**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC17-823

LOWER TRIBUNAL NO.: 16-10552-GG

---

JUAN A. SALINAS and

LUCILA FUENTES,

Appellants

v.

SUE ANN RAMSEY and

HILDA RAMSEY,

Appellees.

---

# ANSWER BRIEF OF APPELLEE

(ON CERTIFIED QUESTION FROM THE FEDERAL COURT OF APPEALS FOR THE ELEVENTH CIRCUIT)

---

Lara O'Donnell Grillo, Esq.
Florida Bar No. 37735
MARK, MIGDAL & HAYDEN
80 S.W. 8th Street, Suite 1999
Miami, FL 33130
Tel.: (305) 374-0440
Email: lara@markmigdal.com
Email: eservice@markmigdal.com
*Attorneys for Appellee, Sue Ann Ramsey*

## Table of Contents

**Page**

## Table of Citations and Authorities

## STATEMENT OF THE CASE

On September 23, 2014, the United States District Court for the Southern District of Florida entered a judgment in the underlying case against the Appellee, Sue Ann Ramsey ("Appellee" or "Ms. Ramsey"), a *pro se* defendant. *See* App. Tab D.[1] Two writs of execution issued thereafter on November 24, 2004, and April 6, 2005. App. Tab A (Docs 43 and 45). Despite the fact that Eleventh Circuit precedent held, and continues to hold, that a 5-year statute of limitations applies to post-judgment discovery and collection proceedings on a judgment such as Appellants' under §95.11(2)(a), Fla. Stat., Appellants took no action on the judgment for over a decade.

On May 15, 2015, more than five years after their right to proceed on the judgment had extinguished under binding precedent, Appellants sought responses to a Fact Information Sheet from the Appellee "for purposes of collection proceedings." *See* App. Tab F; Appellants' Initial Br. at 7.[2] The district court rejected this belated attempt to obtain post-judgment discovery. Specifically, on June 8, 2015, based on the Eleventh Circuit's opinion in *Balfour Beatty Bahamas Ltd. v.*

[1] Citations to the Appendix shall be in the form "App." followed by "Tab [letter]." Citations to Appellees' Supplemental Appendix shall be in the form "Supp. App." followed by "Tab [number]" "at [Supplemental Appendix page number]."

[2] "Appellants' Initial Br." shall refer to the brief filed in this Court on the certified question. Appellants' initial brief filed in the Eleventh Circuit shall be referenced by its Supplemental Appendix citation.

*Bush*, 170 F.3d 1048, 1050 (11th Cir. 1999) applying Florida law, the district court entered an order ruling that Appellants' collection proceeding was barred by the five-year statute of limitations in §95.11(2)(a), Fla. Stat. *See* App. Tab G.

Appellants moved for reconsideration of the district court's order, arguing that a 20-year rather than 5-year limitations period applied under §95.11. *See* App. Tab H. By order dated January 21, 2016, the district court denied the motion for reconsideration, finding no manifest error in its application of the five-year statute of limitations to "Plaintiff's attempt to enforce a district court judgment, entered in the Southern District of Florida, in the same district court." *See* App. Tab I. The district court applied *Balfour*, which it was bound to do and which, as noted by the Eleventh Circuit in its certification order, is indistinguishable from this case. *See* Eleventh Circuit Certified Question Order (May 2, 2017). The district court emphasized that Plaintiffs' counsel "failed to pursue his client's writ of execution for more than a decade," and noted that, according to the District's CM/ECF records, he has "brought more than 1,000 FLSA claims in this jurisdiction." *Id*., n.1.[3]

[3] Appellants state in a footnote that the Appellee, who was *pro se* at the time, "failed to file a response" to the motion to compel "raising" the statute of limitations issue and that instead, the district court ruled on the issue *sua sponte*. However, Appellants cite cases holding that failure to plead the statute of limitations as an affirmative in an answer waives the issue. Thus, those cases are inapplicable to post-judgment proceedings, and Appellee did raise the statute of limitations as an affirmative defense in her pleadings.

Appellants filed their initial brief in the Eleventh Circuit on February 18, 2016, presenting the following issue to be decided on appeal:

> Whether the five (5) year or twenty (20) year statute of limitations applies to collection on a federal judgment in the State of Florida.

