

**IN THE SUPREME COURT OF FLORIDA**

CASE NO.: SC17-823  
LOWER TRIBUNAL NO.: 16-10552-GG

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JUAN A. SALINAS and  
LUCILA FUENTES,

Appellants

v.

SUE ANN RAMSEY and  
HILDA RAMSEY,

Appellees.

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**SUPPLEMENTAL APPENDIX TO ANSWER BRIEF OF APPELLEE**

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

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RECEIVED, 07/14/2017 12:18:28 AM, Clerk, Supreme Court

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**16-10552**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

FEB 18 2016

Amy C. Nerenberg  
Acting Clerk of Court

CASE NO. 16-10552-G

JUAN A. SALINAS and LUCILA FUENTES

Appellants/Plaintiffs

v.

SUE ANN RAMSEY AND HILDA RAMSEY

Appellees/Defendants

APPELLANTS' INITIAL BRIEF

FILED

JOHN A. TOMASINO

MAY -4 2017

CLERK, SUPREME COURT

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Supp.App.001

**CERTIFICATE OF INTERESTED PERSONS**

1. LUCILA FUENTES (Plaintiff/Appellant)
2. SUE ANN RAMSEY (Defendant/Appellee)
3. JUAN A. SALINAS (Plaintiff/Appellant)
4. HONORABLE KATHLEEN M. WILLIAMS (U.S. District Judge)
5. J.H. ZIDELL, ESQ. (Plaintiff's/Appellant's Counsel)
6. J.H. ZIDELL P.A. (Plaintiffs'/Appellants' Counsel)

1. LUCILA FUENTES (Plaintiff/Appellant)
2. SUE ANN RAMSEY (Defendant/Appellee)
3. JUAN A. SALINAS (Plaintiff/Appellant)
4. HONORABLE KATHLEEN M. WILLIAMS (U.S. District Judge)
5. J.H. ZIDELL, ESQ. (Plaintiff's/Appellant's Counsel)
6. J.H. ZIDELL P.A. (Plaintiffs'/Appellants' Counsel)

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**STATEMENT REGARDING ORAL ARGUMENT**

Appellants, Juan A. Salinas and Lucila Fuentes, request oral argument. In light of the complex legal issues extant herein, oral argument will benefit the Court.

**STATEMENT OF JURISDICTION**

This Court has jurisdiction over this Appeal pursuant to 28 U.S.C. 1291 because it involves the appeal of a final decision of a District Court.

**STATEMENT OF THE ISSUES ON APPEAL:**

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

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

## INTRODUCTION

The Appellants, Juan A. Salinas and Lucila Fuentes, were the Plaintiffs below. The Defendant, Sue Ann Ramsey was the Defendant below. In this Appeal Brief, Sue Ann Ramsey will be referred to as Appellant and Sue Ann Ramsey as the Appellee. The symbol [R\_\_-\_\_-\_\_] will designate the volume, document number, and page number of documents in the record on appeal. "App." Signifies appendix exhibit.

**STATEMENT OF THE CASE**

In the underlying case, the District Court found the five-year, and not the twenty year, statute of limitations to apply to the collection of an underlying federal judgment in the State of Florida. This Appeal follows.

In the underlying case, the District Court found the five-year, and not the twenty year, statute of limitations to apply to the collection of an underlying federal judgment in the State of Florida. This Appeal follows.

**STATEMENT OF THE FACTS**

Appellants, Juan A. Salinas and Lucila Fuentes, obtained a final judgment against Appellee, Sue Ann Ramsey, on September 23, 2004, but did not prevail against co-defendant Hilda Ramsey.

On May 15, 2015, Appellants' Counsel filed a motion with the District Court requesting that, Appellee, Sue Ann Ramsey, complete a fact information sheet pursuant to Florida Rule of Civil Procedure 1.560 and 1.977. Said Motion was denied by the District Court on the basis that the five-year statute of limitations applied. Thereafter, Appellants' Counsel filed a Motion for Reconsideration which was subsequently denied.

**SUMMARY OF THE ARGUMENT:**

Pursuant to Fed. R. Civ. P. 69(a)(1) all proceedings in aid of execution of a final judgment, must accord with the procedure of the state in which the court is located. In interpreting procedure in the State of Florida, the Florida Court of Appeals have applied the twenty (20) year statute of limitations pursuant to Fla. Stat. § 95.11(1).

## ARGUMENT

### A. Federal Law versus State Law on State Law Matters:

Absent a decision from the state supreme court, Federal Courts are required to follow decisions from the state's intermediate appellate courts on state law matters.

...the rule is that, absent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently. *See Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 775 (11th Cir.2000); *Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1120 (11th Cir.1996); *Williams v. Singletary*, 78 F.3d 1510, 1515 (11th Cir.1996). That rule is, if anything, particularly appropriate in Florida, where the state's highest court has held that “[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court].” *Pardo v. State*, 596 So.2d 665, 666 (Fla.1992) (quoting *Stanfill v. State*, 384 So.2d 141, 143 (Fla.1980)).

*McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002).

In its ruling barring Appellants from pursuing collection of the underlying judgment, and again in denying Appellants' Motion for Reconsideration, the district court relied on *Balfour Beatty Bahamas, Ltd. v. Bush*, 170 F.3d 1048 (11th Cir. 1999) in determining the length of the State of Florida statute of limitation in enforcing a judgment. However, as will be emphasized below, this Court is not bound by said decision, particularly in light of the fact that there have been

intervening Florida appellate court decisions that have expressly disagreed with the Eleventh Circuit interpretation of Florida law.

Further, the *Buse* Court emphasized that courts are *not* bound to follow prior federal court interpretation of Florida state law where “an intervening Florida decision indicates that [the] earlier appraisal of that state’s law is wrong.” *Id.* (emphasis added). Although the *Buse* opinion was ultimately vacated, due to voluntary dismissal by the parties, it is quite instructive. Following *Buse* would, at a minimum, require the application of *Burshan* as it is the most recent intervening intermediate appellate state court decision on the matter.

*Milliken & Co. v. Haima Group Corp.*, 654 F. Supp. 2d 1374, 1380 (S.D. Fla. 2009).

As a result of the intervening state court appellate decisions, the 20-year Eleventh Circuit interpretation of Florida law should be applied to garnishment proceedings in aid of execution of a federal judgment in the State of Florida.

### **B. Twenty Year Statute of Limitations**

“The Federal Rules of Civil Procedure provide that any proceedings supplemental to or in aid of a judgment or execution shall be governed by the procedure of the state in which the district court sits, at the time that the remedy is sought.” *Leasco Response, Inc. v. Wright*, 99 F.3d 381, 382 (11th Cir. 1996). As Florida law controls, and with no decisions on point, the Eleventh Circuit, in the case of *Balfour Beatty Bahamas, Ltd. v. Bush*, 170 F.3d 1048 (11th Cir. 1999), attempted to predict whether the Florida Supreme Court would apply the five-year

or twenty-year statute of limitations to garnishment proceedings. Although the Eleventh circuit previously certified this question to the Florida Supreme Court in *Leasco Response, Inc.*, no opinion was ever issued. Therefore, the analysis by the Eleventh Circuit of Fla. Stat. § 95.11 in *Balfour Beatty Bahamas, Ltd.*, was based upon the limited case law such as the case of *Kiesel v. Graham*, 388 So. 2d 594 (Fla. 1st Dist. App. 1980) (applying the five-year statute of limitations).

