

## **Neil Gillespie**

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**From:** "Amy Hasselbring" <ahasselbring@bowenschroth.com>  
**To:** <neilgillespie@mfi.net>  
**Cc:** "Derek Schroth" <dschroth@bowenschroth.com>  
**Sent:** Monday, April 25, 2016 10:45 AM  
**Attach:** Application Edward P. Dutkiewicz.pdf  
**Subject:** JNC Application - Dutkiewicz

Mr. Gillespie,

Attached is the application of Edward P. Dutkiewicz. Thanks.

Amy McCain Hasselbring  
Florida Registered Paralegal and  
Legal Assistant to Derek A. Schroth  
Bowen & Schroth, P.A.  
600 Jennings Avenue  
Eustis, FL 32726  
Telephone: 352-589-1414 Ext. 316  
Facsimile: 352-589-1726  
e-mail: ahasselbring@bowenschroth.com

**APPLICATION FOR NOMINATION TO THE 5th Circuit COURT**

(Please attach additional pages as needed to respond fully to questions.)

DATE: September 15, 2015 Florida Bar No.: 0883387

GENERAL: Social Security No.: [REDACTED]

1. Name Edward P. Dutkiewicz E-mail: edduke@embarqmail.com

Date Admitted to Practice in Florida: May 10, 2015

Date Admitted to Practice in other States: September 1, 1989

2. State current employer and title, including professional position and any public or judicial office.

self

3. Business address: 32710 Blueberry Hill Way

City Dade City County Pasco State FL ZIP 33523

Telephone (352) 467-2682 FAX (352) 567-5526

4. Residential address: 31710 Blueberry Hill Way

City Dade City County Pasco State FL ZIP 33523

Since July 7, 2007 Telephone (352) 467-2682

5. Place of birth: Meriden, CT

Date of birth: May 22, 1951 Age: 64

6a. Length of residence in State of Florida: Since April 27, 1991

6b. Are you a registered voter?  Yes  No

If so, in what county are you registered? Pasco

7. Marital status: Married

If married: Spouse's name Cynthia Grace Dutkiewicz

Date of marriage May 19, 1979

Spouse's occupation retired / homemaker

If ever divorced give for each marriage name(s) of spouse(s), current address for each former spouse, date and place of divorce, court and case number for each divorce.

never divorced

8. Children

<i>Name(s)</i>	<i>Age(s)</i>	<i>Occupation(s)</i>	<i>Residential address(es)</i>
none			

9. Military Service (including Reserves)

<i>Service</i>	<i>Branch</i>	<i>Highest Rank</i>	<i>Dates</i>
none			

Rank at time of discharge N/A Type of discharge \_\_\_\_\_

Awards or citations \_\_\_\_\_

**HEALTH:**

10. Are you currently addicted to or dependent upon the use of narcotics, drugs, or intoxicating beverages? If yes, state the details, including the date(s).

No

11a. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism?

Yes  No

If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.]

Please describe such treatment or diagnosis.

N/A

11b. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner?

- Experiencing periods of no sleep for 2 or 3 nights
- Experiencing periods of hyperactivity
- Spending money profusely with extremely poor judgment
- Suffered from extreme loss of appetite

- Issuing checks without sufficient funds
- Defaulting on a loan
- Experiencing frequent mood swings
- Uncontrollable tiredness
- Falling asleep without warning in the middle of an activity

Yes  No

If yes, please explain.

12a. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

Yes  No

12b. If your answer to the question above is Yes, are the limitations or impairments caused by your physical or mental health impairment reduced or ameliorated because you receive ongoing treatment (with or without medication) or participate in a monitoring or counseling program?

Yes  No

Describe such problem and any treatment or program of monitoring or counseling.

13. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, give full details as to court, date and circumstances.

No

14. During the last ten years, have you unlawfully used controlled substances, narcotic drugs or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal law provisions.)

No

15. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs or illegal use of drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

16. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal and the reason why you refused to submit to such a test.

No

17. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No

**EDUCATION:**

18a. Secondary schools, colleges and law schools attended.

<i>Schools</i>	<i>Class Standing</i>	<i>Dates of Attendance</i>	<i>Degree</i>
Berlin High Sch	lower 10%	9/65 - 6/69	dip
Middlesex Comm Coll	don't know	9/69 - 6/71	assoc
New Briatain Gen Hosp, Nursing Sch.	top 50%	9/71-6/74	dip
Farifax Hosp. Sch Nurse Anesthesia	top 30%	9/75 - 9/77	dip

18b. List and describe academic scholarships earned, honor societies or other awards.

None

**NON-LEGAL EMPLOYMENT:**

19. List all previous full-time non-legal jobs or positions held since 21 in chronological order and briefly describe them.

<i>Date</i>	<i>Position</i>	<i>Employer</i>	<i>Address</i>
see attachment			

**PROFESSIONAL ADMISSIONS:**

20. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and if applicable, state whether you have been suspended or resigned.

<i>Court or Administrative Body</i>	<i>Date of Admission</i>
see attached	

**LAW PRACTICE:** (If you are a sitting judge, answer questions 21 through 26 with reference to the years before you became a judge.)

21. State the names, dates and addresses for all firms with which you have been associated in practice, governmental agencies or private business organizations by which you have been employed, periods you have practiced as a sole practitioner, law clerkships and other prior employment:

<i>Position</i>	<i>Name of Firm</i>	<i>Address</i>	<i>Dates</i>
atty	Morroco & Wurz	200 Summer St., Bristol, CT	9/89-4/91
atty	solo pract	home office	7/90-3/94
patent atty	solo practice	640 Douglas Ave, Dunedin, FL	5/03 - present, moved in 2007

22. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

Intellectual property law, with some civil law included, but mostly intellectual property law

23. What percentage of your appearance in courts in the last five years or last five years of practice (include the dates) was in:

<i>Court</i>		<i>Area of Practice</i>	
Federal Appellate	<u>25</u> %	Civil	<u>100</u> %
Federal Trial	<u>25</u> %	Criminal	<u>        </u> %
Federal Other	<u>        </u> %	Family	<u>        </u> %
State Appellate	<u>25</u> %	Probate	<u>        </u> %

State Trial	<u>25</u> %	Other	<u>          </u> %
State Administrative	<u>          </u> %		
State Other	<u>          </u> %		
	<u>          </u> %		
TOTAL	<u>100</u> %	TOTAL	<u>100</u> %

24. In your lifetime, how many (number) of the cases you have tried to verdict or judgment were:

Jury?	<u>4</u>	Non-jury?	<u>5</u>
Arbitration?	<u>3</u>	Administrative Bodies?	<u>30</u>

25. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No

26. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain in full.

No

**(Questions 27 through 30 are optional for sitting judges who have served 5 years or more.)**

27a. For your last 6 cases, which were tried to verdict before a jury or arbitration panel or tried to judgment before a judge, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

see attached

27b. For your last 6 cases, which were settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases).

see attached

27c. During the last five years, how frequently have you appeared at administrative hearings?  
None average times per month

27d. During the last five years, how frequently have you appeared in Court?  
once average times per month

27e. During the last five years, if your practice was substantially personal injury, what percentage of your work was in representation of plaintiffs? NA% Defendants?  
NA%

28. If during any prior period you have appeared in court with greater frequency than during the last five years, indicate the period during which this was so and give for such prior periods a succinct statement of the part you played in the litigation, numbers of cases and whether jury or non-jury.

N/A

29. For the cases you have tried to award in arbitration, during each of the past five years, indicate whether you were sole, associate or chief counsel. Give citations of any reported cases.

Currently trying first arbitration case

30. List and describe the six most significant cases which you personally litigated giving case style, number and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant. Give the name of the court and judge, the date tried and names of other attorneys involved.

see attached.

31. Attach at least one example of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach writing for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

**PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE:**

32a. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved and the dates of service or dates of candidacy.

no

32b. List any prior quasi-judicial service:

<i>Dates</i>	<i>Name of Agency</i>	<i>Position Held</i>
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Types of issues heard:

32c. Have you ever held or been a candidate for any other public office? If so, state the office, location and dates of service or candidacy.

no

32d. If you have had prior judicial or quasi-judicial experience,

(i) List the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance.



N/A

- (ii) Describe the approximate number and nature of the cases you have handled during your judicial or quasi-judicial tenure.

