IN THE SUPREME COURT OF FLORIDA
SC07-1470
District Court Case No. 4D05-4729

LARRY LINER, etc.

Appellant

v.

WORKERS TEMPORARY STAFFING, INC.

Appellee

On Appeal from the Fourth District Court of Appeal

CORRECTED ANSWER BRIEF OF APPELLEE

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INTRODUCTION

This putative class action lawsuit brought by a day laborer against his labor pool company concerns the 2003 version of Florida's Labor Pool Act (the "LPA"), specifically F.S. § 448.24(1)(b) and F.S. § 448.25(1) which provide:

> No labor pool shall charge a day laborer: (b) *more than a reasonable amount* to transport a worker *to or from the designated worksite*, but in no event shall *the amount* exceed the *prevailing rate for public transportation in the geographic area*. F.S. § 448.24(1)(b).
>
> Any worker *aggrieved* by a violation of § 448.24 shall . . . be entitled to recover actual and consequential damages, or $1,000.00, . . . for each violation . . ., and costs.

In Liner v. Workers Temporary Staffing, 962 So.2d 344 (Fla. 4DCA 2007), the Opinion now under review, the Fourth District ("4DCA") agreed with the Circuit Court (J. Robert B. Carney)(the "LT") that F.S. §448.24(1)(b)(2003) is unconstitutionally vague under the Due Process Clause of the Federal and Florida Constitutions because it did not give adequate notice of what conduct was prohibited, and its imprecision invited arbitrary and discriminatory enforcement (relying upon Brown v. State, 629 So.2d 841 (Fla. 1994), wherein this Court similarly held the phrase "public housing facility" to be unconstitutionally vague). Id. at 846-47. Appellant ("Liner") contended he had incurred $265 in actual damages due to 177 alleged 50 cent overcharges for transportation to certain Tri-County[1] jobsites, and Liner sought $177,000 in statutory damages under F.S.

[1] "Tri-County" means Broward, Miami-Dade and Palm Beach Counties

§ 448.25(1). Rejecting the remedial legislative label urged by Liner, the 4DCA observed '[t]he $1000 fine provision makes the statute penal in nature . . . [t]he fine is the statutory hammer designed to deter noncompliance with the statute, just as one purpose of a prison sentence is to deter violations of a criminal law." Id.[2] The 4DCA found constitutional vagueness problems with the undefined statutory terms "reasonable amount[3]," "public transportation" and "geographic area," adopting the reasoning in the LT's Judgment. [R7543-49] The 4DCA and LT both agreed that because fair notice of the proscribed conduct was not given and persons of ordinary intelligence had to guess at its meaning, F.S. § 448.24(1)(b)(2003) was unconstitutionally vague[4]. Vagueness is shown by the successive "guesses" the statute required one to make, in order to fit within Liner's theory of liability. These guesses include: (i) that "public transportation" was

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2 WTS maintained this civil statute is penal, not remedial, in nature [R 599, ¶ 27][R 2943, 2957], and the LT identified it as a confiscatory statute. [T 361]. The Orders on appeal should stand regardless of whether it is remedial or penal.

3 The "reasonable amount" issue was clearly one of the issues being litigated in this case [R 3713], but was not expressly dealt with in the LT Judgment. Because facial unconstitutionality implicates de novo review, the 4DCA was not constrained by the LT's reasoning, and can affirm on alternative theories.

4 The facts before both Courts were developed at a bench trial at which the parties empowered the LT [T 604-11] to resolve all aspects of the merits of Liner's individual claim as well as the WTS declaratory judgment counterclaim. Facial and as-applied challenges to constitutionality begin with the facts before the LT. The LT correctly decided the mixed questions of fact and law presented as to both unconstitutionality (void for vagueness and violative of substantive due process) and on WTS' lack of liability based on the statute and evidence

limited to bus travel, notwithstanding that other Florida statutes gave it a broader meaning; (ii) that the viability of public transportation in terms of actually getting a worker to the designated worksite was not relevant; (iii) that "geographic area" had to mean county; and (iv) that "prevailing rate" meant "most used" within a county. The 4DCA and LT rejected Liner's alternative "subjective versus objective test", finding the statute's imprecision invited arbitrary and discriminatory enforcement.

In K.C. Cromwell v. Pollard, 2007 WL 2963816 (Fla. 2nd DCA 2007), a non-class action labor pool case[5] involving $160,000 in statutory damages that had been awarded to the plaintiff in that case, the Second District ("2DCA") reversed, adopting the rationale of the 4DCA in Liner v. WTS and declaring the version of F.S. § 448.24(1)(b) in effect from 2000-2003 to be unconstitutionally vague. In the Liner LT Judgment, Liner 4DCA Opinion, and Pollard 2DCA Opinion, it was acknowledged the Florida Legislature amended F.S. § 448.24(a)(b) effective July 1, 2006 to change "*but in no event shall the amount exceed the prevailing rate for public transportation in the geographic area*" to "*but in no event shall the amount exceed $1.50 each way.*" Through the enactment of this amendment, the Florida

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presented. Liner ignores the factual findings made in the LT's Final Judgment, which are presumed correct and supported by competent substantial evidence.

5 The only other reported case involving the pre-2006 LPA is Tampa Service Co. v. Hartigan, 2007 WL 2935058 (Fla. 4DCA 2007), which affirmed a class certification order. Unless Liner is affirmed, Hartigan illustrates the WTS prediction about facing excessive classwide statutory penalties in Liner is real.

legislature at least tacitly, if not overtly, conceded that the terms "geographic area," "public transportation" and "prevailing rate" were vague and failed to establish uniform standards for labor pools in the state. The committee reports acknowledge that passing the new language will "resolve the [constitutional] issues presented." S. Rep. Commerce & Consumer Serv. Comm, 2 n.3 (2006). Where, as here, an amendment to a statute is enacted after controversies as to the interpretation of the original act arise, this Court has recognized the propriety of considering the amendment in arriving at a proper interpretation of the prior statute. Lowry v. Parole Comm., 473 So.2d 1248, 1250 (Fla. 1985)(citing Gay v. Canada Dry, 59 So.2d 788 (Fla. 1952)("court has right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation"). The Florida legislature fixed (post-July, 2006) the void for vagueness problem with "*but in no event shall the amount exceed the prevailing rate for public transportation in the geographic area*" that the LT and 4DCA in Liner and the 2DCA in Pollard recognized, and this Court should affirm. A contrary ruling by this Court would inflict on the Florida labor pool industry of which WTS is part, without the fair warning that due process requires, constitutionally excessive statutory damages[6]. The 4DCA's Opinion that "reasonable amount" is void for vagueness should also be affirmed, the concept of "reasonable amount" being facially unconstitutional.

[6] The Florida Attorney General opted not to appear or otherwise actively participate

STATEMENT OF THE FACTS AND CASE

The Liner Statement of the Case and Facts is supplemented as follows.

The operative pleadings for the November 14-16, 2005 bench trial were the WTS Counterclaim for Declaratory Relief [R 594], the Liner Answer to WTS Counterclaim [R 909], the Liner Second Amended Complaint [R 1903], and the WTS Answer and Affirmative Defenses. [R 2929] Neither the WTS Counterclaim nor the WTS Answer were limited in geographic area to Broward County alone, the F.S. §448.24(1)(b) inquiry being Tri-County because the WTS worksites to which Liner was transported were Tri-County, and that was the area WTS serviced. The fact Liner's Second Amended Complaint strategically sought to narrow the definition of "public transportation" to a Broward County bus did not end the matter, as the proper meaning of "public transportation," geographic area," and "prevailing rate" were disputed evidentiary and legal matters at trial. The Joint Pretrial Stipulation [R 3792-3824] made clear that the triable issues included whether "geographic area" and the relevant form of "public transportation" meant only a BCT bus, or has other possible meanings. The LT made clear at numerous junctures in the case that it viewed a resolution of the Broward County vs. Tri-County geographic area determination, coupled with related "public transportation" and "prevailing rate" issues, to be critical. [R 5106-197]

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in this cause [R904][R335], notwithstanding constitutional challenges.

The LT exercised its discretion from a case management standpoint by directing early on that an evidentiary hearing was necessary to determine whether Liner had a claim against WTS, based on statutory ambiguity. [R 828][R 689][7] The LT further clarified the issues to be tried at a follow-up July 20, 2006 Case Management Conference and intervening June 30 hearing.[8] Liner unsuccessfully sought to consolidate this case with seven (7) other LPA Broward County lawsuits. [R 924][R 1113-18][R 1260] WTS challenged consolidation [R 1503, 1732], and Judge Eade denied it [R 1790]. Liner then strategically sought to limit his claims in this case only to Broward County [R 1903], so as to try and cherry-pick the relevant the "geographic area". Prior to trial, Liner sought exclusion of evidence of reasonableness and actual costs [R 2370], and exclusion of the WTS transportation expert [R 3175][R 3436][R 3560], which was denied. [R 3713] A final clarification of the issues was effectuated by the stipulation [T 580-611]. Prior to Trial, WTS filed a Trial Memorandum [R 7454], while Liner relied upon his still pending Partial Summary Judgment Motion [R 3318], which the Trial Order stated could not be heard at the time of Trial. [R 7282][T 605]

On November 18, 2005, the LT entered its Judgment in favor of WTS, making extensive factual findings to support its unconstitutionality and no-liability

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7 The LT ordered reverse bifurcation (merits first, not class discovery first).