However, since the Eleventh Circuit ruling in 1999, the case law has developed, and the Florida Courts of Appeals have disagreed with the Eleventh Circuit interpretation of Florida Law, and have applied the 20-year statute of limitations to garnishment proceedings. In 2001, the Florida Fourth District Court of Appeals addressed this issue in *Burshan v. Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 805 So. 2d 835 (Fla. 4th Dist. App. 2001). The Fourth Circuit expressly disagreed with *Balfour Beatty Bahamas, Ltd. v. Bush*, and found the *Kiesel v. Graham* Court not to have performed any analysis in coming to the conclusion that the garnishment proceedings were an “action on a judgment.” *Id.* at 843.

The *Kiesel* plaintiffs attempted to use mandamus as a collection mechanism. To paraphrase the film *Jerry Maguire*, the *Kiesel* plaintiffs wanted a writ of mandamus to force the state to “show them the money.” In this regard, the writ of mandamus was not a “new and independent action,” but was like other collection devices contemplated by Florida law, such as scire facias, garnishment, proceedings supplementary, or discovery in

aid of execution. While mandamus in *Kiesel* may have been objectionable as a collection device on some other ground, it was not an “action on a judgment” within the meaning of section 95.11(2)(a).

*Id.* at 843-44. The Court went on to state:

For similar reasons, we disagree with the eleventh circuit's conclusion that post judgment discovery in aid of execution was an action on a judgment under section 95.11(2)(a). See *Balfour Beatty Bahamas*, 170 F.3d at 1050–51. That case relied primarily on *Kiesel*, without reference to the earlier cases from the Florida Supreme Court. The post judgment discovery at issue in *Balfour Beatty Bahamas*—interrogatories and subpoenas duces tecum—are the type permitted by Florida Rule of Civil Procedure 1.560. In the words of earlier cases, such discovery is not a “new and independent action,” but only a “step leading to the execution of a judgment already obtained.” *B.A. Lott*, 14 So.2d at 669; *Massey*, 100 So. at 171–72.

*Id.* at 844.

Similarly, the Court in *Park Fin. of Broward, Inc. v. Jones*, 94 So. 3d 617 (Fla. 4th Dist. App. 2011) found the 20-year statute of limitations to apply to garnishment proceedings. “An execution is thus “subject to the time limit of section 55.081,” Florida Statutes (2009) and may issue during the 20-year life of the underlying judgment. *Burshan v. Nat'l Union Fire Ins. Co.*, 805 So.2d 835, 839 (Fla. 4th DCA 2001).” *Park Fin. of Broward, Inc.* at 619. Likewise see First District Court of Appeals applying 20-year statute of limitations in *Desert Palace, Inc. v. Wiley*, 145 So. 3d 946 (Fla. 1st Dist. App. 2014).

In 2009, this issue was analyzed in the case of *Milliken & Co. v. Haima Group Corp.*, 654 F. Supp. 2d 1374 (S.D. Fla. 2009). In said case, the district judge adopted the report and recommendation finding that the five-year statute of limitations did not apply to garnishment proceedings. In coming to said conclusion, the Court cited to the Eleventh Circuit opinion, that when there is no state supreme court opinion on point, the court may look to intermediate appellate court decisions in determining state law.

In 2003, the same question (as it pertains to enforcement of judgments) was presented to the Eleventh Circuit in *Buse v. Kuechenberg*, 325 F.3d 1249 (11th Cir.2003). Despite having certified the issue to the Florida Supreme Court, the 11th Circuit explained that federal reviewing courts may look to “state intermediate appellate court decisions on state law when there are no state supreme court decisions on point.” *Id.* at 1251 (citing *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir.2002)). Further, the *Buse* Court emphasized that courts are *not* bound to follow prior federal court interpretation of Florida state law where “an intervening Florida decision indicates that [the] earlier appraisal of that state’s law is wrong.” *Id.* (emphasis added). Although the *Buse* opinion was ultimately vacated, due to voluntary dismissal by the parties, it is quite instructive. Following *Buse* would, at a minimum, require the application of *Burshan* as it is the most recent intervening intermediate appellate state court decision on the matter.

*Milliken & Co. v. Haima Group Corp.*, 654 F. Supp. 2d 1374, 1380 (S.D. Fla. 2009). Therefore, relying on state court interpretation of state law, the Court in *Milliken* found the 5-year statute of limitations inapplicable.

Furthermore, following the 1999 Eleventh Circuit decision in *Balfour Beatty Bahamas, Ltd.*, in 2001, the Florida Supreme Court found the twenty-year statute of limitations to apply to foreign judgments domesticated in the state of Florida. *Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226 (Fla. 2001). The reasoning was that a domesticated foreign judgment should have the same time limitations as a judgment of this state.

The UFMJRA specifically requires the recognized judgment be “enforced in the same manner as the judgment of a court of this state.” One of the requirements for enforcement of judgments of this state is that the judgment be enforced with the time constraints of section 95.11. Section 95.11(1) provides that an action to enforce a judgment of a court of record of this state must be commenced within twenty years.

*Id.* at 1232.

In its conclusion, the Florida Supreme Court stated, “[i]n answer to the second certified question, we hold that the twenty-year period contained in section 95.11(1) should be applied to actions brought to enforce a foreign judgment once it has become domesticated through the registration and recognition phase of the UFMJRA.” *Id.* at 1233. Therefore, if the 20-year statute of limitations is applied to a foreign domesticated judgment on the basis that it must be enforced in the same manner as a judgment of a court for this state, a judgment of a court of this state must likewise benefit from the 20-year statute of limitations.

Therefore, due to the intervening change in case law on this issue, the Eleventh Circuit interpretation on the statute of limitations is contrary to the state courts interpretation of the same statute, and pursuant to Fed. R. Civ. P. 69 and *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir. 2002), the state appellate court interpretation of the state statute should be followed, and the 20-year statute of limitations should be applied to the present garnishment proceedings.

**C. Affirmative Defense:**

Appellee, failed to file a response to Appellants' underlying Motion to Compel, and never asserted the statute of limitations to the garnishment proceedings as an affirmative defense. Despite Appellee's failure to file a response, the district court sua sponte denied Appellants' Motion on the basis of the five-year statute limitations. While it is Appellants' contention that the twenty-year, and not the five-year, statute of limitations would apply to garnishment proceedings in collection of a judgment, said issue is a matter that must be raised by Appellee as an affirmative defense, and not sua sponte raised by the court.

In *Balfour Beatty Bahamas, Ltd. v. Bush*, 170 F.3d 1048 (11th Cir. 1999) it was the judgment debtor (Appellee) that raised the statute of limitations defense, and was not raised sua sponte by the Court. See *Paetz v. United States*, 795 F.2d 1533 (11<sup>th</sup> Cir. 1986) (Defendants failed to plead the statute of limitations as an affirmative defense and therefore waived the defense).

The statute of limitations is an affirmative defense which must be specifically pled. Fed.R.Civ.P. 8(c). This court has held in a number of discrimination actions that failure to plead the bar of the statute of limitations constitutes a waiver of the defense. *See, e.g., E.E.O.C. v. White & Son Enterprises*, 881 F.2d 1006, 1009 (11th Cir.1989)(statute of limitations must be expressly pleaded and included in pretrial order or it is waived).