N/A

- (iii) List citations of any opinions which have been published.

N/A

- (iv) List citations or styles and describe the five most significant cases you have tried or heard. Identify the parties, describe the cases and tell why you believe them to be significant. Give dates tried and names of attorneys involved.

N/A

- (v) Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give date, describe complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

N/A

- (vi) Have you ever held an attorney in contempt? If so, for each instance state name of attorney, approximate date and circumstances.

N/A

- (vii) If you are a quasi-judicial officer (ALJ, Magistrate, General Master), have you ever been disciplined or reprimanded by a sitting judge? If so, describe.

N/A

#### **BUSINESS INVOLVEMENT:**

- 33a. If you are now an officer, director or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

Sole Practitioner, PA. I would close my office if appointed.

- 33b. Since being admitted to the Bar, have you ever been engaged in any occupation, business or profession other than the practice of law? If so, give details, including dates.

Nurse Anesthesia, 1991 until 2003, Anesthesia Associates of Pinellas County, see answer 18 a, attached

- 33c. State whether during the past five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind. If so, identify the source of such compensation, the nature of the business enterprise, institution, organization or association involved and the dates such compensation was paid and the amounts.

None

**POSSIBLE BIAS OR PREJUDICE:**

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you as a general proposition believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

I cannot think of any. I believe I can apply the law, as set forth in the case law and statutes, without reservation.

**MISCELLANEOUS:**

35a. Have you ever been convicted of a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

35b. Have you pled nolo contendere or pled guilty to a crime which is a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

35c. Have you ever had the adjudication of guilt withheld for a crime which is a felony or a first degree misdemeanor?

Yes \_\_\_\_\_ No  If "Yes" what charges? \_\_\_\_\_

Where convicted? \_\_\_\_\_ Date of Conviction: \_\_\_\_\_

36a. Have you ever been sued by a client? If so, give particulars including name of client, date suit filed, court, case number and disposition.

No

36b. Has any lawsuit to your knowledge been filed alleging malpractice as a result of action or inaction on your part?

No

36c. Have you or your professional liability insurance carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the amounts involved.

No

37a. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

No

37b. Have you ever owned more than 25% of the issued and outstanding shares or acted as an officer or director of any corporation by which or against which a petition in bankruptcy has been filed? If so, give name of corporation, your relationship to it and date and caption of petition.

No

38. Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If so, please supply the jurisdiction/county in which the lawsuit was filed, style, case number, nature of the lawsuit, whether you were Plaintiff or Defendant and its disposition.

see attached

39. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, give the particulars.

No

40. To your knowledge within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers or clients ever filed a formal complaint or formal accusation of misconduct against you with any regulatory or investigatory agency, or with your employer? If so, please state the date(s) of such formal complaint or formal accusation(s), the specific formal complaint or formal accusation(s) made, and the background and resolution of such action(s). (Any complaint filed with JQC, refer to 32d(v).

No

41. Are you currently the subject of an investigation which could result in civil, administrative or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation and the expected completion date of the investigation.

No

42. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No

43a. Have you filed all past tax returns as required by federal, state, local and other government authorities?

Yes  No  If no, please explain. \_\_\_\_\_

43b. Have you ever paid a tax penalty?

Yes  No  If yes, please explain what and why. \_\_\_\_\_

43c. Has a tax lien ever been filed against you? If so, by whom, when, where and why?

No

## HONORS AND PUBLICATIONS:

44. If you have published any books or articles, list them, giving citations and dates.

yes. I had published an article on the use of Nitrous Oxide for local supplementation. the Journal which published the article was the Journal of the American Association of Nurse Anesthetists. The article was published some time in the 1980's, and i do not recall the date.

45. List any honors, prizes or awards you have received. Give dates.

None

46. List and describe any speeches or lectures you have given.

I have talked to a local inventors club regarding patent practice. The club is the Tampa Bay Inventor's club. The last speaking was about five years ago. I had moved from the area.

47. Do you have a Martindale-Hubbell rating? Yes  If so, what is it? \_\_\_ No

I do not know

## PROFESSIONAL AND OTHER ACTIVITIES:

48a. List all bar associations and professional societies of which you are a member and give the titles and dates of any office which you may have held in such groups and committees to which you belonged.

Member of the Connecticut Bar, the Florida Bar, and the Federal Circuit Bar

48b. List, in a fully identifiable fashion, all organizations, other than those identified in response to question No. 48(a), of which you have been a member since graduating from law school, including the titles and dates of any offices which you have held in each such organization.

I am a long standing member of the National Rifle Association. I have never held any office in that organization.

48c. List your hobbies or other vocational interests.

I am a firearm collector, and I practice marksmanship. I own a 32 acre tree farm, and I am involved in the mowing and care of the land. I also am building a 55 chevrolet belair, from the frame up. I enjoy doing metal fabrication, welding, and body work on the vehicle I am building.

48d. Do you now or have you ever belonged to any club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion, national origin or sex? If so, detail the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

No

48e. Describe any pro bono legal work you have done. Give dates.

see attached.

## SUPPLEMENTAL INFORMATION:

- 49a. Have you attended any continuing legal education programs during the past five years? If so, in what substantive areas?

I've obtained Continuing Education hours. Mostly in appellate practice, when I can find those courses nearby.

- 49b. Have you taught any courses on law or lectured at bar association conferences, law school forums, or continuing legal education programs? If so, in what substantive areas?

No.

50. Describe any additional education or other experience you have which could assist you in holding judicial office.

I hold a masters in electrical engineering, and BS in nurse anesthesia. I have had small businesses, which I've worked at part time. I have a broad base of experience, which, I believe, gives me a broad perspective of the cases I may be called upon to decide.

51. Explain the particular potential contribution you believe your selection would bring to this position.

I believe that the judge is in the unique position to help guide the case expeditiously and efficiently through the system. My experience with the judicial system teaches me that there may be better, more efficient, means of guiding the cases through the legal system,

52. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

I applied for a District Court magistrate position in the early spring, for the Middle District of Florida. I am concurrently applying for openings in the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> judicial circuits, as such openings have now been made available.

53. Give any other information you feel would be helpful to the Commission in evaluating your application.

I'm a believer in the Constitution, and the rights of the people under the Constitution. I believe that those who seek redress, or those placed before the Court, as a legal process, deserve respect. I believe, also, that people owe the court respect, and honesty.

## REFERENCES:

54. List the names, addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for judicial position and of whom inquiry may be made by the Commission.

**CERTIFICATE**

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(I), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 15th day of September, 2015.

Edward P. Duffin  
Printed Name

Edward P. Duffin  
Signature

*(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

## FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date

	85K	83K		59K
List Last 3 years				

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current year to date

	0	8K		8.2K
List Last 3 years				

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current year to date 37.5K

	32.5K	32.5K		37.5K
List Last 3 years				

4. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current year to date 22.5K

	20K	22.5K		20.5K
List Last 3 years				

**FORM 6  
FULL AND PUBLIC  
DISCLOSURE OF  
FINANCIAL INTEREST**

**PART A – NET WORTH**

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of 9/5, 2015 was \$2.5 Million.

**PART B - ASSETS**

**HOUSEHOLD GOODS AND PERSONAL EFFECTS:**

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds \$1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is \$ \_\_\_\_\_

**ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:**

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)

VALUE OF ASSET

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
firearms	50K
household furnishings	10K
farm equip	32K
farm buildings	56K
house and land	2 million
investments, stocks, annuities, IRA	650K

**PART C - LIABILITIES**

LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
credit card, bank of america	2K
credit card, wells fargo	0
taxes on house	3200
Insurances	2600

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY



**PART D - INCOME**

You may **EITHER** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments*, **OR** (2) file a sworn statement identifying each separate source and amount of income which exceeds \$1,000 including secondary sources of income, by completing the remainder of Part D, below.

I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.  
 (if you check this box and attach a copy of your latest tax return, you need not complete the remainder of Part D.)

