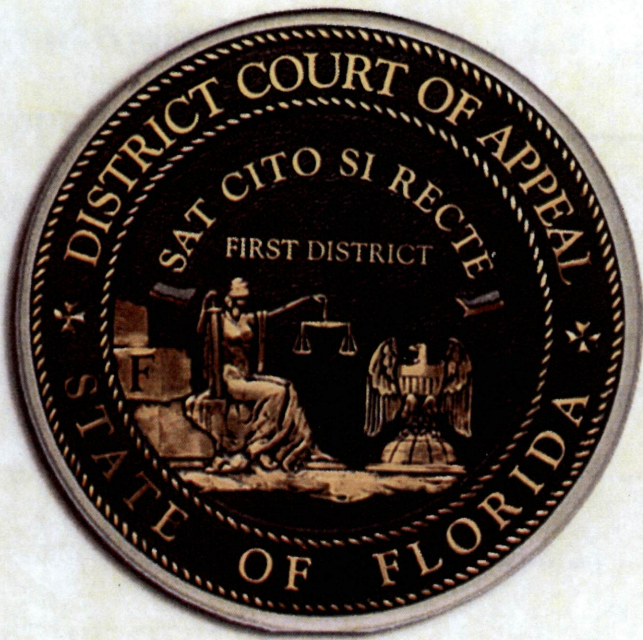


Florida First District Court of Appeal



ORAL ARGUMENT

October 23, 2014

University of Florida Levin College of Law
Gainesville, Florida

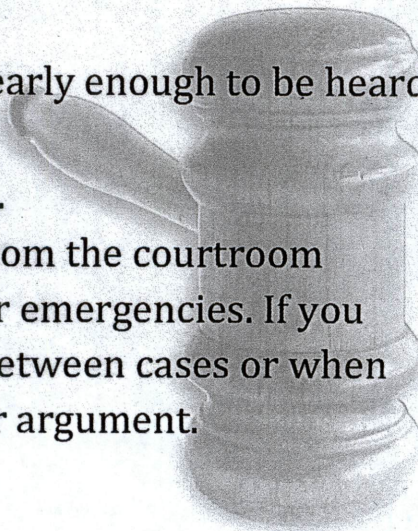


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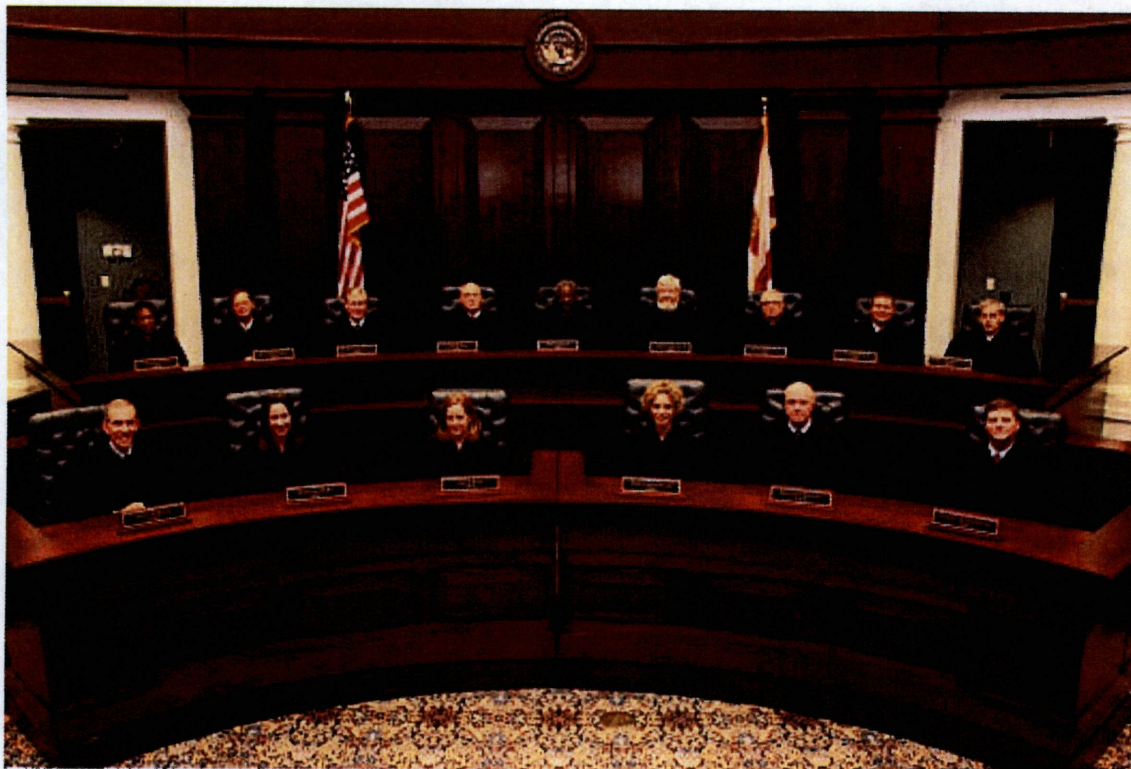
Courtroom Etiquette