*Day v. Liberty Nat. Life Ins. Co.*, 122 F.3d 1012, 1015 (11th Cir. 1997) *See, also, Braddock v. Madison County*, 34 F.Supp.2d 1098 (S.D. Ind. 1998) addressing waiver of the limitations period in an FLSA context. In the present case, Appellee failed to plead said affirmative defense as Appellee never filed a response to Appellants' garnishment proceedings. Therefore, the statute of limitations affirmative defense should not have been raised sua sponte by the court as a basis for denying Appellants' Motion in aid of execution of the final judgment.

**CONCLUSION:**

The District Court incorrectly determined that (1) the five-year and not twenty-year statute of limitations applied to garnishment proceedings; and (2) the statute of limitations is an affirmative defense that must be raised by Appellee and not sua sponte raised by the court.

RELIEF REQUESTED:

WHEREFORE, Appellants, Juan A. Salinas and Lucila Fuestes, pray that this Court Grant Appellants' Appeal in its entirety, finding that the twenty-year statute of limitations applies to the collection of judgments in the state of Florida and that the statute of limitations is an affirmative defense that must be raised by Appellee, and if not raised, is waived.

Respectfully Submitted,

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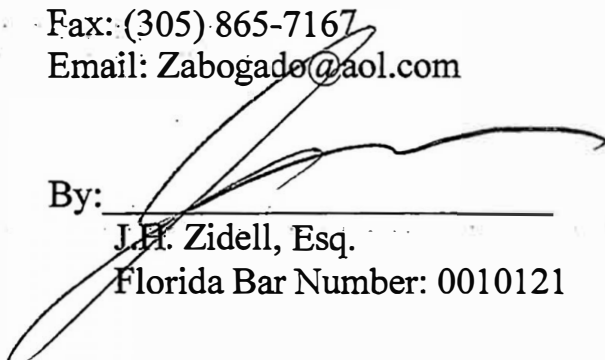
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy hereof has been furnished by U.S. Mail, to Sue Ann Ramsey, 108 S. Oleander Ave, Daytona Beach, Florida 32118 on this 22<sup>nd</sup> day of February, 2016.

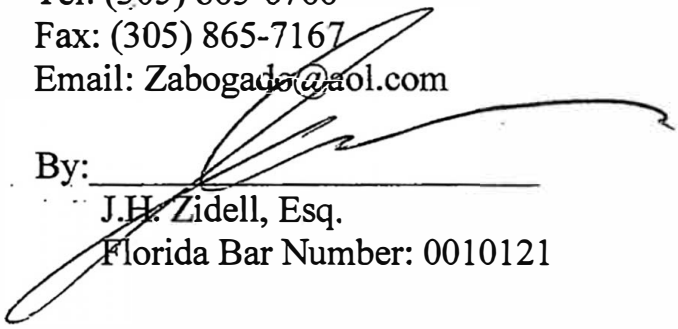
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that 14 point Times New Roman font was used throughout this brief and that 3,012 words are extant herein.

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**CASE NO. 16-10552**

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

JUAN A. SALINAS and LUCILA FUENTES,

**JAN 11 2017**

Appellants/Plaintiffs

**David J. Smith  
Clerk**

v.

SUE ANN RAMSEY and HILDA RAMSEY,

Appellees/Defendants.

FILED

JOHNA A. TOMASINO

MAY - 4 2017

CLERK, SUPREME COURT  
BY \_\_\_\_\_

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On Appeal from the Unites States District Court  
For the Southern District of Florida  
(District Court Case No. 1:03-cv-22046-KMV)

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Supp.App.025

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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**CASE NO. 16-10552**

**JUAN A. SALINAS and LUCILA FUENTES,**

Appellants/Plaintiffs

v.

**SUE ANN RAMSEY and HILDA RAMSEY,**

Appellees/Defendants.

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On Appeal from the United States District Court  
For the Southern District of Florida  
(District Court Case No. 1:03-cv-22046-KMV)

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Supp.App.026

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of the Eleventh Circuit Rules and Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee, Sue Ann Ramsey, certifies that the following persons or entities may have an interest in the outcome of this appeal:

- Abrams Anton, PA
- Adalberto Jordon, United States District Judge
- Berger Singerman LLP
- Hilda Ellen Ramsey, Deceased
- J.H. Zidell, Esq.
- Juan A. Salinas
- Kathleen M. Williams, United States District Judge
- Lara O'Donnell Grillo, Esq., Berger Singerman, LLP
- Lucila Fuentes
- Peter R. Siegel
- Ramsey Design Company, Inc. (Closed)
- Sue Ann Ramsey
- Daniel Feld, Esq.

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Supp.App.027

Pursuant to Federal Rule of Civil Procedure 7.1, Sue Ann Ramsey states that she is a non-governmental, individual party, and therefore has (1) no subsidiaries, conglomerates, affiliates, parent corporations, or other identifiable related legal entities; and (2) there is no publicly held corporation owning 10% or more of any stock.

s/Lara O'Donnell Grillo  
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**STATEMENT REGARDING ORAL ARGUMENT**

Appellee believes oral argument may assist the Court in resolving the issues in this appeal and therefore requests oral argument.

## STATEMENT OF THE ISSUES

Whether the district court correctly ruled that, pursuant to §95.11(2)(a), Florida Statutes, a five-year statute of limitations bars Appellants' action to collect on a federal judgment in the State of Florida.

## 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. *See* App. Tab D at 22-23.<sup>1</sup> Two writs of execution issued thereafter, one on November 24, 2004, and one on April 6, 2005. App. Tab A at 5 (Docs 43 and 45). Appellants did not take action on the judgment until over a decade later, on May 15, 2015, when they sought to compel responses to a Fact Information Sheet from the Appellee, Sue Ann Ramsey ("Appellee" or "Ms. Ramsey") by June 1, 2015. *See* App. Tab F at 27-29.

On June 8, 2015, based on this Court's precedent in *Balfour Beatty Bahamas Ltd. V. Bush*, 170 F.3d 1048, 1050 (11<sup>th</sup> Cir. 1999) applying Florida law, the court below entered an order ruling that Appellants' action was barred by the five-year statute of limitations under §95.11(2)(a), Fla. Stat. *See* App. Tab G at 36-37. Appellants moved for reconsideration of the district court's order. *See* App. Tab H

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<sup>1</sup> Citations to the Appendix shall be in the form "App." Followed by "Tab [letter]" "at [Appendix page number]."

at 39-45. By order dated January 21, 2016, the district court denied the motion for reconsideration, finding no manifest error in the court's 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 at 48-49. The district court further noted that Plaintiffs' counsel "failed to pursue his client's writ of execution for more than a decade," and that according to the District's CM/ECF records, he has "brought more than 1,000 FLSA claims in this jurisdiction." *Id.*, n.1. This appeal followed.

### SUMMARY OF ARGUMENT

The district court correctly applied the five-year statute of limitations under §95.11, Fla. Stat., to Appellants' attempt to enforce a district court judgment, entered in the Southern District of Florida, in the same district court, by following the Florida First DCA's reasoned decision in *Kiesel v. Graham*, 388 So. 2d 594 (Fla. 1st DCA 1980), and the rules of statutory construction. Absent a resolution of this issue by the Florida Supreme Court, Florida's intermediate appellate courts remain in conflict and the Eleventh Circuit must follow its existing precedent in *Balfour*, 170 F.3d 1048, 1050, as did the court below.

Moreover, Appellants' failure to cite the record and to articulate the basis for applying the law to the facts of this particular case is fatal to the appeal.