**PRIMARY SOURCE OF INCOME** (See instructions on page 5):

NAME OF SOURCE OF INCOME EXCEEDING \$1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
Disability check	Social Security, disability	22.5K/year
IRA withdrawals	Ameriprise financial	about 15 K per year
Wife's social security	Social Security payment	10K/year

**SECONDARY SOURCES OF INCOME** [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSIENSS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
dividend from PA	Edward P. Dutkiewicz, PA	32710 Blueberry Hill Way, Dade City, FL 33523	owner, about 8K yearly, income permitting

**PART E – INTERESTS IN SPECIFIC BUSINESS** [Instructions on page 7]

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTITTY	Edward P. Dutkeiwicz,PA		
ADDRESS OF BUSINESS ENTITY	32710 Blueberry Hill Way, Dade City, FL 33523		
PRINCIPAL BUSINESS ACTIVITY	law practice		
POSITION HELD WITH ENTITY	sole practitioner		
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS	100% owned by self		
NATURE OF MY OWNERSHIP INTEREST	1000%		

IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE

**OATH**

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

**STATE OF FLORIDA**

**COUNTY OF Pasco**

Sworn to (or affirmed) and subscribed before me this 18 day of Sept. 2015 by Edward P Dutkiewicz

*Christelle Myburgh*  
 (Signature of Notary Public—State of Florida)

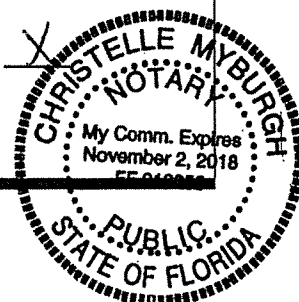
Christelle Myburgh  
 (Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known \_\_\_\_\_ OR Produced Identification X

Type of Identification Produced FL DL

*[Handwritten Signature]*

SIGNATURE



*FLORIDA DEPARTMENT OF LAW ENFORCEMENT*

DISCLOSURE PURSUANT TO THE  
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

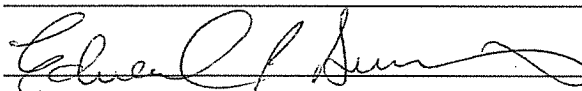
CONSUMER'S AUTHORIZATION FOR FDLE  
TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Printed Name of  
Applicant:

Edward P. Dutkiewicz

Signature of Applicant:

  
\_\_\_\_\_

Date: September 15, 2015

**ATTACHMENT**

Questions:

18(a) Continued

<u>Schools</u>	<u>Class Standing</u>	<u>Dates</u>	<u>Degree</u>
George Washington U.	top 40%	9/75-9/77	BS Nurse Anes.
U. Fla (premed)	incomplete, one semester	1/78	incomplete
Central CT S. U	non matric.	9/77-6/81	non-mat. Premed
Western New England Law School	top 55%	9/85-5/89	Juris Doc.
St. Petersburg CC	Non-mat.	1/2000-5/2003	non-mat.
USF	?top 50%	9/03-6/08	BS elec eng
USF	?	9/08-12/10	MS elec eng

19. <u>Date</u>	<u>Position</u>	<u>Employer</u>	<u>Address</u>
5/67-9/71	Orchard help  Part time	Hrubiec's Orchard	dissolved 35 years ago
5/72 - 8/74	Orderly (Pt time)	New Britain Gen Hosp	100 Grand St. New Britain, Ct

9/74 - 9/75	Nurse ICU (F.T)	Halifax Hospital	Clyde Morris Blvd, Daytona Beach, FL
12/75-9/77	Nurse ICU (P.T)	Jefferson Mem Hosp	Alexandria, VA  4600 King Street
9/77-9/89	Nurse Anesthetist (F.T)	New Britain  Anesthesia PC	100 Grand Street New Britain, CT
9/89-4/91	Associate Atty (F.T.)	Morrocco & Wurz	200 Summer St. Bristol, CT
5/91-5/03	Nurse Anesthetist (F.T)	Anesthesia Assoc Of Pinellas co.	430 Morton Plant St Clearwater, FL 33756
7/90-3/94	Sole Pract (Pt time)	Edward P. Dutkiewicz	
5/03-present	Sole Pract (F.T)	Edward P. Dutkiewicz, PA	PO Box 937 Dade City, FL 33526

20.	<u>Court or admin body</u>	<u>Date of Admin</u>
	Connecticut Bar	Sept 89
	Florida Bar	May 1991
	US Patent Office	May 2000
	Federal Circuit Bar	April 28, 2006
	US Supreme Court	March 2007

27(a) Last 6 cases, jury or arbitration, judge

Trial Counsel (opposing)

(1990) Criminal theft case, Connecticut, Jury Trial  
Prosecutor's office. I believe it was attorney Glowa for the  
state of Connecticut (1990) I cannot recall the client's name, th  
case number, or style.

(1991) Civil Case, My client was a couple named John and Linda  
Navarro. I do not recall the other attorney's name, or the case  
number or style. It was a court trial.

(1993) Criminal case, County Court, Judge Paul Levine. It was a  
bench trial. I do not recall the state prosecutor's name. The

case concerned an unlicensed vehicle in a driveway. My client's last name was Murphy.

(June 2006) Federal Court, Judge Pizzo, Attorney Richard An, Jenner & Block (212) 891-1600, New York for opposing side, along with Robert Williams, of Tampa (813) 221-2626. Jury trial, Case No. 8:04-CV-2101

(July 2006) Ritchie v. Vast Resources 8:06-cv-2229. Opposing counsel was Michael Harris (805) 230 1350.

(April 2007) Pods v. Porta Stor, Fed. Circ. Court of Appeal No. 2006-1504, Opposing Counsel was Richard An (212) 891-1600.

(Sept 2007) McGeehan Construction v. Oklawaha Inc, construction contract appeal, Case No.: 2D07-2916. Opposing counsel was Lana Dean (407) 425-0234.

(November 2008) Court of Appeal, Federal Circuit, Ritchie v. Vast Resources 2008-1528, -1529. Opposing counsel was Michael Harris (805) 230 1350.

(December 2012) Federal District Court, Spencer v. Taco Bell, 8:12-CV-0387. Opposing Counsel was Jeffrey Joyner (310) 586 7700.

(November 2013) Federal Circuit Court of Appeal, Spencer v. Taco Bell, 14-1097, Opposing Counsel was Jeffrey Joyner (310) 586 7700.

(October 2013) Federal District Court, Draper v. Pelam 8:10-cv-0822. Opposing Counsel was John Urban, 407 245 8352.

(March 2013) Federal Circuit Court of Appeal, Irwin Industrial Tool v. Bibow Industries. 2013-1112. Opposing Counsels were John Burlingame 202 626 6000 and Rachael Harris 202 626 6000.

#### 27(b) Mediation or settled Cases

(2007) Louisiana Fish Fry Products v. Charles Corry; Federal District Court, 3:07-cv-1224. Opposing Counsel was Ava K Doppelt (407) 841 2330.

(2008) CCI Spectrum v. P.R. Steelcoat, Inc. Federal District Court, Jacksonville 3:08-cv-752. Opposing Counsel was Steven E. Brust, 904 598 6107.

(2009) Croft v. Be Wild, Inc. Federal District court 8;09-cv-00863. Opposing Counsel was Richard Mockler 813 443 4634.

(2011) Coach, Inc. v. Richard Ferkich et al, Federal District Court 3:11-cv-1256. Opposing Counsel was David Rosenberg, (305) 373 9400.

(2015) Scott v. Popp 51-2009-CA-5416. Opposing counsel was Bruce Young 727 787 0000.

### 30. Six Most Significant Cases

(June 2006) Federal Court, 2008WL785358 Judge Pizzo, Jury trial, Case No. 8:04-CV-2101. I represented Porta Stor, a small storage container company, charged with infringement. I was to sole attorney, against experienced, seasoned opposing counsel. It was significant because the facts of the case explored the bounds of surrender of scope of claims, in the context of the prosecution history of the patent application. The Defendant's case was lost in the lower court, and won on appeal.

(April 2007) Pods v. Porta Stor, Fed. Circ. Court of Appeal No. 2006-1504. 177 Fed.Appx. 73. I was the sole practitioner for Porta Stor. This case was the Federal Circuit appeal of the lower court's ruling. The Defendant was vindicated by the Appellate Court.

(Sept 2007) McGeehan Construction v. Oklawaha Inc, construction contract appeal, Case No.: 2D07-2916. (Per Curium Decision) This case was significant in that it resulted in a per curium decision. This loss was a bitter pill, given the existing case law and the facts. My client had to file bankruptcy, and lost his entire construction company.