Supp. App. Tab 1. Appellants argued that a 20-year statute of limitations applied to their federal judgment under §95.11(1), for Florida state court judgments, rather than a 5-year limitations period under §95.11(2)(a), for federal court and other non-Florida judgments. On March 23, 2016, still litigating *pro se*, Appellee filed an answer brief.

The Eleventh Circuit subsequently appointed the undersigned counsel to represent Ms. Ramsey and file a supplemental answer brief, which was filed on January 11, 2017. Supp. App. Tab. 2. Appellants then filed a reply brief on February 6, 2017, raising for the first time the argument that §95.11, Fla. Stat. does not apply to post-judgment discovery proceedings at all, and that Florida law places no limitations period whatsoever on such proceedings. Supp. App. Tab 3. In the reply, Appellants expressly abandoned their initial position that a 20-year limitations period applied under §95.11(1). Supp. App. Tab 3, at 08 ("Fla. Stat. §95.11 was erroneously applied by the district court."); *see also id*. at 025 ("No statute of limitations exists as to judgment liens unless there is one passed in the future by the Florida Legislature to replace repealed Fla. Stat. § 55.15."); *id*. at 027 ("Fla. Stat. §

95.11 does not limit the time for a post-judgment discovery motion to five, or twenty years. Rather, the statute should not have been applied at all.").

After hearing oral argument, the Eleventh Circuit certified the following question to this Court based on an apparent lack of clarity among decisions in the intermediate appellate courts, particularly in the First and Fourth District Courts of Appeal, as to the limitations period applicable to post-judgment discovery proceedings:

> **What limitations period, if any, applies to a request for post-judgment discovery brought in federal district court in Florida on a judgment entered by that same federal district court?**

The First DCA in *Kiesel v. Graham*, 388 So. 2d 594 (Fla. 1st DCA 1980), as well as the Eleventh Circuit and other federal cases relying upon *Kiesel*, hold that a 5-year limitations period applies. The Fourth DCA in *Burshan v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 805 So. 2d 835, 843 (Fla. 4th DCA 2001) has disagreed with *Kiesel*, holding that registration of a New York federal court judgment in the Southern District of Florida was not an "action on a judgment" subject to §95.11, Fla. Stat. *Burshan* rejects the rationale in *Kiesel* that post-judgment proceedings are actions on a judgment within the meaning of §95.11. *Burshan* construes the term "action on a judgment" to mean a specific historical mechanism in which the judgment is 'sued out.' *See Burshan*, 805 So. 2d at 842-43. Appellees' position is

that §95.11 is not so narrow as *Burshan* concludes, because Chapter 95 defines an "action" broadly to include any civil proceeding.

On certification, Appellants now assert both arguments which they raised at different points on appeal: (1) the argument improperly raised for the first time in the Eleventh Circuit reply brief that §95.11, Fla. Stat. does not apply at all; and alternatively, (2) the argument expressly abandoned in the reply brief that the 20-year limitations period applies under §95.11(1). For the reasons stated herein, both are incorrect and should be rejected by this Court.

## SUMMARY OF ARGUMENT

The district court correctly applied the 5-year statute of limitations under §95.11(2)(a), Fla. Stat., to Appellants' belated attempt to enforce a district court judgment, entered in the Southern District of Florida in the same district court, by following the Eleventh Circuit's decision in in *Balfour*, 170 F.3d 1048. Based on the Florida First DCA's reasoned decision in *Kiesel v. Graham*, 388 So. 2d 594 (Fla. 1st DCA 1980) and the plain language of the statute, *Balfour* holds that a 5-year limitations period applies to Appellants' discovery proceeding to collect on the judgment, which is a judgment of "a court of the United States" under §95.11(2)(a).

Appellants' argument to the contrary rests on the erroneous premise that post-judgment discovery is not an action on a judgment under §95.11(2)(a) and therefore

the statute does not apply. Appellants contend that no limitations period applies to this post-judgment proceeding at all. Appellants are incorrect.