Finally, Appellants are incorrect in asserting that the Appellee failed to raise the statute of limitations as an affirmative defense. The defense was clearly raised in the complaint, and Appellants cite no basis for waiver of the defense where it has been properly raised in an Answer.

For these reasons, and those stated herein, the district court's ruling should be affirmed.

## ARGUMENT

### **I. STANDARD OF REVIEW**

This Court reviews the district court's application of the statute of limitations *de novo*. *Berman v. Blount Parrish & Co.*, 525 F.3d 1057, 1058 (11th Cir. 2008) (citing *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1238 (11th Cir.1999)).

### **II. 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 other state or territory in the United States, or foreign country.

§95.11(1)-(2)(a), Fla. Stat. As was the case when this Court decided *Balfour* and *Leasco*, the “applicability, in cases such as this, of §95.11(1) versus §95.11(2)(a) is a question the Florida Supreme Court has yet to address.” *See Balfour*, 170 F.3d at 1050; *see also Leasco*, 99 F.3d at 383 (certifying the following question to the Florida Supreme Court: “What is the appropriate statute of limitations for an action brought in a federal district court in Florida involving a judgment entered by that same court?”). Before the Florida Supreme Court could answer this Court’s certified question in *Leasco*, the litigants settled. *See Balfour*, 170 F.3d at 1050. Thus, the Court, presented with the same question as in *Leasco*, decided the issue in the manner in which it believed the Florida Supreme Court would act. *See id.* (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

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 five (5) year limitations period set forth in §95.11(2)(a), Fla. Stat., controlled post-judgment collection efforts under a district court judgment entered in the Southern District of Florida. Adopting *Kiesel's* reasoning, the Court noted that the conflict between 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 further 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.Dist.Ct.App.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 added and deleted; footnote and italics deleted)). *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 five-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 at 22-23, and two writs of execution issued, one on November 24, 2004, and one on April 6, 2005. App. Tab A at 5 (Docs 43 and 45). Appellants did not take action on the judgment until over ten years later, on May 15, 2015, when it sought to compel responses from Ms. Ramsey to a Fact Information Sheet by June 1, 2015. *See* App. Tab F at 27-29. Thus, as held by the district court in its original ruling and on reconsideration, Appellants’ action was barred by the five-year statute of limitations under §95.11(2)(a), Fla. Stat. *See* App. Tab G at 36-37 and Tab I at 48-49 (citing *Balfour*, 170 F.3d 1051).

The Florida Supreme Court has not held otherwise, and a conflict still exists among the state appellate courts. *See, e.g., Burshan v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 805 So. 2d 835, 843 (Fla. 4th DCA 2001) (relied upon by Appellants, but acknowledges and certifies the existing conflict). As noted by Appellants, this Court later considered the statute of limitations issue in *Buse v. Kuechenberg*, 325 F.3d 1249 (11th Cir. Mar. 27, 2003), which was ultimately vacated due to settlement. *See Bush*, 337 F.3d 1250 (11th Cir. July 2, 2003).

Contrary to Appellants' contention, *Buse* does not support the argument that this Court should overturn *Balfour* based on the Fourth DCA's decision in *Burshan* and other similar rulings on which Appellants rely. See Initial Br. at 14-16 (citing *Milliken & Co. v. Haima Group Corp.*, 654 F. Supp. 2d 1374, 1380 (S.D. Fla. 2009) (quoting *Buse*, 325 F.3d 1249, 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.'")). Appellants cite the district court's conclusion in *Milliken* that "*Buse* would, at a minimum, require the application of *Burshan* as it is the most recent intervening intermediate appellate court decision on the matter." See Initial Br. at 16 (quoting *Milliken*, 654 F. Supp. 2d at 1380. *Milliken* is incorrect. This Court is not required to apply the Fourth DCA's decision over another reasoned opinion from a different appellate court. Neither the *Buse dicta* cited by *Milliken*, nor any other case cited by Appellants supports that conclusion.

First, there remain other, intermediate appellate court decisions in Florida that support this Court's holding in *Balfour*. See *Kiesel*, 388 So. 2d at 595-96. Both *Burshan* and *Buse* acknowledge the conflict:

Unfortunately for us, however, the difference of opinion between the two intermediate appellate courts has not been resolved by the Florida Supreme Court and will not be in the *Burshan* case...The conflict remains, and we are not the ones to resolve it.

*Buse*, 325 F.3d at 1251; *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)). In fact, *Buse* notes precisely why this Court is bound to apply its own decision in *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) (applying the “prior precedent rule” that it is bound by circuit precedent absent an intervening state case resolving the issue)). Specifically, this Court is bound to follow existing Eleventh Circuit precedent absent an intervening Florida case resolving the statute of limitations issue presented in *Balfour*. *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)). Here, this Court’s decision in *Balfour* governs because there remains a conflict among Florida’s appellate courts regarding which limitations period applies (this is, again, even assuming the applicability of Appellants’ citing authority to the case at hand, which as discussed herein, Appellants have not demonstrated). Accordingly, the Court should affirm the district court’s decision correctly applying *Balfour* to this case.

### **B. Appellants’ Cases Are Inapplicable**

Appellants’ cases are inapplicable for a number of reasons. First, none of the cases addresses the distinction between §95.11(1) and §95.11(2)(a), Fla. Stat., made in *Balfour* or supports Appellants’ position that in “interpreting procedure in

the State of Florida, the Florida Court[s] of Appeal[] have applied the twenty (20) year statute of limitations pursuant to Fla. Stat. §95.11(1).” *See* Appellants’ Initial Brief, Summary of Argument, at 11. Instead, Appellants rely on some Florida appellate court decisions holding the proceedings in those cases were not subject to §95.11, Fla. Stat., but rather, were governed by the twenty (20) year limitations period contained in §55.081, Fla. Stat., because they were not “actions on a judgment.” *See* Initial Br. at 15-16 (citing *Burshan*, 805 So. 2d 835; *Park Fin. of Broward, Inc. v. Jones*, 94 So. 3d 617 (Fla. 4th DCA 2011); *Desert Palace, Inc. v. Wiley*, 145 So. 3d 946 (Fla. 1st DCA 2014); *Milliken*, 654 F. Supp. 2d 1374; *cf. Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226 (Fla. 2001) (addressing the application of both §§55.081 and 95.11 in the context of a foreign country judgment with no limitations period at the time and place of entry, and which was later domesticated and sought to be enforced under the UFMJRA). Thus, none of these cases supports the application of the twenty (20) year limitations period in §95.11(1), Fla. Stat., to the actions on the judgment in this case.

Second, even assuming that any of the Florida appellate court decisions relied upon by Appellants supported their argument, this Court is not required, and should not be persuaded, to follow them. The Florida courts of appeal remain in conflict on this issue which has yet to be resolved by the Florida Supreme Court or otherwise. *See supra* at 8-9. Appellants’ own cases acknowledge this fact. *Id.*

Accordingly, this Court is not required to reverse *Balfour* by electing to follow a different state appellate court decision when the same, well-reasoned state appellate decision the Court previously relied on continues to support its existing precedent and the state court conflict has not been resolved. Until such time, the Eleventh Circuit is bound to follow its own precedent set forth in *Balfour* to affirm the district court's ruling. *See supra* at 9-10.