(November 2008) Court of Appeal, Federal Circuit, Ritchie v. Vast Resources 2008-1528, -1529. 563 F.3d 1334. I was the sole attorney on this case, representing Ritchie. This case was significant in that one can win in the lower court, and lose on

appeal. This case helped define what the borders of "obviousness" was, in the context of patent practice.

(December 2012) Federal District Court, Spencer v. Taco Bell, 8:12-CV-0387. 2014WL1117048. I was the sole attorney representing the Plaintiff, Spencer. This was a design patent case, which explored the vague language of design patent law.

(November 2013) Federal Circuit Court of Appeal, Spencer v. Taco Bell, 14-1097, 560 Fed.Appx. 997. I was the sole attorney for Spencer, the Appellant. The case was lost in the lower court, and the appellate court upheld. However, while exploring the record, it became apparent that there may be a heretofore unexplored way to demonstrate when a utility patent application can substantially teach a design patent material, by interpretation of the utility patent claims. Though first raised on appeal, the Court of Appeal for the Federal Circuit voiced an interest in the potential to develop such case law.

38. Prior Party to Suit

I brought suit against a hospital, surgeon, and anesthesiologist in 1995. The hospital was Halifax Hospital in Daytona Beach Florida, and the surgeon was William H. Johnson. I do not recall the case number, and the case was settled before trial. The case was a medical malpractice case, which left me paralyzed, and wheelchair bound.

48 e. I perform pro bono service on a regular basis. I am known as the only patent attorney a person can call, without having to provide a credit card number. I do not bill for information which I may provide. Most people have a few questions, which take little time to answer. I have represented persons before the court without pay. I do not keep a "hours score", in that I provide the service as it is needed, and do not watch the clock.

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IN THE SECOND DISTRICT COURT OF APPEAL  
FOR THE STATE OF FLORIDA

APPELLATE CASE NO: 2D12-3544  
L.T. CASE NO: 08-014331-CI

PORTA STOR, INC., )  
A Florida Corporation, )  
and )  
LARRY S. HYMAN, Chapter 7 Trustee, )  
For the Bankruptcy Estate of Christopher )  
Edward Neuguth, pending in the )  
United States Bankruptcy Court, )  
Middle District of Florida, Tampa )  
Division, Case No. 8-05-bk-12146-KRM\* )  
Plaintiffs / Appellants, )  
v. ) APPEAL BRIEF  
PODS INC., )  
A Florida Corporation, )  
Defendant / Appellee. )  
\_\_\_\_\_ )

**APPELLANTS' BRIEF**

**(I). STATEMENT OF THE FACTS**

(a). JURISDICTION OF THE COURT

The District Court of Appeal has jurisdiction to hear this matter under Article V, Section 4(b)(1) and Rule 9.030(b)(1)(A) and Rule 9.110 (a)(1) of the Florida Rules of Appellate Procedure.

(b). STATEMENT OF THE CASE

1. The Parties

Appellant, Porta Stor, Inc., hereinafter "Porta", is a Florida corporation having the principle place of business in Pasco county.

Porta Stor, Inc. was in the business of portable storage rental and transportation.

Appellant, Larry S. Hyman, is the Chapter 7 bankruptcy Trustee for the Bankruptcy Estate of Christopher Edward Neuguth, pending in the United States Bankruptcy Court, Middle District of Florida, Tampa Division, Case No. 8-05-bk-12146-KRM. Christopher E. Neuguth is the owner of Porta Stor, Inc. All appellees will be included in the designation "Porta", unless specifically named.

Pods, Inc., hereinafter "Pods", is a Florida corporation, having the principle place of business in Pinellas County, Florida. Pods, Inc. is in the business of portable storage rental and transportation.

## 2. Pertinent Facts

On 9/16/04, Pods sued Christopher Neuguth and Porta Stor, Inc. for patent infringement and injunctive relief, as well as other, non pertinent counts (to this action), i.e. tortious interference (A00031-35). Later Pods amended the complaint to include (also not pertinent) trade dress infringement, copyright infringement, and false advertising and unfair competition, false advertising under Florida law, common law unfair competition, deceptive and unfair trade practices (A000133-141). Pods sought a temporary restraining order and a preliminary injunction (A00056-60), providing proposed orders (00064-68). In support of the request for injunctive relief, Pods' attorney, Anne Mason, filed a memorandum of law

(A00069-81) and an affidavit by Pods' expert, one Lee A. Swanger Ph.D, PE (A000143-159). (It is in the memorandum of law and the expert's affidavit, which Porta Stor finds the basis for its charge of Pods seeking a wrongful injunction in bad faith, as well as other charges.)

The District Court issued a temporary restraining order setting bond at five thousand dollars (\$5000) and, after hearing, issued a preliminary injunction. No bond hearing was held.

Porta sought to lift the injunction and filed an expert's report. This was not allowed by the District Court. During a hearing of 12/13/04 (A000497, entry 51), the Court stated that it would maintain the "status quo" as to the injunction, with the opportunity to revisit the issue pending the completion of non-binding arbitration. After arbitration, Porta moved to live the injunction, and was denied. Porta then filed an appeal (A000500, entry 87) (the appeal alleged error for not allowing the expert's report into consideration, as well as discovery issues).

The Federal Circuit considered the appeal, holding that it did not have jurisdiction to address the discovery issue, and the Federal Circuit found no abuse of discretion for the District Court not allowing the expert's report into consideration (A000436-38), holding that "Porta Stor has failed to show that the magistrate judge was wrong..." (A00438).

The case went to trial, with the Court directing the verdict regarding infringement against Porta. The jury found for Pods on all other counts (A00303). The copyright verdict was appealed and was eventually remanded, wherein it was voluntarily dismissed.

Porta appealed the infringement verdict, and the Federal Circuit reversed the infringement claim, finding non-infringement in favor of Porta (A000328). The District Court, then, lifted the injunction.

Porta filed a suit for wrongful injunction in the federal court, with jurisdiction denied. Porta then filed the present action in State Court.

Before trial in State Court, Pods filed its motion for summary judgment (A000107-121) and motion for judicial notice, which as agreed to (A000122-124) and ordered (A000125). Additionally, Pods filed its Notice of Matters Relied Upon (A000126-129). Porta objected to Pods motion (A000336-435).

After hearing, the Court granted Pods Motion for Summary Judgment, and issued its order (A00001-2), holding that collateral estoppel barred all claims, stating that "the issues raised in this case were litigated and decided in a prior action" (A000001). Porta filed this appeal and moved for a re-hearing on the issue regarding collateral estoppel (A00512-581). Porta's motion for re-hearing was denied.

### 3. The Ruling Being Reviewed

The ruling of the lower court, granting summary judgment to the Defendant / Appellee, Pods, Inc., is hereto appended as part of the appendix (A000001-000002).

4. Case At Bar

i. The History

This is a state court case for wrongful injunction. The wrongful injunction was part of the equitable relief granted by the District Court for the Middle District of Florida. The history of this case is presented, supra, in the section marked "Pertinent Facts", and is incorporated by reference thereto.

ii. The Present Case

In the present case,, the Plaintiffs, Porta Stor, hereinafter "Porta", and Christopher E. Neuguth, hereinafter "Neuguth", allege that the injunction claimed to be wrongful is the injunction which was granted by the U.S. District Court as part of the patent infringement action. In the present case, the Plaintiffs, Porta and Neuguth, allege (Count 1) malicious prosecution in obtaining temporaryl and preliminary injunction (A00006-14), (Count 2) wrongful injunction, unjust enrichment (A00014-19), (Count 3) Abuse of Process, Obtaining and maintaining a Wrongful Injunction (A00019-20), and (Count 4) Wrongful Injunction (A00020-28). Porta alleged that Pods acted in bad faith in obtaining the injunction from the U.S. District Court. In particular, Porta and Neuguth have alleged that Pods, through its attorneys, representatives, and



experts, made intentional affirmative misrepresentations to the U.S. Court, in seeking the injunction (A00022).

Prior to trial, Pods filed its motion for summary judgment. In Pods motion for summary judgment, Pods argued that the doctrine of Collateral Estoppel controlled. Pods argued that the issue of the injunction had already been litigated.