First, Florida Statutes, Chapter 95 defines an "action" broadly to include any civil action or proceeding. *See* §95.011, Fla. Stat. The language in Section 95.11(2)(a), Fla. Stat., stating that it applies to any "action on a judgment," means that is applies to any "[civil action or proceeding] on a judgment." *See id*; *see also* §95.011, Fla. Stat. It is not, as Appellants' argue, limited to the specific mechanism to "sue out" a judgment, often referred to as an "action on a judgment." The Florida Supreme Court cases on which Appellants rely to obtain their definition are inapplicable, as they were decided well before the legislature enacted §95.011 and its definition of "action" in the statute. Thus, when §95.11(2)(a) refers to an "action" on a judgment, it is not in the arcane, narrow sense that Appellants impute to the plain statutory language. Appellants ignore that "action" in Chapter 95 is a defined term, and that definition is inconsistent with Appellants' interpretation of "action on a judgment." Accordingly, §95.11 applies to the post-judgment proceedings at issue, and specifically, the 5-year period under §95.11(2)(a) applies rather than the 20-year under §95.11(1), because the proceedings are on a United States court judgment.

Second, even if Sections 95.11(1) and (2)(a) were exclusive to actions on a judgment as defined by Appellants, the proceeding would still be time barred. Section 95.011, Fla. Stat., makes clear that Chapter 95 applies generally to civil

proceedings, including the post-judgment proceeding at issue here. Section 95.11(2)(p), provides a catch-all limitations period of 4 years for any proceeding "not specifically provided for in these statutes." To the extent Appellants contend that the Florida statutes do not specifically provide a limitations period for post-judgment proceedings, a 4-year period applies in the absence of any other.

Third, the fact that the Florida legislature repealed §55.15, Fla. Stat., has no bearing on the analysis. That statute provided for execution of a judgment within 3 years, and a procedure for renewing same from time to time for 20 years. Currently, §56.021, Fla. Stat., provides that an execution is "valid and effective during the life of the judgment or decree on which it is issued." It says nothing regarding the statute of limitations. It also does not comment on what the life of a judgment is or what will determine its life. In short, §56.021 is not inconsistent with the application of a statute of limitations to post-judgment proceedings under §95.11, and does not imply that the limitations period for such proceedings is infinite.

Accordingly, this Court should find that the applicable statute of limitations for post-judgment discovery and collection proceedings is 4 or 5 years pursuant to §95.11(2)(a) or (p).

Alternatively, the Court should decline to answer the certified question because the answer is not determinative of this cause, as required to certify a question pursuant to Fla. R. App. P. 9.150. *Kiesel* and *Balfour* remain good law, therefore,

the district court was bound to follow *Balfour* when it ruled that Appellants' post-judgment proceedings were time-barred. Consequently, there is no basis for the Eleventh Circuit to find error in the district court's application of *Balfour*, which the Eleventh Circuit acknowledges in its certification order is indistinguishable from this case. The Eleventh Circuit is bound to affirm under the prior precedent rule.

The answer to a certified question is meant to shed light on whether there is an existing error when the court certifying the question does not have a clear basis for resolving it and would simply be guessing at the law. Here, the Eleventh Circuit need not guess at Florida law because it is not a question of first impression for the Court. The Eleventh Circuit may resort to its own precedent to resolve this case, and affirm the district court which correctly applied binding precedent. Should this Court answer the certified question in a manner that is inconsistent with the district court's decision, it would circumvent the prior precedent rule and manufacture error where none previously existed.

Certification is an extraordinary remedy that is not warranted here. Under the facts of this case, it would be error to apply a 20-year or unlimited limitations period retroactively to revive a remedy that had long since expired under clear, binding precedent before Appellants bothered to take any action on it. Appellee was entitled to rely on that precedent and to the finality it afforded. Appellants knew or should have known that a 5-year limitations period applied under Eleventh Circuit law in

*Balfour*, and that neither this Court nor the Florida legislature had taken any action reversing the existing Florida law on which *Balfour* relied. Appellants nevertheless sat on their rights and waited more than 10 years to act on their judgment. Accordingly, this Court should decline to hold that a longer statute of limitations applies.

For these reasons, and those stated herein, the Court should answer in response to the certified question that a 4- or 5-year limitations period applies to the post-judgment proceedings. Alternatively, the Court should decline to answer the certified question on grounds that it is not determinative of the cause, and the cause does not warrant such extraordinary remedy.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY APPLIED THE FIVE-YEAR LIMITATIONS PERIOD SET FORTH IN §95.11(2)(a), FLORIDA STATUTES

#### A. The Applicable Statute of Limitations

Appellants' efforts to collect on the judgment are controlled by the practices and procedures of the state in which the district court is held. *See Balfour*, 170 F.3d at 1050 (citing Fed. R. Civ. P. 69(a); *Leasco Response, Inc. v. Wright*, 99 F.3d 381, 382 (11th Cir. 1996)). Here, the statute of limitations prescribed under Florida law applies. *Id*. Florida's statute of limitations provides in relevant part:

*95.11 Limitations other than for the recovery of real property*

> Actions other than for the recovery of real property shall be commenced as follows:
>
> (1) Within twenty years. – An action on a judgment or decree of a court of record in this state.
>
> (2) Within five years. –
>
> (a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or foreign country.

