taken in the case unless an objecting party demonstrates that the deposition "was not reasonably calculated to lead to the discovery of admissible evidence."

The cost of litigation is one basis of great criticism of our judicial system today. Federal and state courts constantly attempt to devise ways to limit discovery. One of the most costly aspects of discovery is the deposition. The subject even has become a recognizable subject of the every day humor of comment on our legal system.



It is respectfully submitted that the court should take away any possible economic incentive or reward for taking unnecessary or marginally useful depositions. Determination as to whether a party should or should not have to pay the costs of depositions should not reside in the mind of the attorney who decides to take a deposition, or in the mind of the party or it's insurer, with economic the resources to dictate the decision for the initial expenditure. The decision whether to take a deposition or not should carry with it the implied threat that the funds spent cannot be recovered. The bright line for recovery of the costs of discovery should be the actual use of the depositions or other discovery in trial or the actual use by the court in reaching judicial decisions. If, under some circumstances, a party seeking an award of costs can convince the court that the taking of a deposition was of significant importance to the case, even when not used at trial or at a hearing, then such costs should be allowed (as they are under Section I-E of the current Guidelines). "Reasonably calculated to lead to the discovery of admissible evidence" should be the test to determine if a party can prevent a deposition being taken (a test currently widely criticized). The test for recovery of costs should be the actual discovery and use of evidence.

Witness Travel Costs

Although currently witness travel costs are based upon the statutory fee and the statutory per diem for travel to and attendance at trial, the proposed Guidelines

expand the recovery of travel expenses to include lodging and travel to depositions, and do so apparently without any limitation except that the expenses be "reasonable". Whether First Class travel and Four Star accommodations are reasonable is not touched upon. Although the current Rules and statutes require that a witness be deposed in the county of their place of residence, this new Guideline provision would apparently justify paying what could be very expensive air travel and lodging expenses to bring a witness from almost anywhere in the world. Again, that payment would be made an item of cost unless the party to be charged with these costs demonstrate that a deposition was not "reasonably calculated to lead to discovery of admissible evidence." Such proof, if it exists, lies mostly within the mind of the party arranging the deposition, and therefore proof becomes most difficult. The proposal completely ignores the fact that less expensive depositions can be taken by telephone, or even video conferencing, and gives an economic advantage to those able to afford the increasing costs of travel.

Attorney's Travel Costs

Perhaps the greatest expansion in costs involves the requirement for paying for attorney travel and lodging expenses to attend depositions, again apparently without limitations. The opposing party, already burdened perhaps with sending his own attorney around the country for such depositions, will pay for all travel and lodging unless it can be demonstrated that the deposition was not calculated to lead

to the discovery of evidence (that un-provable requirement again). While there currently exists some disincentive for parties to send their attorneys around the world to take depositions, that incentive will be substantially reduced when the prospect exists that the opposing party will reimburse those travel expenses.

Expert Compensation as Costs

Traditionally experts were allowed compensation in certain circumstances upon proof that examinations, inspections and research for trial were necessary to provide either trial testimony, or to provide testimony by deposition if the depositions were used at trial. The authority rested in statute and Rule, as well as case law. The new proposal greatly expands this element of cost recovery.

Costs are allowed merely for "providing expert opinions" apparently regardless of whether trial testimony given in deposition is actually used by the court. Left to uncertainty is the question of whether or not a party deposing an opponent expert witness will be called upon to pay the fees of the expert witness for conducting the examinations and inspections and research necessary to prepare for the deposition.

The recommendation with regard to costs incurred by expert witnesses also totally ignores the recent legislation which allows costs only in situations in which reports have been prepared and delivered to the opposing party before trial and ignores the question of whether costs of preparing such report constitute an

independent cost item. See FS 57.071(2) as Amended by Laws of Florida 99-225. Contrary to this statute, and contrary to reason, costs are allowed even for reports submitted to an attorney or conferencing with an attorney before or during trial. This last provision will open the cost floodgates to trial experts and unlimited conferencing and pretrial preparation, all at the expense of the opposing party (if the party doing the preparation, or it's insurer, can afford it).

Demonstrative Aids as Costs

The Civil Jury Instruction Committee has struggled with the issue of what is and what is not "evidence" and has endeavored to develop cautionary instructions which will have the effect of giving greater authenticity to those items which meet the test of admissible evidence over those things which are seen by juries through the medium of an expert witness, but do not meet the authenticity test for evidence.