In its motion, Pods argued that collateral estoppel applied and barred Porta's claims, stating:

"Porta Stor's sole basis for seeking relief - - that PODS wrongfully obtained a preliminary injunction - was previously litigated and adjudicated in PODS' favor"

(A00112). Pods argues that the twice motion for lifting of the preliminary injunction and the appeal of the denial of the admission of an expert's report "precluded" Porta Stor from re-litigating the same issue" (Id.)

Pods states:

"Here, there can be no question that Porta Stor and PODS litigated the issue of whether PODS was entitled to a preliminary injunction in the underlying federal court action"

(A00113).

Pods argues:

"The propriety of the preliminary injunction was considered twice when Porta Stor sought to dissolve the injunction. The issue was litigated a third time when Porta Stor appealed the trial court's refusal to dissolve the injunction"

(Id.). Pods misstates the case. The first motion to lift was based on the provided expert's report, and not on the issue of

infringement, which forms the basis for the injunctions, both preliminary and temporary. The District Court denied the motion to lift, with the explicit reservation of right to Porta to renew the motion to lift, pending arbitration. The court stated that it would reconsider the motion, if re-filed, after the arbitration. This was done, and the Court denied the consideration of the expert's report. The denial of the admission of the expert's report was the issue present to the Federal Circuit, not as Pods claims, the issue of the appropriateness of the injunction. The Federal Circuit stated, with particularity:

"Moreover, Porta Stor did not make redundant motions to dissolve the injunction, but merely reasserted, after the arbitration proceeding had ended, the request it had previously made to dissolve the injunction (a request that the district court had dismissed without prejudice pending the arbitration proceeding)".

(A00438, FN 2). Pods assertion, that the propriety of the injunction was considered and determined by the Federal circuit, or by the District Court, has no basis in the record. A reading of the opinion of the Federal Circuit (A000436-38) shows that the issue considered in the interlocutory appeal was that of the ruling denying the admission of the expert's report, as untimely. The District Court denied the expert's report in finding no new grounds for lifting the injunction. The District Court only looked to new grounds, and finding none, did not lift the injunction.

It is important to note that the issue of infringement, which is the very basis of the injunctions, was not considered by the

Federal Circuit until the appeal of the judgment of the District Court, which as decided April 27, 2007 (A00439-454).

It is equally important that the issue of infringement, and the issue of wrongful injunction was not finally decided until the Federal Circuit rendered its opinion, and the Supreme Court denied certiorari. It was only at that time that the issue was finally decided, and the issues regarding infringement and the appropriateness of the injunction were decided in favor of Porta Stor (A00451, col 1, para 1). It was decided that Porta never infringed the Pods' patent, and ultimately, Pods was never entitled to a temporary injunction, a preliminary injunction, or a permanent injunction, in that there never was any infringement. The District Court vacated the injunction (A00455). By this time, however, the damage was done, and Porta Stor was no longer a viable business entity.

In all of its arguments to the Court, Pods avoids the final determination as to infringement, issued by the Federal Circuit, in the opinion of April 27, 2007 (A00439-454). In that opinion, the Federal Circuit decides, with finality, the issues of infringement, and whether the injunction was wrongful.

## (II). SUMMARY OF THE ARGUMENTS

### a. Standard of Review

The appellees submit that, in this instance, the standard of review of the Court's order granting summary judgment, is de novo.

"The standard of review for orders on summary judgment is de novo. *Major League Baseball v. Morsani*, 790 So.2d 1071, 1074 (Fla.2001)".

*Bradenton Group, Inc. v. State*, 970 So.2d 403, 408 (Fla. App., 2007).

b. Errors in the Court's Order For Summary Judgment; (A00001-2)

1. Error 1: The Court erred when it granted Pods' motion for summary judgment, based on the doctrine of collateral estoppel. In so granting the motion, the Court found that there were no justiciable issues of fact remaining to be determined.

The Court erred when it held that the motions to lift the injunction and the interlocutory appeal to the Federal Circuit were "final determinations" as to the injunction.

2. Error 2: The Court erred when it held that considerations of the temporary and preliminary injunction were conclusive as to appropriateness of the injunction. The Court erred when it failed to apply pertinent Florida case law on this point.

3. Error 3: The Court granted a summary judgment based on facts that occurred before the cause of action arose.

(III). ARGUMENTS

"It is a basic rule of appellate law that a trial judge's conclusions of law come to us with the presumption of correctness".

*Osceola County v. Best Diversified, Inc.*, 936 So.2d 55, Fla App. 5 Dist, 2006. However, in this case there is substantial

applicable case law which militate against the lower court's findings and ruling of law, and, in fact, prevent the Court from taking the position which it did take.

a. Applying Collateral Estoppel - Error 1

The issue is whether collateral estoppel applies. The United States Supreme Court has stated:

"Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of **relitigating an identical issue** with the same party or his privy and of promoting judicial economy by preventing needless litigation. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329, 91 S.Ct. 1434, 1442-1443, 28 L.Ed.2d 788". (Bold mine).

*Parklane Hosiery Company, Inc v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). Florida Courts do not adhere to *Blonder*, but have taken the *Blonder* case and have further narrowed the requirements for the doctrine of collateral estoppel to apply, stating:

"In summary: For the doctrine of collateral estoppel to apply to bar relitigation of an issue, five factors must be present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated. *Goodman v. Aldrich & Ramsey Enters., Inc.*, 804 So.2d 544, 546-47 (Fla. 2d DCA 2002); see also Restatement (Second) of Judgments § 27 (1982)".

*Cook v. State*, 921 So.2d 631, 634, Fla.App. 2 Dist., 2005.

The Cook Court went on to state:

"The requirement of Florida law that the prior determination of an issue be based on full and fair litigation is similar to the acknowledgement in Restatement (Second) of Judgments Section 28(3) of an exception to the general rule of issue preclusion when "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." See also Restatement (Second) of Judgments: ch. 1, Scope ("[A] judgment in a particular case must be subject to reexamination in the name of substantial justice if the initial engagement of the merits was inadequate.) In general, Florida has adhered to the requirement of mutuality of parties. "[U]nless both parties are bound by the prior judgment, neither may use it in a subsequent action." *Stogniew*, 656 So.2d at 919. Notwithstanding the federal decisions in which collateral estoppel has been applied despite the absence of mutuality of parties, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), and *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), the rule in Florida has been-with limited exceptions FN2 -that collateral estoppel only "applies when 'the identical issue has been litigated between the same parties or their privies,' " *McBride*, 848 So.2d at 291 (quoting *Gentile v. Bauder*, 718 So.2d 781, 783 (Fla.1998)). FN2. See, e.g., § 772.14, Fla. Stat. (2004); *Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061 (Fla.2001); *Zeidwig v. Ward*, 548 So.2d 209 (Fla.1989)".

*Cook v. State*, at 634-35. On previous occasion, the Florida Court had reviewed the application of collateral estoppel, stating:

"Collateral estoppel is a judicial doctrine which in general terms prevents identical parties from relitigating the same issues that have already been decided." *Department of Health & Rehabilitative Services v. B.J.M.*, 656 So.2d 906, 910 (Fla.1995). Under Florida law, collateral estoppel, or issue preclusion, applies when "the identical issue has been litigated between the same parties or their privies." *Gentile v. Bauder*, 718 So.2d 781, 783 (Fla.1998). **In addition, the particular matter must be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction.** See *B.J.M.*, 656 So.2d at 910. *City of Oldsmar v. State*, 790 So.2d 1042, 1046 n. 4 (Fla.2001).

Although collateral estoppel generally precludes relitigation of an issue in a subsequent but separate cause of action, its intent, which is to prevent parties from rearguing the same issues that have been decided between them..". (Bold mine).

*State v. McBride*, 848 So.2d 287, 290-91 (Fla., 2003).

i. THE FIRST ISSUE; IDENTITY OF CAUSE OF ACTION

The first issue is whether there is an identity of cause of action. In defining what is an "identity of cause of action" other Court's have stated:

**"The test for identity of a cause of action for the purposes of determining res judicata is the identity of the facts essential to the maintenance of the action. *Gordon v. Gordon*, 59 So.2d 40 (Fla.), cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680 (1952). These facts need not be identical; rather, the testimony produced by the plaintiff in the second suit must be essentially the same as that which was produced in the former action. *Gordon*, 59 So.2d at 44".** (Bold mine).