§95.11(1)-(2)(a), Fla. Stat.

Relying on the Florida First District Court of Appeals' decision in *Kiesel v. Graham*, 388 So. 2d 594 (Fla. 1st DCA 1980), *Balfour* held that the 5-year limitations period set forth in §95.11(2)(a), Fla. Stat., controlled post-judgment discovery efforts under a district court judgment entered in the Southern District of Florida, as opposed to the 20-year period under §95.11(1). Section 95.11(1) applies a 20-year limitations period to actions or proceedings on judgments of "a court of record in this state," and 95.11(2)(a) applies a 5-year limitations period to actions or proceedings on judgments of "any court of the United States."

Adopting *Kiesel*'s reasoning, the Eleventh Circuit noted that interpretation of the two provisions was readily resolved by the principles of statutory construction:

> In adopting §95.11(2)(a) as controlling, the *Kiesel* court reasoned as follows:
>
> > Both [§§ 95.11(1) and 95.11(2)(a)] appear to govern the instant situation, for the subject judgment is that "of a court of record in this state" as well as that "of

> any court of the United States." This apparent conflict, however, can be readily resolved by resort to well-accepted principles of statutory construction.
>
> It is a general rule of statutory construction that a more specific statute covering a particular subject is controlling over a statutory provision covering the same subject in more general terms. In this situation, the phrase "of any court of the United States" is more specific than "of a court of record in this state." The former clearly limits its scope to courts of the United States, while the latter could include both federal and state courts, as long as they are in Florida. Hence, it must be concluded that [§] 95.11(2)(a) will operate as an exception to, or a qualification of, the more general terms of [§]95.11(1).

*Balfour*, 170 F.3d at 1050 (quoting *Kiesel*, 388 So. 2d at 595-96 (citations omitted)).

The Court further reasoned that the principle of last expression of legislative will supported its interpretation:

> This result is further supported by the corollary principle that the last expression of legislative will is the law, and, therefore, that the last in point of time or order of arrangement prevails. This rule is applicable where the conflicting provisions appear in different statutes, *Sharer v. Hotel Corporation of America,* 144 So.2d 813 (Fla. 1962), or in different provisions of the same statute. *State v. Hialeah,* 109 So.2d 368 (Fla. 1959); *DeConingh v. Daytona Beach,* 103 So.2d 233 (Fla. 1st DCA 1958). In this situation, two provisions in the same statute, the former covering "courts of record in this state" and the latter covering "judgments of any court of the United States," are in direct conflict. Application of the principle set forth in *Hialeah, supra,* and

> *DeConingh , supra*, dictates that the latter provision, now enumerated in §95.11(2)(a), must govern.

*Id.* at 1050-51 (quoting *Kiesel*, 388 So. 2d at 595-96 (brackets, footnote, and italics omitted)). *Balfour* thus concluded that an attempt to enforce a district court judgment entered in the Southern District of Florida, in the same district court, was governed by the 5-year statute of limitations contained in §95.11(2)(a). *See id.* at 1051 ("We find *Kiesel* well–reasoned, and adopt its holding with respect to the unique facts presented here, *i.e.*, an attempt to enforce a district court judgment, entered in the Southern District of Florida, in the same district court. We therefore hold that, under such circumstances, the five-year limitations period set forth in Fla. Stat. Ann. §95.11(2)(a) controls.").

The same analysis applies to the present case. Here, the underlying judgment was entered by the United States District Court for the Southern District of Florida on September 23, 2004, App. Tab D, and two writs of execution issued on November 24, 2004, and on April 6, 2005. App. Tab A (Docs 43 and 45). Appellants did not take action on the judgment for more than ten years later, when they sought post-judgment discovery from Ms. Ramsey. *See* App. Tab F. Thus, as the district court held in its original ruling and on reconsideration, Appellants' post-judgment proceeding was barred by the 5-year statute of limitations under §95.11(2)(a), Fla. Stat., as a proceeding on a judgment of a "court of the United States." *See* App. Tab G and Tab I (citing *Balfour*, 170 F.3d 1051).