Computer animations and accident reconstruction models and similar demonstrative aids often are created by expert witnesses based upon certain assumptions, which the jury may in fact not accept. This is distinguishable from enlargements of exhibits such as photographs or documents intended to make it easier for the jury to see an item of evidence which itself meets the evidentiary test for admissibility. Often these issues are not simple issues for the trial judge to resolve.

It would seem that if certain items meet the evidentiary test to allow the items to be admitted into evidence, or are merely copies of or enlargements of items authenticated as of evidentiary value, the costs of preparing the items are legitimate taxable costs. These items are currently usually allowed as cost items under present Guidelines.

On the other hand, the fact that a party has the financial resources and capability to create elaborate demonstrative aids for use by expert witnesses to convince the jury of the validity of the expert's opinion (based to some extent on assumption of certain selected facts), should not justify assessment of these "marketing devices" as costs to be paid by the losing party. Elaborate and expensive demonstrative aids may optionally be used. They are not required for trial. Demonstrative aids, computer animations, and reconstructions should never be allowed as items of costs. The proposed Guideline states that the judge "may" award such costs "to the extent they assist ...the jury in reaching a decision." The Guideline is silent on how the judge can ever determine "the extent" to which the jury was influenced in its decision process. The fact that the demonstrative aid may not even be seen by the jury until the trial court determines that the demonstrative aid will likely assist the jury, makes it almost a foregone conclusion that the aid will be allowed as a cost item.

ISSUE: THE PROBLEMS OF APPORTIONING COSTS

Trial and appellate courts have always recognized that the court may consider, in assessing costs, certain circumstances in which costs should be apportioned. These circumstances involve situations in which costs have been incurred in a suit against multiple parties or a suit involving multiple claims where the result gives the prevailing party success against some, but not all, of the parties or success on some, but not all, of the claims. This issue is ignored by these proposed Guidelines. If this Court concurs that it is time to formulate a rule regarding costs, that subject should definitely be considered as a part of a Rule. Even if this Court continues using the concept of guidelines, it would seem appropriate that this matter should be covered by the Guidelines, particularly in view of the greatly expanded scope of the costs allowed under the revised Guidelines. If this matter is referred for further consideration, it is urged that the instruction include direction to consider procedures for apportionment.

ISSUE: IMPACT OF THE *FABRE* DOCTRINE

The issue of apportionment of costs in cases arising under the "*Fabre* doctrine" is of importance to the administration of justice, and can have severe impact upon parties involved in litigation today. When this problem was presented to the sub-committee by reference to them of the comment letter of the undersigned, the sub committee decided to make no specific recommendation to

this Court. The vote was three to two. Two members felt that some statement should be included to encourage the trial court to make adjustments by reason of *Fabre* situations. Three members felt that "the *Fabre* decision will always be troublesome unless and until it is modified, and this is simply one more of the many unfortunate repercussions of Fabre."

A brief explanation of the problem may be needed. Plaintiffs involved in litigation already face a significant problem when a defendant claims that someone, not a party, is responsible for plaintiff's damages. If the plaintiff's judgment is that the risk is small that the jury will assign responsibility to a non-party, the plaintiff may not join the accused party, taking the risk that the jury may allocate some responsibility to the absent party. The plaintiff may nevertheless have to present testimony and witnesses in "defense" of the absent party. It is unstated, but it would seem clear that those costs should be recoverable in full if judgment is entered against the defendant held liable by the jury. It is now argued, however, that those costs should be apportioned to the absent defendant rather than being assessed against the defendant against whom judgment is actually entered. Any revised Guidelines should not be silent on this issue.

Of even greater significance is the situation in which the plaintiff (or the plaintiff's lawyer to avoid a later claim of legal malpractice), upon being faced with an allegation of the existence of a Fabre defendant, amends the complaint to

join the Fabre defendant, even though the chances of recovery are small. If the Fabre defendant were ultimately successful at trial, it would seem that the costs of the Fabre defendant should be allocated in some reasonable way between the plaintiff and the defendant, whose allegations brought about the addition of the Fabre defendant as a party. The guidelines should not be silent on this issue of allocation.