*Husky Industries, Inc. v. Griffith*, 422 So.2d 996, 999 (Fla. App. 5 Dist., 1982). As identified by the 5<sup>th</sup> District, the determination of whether there is an identity in a cause of action is whether the testimony produced by the plaintiff in the second suit MUST be essentially the same as that which was produced in the former action. While the court was looking to res judicata, the courts have generally discussed res judicata and collateral estoppel together (See: *West v. Kawasaki Motors Mfg. Corp., U.S.A.*, 595 So.2d 92, cited *infra*).

The Second Circuit DCA defined the requirements of the application of collateral estoppel, stating:

"[f]or the doctrine of collateral estoppel to preclude relitigation of an issue in a subsequent action, the parties and issues must be identical, and the **particular matter must have been fully litigated and determined in a contest resulting in a final decision of a court of competent jurisdiction.** *Dep't of Health & Rehabilitative Servs. v. B.J.M.*, 656 So.2d 906, 910 (Fla. 1995). The party claiming collateral estoppel bears the burden of showing its applicability with **sufficient certainty through the record or extrinsic evidence.** See *Meyers v. Shore Indus., Inc.*, 597 So.2d 345, 346 (Fla. 2d DCA 1992)". (Bold mine)

*Campbell v. State*, 906 So.2d 293, 2004 WL 1175483 (Fla. App., 2004). The trial court transcript (A00457-490) fails to show that there was any consideration as to whether there was testimony or evidence provided to the lower court or the Court of Appeals for the Federal Circuit, regarding misrepresentations made to the Court. (Pods did mention, in argument to the District Court Judge, that a grievance had been filed against Ms. Mason, Pods initial attorney).

No testimony regarding any such statements was made, and the District Court did not act, in any way, to determine the issues regarding any such statements. The Defendant has not provided any proof that the matter was litigated in the lower court (notwithstanding the reversal by the FCCA), with the Defendant solely relying on argument to support the position that the matter was litigated and a final determination reached (with the FCCA ruling that there was not infringement (A004531 col 2, para 1) and that Pods was not entitled to the injunction. Hence, the injunction was wrongful).



The Defendant relies on the erroneous rulings of the District Court, which was determined to be in error in the application of the law (hence the injunction was wrongful), and an FCCA panel which did not address the issue of the injunction, only whether there was sufficient evidence to lift the injunction (the Expert's report which was not allowed) (A00436-438).

In that the lower court issued the injunction, and did not lift the injunction, only demonstrates that the Court believed the misrepresentations made by Pods, its attorneys (A00076; para 2, the "plaintiff in this case did not amend or "give up" anything in its patent application during the prosecution history" and "there was no amendment...which would prevent the plaintiff from claiming the doctrine of equivalents"), and expert (A00144; para.8, the expert "found it to be a very clean prosecution history") (repeated A00148; para 9).

The affidavit of Elliot Stern, Ph.D, PE, which was provided to the Court, stated:

"5. I find that the statements made to the District Court were not based on the facts of the case, which were indicated by Pods, its attorneys, and its expert, Dr. Swanger. I believe that the statements made to the Court were in opposition to the facts, represented by Pods, Pods' attorney, and the expert.

6. I find that Dr. Swanger's statement to the Court, that the prosecution was "clean" was false and misleading, give the clear rejection by the patent office and the amendments made by the patentees to overcome that rejection".

(A00360) The present case is about a wrongful injunction, and more particularly, about allegations of misrepresentations made

to the Court in seeking and acquiring the wrongful injunction. Expert testimony will turn on the absence in the record of the patent prosecution of conditions, rejections, and responses, which could possibly support the Defendant's position. Expert testimony will also show that the patent prosecution history did not support, and could not support, the statements made to the Court. The evidence and the proof made to the District Court in the infringement action were legal arguments about the patent prosecution history, and did not turn on statements made to the Court, but rather, statements made to the Patent Office Examiner. The difference is that this present case focuses on the statements made to the Court, with the patent prosecution being used to show that those statements could not have been true, and that those statements could not have been supported by any interpretation of the patent prosecution history.

Simply put, the past case sought a finding of infringement with an injunction as a remedy, with the final outcome being that there was no infringement and the injunction was wrongful. The present case seeks damages for bad faith in obtaining the wrongful injunction. The cases are different, and the proofs are different.

Porta Stor, the Plaintiff in the present case, could not have brought an action for wrongful injunction until it was determined that Pods was not entitled to the injunction, with was therefore "wrongful". This is not a case of "you could have but you didn't"

(A00462; L 2-3), because the cause of action did not exist until after the final determination by the Federal Circuit Court of Appeals.

ii. THE FINAL DETERMINATION

The second component of the first error is directed to whether the final determination by the FCCA is controlling. The Federal Circuit finally determined that the lower court misapplied the law regarding the doctrine of equivalents. The Plaintiffs refer to the final opinion of the FCCA hereto attached as Exhibit 1, wherein that court succinctly stated:

"We conclude that arguments made by PODS during prosecution bar it from asserting that Porta Stor's device infringed by equivalents. During prosecution, the examiner rejected claim 1 of the '062 patent as obvious in light of the Dousset prior art reference, U.S. Patent No. 3,541,598 ('598 patent'), and another reference. In response, PODS argued that "Applicants' invention is decidedly different from the teachings of the Dousset patent" for three reasons. First, Dousset required specially designed containers, whereas PODS's device was operable with any container. Second, "[a]s the Examiner acknowledges, the Dousset reference clearly lacks the teachings of the singular rectangular-shaped frame." J.A. at 65 (emphasis added). Third, PODS's invention teaches uniformity in the handling, lifting and lowering of a container" whereas the Dousset reference clearly lacks combined elevating and positioning means as thought by the present invention which allows the carrier frame to be elevated and positioned as a rectangular-shaped frame with respect to the container, the vehicle and the ground." J.A. at 65 (emphasis added). The second basis PODS offered for distinguishing Dousset, along with the reference to a rectangular shape in the third basis, clearly and unmistakably shows that PODS limited its claims to a rectangular-based frame and surrendered any claim to a frame that was not rectangular or four-sided. **Since PODS offered each argument as a separate basis for distinguishing Dousset, its rectangular-frame argument created a separate estoppel.** See *Southwall Techs.*, 54 F.3d at 1582-83". (Bold mine).

*PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1367-68, C.A.Fed. (Fla.),2007. The Court then concluded:

**"Under the proper claim construction (requiring a four-sided, rectangular carrier frame), there is no literal infringement of claim 29 of the '062 patent.** Since infringement of claims 1 and 32 under the doctrine of equivalents is barred by prosecution history estoppel, we reverse the district court's judgment of infringement and direct it to enter a judgment of non-infringement in favor of Porta Stor". (Bold mine).

*Id.*, at 1371. In the final determination, the Court found that there was no infringement, and there was, therefore, no basis for any injunction related to the patent, which formed the basis for the injunction entered by the lower District Court.

The Defendant had provided the opinion of the FCCA, regarding the expert's report, as Exhibit M of the documents relied upon in the Defendant's Motion for Summary Judgment (A00297-300). Defendant has also provided the final FCCA determination as Exhibit O of the documents relied upon in the Defendant's Motion for Summary Judgment (A00307).

It is plain to see that the Federal Circuit Court of Appeals (FCCA), in its final determination, rejected the application of the doctrine of equivalents and found that there was no infringement. The matter was then sent back to the District Court, where the Court entered the order vacating the judgment which granted the permanent injunction (A00331-332).

It was at the time, that the FCCA determined that infringement had not occurred, that the injunction was then determined to be wrongful.

b. Non-application of Pertinent Case Law - Error 2

The Court erred when it failed to apply the appropriate case law concerning wrongful injunction and procedures in courts below regarding such injunctions. The Court erred when it considered the motions to lift the injunctions, and the appeal of the denial of admission of an expert's report, to be a final determination of the appropriateness of the injunction.