8 The Statement of Issues from Court re: Evidentiary Hearing filed by WTS, which can be found in the record at [R 5106-197], consolidates all pronouncements.

rulings in favor of WTS. In addition to the fourteen numbered paragraphs of findings under the heading "THE FACTS" [R 7543-44], the LT made further factual findings in the introductory, "WHAT THIS MEANS," and "CONSTITUTIONALITY" sections of its Final Judgment [R 7545].

I. THE EVIDENTIARY HEARING.

A. The Plaintiff's Evidence.

Liner began his evidentiary presentation with a previously judicially noticed [R 3790-91] audio tape excerpt from the Florida Senate Judiciary Committee Meeting on April 19, 1995.[9] This audio tape excerpt is part of 11 audio tapes produced by the Florida State Archives concerning LPA; of the 20 hours of audio on these tapes, the dialogue on which Liner relies lasts 30 seconds.[10] The LT admitted the Judiciary Committee statements proffered by Liner on the rationale that no one was disputing authenticity. [T 54-58] WTS urges this Court listen to, rather than just read the transcript of, the same audio tape excerpt the LT heard [T58-70]. The tape itself reveals, by intonation, a difference of opinion - or at least ambiguity - over what the term "public transportation" is intended to mean. The Chairman himself expressed a belief that "public transportation" means bus and

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9 Transcript excerpts are included as Exhibit "A" to WTS' Bench Memorandum [R 7391]. See also WTS Trial Memorandum [R 7454]. The full transcript was admitted as Plaintiff's Ex. 1, and the audio tape as Plaintiff's Ex. 2.

taxi service, with which Senator Jones himself appears to agree. It is only after the Chairman says, "and that could be very expensive. Without objection," that Senator Jones then interjects "we are looking at the bus." Senator Jones then later injects the concept of "government subsidies." The tape does not indicate the Chairman agreed with Senator Jones, or at least is ambiguous on that point.

Liner's evidence also included deposition excerpts of 7 witnesses [T 3] as well as 30 exhibits introduced into evidence. [R 7537-39][11].

B. **WTS' Evidence**.

WTS called five (5) fact witnesses and two (2) experts, and introduced Defendant's Ex. 1-27 as well additional judicially noticed materials [T4 to 5] [R 7539-42][R 3790][R 3424][R7275][T 564-76] and deposition transcripts. Liner's Brief respectfully does not accurately or completely summarize WTS' evidence[12].

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10 WTS had the official Florida State Archive materials on the LPA judicially noticed [R 3791][R 3014-3118], and these legislative history materials are silent to existence of this taped conversation. [T 569-70].

11 A disputed exhibit is a chart through which Liner contended it would cost him an average of $48.00 per day to ride a taxi cab to and from his WTS Broward County work sites, and between $19.05-$52.38 per day if Liner used a van pool. This chart, Plaintiff's Ex. 3 [T 289-92] does not reconcile with the evidence that WTS would not allow any day laborer to drop below minimum wage when all transportation and other deductions are taken into account. [T 325-26] F.S.§ 448.24(2)(b) does not permit a labor pool to pay below minimum wage.

12 On cross-examination, WTS established that Liner did not know which WTS job assignments he took the bus to. [T 307-08] At deposition [T-579], he admitted to simply guessing. [R. 3886] Liner's credibility is also suspect because he has been convicted of a felony [T 310-11] and lied about that in his

The first witness in the WTS case in chief was its CEO and President, Mark Lang. Lang testified that WTS read the LPA as requiring a comparison of the form of public transportation that will actually deliver the worker *to or from the designated worksite*, and WTS charged far less than that. [T 326-30] Lang established the geographic area serviced by the Broward Labor Hall is Tri-County, and that Lang had no idea what "*prevailing rate for public transportation in the geographic area*" means. [T 330] Lang denied Liner's contention that the transportation option election was forced by WTS upon day laborers. [T 332-33] Day laborers could take the van, ride in WTS carpool (which is nothing more than a pass through wherein the transportation fee was deducted from the day laborer who rode and paid to the day laborer who drove), take the bus, or otherwise get themselves to work. [T 331-33] The WTS policy was to charge $1.50 each way if the laborer voluntarily elected to utilize the WTS van or carpool, which WTS offered as a convenience. [Def. Ex. 3-4; T 335-37] The LT's judgment found that "WTS offered a van service to and from the jobsites or alternatively offered carpool," [R 7543], rejecting Liner's testimony that WTS forced a choice.

Lang further established that day laborers had to get to work on time. [T 33-32] The WTS "Employee Hours Worked" report for Liner [Def. Ex. 6, T 339-41][PL Ex. 29] was admitted, as were the exact addresses and work start times for

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WTS employment application [T311-12, Def. Ex. 1] and with the State of

Liner's jobsites. [Def. Ex. 7-8] [T341-43] The service area with respect to Liner, on a county by county basis, as well as the miles involved, was then graphically depicted on a chart which the LT admitted as Def. Ex. 10. [T 344-47]

Lang further refuted the contention put forth in Liner's Brief that WTS thought it appropriate to charge taxi fare to day laborers [T 354-57]. WTS lost money every year on transportation [T 331] after considering the very limited cost recovery from the $1.50 charges collected from day laborers. [T 333] Lang testified WTS had a $1.0 million bottom line and employed 22,000 workers. [T 323-25] Lang (as well as CFO, Mike Stanley), further testified that Liner's $177,000 in claimed statutory damages for an alleged overcharge of $265 represents about 17.7% of WTS company wide bottom line, with legal fees and costs of defense being $300,000 on top of that. [T 347-48] This amounted to 50% of WTS company-wide profits to defend Liner's single claim. Lang explained that a Liner $177,000 judgment would so negatively impact the P&L that a disfavorable audit opinion would result, and WTS would then lose its line of credit. [T 348-51] Lang testified the construction of the statute being urged by the Plaintiff would "put WTS out of business." The LT referred to these significant and punitive ramifications in its Judgment, and during the trial. [T 358-65]

Florida when he applied for catastrophic adjuster license [T312-14, Def. Ex. 2].

WTS next called its transportation expert, Molly Hughes. [Def. Ex. 11] [T 373] Hughes' expert report supporting her opinions was admitted Def. Ex. 19 [T 439], and the Hughes testimony [T 368-70] serves as competent substantial evidence in support of the LT findings of fact. Contrary to what Liner's Brief suggests, the LT did not defer to Hughes on how to construe the disputed transportation provisions in the LPA[13]. The LT ruled that "she can bring out -- I agree, she can't tell the court how to interpret the statute. But she can say simply what she did, what presumptions she traveled under [in fulfilling her expert engagement]". [T 376-77] What Hughes did[14], in addition to her expert report and supplemental report, was to annotate the Dolph's Tri-County Map which the LT both judicially noticed [R 7276] and admitted into evidence. [Def. Ex. 14][T387-89] This annotated Dolph's Map shows the location of all of Liner's WTS worksites to which he was charged $1.50 each way as taken from his Employee Hours Worked report [Def. Ex. 6], and in and of itself proves the geographic area that Liner actually worked was Tri-County in scope. The evidence supports the LT's finding as to Tri-County being the relevant *geographic area*.

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[13]The LT denied Liner's Motion to Exclude Hughes. [R3713][R3841-78]

[14] The only excerpted "Hughes opinion" that was included in Liner's Brief was the one elicited by Liner's own counsel in cross-examination; namely that there is not a "single prevailing rate" for public transportation in Broward County. [T 445] Hughes' excluded a ranking of ridership because this was not relevant to her work. [T 447-48] Hughes' testimony was uncontroverted because Liner had no transportation expert, as noted by the LT in its Judgment. [R 7545]

Hughes' expert assignment was also to: (i) identify the public transportation options available to Liner, and (ii) find out what the cost of those were so that the realistic options Liner had at the time he worked for WTS could be assessed. [T 375-76] With respect to *public transportation*, Hughes testified the *Transportation Planning Handbook 2nd Ed.* [Def. Ex. 12][T 380][R 7275-76] is an internationally used treatise on transportation planning which defines "public transportation" as having two components: *public transit*, meaning bus and rail, and *paratransit*, which includes carpools, vanpools, taxis, etc. [T 378-80] Hughes also went to the Florida Public Transit Act, F.S. § 341.031 and found a similar definition of public transportation [T 380-83] which the LT judicially noticed and admitted as Def. Ex. 13. [T 382-83][R 7275] Hughes explained the evolution of the difference between the term *public transit* and *public transportation* in her field of expertise to be that public transportation is inclusive of 15 or 20 different publicly available transportation elements, of which public transit is only one. [T 381]

With regard to *geographic area*, Hughes testified that public transportation systems in South Florida are managed on a Tri-County basis, citing as examples (i) the South Florida Regional Transportation Authority, (ii) the South Florida Vanpool Program run by VPSI, and (iii) the federal government's identification of the Tri-County as one metropolitan statistical area. [T 383-85] Hughes further testified that WTS records of Liner's job assignments, as summarized on that

annotated Dolph's Map, established Liner worked for WTS throughout the Tri-County Area [T 385-89], and the WTS labor hall had a Tri-County service area.