- The dignity of the Court is to be respected and maintained at all times.
- Attire should be restrained and appropriate to the dignity of the Court.
- Everyone in the courtroom, unless physically challenged, must rise when the judges enter and remain standing until the presiding judge invites everyone to be seated. Similarly, when court adjourns, everyone stands in place until the judges are no longer visible.
- When Court is in session, no one should be heard except for counsel making argument or a judge.
- Phones and other electronic devices must be turned off and should not simply be turned to vibrate.
- No food or beverages are allowed in the courtroom.
- Stand if you address a judge on the bench.
- Should a judge speak to you directly, it is appropriate to stand and answer “Yes, your honor” and “No, your honor.”
- Speak loudly, slowly, and clearly enough to be heard and understood.
- Be courteous and respectful.
- Entrances and departures from the courtroom should be avoided except for emergencies. If you need to exit it is best done between cases or when counsel completes his or her argument.



Appellate Court Procedure

Each of the cases being heard today is on appeal from a trial court in the Third or Eighth Circuit of the State of Florida. While at the trial level, the parties are typically known as the Plaintiff (the party bringing the case) and the Defendant. At the appellate level, the parties are known as the Appellant (the party bringing the appeal) and the Appellee. All of the cases today are civil, not criminal, cases. The court will hear Oral Arguments, in which the attorneys for each appellant and appellee will have 15 or 20 minutes to argue their side's issues in the case.



Organization

The bulk of trial court decisions that are appealed are never heard by the Supreme Court. Rather, they are reviewed by three-judge panels of the district courts of appeal. Florida did not have district courts of appeal until 1957.

Until that time, all appeals were heard solely by the Supreme Court. As Florida grew rapidly in the twentieth century, however, the Supreme Court's docket became badly congested. Justice Elwyn Thomas with help from other members of the Court perceived the problem and successfully lobbied for the creation of the district-court system to provide intermediate appellate courts.

The Florida Constitution now provides that the Legislature shall divide the State into appellate court districts and that there shall be a district court of appeal (DCA) serving each district. There are five such districts that are headquartered in Tallahassee, Lakeland, Miami, West Palm Beach, and Daytona Beach.

DCA judges must meet the same eligibility requirements for appointment to office, and they are subject to the same procedures and conditions for discipline and removal from office, as Justices of the Supreme Court. Like Supreme Court Justices, district court judges also serve terms of six years and will be eligible for successive terms under a merit retention vote of the electors in their districts.

In each district court, a chief judge, who is selected by the district court judges within the district, is responsible for the administrative duties of the court.

Jurisdiction

The district courts of appeal can hear appeals from final judgments and can review certain non-final orders. By general law, the district courts have been granted the power to review final actions taken by state agencies in carrying out the duties of the executive branch of government.