In a third district case, that is procedurally similar to the case at bar, the temporary injunction was not dissolved during the pendency of the cause and the injunction was affirmed on appeal therefrom. There was then an entry of judgment in favor of the defendants on final hearing. On appeal, the appellant / plaintiffs argued that because the issue of the injunction had been resolved by the lower court, there could not be a basis for holding the injunction was improvidently issued. The Court of Appeal for the Third District held otherwise, stating:

**"The determinative question on this appeal is whether rendition of judgment for the defendants and dismissal of the cause on final hearing entitled the defendants to recover damages on the injunction bond. In contending against liability on the bond, the appellants argue that because the temporary injunction was not dissolved during the pendency of the cause and was affirmed on appeal therefrom, the entry of judgment in favor of the defendants on final hearing could not be a basis for holding the injunction was improvidently issued. The appellee-defendants argue that the affirmance of**

the temporary injunction determined only that a proper showing had been made therefor at the time it was applied for, and that the final judgment denying a permanent injunction and dismissing the cause on the merits amounts to an ultimate determination that the injunction for which the bond was posted was improvidently entered, resulting in liability on the bond. We hold that the latter argument, by the appellees, is correct. Where a plaintiff is unable to maintain his cause or obtain the relief sought therein, incident to which he may have made a sufficient showing for the entry of a temporary or preliminary injunction, the damages occasioned thereby to the defendant who is successful on final hearing are properly recoverable on an injunction bond. *Sewell v. Huffstetler*, 83 Fla. 629, 93 So. 162; *National Surety Co. v. Willys-Overland, Inc.*, 103 Fla. 738, 138 So. 24. (Bold mine).

*Morse Taxi & Baggage Transfer, Inc. v. Bal Harbour Village*, 242 So.2d 177, 179, (Fla. App. 3 Dist., 1970). The third district held that the determinations in the courts below only went to the sufficiency of the proof, "at that time", and did not affect the outcome, or the ability of the Defendant / Appellee to later bring a cause of action for wrongful injunction.

This line of reason was applied by the Court of Appeal for the Fifth District in *Jones v. Sterile Products Corp*, wherein that Court stated:

"Affirmance of the temporary injunction determined only that a proper showing had been made ... at the time it was applied for, and that the final judgment denying a permanent injunction and dismissing the cause on its merits amounts to an ultimate determination that the injunction for which the bond was posted was improvidently entered resulting in liability on the bond. *Morse Taxi*, 242 So.2d at 178. The reasoning of *Morse Taxi* applies and is controlling here. The affirmance of the temporary injunction does not as a matter of law require the dismissal of the actions for wrongful injunction".

*Jones v. Sterile Products Corp.*, 658 So.2d 1099, 1100, (Fla. App. 5 Dist., 1995). The Jones Court further considered the question as to whether the trial court correctly interpreted the law in holding that lower court procedures regarding the injunction were a determination of the issue. The Jones Court stated:

"In its order of dismissal, the trial court held that "the preliminary injunction cannot have been wrongful since it was affirmed by the appellate court." While SPC urges us to reverse because the court went outside the four corners of the complaint in considering Jones I, we direct ourselves to the question of whether the trial court's conclusion is a correct statement of the law. We conclude that it is not. This issue was addressed in *Morse Taxi & Baggage Transfer, Inc. v. Bal Harbour Village*, 242 So.2d 177 (Fla. 3d DCA 1970)".

*Jones v. Sterile Products Corp.*, at 1100. The case law militates against, and is contrary to, the Circuit Court's position that consideration of the injunction, within the context of motions to lift and an appeal from an exclusion of expert's report, was a final determination. As such, the Circuit Court's determination of summary judgment is devoid of any basis, and should be vacated (See also *Sterile Products Corp. v. Jones*, 702 So.2d 628, 629, Fla.App. 5 Dist., 1997).

c. Granting Summary Judgment Based on Facts Which Occurred Before the Cause of Action Arose - Error 3

The Court granted a summary judgment based on facts that occurred before the cause of action arose.

- i. WHEN DOES A CAUSE OF ACTION FOR WRONGFUL INJUNCTION ARISE

The Third District Court of Appeal, in Picasso Tower Inc., stated:

"the right of the defendant in an injunction suit to recover costs and damages for the wrongful issuance of the temporary injunction does not accrue until there is a final determination that said injunction was wrongfully issued".

*Picasso Tower Inc. v. Dairene Int'l.*, 874 So.2d 640, (Fla. 3d DCA 2004). In essence, the Circuit Court has applied the facts (notwithstanding the case law regarding the holding of lower court proceedings to be non-binding regarding injunctions and wrongful injunctions) which occurred before the accrual of the cause of action, to bar the cause of action. The Circuit Court disregards the fact that any lower court proceedings were concerned, at least tangentially, with an injunction, wherein the case now before the court is directed to a wrongful injunction.

The argument that somehow the issue of a "wrongful injunction" could have been determined by a lower court (which was overturned), before the Court of final determination reached the conclusion that the injunction was, in fact, wrongful, cannot be logically supported. This is, however, the position that the Defendant took and asserted during argument, when defense counsel stated:

"So one of our primary arguments, Judge, is this collateral estoppel issue has been litigated and re-litigated and by five judges; Judge Pizzo, Judge Kovachevich, and then the appellate pane in the Federal Circuit, a three-judge panel".

(A00554; lines 4 - 9). This argument ignores the fact that the FCCA later reversed the lower court, being Judge Pizzo and



Judge Kavochovich. Rather, counsel's statement to the Court led the Court "down the primrose path" to creating reversible error, in granting the motion for summary judgment based upon the doctrine of collateral estoppel, which does not, under current case law, apply.

The Court does not appear to have considered the fact that the "three judge panel" (referred to by counsel in his affirmative statement to the court), did not consider whether the injunction was proper or wrongful. In that matter the court only ruled that the striking the Expert's report sought to be entered, was proper. That Court (the FCCA) was concerned with the finding that Porta Stor did not offer any further evidence which could support the lifting of the injunction (other than the stricken expert's report, which was ruled to be "untimely").

It is instructive to consider the Court's language:

"On December 3, 2004, Porta Stor filed a "motion for lifting," i.e., dissolving, the preliminary injunction. When the parties subsequently agreed to engage in arbitration proceedings, that motion was denied without prejudice. On May 11, 2005, after the arbitration proceedings had ended, Porta Stor moved again to dissolve the preliminary injunction, arguing that the court had improperly relied on the opinion of PODS's engineering expert and that the prosecution history of the '062 patent did not support application of the doctrine of equivalents as to two of the limitations of claim 1. The magistrate judge denied the motion. With respect to the new information that Porta Stor offered in its motion, the magistrate judge explained that with due diligence Porta Stor could have presented that information prior to the issuance of the preliminary injunction. Moreover, the magistrate judge observed that Porta Stor's arguments in its motion to dissolve the injunction failed to address claim 29. Because the original report and recommendation was based on a finding that PODS would likely prove infringement of claims 1 and 29, the magistrate judge concluded that Porta Stor's "factual and

legal arguments have little relevance." Porta Stor appeals that decision....

Porta Stor has failed to show that the magistrate judge was wrong in holding that the new information submitted in connection with Porta Stor's motion to dissolve the preliminary injunction could have been presented at the original hearing on the injunction. For that reason, the magistrate judge properly denied the motion to dissolve the injunction.FN2 In addition, as the magistrate judge pointed out, the district court entered the preliminary injunction on the basis of the magistrate judge's conclusion that PODS had demonstrated a reasonable likelihood of success in showing that Porta Stor's device infringed claims 1 and 29 of the '062 patent. Because Porta Stor's motion to dissolve the preliminary injunction was expressly limited to claim 1, and because we have held that in cases involving multiple patent claims a patentee seeking a preliminary injunction need only demonstrate that it will likely prove infringement of one of those claims, *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed.Cir.2001), the magistrate judge was correct in holding that Porta Stor's motion did not present sufficient grounds for dissolving the preliminary injunction. We therefore affirm in appeal No. 05-1471".

*PODS, Inc. v. Porta Stor, Inc.*, 177 Fed.Appx. 73, 74, C.A.Fed.,2006 (A00437). The FCCA panel in ruling on the expert's report, did not consider the prosecution history, but relied upon the District Court. That FCCA panel did not determine the issue of infringement, or the wrongfulness of the injunction.

As can be seen, the FCCA, at this stage, did not find anything which would support the lifting of the injunction. The FCCA referenced Claim 1 and 29 (which were declared not to be infringed by the Court of final determination). It should also be noted that the phrase "wrongful injunction" does not appear anywhere in the FCCA's opinion. The term "injunction" is used frequently, but the Court did not rule on, or even consider, a "wrongful injunction"

which is the cause of action before this court, and which has been summarily dismissed under the doctrine of collateral estoppel.