### B. *Burshan* Is Inapplicable And Fails To Account For The Statutory Definition Of The Term "Action"

Subsequently, in *Burshan v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 805 So. 2d 835, 843 (Fla. 4th DCA 2001), the Fourth DCA issued an opinion disagreeing with *Kiesel's* conclusion that a 5-year limitations period applied to post-judgment proceedings. *See Burshan*, 805 So. 2d at 843. Citing Florida Supreme Court cases discussing *scire facias*, a mechanism formerly used to renew the period in which a judgment holder could sue on a judgment before the end of the statutory period, *Burshan* concludes that an "action on a judgment" under §95.11 must mean a "new and independent action" to 'sue out' the judgment, as opposed to *scire facias*, which is merely a continuation of that action.[4] This analysis is flawed for a number of reasons.

First, *Burshan* fails to consider the statutory definition of "action" applicable to Chapter 95, and erroneously relies on Florida Supreme Court cases that predate the inclusion of that definition in the statute. As this Court noted in *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 192 (Fla. 2013), the legislature did not enact §95.011 until 1974. That section "sets forth the applicability of chapter 95" and broadens its application:

[4] Appellants quote §95.11, Fla. Stat., as stating that it applies to "new and independent actions" (Initial Br. at 6-7), however, §95.11 does not contain this language.

> Prior to 1974, the Legislature had not yet enactesection 95.011, which sets forth the applicability of chapter 95. At that time, the protections against shortening time periods under section 95.03 were limited to apply only to "suits," a more narrow term that involves only court proceedings. *See Black's Law Dictionary* 1572 (defining "suit" as "[a]ny proceeding by a party or parties against another in a court of law"). However, in 1974, the Legislature created section 95.011, which explicitly provided that the provisions of chapter 95 extend to any "civil action or proceeding."

*Phillips*, 126 So. 3d at 192. *Phillips* further provides that "a review of the common usage of the terms used," supports the conclusion "that the term 'proceeding,' as used in section 95.011, is a broad term." *Phillips*, 126 So. 3d at 190-91. *Phillips* interpreted the term broadly to include arbitration. The Court further reasoned:

> As this Court has held, "[w]hen considering the meaning of terms used in a statute, this Court looks first to the terms' ordinary definitions, ... definitions [that] may be derived from dictionaries." *Metro. Cas. Ins. Co. v. Tepper*, 2 So.3d 209, 214 (Fla.2009). Black's Law Dictionary defines "civil action" as "[a]n action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." *Black's Law Dictionary* 34 (9th ed. 2009). It defines "proceeding" as "***[a]ny procedural means for seeking redress from a tribunal or agency***." *Id.* at 1324.

*Phillips*, 126 So. 3d at 190 (emphasis added). Accordingly, Chapter 95 applies to post-judgment discovery and related proceedings because they are a "procedural means for seeking redress from a tribunal." *See id.*

The post-judgment discovery proceedings at issue in this case simply do not fall within *Burshan*'s framework, which ignores the current statutory definitions and

is based upon analogy to mechanisms that have been repealed and/or fallen into disuse. Chapter 95 contains an explicit, broad definition of the term "action" which plainly applies to the post-judgment proceedings at issue here. This definition did not exist at the time of you *Young v. McKenzie*, 46 So. 2d 184 (Fla. 1950) or the other decades-old cases on which *Burshan* relies. Both *Burshan* and Appellants ignore this definition entirely, and fail to adequately justify imputing their own esoteric meaning of "action on a judgment" in §95.11 to mean a "specific common law cause of action." *See Burshan*, 805 So. 2d at 840. The Court should reject Appellants' interpretation of §95.11 under *Burshan*, which fails to consider the definitional changes since *McKenzie* and their relevance to a modern application of the statute.