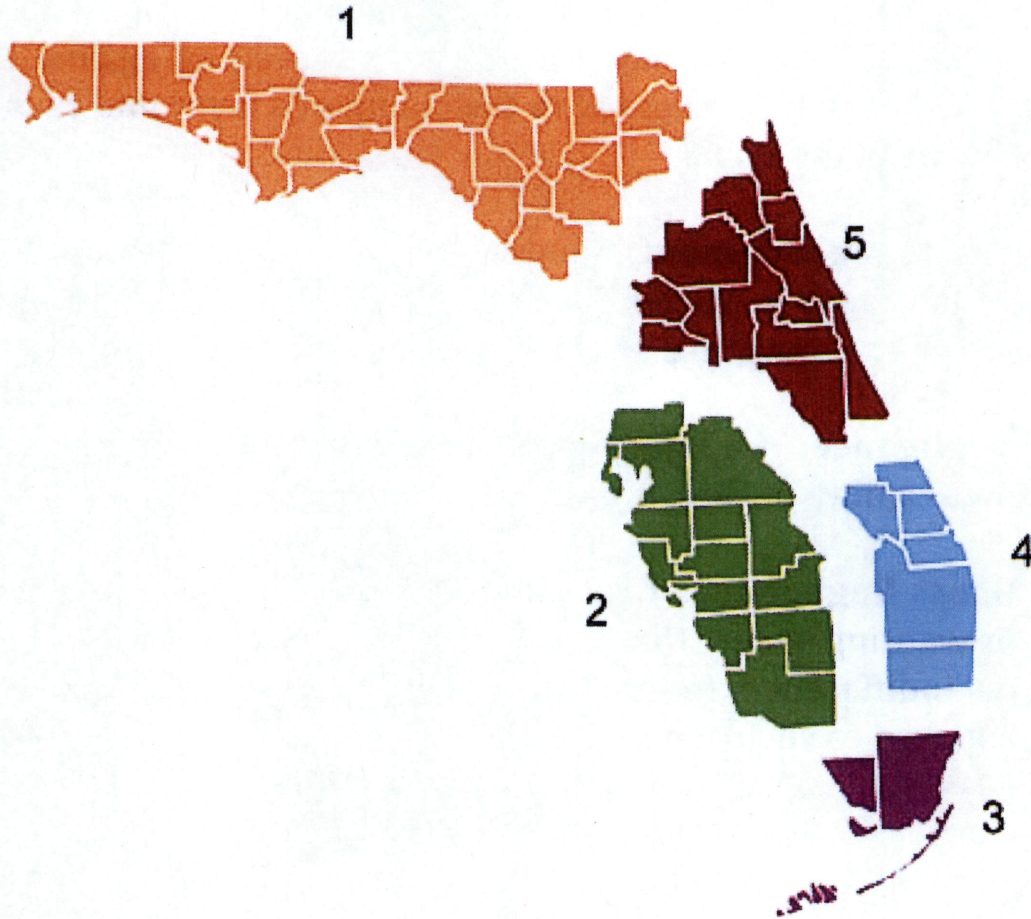
Finally, the district courts have been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.

As a general rule, decisions of the district courts of appeal represent the final appellate review of litigated cases. A person who is displeased with a district court's express decision may ask for review in the Florida Supreme Court and then in the United States Supreme Court, but neither tribunal is required to accept the case for further review. Most are denied.



The Districts

The thirty-two counties in the First District are: Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton and Washington. The First District also has statewide and sole jurisdiction to hear workers' compensation appeals.



Glossary of Terms

Absolute Litigation Privilege: Absolute legal immunity afforded to any act that occurs during the course of a judicial proceeding so long as the act has some relation to the proceeding.

Malicious Prosecution: Cause of action in which the claimant asserts the defendant maliciously and without probable cause initiated a judicial proceeding against the claimant that terminated in the claimant's favor and caused the claimant harm.

Summary Judgment: A judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law.

Negligence: An injury proximately caused when one who owes a duty of care, breaches that duty.

Gross Negligence: Gross negligence is conduct so reckless or wanting in care that it constitute[s] a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Glossary of Terms

Intentional Misconduct: A defendant commits intentional misconduct when he has actual knowledge of the wrongfulness of the conduct and understands there is a high probability that injury or damage will result, and despite that knowledge, nevertheless intentionally pursue[s] that course of conduct.

De Novo Standard of Review: When a trial court's decision is based on a conclusion of law, the appellate court is permitted to make its own determination as to the correct principle of law that should have been applied to a particular set of facts.