This issue of costs is even more aggravated in circumstances in which offers of judgment have been made by Fabre defendants This is even more true today since in many such cases "costs" include not only costs as defined today, but also include attorney's fees.

FINAL THOUGHTS ON UNINTENDED CONSEQUENCES

Trial lawyers are famous for their ability to react in unexpected ways to new Rules and new statutes. With great frequency, well-meaning proposals intended to solve what is thought to be a major problem, so focus on the solution for that specific problem that the total effect of the proposed solution is not considered. The well-known "Law of Unintended Consequences" is the usually recognized short hand phrase for this phenomenon.

Will there be many unintended consequences should the Court adopt this new proposal for Revised Guidelines, as submitted, and without modification? The concept, of course, is that no one can anticipate all of the consequences, and in

addition, each of us is to some extent blinded by bias or limited scope of experience experience.

One can suggest some possible unintended consequences: insurance policies that do, or do not, include legal costs within the coverage limits; sanctions under the Offer of Settlement Rule dependant on the trial court entry of cost judgments; unreasonable limitations on the right of appeal because of increased levels of cost judgments; voluntary dismissals becoming final by excessive cost judgments; Negotiations dominated by threats of increased cost judgments; bad faith claims based as much on case value as cost judgments; extensive reliance on expensive demonstrative evidence or special experts on proof of damages, all paid for by the defendant; cost judgments in favor of *Fabre* defendants wiping out recoveries by innocent plaintiffs against responsible defendants; competition among lawyers for clients based on the ability to fund ever increasing expensive technological proof; Trials becoming more and more dramatic merchandizing events; development of firm profit centers centered around creation of demonstrative aids; claimants more willing to "go to trial" when more costs of trial will be recovered.

CONCLUSIONS

It is respectfully submitted that the Court should:

a. Reject the proposed amendments to the Guidelines in their present form.

b. Require that any further proposed changes be developed by reference to the current statutory and case law.

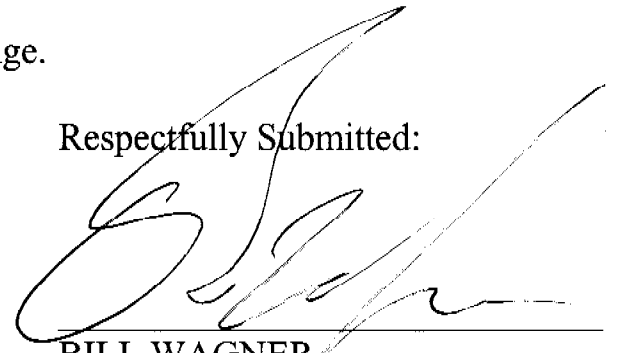
c. Require that proposed deviations from current law be supported by adequate demonstration of an existing injustice that needs correction, or by a showing that proposed Guidelines would improve the ability of trial judges to administer their responsibilities in taxing costs.

d. Should a substantial need for a change in the law be demonstrated, require consideration of recommending such change be accomplished by amendments to the Rules of Civil Procedure, the Rules of Judicial Administration, or by recommended legislation.

e. Request that immediate attention be focused on changes relating to the extent to which in most circumstances entire depositions and copies could be assessed as costs rather than as currently provided.

f. Request that the Conference of Circuit Judges advise the Court of their evaluation of the need for any change in the current Guidelines to assist in the administration of their duties in taxing of costs, or their recommendation for change in the current law regarding the taxation of costs and the proper means for accomplishing such change.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

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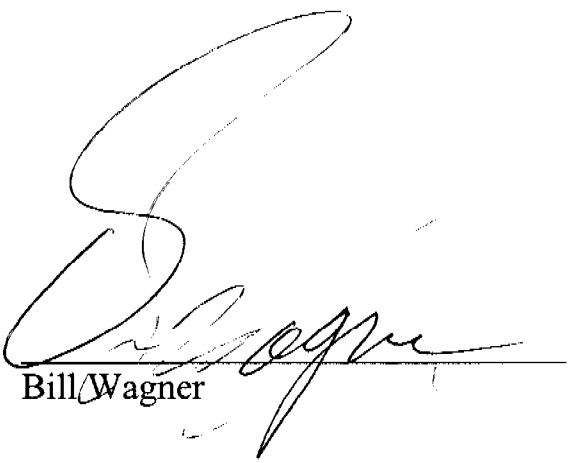

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