The remaining task Hughes had to perform to carry out her assignment was to route Liner's most cost effective public transportation option to get to a representative sampling of his WTS jobsites. [T 389] In short, the parameters Hughes employed included the necessity to get to work on time, and do it at the least possible cost, using any available modality of public transportation. [T 398 to 400] Hughes summarized applicable rate structures in effect between December 2002 and March 2004 on Table 1 of her expert report. [Def. Ex. 19][Def. Ex. 27] [T 576-79] For each of the 23 randomly selected Liner/WTS job assignments, Hughes summarized her work at Table 2 and 3 of Def. Ex. 19.[15] [T 411-25][T 393-95] Hughes assumed Liner would catch the very earliest bus available [T 395], and used actual WTS job start/end times. [T 396] Hughes chose the least costly option that would reach the sampled work sites on time. [T 397-99, 403-10]

Hughes conclusions, as reflected in Table 2-3 and page 24 of Def. Ex. 19, was that for 61% of the job assignments sampled (14 of the 23), Liner could not have reached the jobsite on time using just the bus, and Liner would have only been successful using only the bus during 39% of the time (9 of the 23). [T 423-24] Hughes also summarized Liner's average cost to utilize the public

transportation sampled in jobsites as $39.99 as reflected in Table 3 of Def. Ex. 19, but at no time did either Hughes or WTS argue this was the "prevailing rate".

Hughes testimony and expert report also addressed vanpooling as a comparable public transportation cost model available to Liner. [T 430-31] A key premise for viability of vanpool program is that Liner would be personally responsible for getting himself to work, which is the WTS transportation policy. [T 431-32] Hughes testified that vanpooling was public transportation and government subsidized. [T 432-34] Hughes applied vanpool costs to the 23 studied jobsite cases, utilizing actual mileage and gasoline cost. [Def. Ex. 19, Table 3B] Hughes concluded the total daily cost of a government subsidized vanpool program exceeded the $1.50 each way charged by WTS. [T 434-36]

Catherine McIntyre, the vanpool program coordinator, testified that VPSI provides vehicles to qualified drivers and a financially responsible person or employer. [T 169-72, 191, 198-99] McIntyre confirmed the vanpool program is "public transportation" by Federal definition. [T 203-04] McIntyre testified it made economic sense for a person making $40 to $60 a day to utilize a vanpool service. [T 177] The monthly charge for South Florida vanpools, after subtracting the $400 government subsidy, is $700 [T 177-78], which is then split among riders. [T 179] McIntyre said a labor pool would be approved if financially viable, and

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[15] Dr. Fred Raffa advised Hughes to select the first job assignment and every tenth

VPSI does not discriminate against day laborers. [T 213, 207][R 7088, 7052] McIntyre testified the monthly average per van passenger cost, for a van pool in South Florida, was $70 to $90 a month. [T 220-22] Liner's Brief mistakenly categorizes vanpool cost at between $400 and $1,100 per month, because this fails to take into account the ride sharing dynamic required by this form of public transportation (the car pool at WTS demonstrates such a daily ride-sharing commuting pattern). Hughes [Def. Ex. 19, Section II] determined actual, daily vanpool cost to a plaintiff with the $400 government subsidy to be $2.37 each way/$4.73 roundtrip with 5 riders [T 434-36] The Judgment made a finding of fact that this comparable form of public transportation exceeded what WTS charged.

William Sorrells, a Broward County Transit representative, established, *inter alia*, that: (i) the overall bus transit system in South Florida includes Dade, Broward, and Palm Beach, consistent with South Florida Regional Transportation Authority [T 474-75]; (ii) bus transit is not the only form of public transportation[16] in South Florida [T 475]; and (iii) there is an absence of bus routes within a significant portion of Broward County. [T 471-72] When the BCT, Palm Beach and Dade County Transit Map [Def. Ex. 15-17] are compared with the annotated

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assignment after that. [T 391-93] Liner did not challenge this methodology.

[16] Sorrells attested to other forms of public transportation, including taxis. [T 475]

Dolph's Tri-County Map showing Liner's actual WTS worksites [Def. Ex. 14], it is apparent that BCT public transit does not service many of Liner's jobsites[17].

The WTS Broward Branch Manager, Grady Booth, testified Liner arrived at the Labor Hall between 5:30 - 5:45 a.m. [T 486], the most common start times for jobs was 7:00 a.m., and on time arrival at the designated work assignment was a job requirement. [T 483-84] Booth confirmed it was a day laborer's responsibility to get himself to the job site. [T 487] The transportation charged by WTS was $1.50 each way, regardless of whether the trip was all the way to South Dade or North Palm Beach counties, as well as anywhere in Broward County. [T 490-92] Liner never complained of the charges. [T 492] The way carpool worked was that WTS uses its payroll system to effectuate payment of the $1.50 charged by the rider to the driver, with no portion of those monies being retained by WTS. [T 492-94] Laborers were never required to ride in a carpool or WTS van. [T 499, 495]

The last witness called by WTS was Michael Stanley, its CFO. [T 527] Stanley established the WTS net income or "bottom line" was $368,000 in 2002; $1,392,146 in 2003; and $925,890 in 2004. [Def. Ex. 23][T 528-30] Stanley also calculated the ratio of Liner's $265 actual damages/$177,000 in statutory damages as 667 to 1. [T 531] Stanley explained that the $177,000 statutory damage figure alone would be devastating to WTS because if 7-9 persons had claims similar to

[17] Palm Tran and Miami-Dade Transit provided similar evidence. [T 120-60]

Liner (WTS employed 1,500 in Broward per year [T 537], and 22,000 company-wide), the damages would exhaust WTS's entire net income for a year [T 532] and lead to bankruptcy. [T 533-34][T 535-36][T 539] Lang had earlier testified WTS would lose its line of credit upon receipt of an adverse audit opinion. [T 349-51] The testimony of Stanley and Lang constitutes substantial competent evidence in support of the devastating financial impact of Liner's statutory damage penalty.

Stanley also gave evidence concerning all the $1.50 charges collected from day laborers at the Broward County Labor Hall, which resulted in a WTS cost recovery of only $2,362 in 2002; $4,605 in 2003; and $371 for the first 3 months of 2004. [T 547][Def. Ex. 24, T 553] WTS cost recovery from $1.50 charges to day laborers covered only a fraction of the transportation costs. [T 559-60]. Taken together, all of the evidence submitted by WTS demonstrates there was no *exploitation* of Liner by WTS, and the LT made no finding of "exploitation".

The final evidence submitted by WTS were judicially noticed matters [T 564-76][R3790, R3424, R7275], including the official Florida State Archive materials relating to the LPA. [R 3015-3118] The Archive materials are silent concerning the LPA transportation provisions. Judicial notice was also taken of Florida House Bill No. HB 525. [R 3642-58][R 3793][T 571-73] Effective July 2006, F.S. § 448.24(1)(b) was amended, deleting "the prevailing rate for public transportation in the geographic area" and replacing it with "$1.50 each way."

II. THE LT'S FINAL JUDGMENT IN FAVOR OF WTS [R7543-49]

After application of findings of fact recited above, the LT logically set forth the rationale for its decision in sections entitled "What this Means," "The Constitutionality of F.S. 448.24 and 448.25," "Can Mr. Liner state a Claim of Liability Against WTS," and "Does the Carpooling Arrangement of WTS Take it Out of the Application of F.S. 448.24." The main points the LT made are:

1. For Liner to prevail on his claim, based on these facts, "public transportation" must mean travel exclusively by bus, as any other form of public transportation would be more expensive than that charged by WTS, and the "geographic area" must also be limited to Broward County [R 7545];

2. Determining whether a person of ordinary intelligence must guess at the meaning of this statute, a court must take into account civil penalties are significant and substantial for noncompliance [R 7545-46];

3. Ambiguities emerge with the meaning of "public transportation," and a reasonable person of ordinary intelligence would not have known the term "public transportation" meant only bus travel [R 7546];

4. The clause "prevailing rate for public transportation" surely means prevailing rate for *public transportation to the worksite*, as opposed to *public transportation anywhere in the geographic area*. As 60% of Liner's jobsites were not serviced by a bus route, one must compare the rates charged by WTS to a jobsite versus the cost of public transportation to the jobsite. A person of ordinary intelligence would not know the viability of public transportation in actually serving the jobsites is not relevant [R 7547];

5. The Legislature did not see fit to define "geographic area," which could mean the area serviced by WTS, or the worksites worked by Liner. A person of ordinary intelligence would not know "geographic area" can mean only one thing - county boundary. If that was what the Legislature meant by "geographic area," they should have said so. [R 7547];

6. It is impossible to determine prevailing rate when Legislature did not limit "public transportation" only to buses, and "public transportation" means *cost of public transportation to the jobsite*. [R 7547];

7. The punitive aspect of the statute is troubling, given a 2000 to 1 ratio of the $.50 cent overcharge to the civil penalty, and the 667 to 1 ratio of Liner's $265 actual damages compared with $177,000 in statutory damages. For statutory damages, this is excessive, and it amounts to punitive damages that so far outstrip the actual damage as to violate due process. Even more unsettling is that a plaintiff can pick his desired damage figure [R 7547-48];