### III. APPELLANTS FAIL TO CITE THE RECORD OR APPENDIX AND FAIL TO ARTICULATE THE BASIS FOR APPLYING THEIR LEGAL ARGUMENT TO THE RECORD

Under Federal Rule of Appellate Procedure 28, Appellants' Initial Brief must include, among other things:

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, *with appropriate references to the record* (see Rule 28(e));

\* \* \*

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities *and parts of the record on which the appellant relies*; and

(B) *for each issue, a concise statement of the applicable standard of review* (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)

Fed. R. App. P. 28(a)(6)-(8) (emphasis added).

Appellants do not cite the record or appendix in support of this appeal. Although the brief refers vaguely to the proceedings below, *see* Initial Br. at 10, 12, and Appellants provided an Appendix, neither the statement of facts nor any other part of the brief contains record citations. The consequence is that Appellants fail to cite specific points of error in the district court's reasoned decision that warrant reversal, and fail to articulate how the legal argument and case law cited by Appellants applies to this record.

As discussed above, Appellants rely on cases that do not directly govern their legal position and it is not evident in what manner the cases would apply. For instance, Appellants, fail to address the discrepancy between the analysis in *Balfour* under the two separate provisions of §95.11, Fla. Stat., and the cases on which Appellants rely, comparing §95.11 with §55.08, Fla. Stat., and finding that §95.11 does not govern at all in those cases because there was no “action on a judgment” within the meaning of the statute. *See* Initial Br. at 14-16 (citing *Burshan*, 805 So. 2d 835; *Jones*, 94 So. 3d 617; *Milliken*, 654 F. Supp. 2d 1374). Similarly, Appellants fail to show how the Florida Supreme Court's decision in *Nadd v. Le Credit Lyonnais, S.A.*, 804 So.2d 1226, applies to the facts of this case. *See* Initial Br. at 18. As noted above, *Nadd* involved application of the statute of limitations to a foreign country judgment under a different set of circumstances. *See supra* at 11. Appellee therefore cannot fully address Appellants' basis for

applying the law it cites to the record in this case because Appellants do not cite the record nor make such connection as required by Fed. R. App. P. 28.<sup>2</sup> This is grounds for waiver of the issue on appeal. *See Pizzini v. Sec'y for Dep't of Homeland Sec.*, 495 F. App'x 991, 994 (11th Cir. 2012) (failure to include citations to the parts of the record on which an appellant relies may result in waiver of those allegations for purposes of appeal); *see also Davidson v. Huntington Ingalls, Inc.*, 712 F.3d 884, 885 (5th Cir. 2013) (failure to comply with the rules of this court regarding the contents of briefs can be grounds for dismissing a party's claims where noncompliance is not merely stylistic, but affects meaningful review of the issues on appeal).

#### **IV. APPELLEE RAISED THE STATUTE OF LIMITATIONS AS AN AFFIRMATIVE DEFENSE**

Appellants' argue that the district court erred in applying the statute of limitations because Ms. Ramsey did not file a response to the motion to compel making an a statute of limitations argument. Appellants ignore that Ms. Ramsey clearly raised the defense in her Answer to the Complaint. *See* App. Tab C at 19, ¶G. The district court, therefore, did not "raise" the statute of limitations defense for Ms. Ramsey, the then pro se Defendant, and it had authority to enter an order on grounds that Appellants' action on the judgment grossly exceeded the applicable limitations period.

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<sup>2</sup> Appellants also omit the standard of review required by Rule 28.

Appellants' cases do not hold otherwise. *Paetz v. United States*, 795 F.2d 1533 (11th Cir. 1986) held only that the defendant waived statute of limitations as an affirmative defense by failing to raise it in the pleadings. *See id.* at 1536. *Day v. Liberty Nat'l Life Ins. Co.*, 122 F.3d 1012 (11th Cir. 1997), similarly held that failure to plead the statute of limitations waived the defense. *See id.* at 1015. In *Braddock v. Madison County*, 34 F. Supp. 2d 1098 (S.D. Ind. 1998), the trial court found the same, rejecting defendant's last minute attempt to add a new defense to the case. Here, the opposite is true, as Ms. Ramsey raised the statute of limitations defense in her Answer. See App. Tab C at 19, ¶G. Accordingly, Appellants' argument that Ms. Ramsey failed to raise the statute of limitations as an affirmative defense is inaccurate and should be rejected.

### CONCLUSION

For the foregoing reasons, Appellee Sue Ann Ramsey respectfully requests that this Court affirm the district court's ruling.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned hereby certifies that this brief is printed in Times New Roman, fourteen-point font and it contains 4,209 words excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). Therefore, this Brief complies with the type face and length limitations set forth in Federal Rule of Appellate Procedure 32(a)(7).

Dated: January 11, 2017

Respectfully Submitted,

**s/Lara O'Donnell Grillo**

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing on all counsel or parties of record who are listed below and are registered in the CM/ECF system.

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January 11, 2017

11<sup>th</sup> CIRCUIT DOCKET NO: 16-10552

IN THE 11<sup>th</sup> CIRCUIT COURT OF APPEALS

FILED  
U.S. COURT OF APPEALS  
ELEVENTH CIRCUIT

FEB 06 2017

David J. Smith  
Clerk

JUAN A. SALINAS & LUCILA FUENTES

Plaintiffs-Appellants,

v.

SUB ANN RAMSEY & HILDA RAMSEY

Defendants-Appellees.

FILED

JOHN A. TOMASINO

MAY -4 2017

CLERK, SUPREME COURT

BY

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of the Eleventh Circuit Rules and Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants, certify that the following persons or entities may have an interest in the outcome of this appeal:

- Abrams Anton, PA – Former Counsel for Appellees
- Adalberto Jordon, United States District Judge – United States District Judge in Original Proceeding
- Berger Singerman LLP - Counsel for Appellees
- Daniel Feld, Esq. - Counsel for Appellant
- Hilda Ellen Ramsey, Deceased - Co-Defendant in Underlying Action
- J.H. Zidell, Esq. - Counsel for Appellant
- J.H. Zidell, P.A. – Counsel for Appellant
- Joshua H. Sheskin, Esq. – Counsel for Appellant
- Juan A. Salinas - Appellant
- Kathleen M. Williams, United States District Judge – United States District Judge Whose Decision on Underlying Action is Being Appealed
- Lara O’Donnell Grillo, Esq., - Counsel for Appellees
- Lucila Fuentes – Appellant
- Peter R. Siegel- Former Counsel to Appellees

- Ramsey Design Company, Inc. – Appellee’s Company
- Sue Ann Ramsey – Appellee

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**STANDARD OF REVIEW**

The standard of review this Court to applies to application of a statute of limitations is *De Novo*. See, *Berman v. Blount Parrish & Co.*, 525 F.3d 1057 (11<sup>th</sup> Cir. 2008).

## ARGUMENT

### INTRODUCTION

*Fla. Stat. §95.11* was erroneously applied by the district court. The application of *Fla. Stat. § 95.11* is erroneous in the context of a discovery motion filed in the original action it pertains to because it is not a new action instituted upon the judgment, but rather, a continuation of the original action. *See, infra*.

Previously this Court found *Fla. Stat. § 95.11* is applicable to post-judgment discovery requests. The Appellants' Argument that *Burshan v. Nat. Union Fire Ins. Co.*, 805 So.2d 835 (Fla. 4<sup>th</sup> DCA 2001), should cause this Court to reconsider its decision in *Balfour Beatty Bahamas Ltd. v. Bush*, 170 F.3d 1048 (11<sup>th</sup> Cir. 1999) and not apply any limitations period of *Fla. Stat. § 95.11* to a post judgment discovery request, is persuasive, and has been found by district courts to be persuasive.