### C. Florida Legislation Did Not Make The Life of a Judgment Infinite; A 4-year Limitations Period Applies Under §95.11(p) Absent Any Other

In support of applying *Burshan*, Appellants further argue that the legislature's repeal of §55.15, Fla. Stat., implicitly confirms its purported intent that post-judgment proceedings should have no statute of limitations. Section 55.15 provided:

> The plaintiff shall be entitled to his execution at any time within three years after the rendition of any judgment or decree, and upon the issuance of his execution, shall be entitled to renew the same upon the return to the clerk's office of the original execution, from time to time for twenty years, unless the same be sooner satisfied.

§55.15, Fla. Stat. (1965); *repealed,* Fla. Laws 1967, ch. 67-254 §49. Appellants argue that because the current provision addressing the *validity and effectiveness* of execution, §56.021, Fla. Stat., does not contain a limitations period for post-judgment proceedings, it must be that none applies. *See* Initial Br. at 12-13. Section 56.021 provides:

> When issued, an execution is valid and effective during the life of the judgment or decree on which it is issued. When fully paid, the officer executing it shall make his return and file it in the court which issued the execution. If the execution is lost or destroyed, the party entitled thereto may have an alias, pluries or other copies on making proof of such loss or destruction by affidavit and filing it in the court issuing the execution.

§56.021, Fla. Stat. (1969). This leap in logic is not supported by the plain language of the statute. Section 56.021 does not repeal or eliminate a limitations period for post-judgment proceedings. It is completely silent on the subject. As Appellants previously acknowledged, "Florida Courts are not to speculate on what the legislature would do if it chose to act, when it has not chosen to act, and judicially enact said speculation as law." *See* Supp. App. Tab 3 at 067 (citing *State v. Dugan*, 685 So. 2d 1210, 1212 (Fla. 1996)); *see also id*. (citing *Baker v. State*, 636 So. 2d 1342-44 (1994) (courts are obliged to give effect to the language used by the legislature and lack authority to redefine terms, even if it leads to a harsh result or departs from the common law)).

Moreover, §95.11(p), provides for a situation in which a proceeding does not otherwise have a statute of limitations. That is, if the post-judgment proceedings at issue are not covered by §95.11(2)(a) because they are not "actions on a judgment," and no limitations period is found elsewhere in the statute, then a 4-year limitations period applies under §95.11(p). As noted above, Chapter 95, Florida Statutes applies to "any civil action or proceeding," *see* §95.011, Fla. Stat.; *see also Phillips*, 126 So. 3d at 190, thus the absence of a statute of limitations elsewhere in the Florida statutes does not preclude application of §95.11 to the discovery proceedings at issue here.

## II. THIS COURT SHOULD DECLINE TO ANSWER THE CERTIFIED QUESTION BECAUSE THE ELEVENTH CIRCUIT'S PRIOR PRECEDENT RULE IS DETERMINATIVE OF THIS CAUSE

The question before the Eleventh Circuit is whether the district court erred in holding that Appellants' post-judgment attempt at initiating collection proceedings by way of discovery was barred by the 5-year limitations period in §95.11, Fla. Stat.[5] *Balfour*, and longstanding Eleventh Circuit law holding that the district court and the Eleventh Circuit are bound by *Balfour*, resolves this question. The Eleventh

[5] As noted above, the issue presented on appeal was specifically, whether §95.11(1) or §95.11(2)(a) applied to Appellants' action on the judgment. The appeal was taken on the assumption that §95.11 applied to the post-judgment proceeding (which as demonstrated above, it clearly does). Appellants later abandoned this issue and argument, taking the position that neither section applied, and that instead, Appellants had an unlimited amount of time to take action on the judgment. On certification before this Court, Appellants now argue both positions in the alternative.

Circuit is bound to follow its existing panel precedent absent an *en banc* reversal or an intervening Florida case that resolves the issue or changes underlying state law. *See id*.; *see also United States v. Hamblin*, 911 F.2d 551, 554 (11th Cir. 1990) (citing *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986)). Neither situation has occurred here.