8. F.S. 448.24 and 448.25 are unconstitutionally vague, and there is an unreasonable and arbitrary relation of damage to penalty [R7548];

9. Even if the statute is constitutional, WTS has no liability to Liner because (i) "public transportation" is not limited to bus travel, (ii) what is being compared is the $1.50 each way cost charged by the labor pool to deliver workers to the worksite, as compared to the cost of public transportation to deliver workers to the worksite, and (iii) "geographic area" in this case means Tri-County Area because that was the area serviced by WTS and the area in which Liner worked. Moreover, even if the Court were to find the geographic area to be Broward County, Liner's claim would still fail because of (i) and (ii). Even without findings (i) and (ii) above, Liner's claim fail because of finding (iii). [R 7548]

SUMMARY OF ARGUMENT

This Court's standard of review is deferential concerning the factual findings which the LT made, and de novo as to both statutory interpretation and unconstitutionality. The civil penalty imposed upon WTS renders this statute penal, not remedial in nature, so any ambiguity must be construed in favor of WTS. The LT properly applied the rules of statutory construction by, *inter alia*, considering "to and from the designated worksite" as part of the essential context in all of F.S. § 448.24(1)(b), and by considering the broad meanings of both "public transportation" and "geographic area" when viewed in light of its factual findings that are supported by competent substantial evidence. The LT's Judgment as to both facial and as applied unconstitutionality on vagueness grounds is correct

because the LPA's transportation provision failed to give WTS adequate notice of what conduct was prohibited, and that imprecision invited arbitrary and capricious enforcement by civil litigants such as Liner. The constitutional infirmity was compounded by the substantive due process violation that exists because of the unreasonable relation of actual damages to the severe statutory penalty, and the arbitrary manner the statute permits a plaintiff like Liner to determine his own damage amount without notice to WTS. The statute's ambiguities in not defining "public transportation," "geographic area," or "prevailing rate" left persons of ordinary intelligence without a way to know what the proscribed conduct was, much less comply with it, and the statute's ambiguities were far too great when compared with the devastating financial consequences to WTS if it "guessed wrong" in the manner the Judgment describes. This penal legislation fails in its purpose to establish uniform standards of conduct and practice for labor pools throughout the State, and the LT's Judgment invalidating it was correct.

The 4DCA properly affirmed on the basis, *inter alia*, that the LT's Judgment had succinctly summarized the vagueness problem with the transportation provision by focusing on the prohibition against *guessing at a statute's meaning.* The LT's Judgment should be affirmed in all of its stated respects, including but not limited to the void for vagueness determination of F.S. § 448.24(1)(b)(2003) adopted by the 4DCA, which the 2DCA followed. The fact the Florida legislature

itself fixed (post-July, 2006) the void for vagueness problem with its statutory amendment replacing "*but in no event shall the amount exceed the prevailing rate for public transportation in the geographic area*" with a reference to *"$1.50 each way*" supports affirmance.[18] The LT's Judgment properly construed, and then declared unconstitutional, F.S. §448.24(1)(b)(2003)[19], and the correctness of its void for vagueness determination has been upheld by two District Courts.

ARGUMENT

III. STANDARDS OF REVIEW, PRESUMPTIONS AND PRINCIPLES OF CONSTRUCTION APPLICABLE TO THIS APPEAL.

A LT must examine the application of a statute being challenged for vagueness in light of the facts at hand. Jean v. State, 764 So.2d 605, 607 (4th DCA 1999). This Court's standard of review in assessing the factual findings in the LT's Judgment is to determine whether they are supported by competent evidence. Saporito v. Saporito, 831 So.2d 697 (Fla. 5th DCA 2002). The standard of review for the LT's and 4DCA's conclusions of law and statutory construction is *de novo*. Maggio v. Florida, 899 So.2d 1074 (Fla. 2005). The issue of facial

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18 Judicial notice of this statutory amendment is proper because this appeal is "a subsequent proceeding." Department of Revenue v. Florida Home Builders, 564 So.2d 173 (Fla. 1st DCA 1990); Ellsworth v. Ins. Co. of N. Am., 508 So.2d 395 (Fla. 1st DCA 1987). The amendment is also a "legislative fact."

19 The LT also held F.S. §448.25 to be unconstitutional, it being §448.25 that provides the statutory damages penalty for a violation of §448.24(1)(b). The 4DCA did not agree that §448.25 is unconstitutionally vague, but it is clear that both the LT and 4DCA relied upon the interplay between the two statutes. WTS urges this Court to affirm the LT insofar as that interplay is concerned.

constitutionality is here a mixed question of fact and law. Bush v. Holmes, 886 So.2d 340, 345 (1st DCA 2004); State v. Pres. Women's, 884 So.2d 526, 530 (4th DCA 2004). To determine constitutionality, this Court begins by using the facts established by the LT. Here, because the LT ruled on the constitutionality of the statute following a trial, the LT's ultimate ruling is subjected to de novo review, but the factual findings must be sustained if supported by competent evidence. N. Fla. Women's Health v. State of Florida, 866 So.2d 612, 626-27 (Fla. 2003).

WTS does not agree with Liner that the LPA is remedial legislation[20], but instead contends it is a penal statute subject to strict construction that cannot be extended by interpretation. [R 2943,¶57][R-599,¶27] The Judgment does not address whether it is remedial or penal, but the LT did label it a "confiscatory statute that has excessive fines" [T 361], and the Judgment makes findings about the "punitive aspect" of the "civil penalties that are significant and substantial" and which had such an "excessive relationship to actual damages as to violate due process". [R 7545-48]. The 4DCA expressly found the $1,000 fine provision in F.S. §448.25 makes the statute penal in nature. Liner, 962 So.2d at 346. Such findings support the LPA's civil penalties for transportation related violations being considered penal and not remedial, thereby requiring any ambiguity to be

[20] Remedial purposes do not immunize an enactment from constitutional infirmity. Shevin v. International Inventors, 353 So.2d 89, 92-93 (Fla. 1977).

construed in favor of WTS as the defending party. Diaz v. Fla. Election, 857 So.2d 913, 917 (Fla. 3rd DCA 2003).

The Supreme Court recognized the rationale for this rule is that fair warning must be given to the world in language the common world will understand of what the law intends to do if a certain line is passed. Mourning v. Family Publication, 411 U.S. 356, 375-76 (1973). Strict scrutiny is applied to civil statutes of a penal nature. Fla. Industrial v. Manpower, 91 So.2d 197, 199 (Fla. 1956); Diaz, 857 So.2d at 917; Allure v. Lymberis, 173 So.2d 702, 704 (Fla. 1965). A penal sanction is no less penal simply because it imposes "civil", not criminal, penalties, provided it seeks to punish violations to deter conduct. The 4DCA Opinion labeled it a "statutory hammer designed to deter non-compliance with the statute".

The premise that courts are bound to resolve doubts as to the validity of a statute in favor of its constitutionality *also requires that a statute be given a fair construction that is consistent with the federal and state constitutions, as well as with the legislative intent.* Sunset Harbour v. Robbins, 914 So.2d 925, 929 (Fla. 2005). The void-for-vagueness doctrine is a basic tenant of constitutional law. *See U.S. Const. amend. XIV; Art. I, §9, Fla. Const*. A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement. Southeastern Fisheries v. Fla. DNR, 453 So.2d 1351, 1353 (Fla. 1984). An

enactment is void for vagueness if its prohibitions are not clearly defined. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

In deciding a statute's constitutionality, that construction is favored which gives effect to every clause and every part of the statute. Snively v. Mayo, 184 So. 839, 841 (Fla. 1938). Legislative intent is the polestar that guides the court's inquiry, and legislative intent is determined primarily from the language of a statute. Nettles v. State, 850 So.2d 487, 493 (Fla. 2003). The LPA's "Legislative Intent" provision states as follows:

> 448.21 Legislative intent. - The Legislature defines that this part is necessary to provide for the health, safety and wellbeing of day laborers *throughout the state* and *to establish uniform standards of conduct and practice for labor pools in the state*, and this part shall be carried out in accordance with this purpose. (emphasis added).

When interpreting a statute, "courts must determine legislative intent from the plain meaning of the statute." Aramark v. Easton, 894 So.2d 20, 23 (Fla. 2004). The court should glean the legislative intent from, *inter alia*, a consideration of the Act as a whole, the language of the Act, and the state of law already in existence bearing on the subject, and give that construction which comports with the evident legislative intent. Foley v. Gordon, 50 So.2d 179 (Fla. 1951).

IV. F.S. § 448.24(1)(b) AND F.S. § 448.25(1)(2003) ARE UNCONSTITUTIONALLY VAGUE AND VIOLATIVE OF SUBSTANTIVE DUE PROCESS, BOTH FACIALLY AND AS APPLIED, FOR REASONS STATED BY THE LT IN ITS JUDGMENT AND IN THE 4DCA OPINION.