“Further, the *Buse* Court emphasized that courts are *not* bound to follow prior federal court interpretation of Florida state law where “an intervening Florida decision indicates that [the] earlier appraisal of that state's law is wrong.” *Id.*(emphasis added). Although the *Buse* opinion was ultimately vacated, due to voluntary dismissal by the parties, it is quite instructive. Following *Buse* would, at a minimum, require the application of *Burshan* as it is the most recent intervening intermediate appellate state court decision on the matter.”

*Milliken & Co. v. Haima Grp. Corp.*, 654 F. Supp. 2d 1374, 1380 (S.D. Fla. 2009) (Citing, *Buse v. Kuechenberg*, 325 F.2d 1249 (11<sup>th</sup> Cir. 2003)).

*Fla. Stat. § 95.11* applies to “new and independent actions” brought to enforce the judgment. *See, Fla. Stat. § 95.11*. Compelling discovery is not a “new and independent action.” *See, infra*. The discovery request propounded for purposes of collection proceedings concerning an existing judgment is part of the original action brought within the statute of limitations. Hence, the motion to compel completion of Florida Form 1.977 (Tab F) was erroneously denied based on *Fla. Stat. §95.11(2)(a)* (See Tab G p. 2).

“For similar reasons, we disagree with the eleventh circuit's conclusion that post judgment discovery in aid of execution was an action on a judgment under section 95.11(2)(a). *See Balfour Beatty Bahamas*, 170 F.3d at 1050–51. That case relied primarily on *Kiesel*, without reference to the earlier cases from the Florida Supreme Court. The post judgment discovery at issue in *Balfour Beatty Bahamas*—interrogatories and subpoenas duces tecum—are the type permitted by Florida Rule of Civil Procedure 1.560. In the words of earlier cases, such discovery is not a “new and independent action,” but only a “step leading to the execution of a judgment already obtained.” *B.A. Lott*, 14 So.2d at 669; *Massey*, 100 So. at 171–72.”

Burshan, 805 So. 2d 835 at 844.

The Florida Fourth District Court of Appeals, in Burshan, specifically disagrees with the district Court’s conclusion that post judgment discovery is an action on a judgment. This decision is an intermediate appellate decision on point,

that the application of *Fla. Stat. §95.11* to post judgment discovery, is incorrect. *See, id.*

The district court erred because compelling completion of Florida Form 1.977 is not a new action, hence, *Fla. Stat. §95.11* is not applicable. This argument is ineloquently made in Appellant's Initial Brief. *See, Crane v. Nuta*, 26 So.2d 670 (Fla. 1946); *Workingmen's Co-operative Bank v. Wallace*, 9 So.2d 731(Fla. 1942); & *Witeside v. Dinkins*, 97 So.2d 517 (Fla. 1923).

Most importantly, the Florida Legislature has spoken on the issue when it repealed the statute of limitations to execute on a judgment in 1968. *See, infra.* Hence, the district court erred in applying any statute of limitations to Appellants' attempts to execute upon the judgment. *See, infra.*

This Court, the Florida First District Court of Appeals, and the Parties before these courts, have framed the issue incorrectly. Considering Appellee's analysis of statutory construction, it is pertinent to note that the twenty-year statute of limitations in Florida to collect on a judgment (*Fla. Stat. § 55.15*) was repealed without replacement 49 years-ago. Hence, no statutory construction is relevant, the statute was repealed, and the issue is not how to interpret *Fla. Stat. §§ 95.11(1) or 95.11(2)*, but rather how to proceed, given that there is no statute of limitations on the execution of a judgment. *See, infra.*

**WHICH PART OF FLORIDA STATUTE § 95.11 APPLIES TO FEDERAL JUDGMENTS IS NOT THE REAL ISSUE AT BAR**

An analysis of the three methods for collecting on a Judgment under Florida Law is instructive as to why the district court erred in applying *Fla. Stat. § 95.11*, and a five-year statute of limitations, to a post-judgment discovery motion.

**I: Method One**

The first method is to assert a lien against the judgement debtor's property/assets through domestication of the Judgment. A federal judgment in the state of Florida creates a lien against real and personal property that may be registered and enforced under Federal and Florida law for at least twenty-years. *See, 28 U.S.C. §1962, Fla. Stat. § § 55.081, 55.205(1); B.A. Lott, Inc. v. Padgett*, 14 So.2d 667, 668 (Fla. 1943); & *Cf. Trend Mills v. Socher*, 4 B.R. 465, 468 (D. N.J. 1980).

“A judgment of a federal court sitting in Florida is a lien on property to the same extent as a judgment of a Florida court. *See B.A. Lott, Inc. v. Padgett*, 153 Fla. 304, 306, 14 So.2d 667, 668 (1943). 28 U.S.C.A. § 1962 (2000) provides:

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time.”

Burshan, So. 2d 835 at 839.

This option requires the judgment creditor to file a separate domestication of the judgement, and/or lien, with the Department of State and register the judgment with the State Clerk of Courts in the jurisdiction in which the debtor has assets. *See, id. & Fla. Stat. § 28.222(3)(C)*. In other words, a federal judgment automatically creates a lien enforceable under Florida Law for more than five years.

The registration of a lien within twenty years of a judgment creates a ten-year period in which the judgement creditor's assets are subject to lien under state law, starting on the date of filing, and subject to renewal for an additional ten-year period. *See, Fla. Stat. §§ 55.10, 55.081, 55.205(1) & 28 U.S.C. §1962*. The time limits on judgment liens, including the twenty years in which to seek one, are not necessarily dispositive in and of themselves, because the judgment can be executed upon using "appropriate judicial process," after the running of any of these periods. *See, id.*

*Florida Statute § 55.205* can effectively eliminate any statute of limitations applicable to judgment liens because it allows a judgment creditor, who has not obtained a lien or has an expired lien, to "proceed against the judgment debtor's property through any appropriate judicial process." *Fla. Stat. § 55.205(1)*; *See also, See, The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

The discovery requested in Tab F, and denied in Tab G, of the Appendix in this Appeal, was necessary to enforce a lien already created by Federal Law and Florida Law by entry on the Judgment. *See, supra*. Once Appellants discovered property on which to place a lien, the Appellants could have registered same with the Department of State and local clerk of courts for the appropriate jurisdiction under *Fla. Stat. § 55.205(1)*, long after the statute of limitations in *§ 95.11(2)(a)* had run. *See, infra & supra*. Hence, the district court erroneously prohibited the Appellants from seeking further collections remedies available to them under state law, denying the Appellants the information necessary to discern which clerk to file the judgment lien with, and what property to place a lien on. *See, Fla. Stat. § 28.222(3)(C)*.

The district court's error is blatantly apparent. The discovery requested by Appellants in Tab F is filed under the original action, which could have been domesticated under *Fla Stat. §§ 55.10(1), 55.203 and 55.202 (2)(a), & 55.205(1)*, and then subject to a renewable ten-year statute of limitations for liens under *Florida Statute § 55.10(1)*. Compelling Appellees to fill out Florida Form 1.977 would have enabled Appellant/Creditors to seek proper redress for the Appellee's failure to pay the judgment. The Appellant Creditors were entitled to avail themselves of all remedies under Florida Law for an unsatisfied judgement. The Court erred in

denying the Appellant/Judgment Creditor the ability to properly seek the lien remedy under Florida Law. *See, infra & supra.*

Hence, the judgment of the district court could not be domesticated in the proper state jurisdiction, because of district court's erroneous refusal to compel Appellees to fill out Florida Form 1.977. Appellants were denied the right to avail themselves of state remedies available to judgment creditors.