Amicus Curiae: Literally, "friend of the court;" one who is not a party, but who assists the court by imparting non-partisan information of some matter of law in regard to which the court is doubtful or mistaken.

Summary of Cases

STEINBERG V. STEINBERG

Case No. 1D13-5966

In July 2010, appellant filed for divorce from appellee, his wife of over thirty years. Appellee filed a counter-petition for dissolution of marriage that included a claim for continuing domestic violence pursuant to section 768.35, Florida Statutes. Following a trial, the trial court found that appellee failed to prove the continuing domestic violence claim. In November 2012, appellant filed an amended complaint that included a count for malicious prosecution based on the allegations of continuing domestic violence contained in appellee's counter-petition for dissolution of marriage. Appellee moved for summary judgment on the malicious prosecution count because the absolute litigation privilege immunized her from civil liability. Appellant responded that the absolute litigation privilege did not apply to the tort of malicious prosecution. Citing Wolfe v. Foreman, 128 So. 3d 67 (Fla. 3d DCA 2013), the trial court concluded that the absolute litigation privilege applied to appellant's malicious prosecution claim and granted appellee's motion for summary judgment. The issue on appeal is whether the trial court erred in following Wolfe and concluding that appellant's malicious prosecution claim was barred by the absolute litigation privilege.

Summary of Cases

KHEPERA SOLAR v. CITY OF GAINESVILLE

Case No. 1D14-517

Appellant, Khepera Solar, sought declaratory and injunctive relief against the City of Gainesville (d/b/a Gainesville Regional Utilities) relating to violations of Florida's Sunshine Law in the City's award of solar energy purchase contracts, known as Feed-in-Tariff Agreements. The City had sent the applicants for the solar contracts to the University of Florida Survey Research Center (UFSRC) to conduct a random computerized drawing for the winners of the Feed-in-Tariff Agreements. Khepera argued that the City failed to conduct the lottery drawing at a public meeting in the "Sunshine." The trial court entered Summary Final Judgment in favor of the City, determining that the parties, prior to Khepera filing the instant action, had entered into a dispute resolution agreement which settled all disputes and contained a release of all claims against the City. The trial court also found that the lottery process used to determine the winners of the Feed-in-Tariff Agreements was not subject to the Sunshine Law.

The issues on appeal are (1) whether the City delegated decision-making authority to the UFSRC such that the actions of UFSRC were subject to the Sunshine Law; (2) whether the release Khepera executed was valid and enforceable; and (3) whether the City's selection of winners gave an appearance of favoritism and impropriety in the selection process.

Summary of Cases

DONNA MAE POOLE, as personal representative of the ESTATE of Dennis Allen Pangburn (Deceased) v. CSX TRANSPORTATION INC., a foreign corporation, TIMOTHY G. TOWAN and DAN W. VAUGHN

Case No. 1D14-125

This appeal arose out of a wrongful-death action filed by plaintiff/appellant, Donna Poole, after her adult son, Dennis Pangburn, was struck and killed by a train operated by defendant/appellee, CSX Transportation. At the time Mr. Pangburn was struck, it was approximately 5:30 a.m., on the morning of July 31, 2008, and it was still dark. The evidence suggests Mr. Pangburn was either sitting or lying on the tracks just west of a footpath used by pedestrians, which was situated perpendicular to and between two sets of railway tracks, one set running west, the other, east. It was made of extra "ballast" rock typically used along the tracks by the railroad. At the time of his death, Mr. Pangburn had a blood-alcohol level nearly three times the legal limit according to the autopsy report, and was considered helpless.

Appellant's Third Amended Complaint against CSX and its engineers, Timothy Towan and Dan Vaughn, alleged the defendants (1) negligently operated the train because they failed to keep a proper lookout, apply the brakes and blow the horn, or otherwise avoid hitting Mr. Pangburn (COUNT I); (2) negligently designed constructed, and maintained the footpath near where Mr. Pangburn was killed (COUNT II); and (3) engaged in intentional misconduct and gross negligence because they failed to keep a proper lookout, apply the brakes and blow the horn, or otherwise avoid hitting Mr. Pangburn (COUNT III).