A. The LT's conclusions in its Judgment were correct.

The LT properly rejected the "subjective prong" versus "objective prong" statutory construction advanced by Liner, recognizing that Liner had to win on both his *"public transportation" only means bus* and *"geographic area" only means Broward County* arguments in order to prevail. Such a construction was incongruent with the LT's factual finding that the transportation rate charged by WTS ($1.50 each way/$3.00 round trip) to reach Liner's 234 worksites throughout Tri-County area was cheaper than the rate of any other form of available public transportation serving these three counties. The LT at no point ruled that WTS could charge taxi or limousine rates, but did find it was not proper to evaluate WTS charges solely by reference to a bus when WTS had proven the bus would not get Liner to his designated worksites 60% of the time. The LT also found the "prevailing rate" measure to be unworkable, its ambiguity being added to that of "public transportation" (which the LT agreed must be able to get to the worksites) and "geographic area." The statute required WTS to guess at what a proper "prevailing rate" would be for the "geographic area". Contrast this with the clear standards the LPA §448.24 imposes regarding the amount labor pool companies may charge for clothing, equipment or food – *market value or actual cost.*

As for the impact of a $177,000 in civil penalties plus costs, the LT found the punitive aspect of the statute troubling because: (i) Liner only claims an overcharge of $0.50, but the statutory penalty for each occurrence is $1,000,

resulting in a 2000 to 1 penalty to damage ratio; and (ii) Liner only claimed $265 in actual damages, but his penalty to damage ratio is 667 to 1. The LT found this to be unreasonable and excessive so as to amount to punitive damages that so far outstrip the actual damage as to violate due process. The LT's due process violation was further supported by its finding that the statute empowered Liner to arbitrarily pick his own desired damage figure, without notice to WTS. The LT's vagueness determination and the substantive due process violation are both supported by the lack of a definite or clear warning as to what the statute proscribes or the amount of its penalties. This impermissibly enabled Liner to "cherry pick" both his geographic area and his damages to fit whatever mode of public transportation (in this case, a BCT bus) was necessary for his legal case. This did not comport with the "uniform standards of conduct and practice for labor pools in the state" which F.S. § 448.21 called for, particularly when *geographic area* does not necessarily mean *county* in many areas of the state, and many geographic areas do not have bus service that would reach day laborer worksites.

The premises advanced by the LT were correct, and applied proper statutory construction principles, by (i) giving full effect to the critical *to and from the designated worksite* provision, rather than viewing it in isolation, and (ii) presuming the legislature considered and intended the broad definition of "public transportation" found in other Florida statutes. The LT appropriately rejected

Liner's attempts to substitute the statutory term *bus* for *public transportation* and to replace *geographic area* with *county*, but instead construed the statute as written to support a finding in favor of WTS on both unconstitutionality and no-liability grounds. The LT found the ramifications on WTS were significant, given that WTS has a $1.0 million bottom line and - like other labor pool companies - operates on thin margins and depends on credit lines to survive. The evidence presented by WTS at trial was that bankruptcy would result from a judgment in favor of Liner alone, with aggregation of statutory damage penalty exposure from other individual day laborer cases – either individually or in a putative class action like the one Liner brought - being identified as a real and present threat. See Tampa Service Co. v. Hartigan, supra (4DCA *affirmed* an LPA class certification).

B. The relevant transportation charge under the LPA.

The LT properly found the Tri-County Area to be both where Liner worked and where WTS serviced, and rejected the notion that Liner could, by pleading, mandate the geographic area, the comparable mode of public transportation, and/or the prevailing rate in order to support his own theory of liability. WTS had its own pleadings (a Counterclaim for Declaratory Relief, and an Answer) that contended otherwise, and the LT ruled these were contested issues to resolve at trial.

In construing a statute, effect must be given to every part, if it is reasonably possible to do so; each part or section should be construed in connection with

every other part or section so as to produce a harmonious whole. Ozark v. Pattishall, 185 So. 333, 337 (Fla. 1939). Statutory terms are not to be read in isolation, but rather in the context of the entire section, and in harmony with interlocking statutes. WFTV v. Wilken, 675 So.2d 674 (Fla. 4th DCA 1996). A statute should be interpreted to give effect to every clause in it. Jones v. ETS, 793 So.2d 912, 914-15 (Fla. 2001). In construing two subsections of the same statute, the subsections are to be read *in pari materia* (i.e., "construed together"). Payne v. State, 873 So.2d 621-22 (Fla. 2nd DCA 2004). "*Ejusdem generis*," which means "of the same kind," is a maxim providing that where an enumeration of specific things is followed by some more general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated. Eicoff v. Denson, 896 So.2d 795, 798 (Fla. 5th DCA 2005).

The LT Judgment is consistent with the foregoing statutory construction principles, and appropriately rejected the premise advanced by Liner that the first and second clauses of F.S. § 448.24(1)(b) are to be read separately. The LT read "*but in no event shall the amount exceed the prevailing rate for public transportation in the geographic area*" in context with the more specific "*transport a worker to or from the designated worksite*" part that preceded it. The first part, being more specific as to what public transportation was to be compared, is appropriately read into the construction of the second part so that the entire section

is *in pari material* (construed together) and in harmony. As a matter of statutory interpretation, the LT rightly construed the two portions of the same section together, and Liner's Brief is not correct to construe them in isolation and/or apart. WTS disagrees with the notion that two separate and distinct clauses are even present in F.S. § 448.24(1)(b). WTS has instead argued from the outset of this case that "to and from the designated worksite" must be read and construed as part of the "prevailing rate for public transportation in the geographic area" .

Liner essentially conceded below that WTS did not charge more than a "reasonable amount to transport Liner to or from the designated worksites." Liner even attempted to bar WTS from presenting evidence as to the reasonableness of its charges before trial, and objected to the introduction of such evidence throughout the trial. When considering what "the amount exceed the prevailing rate for public transportation in the geographic area" means, it must necessarily be defined by the "amount to transport a worker to and from the designated worksite."

C. "Public transportation" does not exclusively mean "public bus."

The LT's statutory analysis, as reflected in its Judgment, also began at exactly the right place; namely, the meaning of "public transportation". The LPA does not define "public transportation," so the LT was correct in resorting to other Florida Statutes where "public transportation" is broadly defined. When the legislature uses the same word or phrase even in different chapters of the Florida

Statutes, it is presumed to have intended the same meaning. Florida v. Robertson, 614 So.2d 1155, 1156 (4th DCA 1993). There is a presumption that the legislature passes statutes with knowledge of the other existing statutes, and that the lawmakers know the meaning of the words they use in the statutes and intended to use the precise words employed. Id. *See also* McCollam v. McCollam, 612 So.2d 572, 573-74 (Fla. 1993); State v. Mitro, 700 So.2d 643, 645 (Fla. 1997); Holmes Co. Sch. Bd. V. Duffell, 651 So.2d 1176, 1179 (Fla. 1995). The LT's Judgment recites the fact that F.S. § 163.566(8) defines "public transportation" broadly, including means of common carrier, and then specifically states:

> Other definitions can be found sprinkled throughout Florida Statutes. See, for example, F.S. § 343.62(5) and F.S. § 341.031(5). These are definitions created by the same Legislature that created the LPA. Not one of them limits public transportation to bus service. . . . It seems clear that if the Legislature meant public transportation to mean bus service, they would have said so." [R 7546]

The LT's "public transportation" definition was also entirely consistent with the Transportation Planning Handbook excerpt admitted into evidence as Def. Ex. 12 through Hughes. Established law permits a statutory term to be defined by reference to common usage in an industry. Intern. Med v. State Mut., 604 So.2d 505, 509 (Fla. 1992). Hughes testified as to the evolution of the term "public transportation" to include fifteen or twenty modalities of publicly available transportation elements, of which *public transit* is only one. [T 381-82].

The references in Liner's Brief to "taxis and limousines" as indicative of the LT's concept of comparable door-to-door "public transportation" is misleading,

the Judgment making only a rhetorical reference to "cabs?" after posing the question "what is the measure of prevailing rates then?" The WTS' transportation expert used the "reasonable" criteria from F.S. § 448.24(1)(b) to mandate that the least expensive mode or combination of public transportation modes that could get a day laborer "to or from the designated worksite" on time be utilized. 39% of the time it was the public bus, but 61% of the time was the bus in combination with other modes of public transportation, including walking. The LT rejected Liner's position that a person of ordinary intelligence would know that the viability of "public transportation" is irrelevant, or that the comparison is to any bus route, regardless of whether it can service the job site. Of critical importance to the LT's determination in this regard is that the legislature could have used the narrow term - bus - instead chose the broader term – public transportation. The legislature is presumed to know meaning of words and to have expressed its intent by use of the words in the statute, legislative intent to be determined primarily from the language of the statute as enacted. Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

The position Liner advanced is that the LT should ignore whether a bus actually serviced the designated worksite that Liner was transported to. The LT found Liner's reading of the statute to be a strained one because the first part of F.S. § 448.24(1)(b) clearly deals with transportation of the worker "to or from designated worksite". Even if this Court disagrees that "public transportation" is

not exclusively confined to a bus, the LT's factual findings were that WTS charged day laborers a transportation cost rate: (i) less than any other form of public transportation in the Tri-County Area; and (ii) equal to or less than the cost of bus fare for inter-county travel from the WTS labor hall. The LT's ruling is in accordance with the LPA's legislative intent, per F.S. § 448.21, to "establish uniform standards of conduct and practice for labor pools in the state." The LPA does not only apply to large urban counties with bus systems. This Court must consider how the statute would apply elsewhere in the State, particularly when the term "geographic area" was used in the statute instead of the term "county." [21]