## **II: The Second Method**

The second method in Florida to collect from a judgment debtor is to renew the judgement via a separate action before the statute of limitations runs on the debt. This commences a new action against the judgment debtor. Had the Appellants sought to renew the judgment, it would be a separate action properly subject to *Fla. Stat. § 95.11*. However, the Appellants sought discovery on the original action, not renewal of the judgment, and as explained *supra. & infra.*, Appellants did not attempt to institute a new action subject to *Fla. Stat. § 95.11*. *See, infra & supra.*

One argument, which is advanced ineloquently in the initial Brief of the Appellants, is that *Fla. Stat. § 95.11* applies to actions instituted to recover property (other than real property). Appellants argued that Appellants' discovery request is not a new action to recover property which would be governed by *Fla. Stat. § 95.11*. Rather, the request was a continuation of the original action filed in the Southern

District of Florida. *See*, Burshan 805 So.2d 835; *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005); *infra* & *supra*.

Appellants' discovery request proceeded under the same case number and as part of one action not governed by *Fla. Stat. §95.11*. The discovery request was not a new action, and the district court's denial of same under *Fla. Stat. § 95.11* used erroneous analysis, as *Fla. Stat. § 95.11* only applies to new actions upon a judgment. *See, id.*

### **III: The Third Method & Why There is no Statute of Limitations to Execute on a Judgment**

The third method is to execute upon the judgment as a continuation of the original action. Execution upon an action, as in the writ of execution to be governed by state law per *Fed.R.Civ.Pro. 69(a)*, is not a new action. *See, supra, Burshan 805 So.2d835, 24A Fla. Jur. 2d Executions §§ 1 & 648 (2005); Crane, 26 So.2d 670; Workingmen's Co-operative Bank, 9 So.2d 731; & Witeside 97 So.2d 517*. The Appellants' Discovery Motion (Tab F) was an attempt to execute upon the original judgment, as a part of the original action. *See, id.*

The relevant question to ask when executing upon an existing judgment, as a continuation of the original case, is: what is the "life of a judgment?" The relevant

issue concerns the life of the original judgment, not whether a new action is timely under *Fla. Stat. § 95.11*. This question is answered correctly in Burshan, 805 So.2d 835, although not in full. Burshan holds that *Fla. Stat. §95.11* is not applicable to post-judgment discovery proceedings, such as the ones at issue in the case at bar. The Burshan Court fails to articulate what the life of a judgment is in Florida. There is no legislatively enacted statute of limitations in Florida to collect on a judgment, hence, there is no statute of limitations on the enforceability of a judgment. *See, infra & Fla. Stat. § 55.205(1)*.

The Appellate brief imprecisely argues that Burshan came to the opposite holding in contrast to *Kiesel v. Graham*, 388 So.2d 594 (Fla. 1<sup>st</sup> DCA 1980). The more precise analysis is that the Kiesel Court is attempting to extrajudicially legislate its own statutes of limitation in place of repealed *Fla. Stat. § 55.15*. When the legislature repealed *Fla. Stat. § 55.15* in 1967, the Florida Legislature repealed the twenty-year statute of limitations governing the life of a Judgment. *See, The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

In Burshan, the Florida Fourth District Court of Appeal disagrees with holding of Kiesel, a case about mandamus, as it is applied in *Balfour Beatty Bahamas Ltd. v. Bush*, 170 F.3d 1048 (11<sup>th</sup> Cir. 1999). It is applied, in Bush, to hold that *Fla. Stat. § 95.11* applies to post judgment collections proceedings. The Burshan Court holds

that the discovery requests at issue, like the discovery requests at issue in the instant appeal, are a continuation of the original action and not subject to *Fla. Stat. § 95.11*.

The Burshan Court lists the statutes and procedures that a creditor holding a Federal Judgment may avail themselves of, all of which have a longer than five-year statute of limitations. Burshan, stops just short of fully articulating that the time-period in which to collect on a judgment is technically without limit, and that the methods to go after a judgment are in no way limited to the methods specified by the Burshan Court, but that any appropriate action at law is permissible. *See, Fla. Stat. § 55.205(1) & infra.*

The Kisel Court erred in speculating on what the legislature would replace the repealed statute of limitations with, and same is beyond the authority of a Florida Appellate Court. *See, State v Dugan*, 685 So.2d 1210 (Fla. 1996) (Florida Courts cannot speculate on what the legislature would do if it chose to act, when it has chosen not to act, and judicially enact said speculation as law); *Baker v. State*, 636 So.2d 1342 (Fla. 1994); & *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

The Kiesel Court speculates as to what the legislature would replace repealed *Fla. Stat. § 55.15* with. The Florida First District Court of Appeals speculates that the time-period applicable to instituting a new action under *Fla. Stat. § 95.11* is what

the legislature would enact to replace the statute the legislature purposefully repealed and intentionally did not replace. In doing so, The Florida First attempts to extrajudicially enact a statute that the legislature intentionally repealed without replacement. The Burshan Court correctly holds that there are many options beyond the five-year statute of limitations for the judgment creditor to avail themselves of when executing on an existing judgment, and only the filing of a new action would implicate *Fla. Stat. § 95.11*. See, Burshan, 805 So.2d 835, *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

More specifically, the Kiesel Court is ruling on an issue of mandamus, which is a questionable collections remedy under Florida Law. See, Burshan, 805 So.2d 835. The Burshan Court specifically notes that its disagreement with this Court is: this Court misinterpreted post judgment discovery as a new action commenced on a judgment subject to the limitations of *Fla. Stat. § 95.11*. See, *id.* at 844.

Hence, the Burshan Holding, is an intermediate appellate court distinguishing Kiesel, and specifying its disagreement with this Court in *Balfour Beatty Bahamas Ltd. v. Bush*, 170 F.3d 1048 (11<sup>th</sup> Cir. 1999): as argued in this brief, that post judgment discovery is not a new action subject to *Fla. Stat. § 95.11*. See, Burshan, 805 So. 2d 835 at 844.

This Court's reliance in Bush, 170 F.3d 1048, on Kiesel, was reliance on the Florida First District Court of Appeals acting beyond its authority by extrajudicially legislating a statute that limited "the lifetime of a judgment." This is despite the Florida Legislature purposefully repealing and not replacing the statute limiting the "life of a judgment" in Florida. Therefore, Kiesel, should not have been relied on by This Court, and the Burshan Court does not create a controversy as to how the Florida Courts would interpret an existing statute, but held that Florida Statute § 1.977 does not apply to post judgment collections proceedings, unless they are an entirely new action, which post judgment discovery is not. *See, Burshan*, 805 SO.2d 835; & *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

Florida Courts are not to speculate on what the legislature would do, or enact what they believe the legislature should enact, but, rather, the legislature must enact new legislation. *See, Baker*, 636 So.2d 1342. The Kiesel Court exceeded its authority by judicially enacting a statute of limitations after the legislature has chosen to repeal the previously existing statute of limitations. *See, id., infra & supra.*

The repeal of *Fla. Stat. § 55.15* delimited "the life of a judgment," which was twenty years. *Fla. Stat. § 55.15*, repealed 49 years ago, was the only statute of limitations applicable to execution on a judgment. *Florida Statute § 55.205(1)* allows a creditor, without a judgment lien or an expired judgment lien, to secure a

writ of execution against the judgment debtor. The district court stopped the Appellants from doing this, erroneously.