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Summary of Cases

(CONT'D)

**DONNA MAE POOLE, etc. v. CSX TRANSPORTATION INC.,
etc., et al.**

Case No. 1D14-125

Following discovery, the parties moved for summary judgment. The trial court entered an order granting appellees' motion, finding (1) sections 768.075 and 768.36 are facially constitutional and constitutional as applied; (2) Mr. Pangburn was *not* an invitee; (3) despite plaintiff's lawsuit sounding in "active negligence," the case was not outside the reach of sections 768.075 or 768.36; (3) Mr. Pangburn could not have had an "objectively reasonable belief" that he had been invited or otherwise welcome in the area of, and between the active rails of, the track; (4) the facts are not in dispute so as to defeat summary judgment; (5) under the undisputed facts, plaintiff/appellant cannot meet the burden of pleading and proving gross negligence/intentional misconduct in order to avoid the immunity afforded defendants/appellees by section 768.075; and (6) plaintiff's claim also could have failed under section 768.075(4), Florida Statutes, because Mr. Pangburn was engaged in the commission of a felony, that being the third-degree felony of obstructing active railroad tracks at the time he was killed. This court will review the correctness of the final judgment using the *de novo* standard of review.

JUDGE BIOGRAPHIES:

Judge Philip J. Padovano



Appointed: August 1, 1996 by Governor Lawton Chiles

• **Degrees:** J.D., Stetson University College of Law, 1973; B.S., Florida State University, 1969.

• **Legal Offices & Positions:** Judge, District Court of Appeal, First District, 1996-Present; Circuit Judge, Second Judicial Circuit, 1988-1996; Chief Judge Second Judicial Circuit, 1993-1996; Adjunct

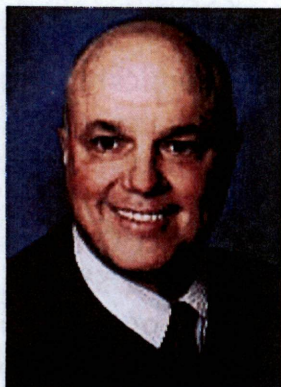
Professor of Law, Florida State University College of Law, 1992; Private Practice, 1973-1988.

• **Bar Offices and Positions:** Chair, Committee on Florida Standard Jury Instructions in Criminal Cases, 1997; Chair, Committee to Recommend Minimum Standards for Lawyers in Capital Cases, 1997; Court Users Technology Committee, 1996; Rules Subcommittee of the Judicial Management Council, 1996.

• **Honors and Awards:** Florida Bar Outstanding Jurist Award, Orlando, June 28, 1991; Tobias Simon Pro Bono Service Award, Tallahassee, March 16, 1983; Nelson Poynter Civil Liberties Award, St. Petersburg, December 4, 1982; Leon Association for Retarded Citizens, Volunteer of the Year Award, 1986; various academic awards including Stetson University College of Law Honor Roll, 1972, and Stetson Law Review, 1973.

• **Publications:** Florida Appellate Practice, West Publishing Company, 1988-2014; Florida Civil Practice, West Publishing Company, 1997-2014; Postconviction Relief in Capital Cases, Benchbook of the National Judicial College; Due Process Defense in Reverse Sting Cases, FLA. BAR J. October 1984; Florida Theft and RICO (CLE Book) Chapter 6: Entrapment; Prejudicial Comments of the Prosecutor During Closing Arguments - A Survey of Florida Law, FLA. BAR J. March 1977; Florida Criminal Rules and Practice (CLE Book) Chapter 8: Immunity; Criminal Law - Constitutional Law - Right to Counsel for Misdemeanants, 3 STETSON L. REV. 191 (1973); Criminal Law - Jury Instructions on Lesser Included Offenses, 3 STETSON L. REV. 91 (1972).

Judge Ronald V. Swanson



Appointed: June, 2011 by Governor Rick Scott

- **Degrees:** LL.M. (Highest Honors), George Washington University, 1982; J.D., University of Florida, 1973; B.S., The Florida State University, 1970.