Liner is wrong in suggesting that "public transportation," as used in the LPA, only applies to "the publicly-owned or regulated transit system." The only evidence advanced by Liner for this premise is 30 seconds worth of audio taped Judiciary Committee hearing conversation. In surveying legislative history, "passing comments of one member" of the Legislature, "casual statements from … floor debates" and other such colloquies represent, at best, the understanding of the individual legislators, and such oral statements cannot be elevated above enacted language in determining the meaning of the statute. Zuber v. Allen, 396 U.S. 168, 186 (1969). The understanding of an individual legislator regarding the legislative

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21 Liner's Brief also advances several dictionary definitions of "public transportation," as well as a dictionary definition of "geographic," that were

intent behind a particular statute is not controlling, even where the remarks are made by a sponsor of the bill at issue. General Dynamic v. Cline, 540 U.S. 581, 599 (2004); State v. Sandfer, 226 P.2d 438, 442 (Ok. 1951). The legislative body speaks through its asserted action as shown by its vote. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993); Barlow v. Jones, 294 P. 1106, 1107 (Ariz. 1930). Legislative intent should be derived primarily from the language of the statute in the form enacted. Thayer, 335 So.2d at 816-17. The LT correctly gave the taped conversation little weight [T 617, 649-58, 687-89], particularly when unsupported by the official record. [T 569-70-76][R 3791][R 3014-3118]

D. "Geographic Area" is not "County, " and "Prevailing Rate."

After broadly defining "public transportation" and then limiting consideration to public transportation that would actually deliver a worker "to or from the designated worksite", the LT's "prevailing rate" assessment dealt with the meaning of "geographic area." The LT found that (i) WTS serviced the Tri-County Area, which is where Liner worked; and (ii) WTS only charged $3.00 roundtrip for jobsites as far south as Coral Gables and as far north as Boynton Beach, substantially below the cost of any available "public transportation". [R 7543-47] Liner's Brief suggests that a "geographic area" has boundaries, and arbitrarily suggests Broward County is the only relevant geographic area in this

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never judicially noticed by the LT. [R7275 to 7277, R3792-93, R3424-26](only

case. The LT's findings of fact refute this. This Court can visualize that evidence in Def. Ex. 10 and Def. Ex. 14, which depicts where Liner's WTS jobsites were located. Def. Ex. 6-9 identifies these worksites and provides exact addresses. The LT recognized in its Judgment that no person of ordinary intelligence would know that "geographic area" can mean only one thing - county boundaries. The legislature clearly knows what a "county" is, yet chose not to use that term in the statute. The evidence at trial established the "geographic area" was Tri-County. There are 67 counties in Florida, and many labor halls have service territories that cross county lines; the LT was correct that a person of ordinary intelligence could not possibly know "geographic area" could mean only "county boundaries."

The LT's Judgment also correctly dealt with the determination of "prevailing rate," noting that each one of Liner's jobsites would have a different rate because (i) "public transportation" means the cost of public transportation to the jobsite, and (ii) the legislature did not limit "public transportation" exclusively to buses. Liner's Brief speculates the legislature must have intended to *expand* the scope of comparison, and then wrongly argues the terms "public transportation" and "public transit" are near equivalent. Hughes explained the evolution of the distinction between "public transit" and "public transportation," "public transit" being a term used for a bus and/or rail fixed route system, while "public

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the term "public" was judicially noticed by Liner [R3791, ¶ 1]).

transportation" includes "public transit" and "paratransit.[22] " [T 381-83] Liner's Brief argues "the only possible alternate meaning for "public transportation" is suggested by Chapter 341, which addresses 'public transit'", but Liner's argument fails because that statutory term by definition includes the "paratransit."[23]

Liner's Brief also fails to acknowledge the LT's Judgment did not set a "prevailing rate", but instead found such a rate setting would impose an impossible burden on WTS. WTS supported the reasonableness of its transportation charge at trial,[24] and the LT made separate findings that the rate charged by WTS was cheaper than the rate of any other form of Tri-County public transportation [R 7545]. Once the LT made these determinations, it was not necessary to declare what the "prevailing rate" was in its Judgment. The key determination was that WTS could not have exceeded the "prevailing rate" based on the other factual and legal findings that were made, and the LT had even declared the statute to be unconstitutionally vague because of ambiguities associated with "public

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22 Hughes cited to the Florida Public Transit Act, F.S. § 341.031 [Def. Ex. 13], and the Transportation Planning Handbook [Def. Ex. 12] [T 380].

23 Liner's own Initial Brief concedes "paratransit" is defined in F.S. § 341.031(5), and includes, taxis, limousines, "dial-a-ride," buses, and other demand responsive operations that are characterized by their non-scheduled, non-fixed route in nature." The Florida Public Transit Act supports the Judgment.

24 Lang [T 321-68], Booth [T 482-500], Irizzary [T 500-02], Cizenski [T 90-102], and Stanley [T 526-63] demonstrated that WTS provided transportation at $1.50 each way for far less than it cost WTS, and Liner himself admitted that WTS charged less for transportation than the other labor halls. [T 298, 303-304]

transportation," "geographic area" and "prevailing rate".[25] Liner's Brief is not correct when it states the WTS expert "permits charges of over $30.00 by her door-to-door analysis" when Hughes herself declined to equate Liner's average public transportation cost with "prevailing rate." What Table 3 from Def. Ex 19 illustrates is the average cost of the most reasonable and cost effective mode of public transportation that would get Liner to his designated worksites on time; the LT was not urged by either Hughes or WTS to accept this as a "prevailing rate". The LT found there was no single 'prevailing rate" when it correctly interpreted the statute to include the concept of "to or from the designated worksite" in determining "the amount" that "cannot exceed the prevailing rate for public transportation in the geographic area." The LT found this placed an impossible burden on WTS to determine what a "prevailing rate" would be. [R 7547]

The LT is clearly not embracing cabs or limousines as a measure of prevailing rate. The LT was correct in observing that "prevailing" does not modify "public transportation," it modifies rate [T 646-48]. The LT also observed there are different dictionary definitions for the term "prevailing." [T 646-47] Liner's reasoning that a prevailing rate in a geographic area must be the most "frequent" or common one is an argument the LT appropriately rejected when it considered F.S.

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[25] WTS denies that Liner was "aggrieved" as per F.S. § 448.25(1) and the judicially noticed definition of the term. [R 7276] The WTS Counterclaim

§ 448.24(1)(b) as a whole. The purportedly analogous state and federal statutes in Liner's Brief are not comparable to the situation presented here because these statutes involve an administrative agency or third party setting the "prevailing rate" in a specified fashion[26]. The failure of the legislature to incorporate a system for determining a "prevailing rate" within the LPA renders F.S. § 448.24(1)(b) unconstitutionally vague. The setting of a "prevailing rate" for the Tri-County geographic area was never the WTS burden, and the LT declined any invitation to set a "prevailing rate" as well. Instead, the LT rightly exonerated WTS by making factual and legal findings that the $1.50 each way rate charged by WTS cost Liner less than any viable proven form of "public transportation" in the relevant Tri-County "geographic area". Liner's premise that "prevailing rate" means *most used* from a ridership standpoint is merely an incorrect *guess* on Liner's part.

E. The LT's Void for Vagueness Determination is Correct.

The ambiguities which the LT's Judgment ably identifies, coupled with the conflicting statutory interpretations and evidence that required this extensive record and appeal to resolve, illustrate that F.S. § 448.24(1)(b) and § 448.25 are void for vagueness under the Due Process Clause of both the Federal and Florida

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[R599, ¶ 28-29] and trial argument [T 568, 710-12] was that Liner received door-to-door transportation for far less than what it cost WTS to deliver it.

26 In contrast, the federal Davis-Bacon Act sets out a uniform procedure for determining the "prevailing wage." See 40 U.S.C § 3141-47 (2000). See also

Constitution by reason of the legislature's failure to give persons of common intelligence and understanding adequate warning or fair notice of the proscribed conduct, both facially and as applied to the factual findings that the LT made. [R 7543-48] The Judgment correctly articulates the standard for testing a civil statute with significant penalties for vagueness, citing Sieniarecki v. State, 756 So.2d 68 (Fla. 2000); Zerweck v. State, 409 So.2d 57 (Fla. 4th DCA 1982); D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977); Linville v. State, 359 So.2d 450 (Fla. 1978). Although the LT's facial and as-applied unconstitutionality rulings are subject to *de novo* review, the predicate factual findings must be sustained if supported by legally sufficient evidence. N. Fla. Women's v. State, 866 So.2d at 626-27.

A vague statute, because of its imprecision, may (and does here) invite arbitrary and discriminatory enforcement. Southeastern Fisheries v. Fla. DNR, 453 So.2d 1351, 1353 (Fla. 1984). The statute must convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Brown v. State, 629 So.2d 841, 842-43 (Fla. 1994). A statute is not sufficiently definite if a person of common intelligence must speculate about the statute's meaning and be subject to a penalty if the guess is wrong. Whitaker v. Dept. of Ins., 680 So.2d 528, 531 (Fla. 1st DCA 1996). If a statute's meaning cannot be ascertained by reading it, the statute can be unconstitutionally vague.