A judgment creditor, without having previously secured a judgment lien, or with an expired judgment lien, may proceed against the judgment debtor's property through other judicial processes, such as writs of execution. *See, Fla. Stat. § 55.205(1)*. A writ of execution is the collections mechanism in *Fed.R.Civ.Pro. 69(a)* governed by state law. Hence, *Fla. Stat. § 55.205(1)* and the repeal of the statute of limitations to collect on a judgment lien (the repeal of *Fla. Stat. § 55.15*) means the district court erred in applying any statute of limitations. *See, The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

Since, the twenty-year statute of limitations to collect on a Judgment Lien was repealed (*Fla. Stat. § 55.15*), *Fla. Stat. § 55.205(1)* permitted Appellants to proceed against Creditor Appellees using other judicial means, including a writ of execution, regardless of the time frame in which they sought to proceed. The discovery Appellants attempted to compel was necessary to obtain the information needed for a writ of execution. The district court erroneously denied same, and same could be used to aid other judicial means, including writs of execution, and Proceedings Supplementary, as contemplated by the Florida Statutes and *Federal Rule of Civil Procedure 69(a)*. *See, Burshan* 805 So.2d 835; *Federal Judgments in Florida Still*

*Good after Five Years*, 73 Fla. B.J. 63, 64 (1999) & *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

*Fla. Stat. § 55.205(1)* delimits the “life of a judgment,” by allowing judicial action on a lien sought within or outside of the statute of limitations, or not sought at all. *Fla. Stat. § 55.205(1)* is a more appropriate basis to proceed upon than a Florida Appellate Court acting extrajudicially by legislating its own statute to replace the repealed *Fla. Stat. § 55.15*. See, *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005). Hence, the district court erred because it relied on the Florida First District Court of Appeals exceeding its authority.

Therefore, more precisely stated than in the Appellate Brief, and in response to the Appellees’ Supplemental Brief, Kiesel, and Burshan, are not conflicting opinions of Florida Appellate Courts interpreting *Fla. Stat. § 95.11*. Rather the Kiesel Court attempted to exceed the authority of a Florida Appellate Court by judicially legislating a statute of limitation, after same was repealed by the legislature. It is illogical to limit the “life of a judgment,” after the Florida Legislature purposefully chose to repeal the existing statute of limitations, and it was outside of the scope of the Kiesel Court’s authority to do so. See, Baker, 636 So.2d 1342.

The Appellate brief states the issue on appeal is whether the five or twenty-year statute of limitations applies to the collection of Federal Judgements. It is couched this way because this Court (relying on a Florida Appellate Court acting extrajudicially), has improperly applied a judicially enacted statute of limitations after the legislature repealed the statute of limitations for execution on a judgment in 1968. The Florida Appellate Court in Kiesel, chose a forbidden path in applying *Fla. Stat. § 95.11* as a judicially legislated statute of limitations. See, Baker, 636 So.2d 1342 & *State v. Egan*, 287 So.2d 1, 4 (Fla. 1973). The Burshan Court clarifies that this is erroneous, and specifies that there is no proper application of *Fla. Stat. § 95.11* to post judgment discovery. See, Burshan, 805 So.2d 835; *Federal Judgments in Florida Still Good after Five Years*, 73 Fla. B.J. 63, 64 (1999); & *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005).

The issue on Appeal is that the Kiesel Court exceeded its authority, and then same was relied on by this Court in Bush. Applying a completely unrelated statute to legislate a statute of limitations where there is none, is erroneous, and an intrinsically flawed overreach by the First District Court of Appeals. Kiesel, is also factually distinct from the issues on appeal presently. Kiesel, was a holding regarding mandamus and not post judgment discovery; whereas the issue the Burshan Court disagrees with this Court regarding, is the same in the instant appeal. Post judgment

discovery requests are not governed by *Fla. Stat. § 95.11*. Burshan, is directly on point and should be considered controlling by this Court. *See, Milliken*, 654 F. Supp. 2d 1374 at 1380; & Buse, 325 F.2d 1249.

The district court erred in that it erroneously relied on the extrajudicial actions of the Florida Appellate Court legislating a statute of limitations stricter than the one legislatively abolished. *See, Burshan*, 805 So.2d 835; & *The Life of a Money Judgment in Florida Is Limited—For Only Some Purposes*, 79 Fla. B.J. No. 7, 20 (2005)

Florida Courts are not to look to rules of statutory construction, or rules of interpretation, when the legislative intent is clear. *See, Egan*, 287 So.2d 1, 4 & *Daniels v. Fla. Dept. of Health*, 898 So.2d 1226 (Fla. 2005) (For the contention that the Courts are not to impose their own rules of interpretation and construction when legislative intent is clear). In this case, repealing the statute of limitations without replacing it for forty-nine years makes the legislative intent clear.

Proper application of *Fed. R. Civ. Pro. 69(a)(1)* should not include an analysis of *Fla. Stat. § 95.11*, absent a new action being commenced to collect on an existing judgment. 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*.

The Florida Legislature repealed *Fla. Stat. § 55.15* in 1968, which eliminates any uncertainty that the repeal of the statute of limitations on judgment liens, without the imposition of a new statute of limitations, was unintentional. Since, the legislature repealed the twenty-year limit, it defies reason to apply a five-year limit.

*Fla. Stat. § 55.205(1)* is the proper statute This Court should apply as to the “lifetime of a judgment.” Proper analysis of *Fla. Stat. §55.205*, clearly shows that execution on a Judgment may take place beyond the scope of any statute of limitations. A writ of execution may be executed after any statute of limitations has expired. Simply stated, *Fla. Stat. § 55.205* allows a judgment creditor with an expired lien, or no lien at all, to proceed by writ of execution without a time limit and seek enforcement of the judgment lien through “any appropriate judicial process.” *Fla. Stat. § 55.205(1)*.

**CONCLUSION**

The district court erred when it applied a five-year statute of limitations to a discovery motion that was not filed as a new action, but rather part of the original action. *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 to a post-judgment discovery motion, because it only applies to new actions. The Florida Legislature repealed the statute of limitations applicable to judgment liens and it was not replaced.

Hence, the district court's denial of the Motion to Compel Completion of Florida Form 1.977 should be reversed. (Tabs F & G, Respectively).

This Court should reverse the district judge's order in Tab G of the Appendix to this Appeal, with instructions on remand to allow post judgment discovery, as same is not limited by *Fla. Stat. § 95.11*. Methods One and Three above, are remedies which the district court erroneously denied to Appellants and that should be open to Appellants on remand. The Appellants must be given the right to seek a lien on the property/assets of the judgment debtor in the appropriate Florida Jurisdiction, and to execute upon the original judgment, using all methods available under Florida Law, including post judgment discovery proceedings.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.App.Pro. 32(a)(7)(c), the undersigned hereby certifies that this brief is printed in Times New Roman, fourteen-point font and it contains 4,666 words excluding the parts of the brief exempted by Fed.R.App.Pro. 32(a)(7)(B)(iii). Therefore, this Brief complies with the type face and length limitations set for in Fed.R.App.Pro. 32(a)(7).

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February, 6, 2016, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing on all counsel or parties of record who are listed below and are registered in the CM/ECF system.

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