- **Judicial Offices and Positions:** Appointed to the First District Court of Appeal by Governor Rick Scott in June 2011; Circuit Court Judge, First Judicial Circuit, April 2003 to July 2011. Appointed by Governor Jeb Bush; County Court Judge, Santa Rosa County, May 2000 to April 2003. Appointed by Governor Jeb Bush; Military Judge, Navy and Marine Corps Trial Judiciary, 1982 to 1985.

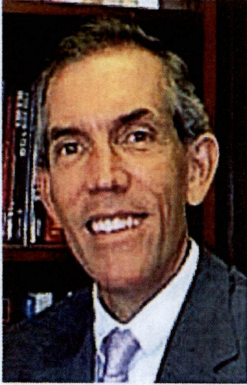
- **Military Service:** Judge Swanson served in the United States Navy's Judge Advocate General's Corps for over 20 years, retiring as a Navy Captain in 1995. While on active duty, Judge Swanson served in numerous assignments to include: in ships of the Atlantic Fleet; Special Counsel to the Vice Chief of Naval Operations during the First Gulf War; 1988 assignment as counsel in the Persian Gulf; duty at Naval Station, Guantanamo Bay, Cuba; and Commanding Officer, Naval Legal Service Office Central, Naval Air Station, Pensacola, Florida.

- **Military awards and decorations:** The Legion of Merit; Meritorious Service Medal (multiple awards); Navy Commendation Medal (multiple awards); Navy Achievement Medal (multiple awards); Overseas Service (multiple awards) National Defense Medal.

- **Office of State Attorney:** Upon retirement from the United States Navy, Judge Swanson served as an Assistant State Attorney, First Judicial Circuit, from August 1995 to May 2000. He was designated Special Prosecutor for cases of significance, 1998 to 2000.

- **Religious and Civic Associations:** Past Board Member and Vice President, Big Brothers/Big Sisters, Northwest Florida, Pensacola, Florida; Past Board Member Navy Home, Biloxi, Mississippi; Past Senior Warden and Vestry Member, St. Francis of Assisi Episcopal Church, Gulf Breeze. Former Rotarian; Past member, Inns of Court (Trial); Volunteer, K9 for warriors.

Judge Scott D. Makar



Appointed: March 2012 by Governor Rick Scott

• **Degrees:** *University of Florida:* Ph.D. (economics), 1993; J.D. 1987; M.B.A. (finance), 1982; M.A. (economics), 1982. *Mercer University,* B.S. (mathematics & economics). 1980.

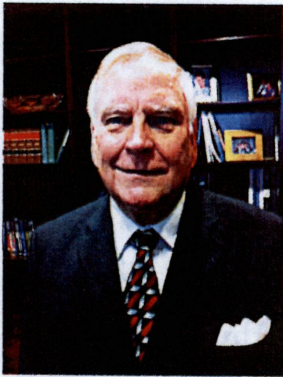
• **Judicial Offices and Positions:** First District Court of Appeal, 2012-present; Solicitor General, State of Florida, 2007-2012; Chief Appellate Division, Office of General Counsel, Consolidated City of Jacksonville, Florida, 2001-2007; Capital Partner/Partner/Associate/Summer Associate, Holland & Knight, Jacksonville, Tallahassee & Tampa offices, 1986, 1987, 1989-2001; Law Clerk, Judge Thomas A. Clark, U.S. Court of Appeals, 11th Circuit, 1988-1989.

• **Teaching Positions:** Adjunct Professor, University of Florida College of Law (2011-present); Richard W. Ervin Eminent Scholar Chair, FSU College of Law (2007-2011); Adjunct Professor, Florida Coastal School of Law (2000-2007). Adjunct Instructor: University of North Florida, (1999-2000); Jacksonville University (1995); University of Florida, College of Business (1984-88).

• **Professional/Civic Activities:** Member, American Law Institute; The Florida Bar: Founding Member & Executive Council, Appellate Practice and Advocacy Section, 1994-1997; Chair, Chair-Elect & Member, Florida Supreme Court Standard Jury Instructions Committee, 1995-2010. Member, Leadership Jacksonville, Class of 1999.