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41 U.S.C. §351 (2000)(Federal Service Contract Act provides that Dept. of

A.B.A v. Pinellas Park, 366 So.2d 761, 763 (Fla. 1979). This Court explained: "[t]he underlying principle is that no man shall be held responsible for conduct which he could not reasonably understand to be proscribed. The vice of vagueness in statutes is the treachery they conceal in determining what persons are included and what acts are prohibited." State v. Barquet, 262 So.2d 431, 434 (Fla. 1972).

In addition to procedural due process, substantive due process may be implicated by vagueness. Chuck v. Homestead, 888 So.2d 736 (Fla. 3rd DCA 2004). Under the vagueness doctrine, a statute violates the federal Due Process clause where its language does not convey a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices so that he or she may act accordingly. Bama v. US, 112 F.3d 1542, 1547 (11th Cir. 1997). In a vagueness challenge, if arbitrary or discriminatory enforcement is found to be likely, the court need not "resort to dictionaries or to present a parade of hypothetical horribles" in reaching its conclusion. Brown, 629 So.2d at 842.

The findings of fact in the LT's Judgment support the legal conclusion that F.S. § 448.24 and § 448.25, when construed together, are unconstitutionally vague. The LPA's failure to define "prevailing rate", "public transportation" or "geographic area" does not provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and arbitrary and

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Labor will set the "prevailing rate" for those who furnish services to agencies).

discriminatory enforcement is encouraged due to the lack of legislative guidance. See Posely v. Eckerd Co., 433 F.Supp.2d 1287 (S.D. Fl. 2006); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The statutory language must "provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice." Warren v. State, 572 So.2d 1376, 1377 (Fla. 1991). Due Process requires that legislatures set reasonably clear guidelines for triers of fact in order to prevent arbitrary and discriminatory enforcement. Smith v. Goguen, 415 U.S. 566, 572-73 (1974). WTS was compelled to spend hundreds of thousands of dollars in the defense of this case [T 348] because of the ambiguities the LT's Judgment identifies. The prohibition against *guessing at a statute's meaning* means a person of ordinary intelligence: (i) would not know the definition of "public transportation" was limited solely to bus service (*the LT found it is not*); (ii) would not have known viability of "public transportation" in terms of ability to actually get the designated worker to and from the worksite was irrelevant (*the LT found it is not*); (iii) would not have known the "geographic area" can mean only one thing - county boundary (*the LT found it does not*); and (iv) would not have known to define "prevailing rate" as most used in Broward County (*the LT found this was not a correct construction of "prevailing rate"*). [R 7546-47]

Throughout his Brief, Liner contends that it is WTS that was complicating and reading words into F.S. § 448.24(1)(b), suggesting the LT's purported

misinterpretation of the same "results in the Act being unworkable, absurd and a violation of notice and due process." Liner has it the other way around. What Liner is urging this Court to do is essentially amend the unconstitutionally vague statute by construction, which is prohibited. State v. Wershow, 343 So.2d 605, 607-08 (Fla. 1977). Vagueness is illustrated by a comparison to Florida's present version of F.S. § 448.24(1)(b) which replaced the "*prevailing rate for public transportation in the geographic area*" with "*$1.50 each way.*" Both Georgia and Illinois have sufficiently definite transportation provisions in their LPAs because they prohibit the charging of any fee at all. See Code of Georgia § 34-10-2; § 820 ILCS 175/20. F.S. § 448.24(1)(b) did not apprise WTS or other labor companies what the prohibited conduct was, and the LT's Judgment correctly found the LPA is subject to arbitrary and selective enforcement by civil litigants.

F. LT's Substantive Due Process Determination is Correct.

The LPA's statutory damages of $1000 per violation were correctly found in the LT's Judgment to constitute an excessively punitive civil penalty that so far outstrips the actual damages as to violate due process. [R 7547-48] The LT found, and Liner did not disagree, that WTS did not charge more than a "reasonable amount" to transfer Liner to or from the designated worksite. WTS therefore clearly did not engage in reprehensible conduct. For WTS to be subjected to bankrupting civil penalties when the prohibited conduct was never adequately

defined, and Liner himself had the arbitrary power to determine his own amount of damages, is the injustice substantive due process is intended to prevent.

The LT's Judgment appropriately found F.S. § 448.24 and F.S. § 448.25 to be unconstitutional as violative of the substantive Due Process Clause of the Federal and Florida Constitutions. The Due Process Clause of its own force prohibits the States from imposing "grossly excessive" punishments. Cooper v. Leatherman, 532 U.S. 424, 434 (2001). Where a civil penalty award will bankrupt or financially destroy the defendant, it is constitutionally excessive. Hockensmith v. Waxler, 524 So.2d 714 (Fla. 2nd DCA 1988). Constitutional jurisprudence dictates that a person not only receive fair notice of the conduct that would subject him to punishment, but also the severity of the penalty which may be imposed for such conduct. On reason a punitive damage award may be categorized as "grossly excessive" and violative of the 14th Amendment *is lack of fair notice*. This means WTS void for vagueness and excessive penalty constitutional challenges must be considered cumulatively, which the LT did by making findings of vagueness, excessive penalty and arbitrary power to civil litigants to determine their own civil penalties. The substantive Due Process Clause of the 14th Amendment and Article I, § 9 of the Florida Constitution focus on both notice of proscribed conduct, as well as severity of civil penalty. *See* BMW v. Gore, 517 U.S. 559 (1996).

Liner's Brief acknowledges that there can be circumstances in which statutory damages might be so large and disproportionate as to violate substantive due process, citing St. Louis v. Williams, 251 U.S. 63 (1919). *See also* Southwestern Teleg. v. Danaher, 238 U.S. 482 (1915). There is no reason to distinguish severe statutory civil penalties from punitive damages awards where (as here) the statute provided wholly inadequate notice of the severity of the significant and substantial penalties to which WTS was subjected when Liner decided to arbitrarily seek an excessive damage award in an amount that was entirely dictated by his own statutory construction. State Farm v. Campbell, 538 U.S. 408 (2003) and BMW v. Gore are just as applicable in this context because a bankrupting statutory damages award is out of all reasonable portion to the actual harm caused by the WTS conduct[27]. *See* In re: Napster, 2005 W.L. 1287611 (N.D. Cal. 2005)(citing Parker v. Time Warner, 331 F.3d 13, 22 (2nd Cir. 2003); In re Trans Union, 211 F.R.D. 328, 350-51 (N.D. Ill. 2002). Grossly excessive penalty concerns, on substantive due process grounds, are of particular concern in class actions, where the aggregation of individual claims "may expand the potential statutory damages suffered so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages". Parker, 331 F3d at 22.

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[27] There was no harm, because Liner received door-to-door transportation at $1.50 each way, which is less than its actual cost, and less than any comparable form of public transportation that would actually get him to the worksite on time.

See also London v. Wallmart, 340 F.3d 1246, 1255, n. 5 (11th Cir. 2003); Ratner v. Chemical Bank, 54 F.R.D. 412 (S.D.N.Y. 1972). Klay v. Humana, 382 F.3d 1241 (11th Cir. 2004), the case relied upon in Liner's Brief to dispute this premise, is distinguishable because no evidence of financial impact was introduced. In Liner v. WTS, a trial was conducted and factual findings were in fact made.

The Judgment found that Liner's civil penalty ($1,000) to damage ($0.50) ratio was 2000 to 1, and his statutory damage ($177,000) to actual damage ($265) ratio was 667 to 1. [R 7544] The Judgment found that Liner sought class certification to represent claims of at least 1,500, and potentially all, 22,000 WTS laborers. [R 7545] The LT found WTS to be a company with net revenues in 2004 of just under $1,000,000 [R 7545], and held that "[f]or a statutory damage, this is excessive. It amounts to punitive damages that so far outstrip the actual damages as to violate due process. What is even more unsettling is empowers the plaintiff to pick his desired damage figure. . . . and grant the plaintiff the arbitrary power to determine the amount of his damages." [R 7548] The Judgment elsewhere described the civil penalties as significant and substantial [R 7546], and the LT elsewhere found a ruling for Liner would put WTS out of business. [T 358-65]

BMW held a ratio of 500 to 1 is "clearly outside the acceptable range and a ratio of 145 to 1 is grossly excessive." The LT properly applied the BMW guideposts in this case, and the LPA did not forecast that such bankrupting

statutory damage exposure to WTS would flow from a reasonable $1.50 charge for door-to-door transportation throughout the Tri-County area.

V. THE 4DCA DECISION ADOPTING THE F.S. § 448.24(1)(b) VAGUENESS DETERMINATION MADE BY THE LT IS CORRECT.

The 4DCA Opinion reported at Liner v. WTS, 962 So.2d 344 affirmed the LT's Judgment insofar as it held F.S. § 448.24(1)(b)(2003) to be unconstitutionally vague. The 4DCA declined to address the rest of the LT's Judgment, presumably because the application of a facially unconstitutional statute constitutes fundamental error. BC v. DCF, 864 So.2d 486, 491 (Fla. 5DCA 2004). The 2DCA followed Liner v. WTS in Pollard, 2007 WL 2963816, so now two District Courts have joined the 2006 Florida legislature in recognizing § 448.24(1)(b)(2003) to be constitutionally infirm. *See* Chapter 2006-10, Laws of Florida, which amended § 448.24(1)(b) to replace problematic language with "no more than $1.50 each way." Lowry, 473 So.2d at 1250 (court has right, in arriving at the correct meaning of prior statute, to consider subsequent legislation); Florida Home Builders, 564 So.2d at 173 (judicial notice of statutory amendment proper).