In their Eleventh Circuit briefs, Appellants argued that the panel could overturn its prior precedent in *Balfour* based on the Fourth DCA's subsequent decision in *Burshan*. *See, e.g.*, App. Tab 1 at 015-017 (citing *Milliken & Co. v. Haima Group Corp*., 654 F. Supp. 2d 1374, 1380 (S.D. Fla. 2009) (quoting *Buse v. Kuechenberg*, 325 F.3d 1249 (11th Cir. Mar. 27, 2003), for the proposition that "courts may look to 'state intermediate appellate court decisions on state law when there are no state supreme court decisions on point.'")). This is incorrect. *Burshan* did not overturn *Kiesel* or any decisions applying *Kiesel*. Thus, there remain intermediate appellate court decisions in Florida that support the Eleventh Circuit's ruling in *Balfour*, which remains applicable law. *See Kiesel*, 388 So. 2d at 595-96. Both *Burshan* and *Buse* (which was ultimately vacated due to settlement) acknowledge this. *See Buse*, 325 F.3d at 1251 ("the difference of opinion between the two intermediate appellate courts has not been resolved"); *see also Burshan*, 805 So. 2d at 843 (certifying a conflict with *Kiesel* which the Florida Supreme Court declined to address in 835 So. 2d 265 (2002)).

*Buse*, in fact, identifies precisely why the Eleventh Circuit is bound to apply *Balfour* in these circumstances. *See Buse*, 325 F.3d at 1251 n.1 (citing *Roboserve, Ltd. v. Tom's Foods, Inc*., 940 F.2d 1441, 1451 (11th Cir. 1991) ("prior precedent rule" provides that the court is bound by prior panel precedent absent an intervening state case resolving the issue)). *Balfour* applies unless and until the underlying state law changes or it is reversed *en banc* by the Eleventh Circuit. The Fourth DCA's opinion in *Burshan* does not overturn *Kiesel* or otherwise change Florida law. It could be considered by the Eleventh Circuit on a question of first impression, however, the issue has already been decided by *Balfour*. A contrary rule would allow the Eleventh Circuit to reverse itself in a panel opinion each time a Florida DCA came out with a different decision on the same subject, rendering meaningless the prior precedent doctrine:

> The prior panel precedent rule is a fundamental ground rule that embodies the principle of adherence to precedent. It promotes predictability of decisions and stability of the law, it helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided. Without the rule every sitting of this court would be a series of do-overs, the judicial equivalent of the movie "Groundhog Day." While endlessly recurring fresh starts is an entertaining premise for a romantic comedy, it would not be a good way to run a multi-member court that sits in panels. As a panel, we must follow our holding in *Hines* instead of any inferences we may draw from the Supreme Court's reasoning in deciding a different issue in *Miles* because the prior precedent rule requires that we do so, and we take that rule seriously.

*Atl. Sounding Co. v. Townsend*, 496 F.3d 1282, 1286 (11th Cir. 2007), *aff'd and remanded*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009).

This case clearly illustrates the rationale behind the prior precedent rule. In 2009, Appellants' right to initiate post-judgment discovery unambiguously expired under Eleventh Circuit law. Then, over five years after the remedy expired and more than a decade after the limitations period began to run, Appellants decided to proceed with discovery. By then, it was far too late under applicable precedent. No intervening judicial decision or legislation has changed the underlying Florida law in *Kiesel* or §95.11. Now, Appellants seek to disturb that finality and have the courts retroactively revive a remedy that Appellants abandoned years ago as a result of their dilatory conduct. Application of the prior precedent rule prevents such an undesirable result.

The district court did not err; it was bound to apply *Balfour* which holds Appellants' remedy to institute post-judgment discovery and collection proceedings on their judgment had long expired. Accordingly, because the Eleventh Circuit's decision in *Balfour* resolves this controversy, this Court should decline to answer the certified question in any manner that would conflict with *Balfour*.

## CONCLUSION

For the foregoing reasons, this Court should find that a 5- or 4-year statute of limitations applies to post-judgment discovery proceedings such as those at issue in

this case. Alternatively, the Court should decline to answer the certified question because Eleventh Circuit law already resolves this cause.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the type-volume limitations set forth in Fla. R. App. P 9.210(a)(2). This brief contains Times Roman type font, sized 14 typeface.

/s/ Lara O'Donnell Grillo

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 13th day of July, 2017, a true and correct copy hereof has been electronically filed via Florida Courts efiling portal, and furnished pursuant to Fla. R. Jud. Admin. 2.516(b) by Electronic Mail to:

J.H Zidell, Esq.
Neil Tobak, Esq.
Rivkah Jaff, Esq.
J.H ZIDELL, P.A.
300 71st Street, Suite 605
Miami, Beach, Florida 33141
Email: zabogado@aol.com

*Counsel for Appellants*

/s/ Lara O'Donnell Grillo