• **Honors & Awards:** U.S. Supreme Court, Cases Argued: Holland v. Florida, (2010); Stop the Beach Renourishment, Inc. v. Florida Dep't of Env. Protection, (2010); Sullivan v. Florida, (2010); Graham v. Florida, (2010); Florida Dept. of Rev. v. Piccadilly Cafeterias, Inc., (2008). Most cases (four) argued by a state solicitor general in a single term (2009 Term); Manager of the Year, Office of the Attorney General (2009); Distinguished Service Award, Office of the Attorney General (2010); Barbara W. Sanders Writing Competition Award, The Florida Bar, 1994-95 (1st Place); 1992-93 (2d place); 1991-92 (2d place).

Clerk of the Court, Jon S. Wheeler



Jon S. Wheeler is the dean of appellate court clerks in Florida having served as Clerk of the Court for Florida's District Court of Appeal, First District, since December 31, 1990.

Mr. Wheeler was a member of the charter class of Florida State University's College of Law and received his Juris Doctorate degree in December 1968. He also received his B.S. degree in business from Florida State University (1966). He is

licensed to practice law in Florida and before the U.S. Supreme Court and the U.S. Court of Military Appeals.

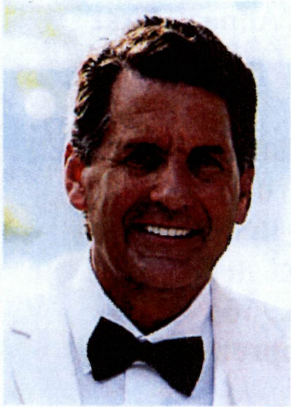
Mr. Wheeler has been a member of the National Association of Appellate Court Clerks (NCACC) since 1991. He has served on the Executive Committee, the Program and Publicity Committees and chaired the Nominating Committee. Mr. Wheeler has been a regular presenter at the NCACC's annual conferences including "The Use of Video Teleconferencing for Appellate Oral Argument," "Handling Pro Se Litigants in the Appellate Courts," "Hiring and Retaining Deputy Clerks," "Florida's Court's Performance and Accountability Study" and "Florida's Appellate Courts' Case Management System." After the 2000 Bush v. Gore election, he presented a 4 hour program on "Handling High Profile Cases" with clerks from the U.S. Supreme Court and the Florida Supreme Court. Mr. Wheeler is a contributing editor to The Florida Bar Continuing Legal Education book, *Florida Appellate Practice*.

Mr. Wheeler was a lead contributor in the development and deployment of Florida's iDCA/eDCA appellate court electronic filing system in 2010 which was recognized by the Davis Productivity Award as one of the top recognized technologies by Florida's Taxwatch in the last 25 years. The system has now migrated to 4 of the 5 appellate courts.

Mr. Wheeler, before being appointed as the third Clerk of the Court for the First District Court of Appeal, served over 21 years as a judge advocate in the United States Air Force. Before retiring at the rank of colonel, his positions included serving as Legal Advisor and Legislative Assistant to the Chairman, Joint Chiefs of Staff (1984-1988) and Staff Judge Advocate of the Air Force District of Washington (1988-1990).

Marshal J. Daniel McCarthy

First District Court of Appeal



Degrees: LL.M. (Highest Honors), George Washington Law School, 1991; J.D. (With Honors), Duke Law School, 1983; B.S., U.S. Naval Academy 1977.

Military Service: Marshal McCarthy served in the U.S. Navy for 30 years, retiring as a Navy Captain in 2002. While on active duty, Marshal McCarthy served in numerous assignments at sea and abroad including: Executive Assistant to the Judge Advocate General 1991-1993; Military Legal Advisor to the Secretary of the Navy 1993-1998; Commanding Officer Trial Service Office Southeast 1998-2002.

Post-Military Career: Marshal McCarthy's has served stints as senior counsel at Holland & Knight LLP ; Director of Military Affairs, Veteran & Disabled Services for City of Jacksonville; Chief Assistant State Attorney 4th Judicial Circuit; Director at Wounded Warrior Project; Executive Director of Center for Smart Justice at Florida TaxWatch.

**For more information, please check out the
Florida First District Court of Appeal Website:
www.1dca.org**