The 4DCA began its analysis by finding the $1000 per violation fine imposed in § 448.25[28] makes § 448.24(1)(b) penal in nature. The 4DCA then observed that much of the evidence "went to the difficult issue of how to define the

[28] In Opinion footnote 2, the 4DCA found § 448.25, by itself, was not unconstitutionally vague. The vagueness holding was as to § 448.24(1)(b).

terms "reasonable amount," "prevailing rate," and "geographic area" contained in § 448.24(1)(b). The 4DCA then states that because the 4DCA held the statute to be unconstitutionally vague, it did not address the LT's rulings on these issues. Instead, the 4DCA expressly adopted the analysis of the LT on the void-for-vagueness issue, relying upon D'Alemberte v. Anderson; 349 So.2d 164 (Fla. 1977); Grayned, supra; Brown, supra; and Whitaker, supra.

The 4DCA went on to hold that three terms in § 448.24(1)(b) have the same constitutional deficiency as the phrase "public housing facility" in Brown. The first problematic term the 4DCA identified was "reasonable amount," noting that it is not precise enough to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. Liner's Brief suggests that the 4DCA erred by even addressing the "reasonable amount" issue, noting that the LT Judgment did not. However, the 4DCA is free to affirm the LT's ruling on an alternative theory when a constitutional vagueness challenge is brought. Turner v. Hillsborough, 739 So.2d 175 (Fla. 2DCA 1999). The record is clear that the entire § 448.24(1)(b) provision, including the "reasonable amount" issue, were litigated. [R. 3799-3825][R. 3713][R 3436-3517]. The 4DCA Opinion observes that evidence was received on the "reasonable amount" issue, and the WTS declaratory relief Counterclaim sought a declaration of no statutory violation of § 448.24(1)(b). Liner advocated that a distinction be drawn between the

"subjective reasonable amount standard" and the objective "prevailing rate for public transportation in the geographic standard," but that dichotomy was rejected by WTS, the LT, and the 4DCA. Accordingly, the void for vagueness ruling as the "reasonable amount" aspect of §448.24(1)(b) should stand. Liner's Brief does not appear to be arguing against the correctness of the 4DCA ruling on the "reasonable amount" issue; rather, Liner suggests the first prong of § 448.24(1)(b) has no bearing on this case. This Court should affirm the 4DCA's Opinion as to the void-for-vagueness of § 448.24(1)(b) due to the ambiguity surrounding the "reasonable amount" issue and the fact § 448.24(1)(b) provides no legislative guidance as to what it means. WTS was faced with suit on the "reasonable amount" issue in this case, and the fact Liner chose not emphasize it does not make the 4DCA incorrect.

The second and third vagueness problems that were cited by the 4DCA were taken directly from the LT Judgment, and were the terms "public transportation" and "geographic area." The 4DCA rejected Liner's attempt to limit the meaning of "public transportation" to bus service, particularly where 60% of Liner's job sites were not serviced by a bus route. As for "geographic area", the 4DCA adopted the LT's finding that the WTS charge was below the cost of any available public transportation in the Tri-County area, and rejected Liner's contention that "geographic area" could only mean one thing – county boundaries. Having

convinced itself that § 448.24(1)(b) was unconstitutionally vague on the foregoing grounds alone, the 4DCA adopted an excerpt of the LT Judgment and affirmed.

Liner's Brief raises the same objections to the 4DCA Opinion as it did with the LT Judgment, and WTS adopts its arguments in support of the LT Judgment again now. There is woefully insufficient context or meaning in § 448.24(1)(b) concerning the terms "public transportation," "geographic area" or "prevailing rate" (not to mention "reasonable amount") to solve the vagueness problem. Liner suggests that just because more people ride the bus in Broward County than any other form of public transportation, that somehow WTS was supposed to have known that door-to-door transportation to Tri-County job sites could not exceed BCT bus fare. The LPA is a statute that is supposed to govern the entire State. Liner argues in his Brief that if in some geographic areas, more people used other forms of public transportation, than in those areas a different benchmark would apply. The Liner argument illustrates the fatal vagueness problem with this statute. § 448.24(1)(b) is ambiguous because "prevailing rate," "public transportation" and "geographic area" are not defined, and the definitions in other Florida Statutes that WTS was entitled to rely upon are much broader than those Liner seeks to impose.

As for the term "geographic area," Liner's suggestion that "the most proximate local government encompassing the transportation at issue defines the boundaries of the relevant geographic area" is not what §448.24(1)(b) says.

Liner's proposed solution constitutes impermissible amendment by construction of the statute, and is itself vague and capable of multiple meanings. In the case of WTS, Tri-County was the relevant geographic area from the standpoint of where Liner actually worked and the market that particular WTS labor hall served. Liner himself even initially sued for all job assignments in the Tri-County area, the limitation to Broward County being made by a strategic amendment to his claim. The LT found this to constitute cherry-picking, and used it to illustrate that Liner had the ability for himself to decide what violations exist by choosing the boundaries according to the best "prevailing rate" argument he could make. Query how WTS or any other labor pool could have anticipated this. This Court must consider the 67 counties in Florida and the numerous other "geographic areas."

The Liner Brief's tongue-in-cheek observation that Liner "may be the first reported decision in which a plaintiff was criticized because he failed to pursue a claim he thought had no merit" misses the point of void-for-vagueness entirely. § 448.24(1)(b) is void-for-vagueness because the statute does not adequately warn *defendants* like WTS of the proscribed conduct, and its lack of legislative guidelines encourages the very kind of arbitrary and discriminatory enforcement by civil litigants that Liner used against WTS in this case. The statute makes a plaintiff like Liner the inventor of his own claim, and allows him to strategically choose to sue only where the "prevailing rate for public transportation in the

geographic area" supports his theory of liability. The void-for-vagueness constitutional problem is that defendants have no way to conform their conduct to the statute until after lawsuits are filed and the cherry picking is done, and then the defendants are faced with draconian statutory penalties that can bankrupt them. Particularly here, where WTS only charged $1.50 each way for Tri-County transportation, to impose liability violates procedural and substantive due process.

VI. THE LT'S NO-LIABILITY DETERMINATION IN FAVOR OF WTS SHOULD BE AFFIRMED, EVEN IF LPA IS HELD CONSTITUTIONAL.

WTS incorporates its argument in Section II of this Brief as supportive of the no-liability determination made in the Judgment. Liner was given his opportunity to prove a case against WTS, and was not able to do so. This no-liability determination should stand regardless of the constitutionality of F.S. § 448.24(1)(b) for the reasons stated by the LT in the Judgment. [R 7548]

CONCLUSION

Two District Courts and the LT correctly found § 448.24(1)(b) to be void-for-vagueness, and should be affirmed. WTS requests this Court affirm the entirety of the Judgment, as to both facial and as-applied void-for-vagueness and for violation of the rights that WTS has to substantive due process. Even if this reverses on unconstitutionality, in whole or in part, the no-liability Judgment in favor of WTS which found that Liner cannot state a legal claim should be affirmed.

DATED this 2nd of November, 2007.

//s// Thomas Todd Pittenger
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished *by U.S. Mail Delivery to* **Stuart A. Davidson, Esquire and David J. George, Esquire,** Lerach Coughlin Stoia & Robbins, LLP, 197 S. Federal Highway, Suite 200, Boca Raton, Florida 33432-4946; **John G. Crabtree, Esquire**, The Florida Appellate Alliance, PLC, 328 Crandon Boulevard, Suite 225, Key Biscayne, Florida 33149; **Gregg I. Shavitz, Esquire and Perry Tanksley, Esquire**, The Shavitz Labor Pool Law Firm, PLC, 7800 Congress Avenue, Suite 108, Boca Raton, Florida 33487; **Shannon McLin Carlyle, Esquire**, The Florida Appellate Alliance, PLC, La Plaza Grande Professional Center, 20 La Grande Boulevard, The Villages, Florida 32159; **Nancy S. Paikoff, Esquire**, McFarlane Ferguson & McMullen, 625 Court Street, Floor 2, Clearwater, Florida 33756-5528;

and **Thomas R. Tatum, Esquire**, Brinkley, McNerney, Morgan, Solomon & Tatum, LLP, 200 East Las Olas Boulevard, 19th Floor, Fort Lauderdale, Florida 33301-2248 this 3rd day of November, 2007. This Corrected Answer Brief is identical to the one served November 2, 2007, except for the font on pages (i) through (viii) which has been changed to Times Roman 14 (same as rest of Brief).

//s// Thomas Todd Pittenger

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CERTIFICATE OF COMPLIANCE

I prepared this Answer Brief in Times New Roman, 14 pt. font.

//s// Thomas Todd Pittenger

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