However, in the later, FINAL opinion, it was found that Claim 1, and hence Claim 29, both, were not infringed. Hence, there was no basis for any injunction, which is proven by the District Court then vacating its infringement judgment and vacating the injunction (A00331).

It cannot be controverted that the decision by the FCCA (cited at *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1367-68, C.A.Fed. (Fla.), 2007) (A00439-454) was, in fact, the final determination of the issue of infringement, which formed the very basis for the injunction. The FCCA did determine (finally) that Porta Stor did not infringe the Pods patent, because the doctrine of equivalents did not apply. The injunction was premised on the lower court's continued erroneous belief that the doctrine of equivalents did apply, and a continued misapplication of patent law. The District Court had erroneously applied the law, and could not see its error. However, the District Court's error does not accrue to the final opinion in the matter, and any such District Court, and FCCA rulings are subservient to the final determination by the FCCA.

ii. APPLICABILITY OF LOWER COURT'S DECISIONS

This issue regards the applicability of the lower court's decisions, in light of the FCCA's final determination. The fact is that there is no case law in Florida which holds that a lower

court's decision binds a party when a superior court of appeals reverses that lower court's decision. In this case, the court of final determination reached the conclusion that the lower court had misapplied the law, and that Pods was not entitled to the injunction (A00439-454).

As the Florida Courts have long recognized:

"We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when *res adjudicata* is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first."

*West v. Kawasaki Motors Mfg. Corp., U.S.A.*, 595 So.2d 92, 94, (Fla. App. 3 Dist., 1992). The present cause of action is a cause of action for "wrongful injunction" (counts 2,3, and 4 (A00014-00028)). The previous cause of action was for "infringement" and other non-pertinent claims (A00031-00035 and A00133-00140). Furthermore, as to wrongful injunction as a cause of action, and when it initially accrues, the Florida courts have stated (citing the 2<sup>nd</sup> DCA):

"We find the Second District's reasoning persuasive. The court said:

**We are aware of the general rule that the right of the defendant in an injunction suit to recover costs and damages for the wrongful issuance of the temporary injunction does not accrue until there is a final determination that said injunction was wrongfully issued.** However, there is a corollary rule to the effect that the dissolution of a temporary injunction, if tantamount to a determination that

the injunction was wrongfully issued, will entitle the defendant to recover for damages resulting from its issuance.... We are of the view that the lower court's dissolution of the temporary injunction, on the ground that it lacked jurisdiction over the cause, was tantamount to a determination that the temporary injunction was wrongfully issued". (Bold mine).

*Picasso Tower Inc. v. Dairene Int'l.*, 874 So.2d 640, 643, (Fla. App., 2004).

The FCCA case (A00436-438) which Pods relied on (A00462; L 4-9), was that which was directed to the appropriateness of the court not allowing in the expert's report, and not the matter of infringement.

The present case focuses on what the attorneys and the experts stated to the court during the infringement trial (A00003-00030). While the record of the prosecution history will most certainly be referenced, the evidence and testimony will be directed to misrepresentations made to the Court by the attorneys, experts, and Pods, long after the patent had issued, and at the beginning of the infringement case.

In the infringement case, the attorney arguments and filings were not evidence of infringement, which formed the basis for the injunction, and the FCCA's eventual determination that infringement had not occurred and that Pods was not entitled to the issued injunction. In support of the Plaintiffs' position that the final determination regarding the injunction did not occur until the case was decided by the FCCA and the injunction dissolved by the

District Court in accordance with the FCCA's opinion, the Florida courts (2<sup>nd</sup> DCA) has found that:

"the dissolution of [the] temporary injunction [was] tantamount to a determination that the injunction was wrongfully issued [and] entitle[d] the defendant to recover for damages resulting from its issuance." *Picasso Tower, Inc. v. Dairene Int'l*, 874 So.2d 640, 642 (Fla. 3d DCA 2004) (quoting *Roger Dean Chevrolet, Inc. v. Painters, Decorators & Paperhangers of Am.*, 155 So.2d 422, 425 (Fla. 2d DCA 1963))".

*Bradenton Group, Inc. v. State*, 970 So.2d 403, 411, (Fla. App., 2007). As can be seen from the Bradenton Group opinion, the final determination was that the injunction was wrongful, notwithstanding any erroneous application of the law by the lower courts.

In this case the attorney arguments and representations are at the heart of the evidence, and are the evidence, with the prosecution record being used to demonstrate that those statements were intentional misrepresentations to the Court.

In *West v. Kawasaki Motors*, the Court referenced the requirement that the "thing being sued for" must be identical in both actions, in order for the doctrine of collateral estoppel to apply, stating:

"It is settled, as a general rule in Florida, that in order to invoke the defense of res judicata or collateral estoppel so as to bar a pending action based on a final judgment entered in a prior action, it must be established that there is (1) an identity in the thing sued for in both actions, (2) an identity of the cause of action in both actions, (3) an identity of parties in both actions, and (4) an identity of the capacity of the parties in both actions. *Seaboard Coast Line R.R. v. Industrial Contracting Co.*, 260

So.2d 860, 862 (Fla. 4th DCA 1972); *Matthews v. Matthews*, 133 So.2d 91, 94 (Fla. 2d DCA 1961) and cases collected".

*West v. Kawasaki Motors Mfg. Corp., U.S.A.*, 595 So.2d 92, 94, (Fla. App. 3 Dist., 1992).

#### IV. MANIFEST INJUSTICE

The last issue is whether Collateral Estoppel should apply if it works a manifest injustice. The Florida Courts have recognized that Collateral Estoppel would not apply if it worked a manifest injustice, stating:

"Federal courts and other state courts, however, have held that the collateral estoppel doctrine does contain such a manifest injustice exception. See, e.g., *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir.1982); *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir.1971); *Dowling v. Finley Assocs., Inc.*, 248 Conn. 364, 727 A.2d 1245, 1249 n. 5 (1999); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 262 Kan. 635, 941 P.2d 1321, 1333 (1997); *State v. Harrison*, 148 Wash.2d 550, 61, P.3d 1104, 1109 (2003). We agree. We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice".

*State v. McBride*, 848 So.2d 287, 291-92, (Fla., 2003).

The manifest injustice occurring would be using the doctrine of Collateral Estoppel to cut of the Plaintiffs' right of recovery before the Plaintiff could have raised the case for wrongful injunction. By the application of Collateral Estoppel, the Court has barred the Plaintiff from relief that he is entitled to.

#### V. CONCLUSION

The Plaintiffs submit that the doctrine of Collateral Estoppel had not been properly applied by the court, and the requisite basis for the application of such a doctrine is wholly lacking, in that;

(1) the Lower Tribunal's position is contrary to the case law cited supra;

(2) there has been no proof or evidence that the issues now before the Court had been finally adjudicated, except in the Plaintiffs' favor (as to infringement and the injunction), the cause;

(3) the cause of action for wrongful injunction did not arise until after the final determination (in Plaintiffs' favor);

(4) the causes of action and proofs for the past case and this present case are different;

(5) the Federal Circuit Court of Appeals finally determined the issues of infringement and the injunction, in Plaintiffs' favor, thereby defining the injunction as "wrongful"; and

(6) the application of the doctrine of Collateral Estoppel, even if appropriate, would work a manifest injustice.

The Appellants, therefor, request that the District Court of Appeal for the Second District vacate the Lower Tribunal's summary judgment, and remand the case for procedures consistent with the District Court of Appeal's opinion.



Dated:

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IN THE SECOND DISTRICT COURT OF APPEAL  
FOR THE STATE OF FLORIDA

APPELLATE CASE NO: 2D12 3544  
L.T. CASE NO: 08-014331-CI

PORTA STOR, INC., )  
A Florida Corporation, )  
 )  
and )  
 )  
LARRY S. HYMAN, Chapter 7 Trustee, )  
For the Bankruptcy Estate of Christopher )  
Edward Neuguth, pending in the )  
United States Bankruptcy Court, )  
Middle District of Florida, Tampa )  
Division, Case No. 8-05-bk-12146-KRM\* )  
Plaintiffs / Appellants, )  
 )  
v. )  
PODS INC., )  
A Florida Corporation, )  
Defendant / Appellee. )  
 )  
\_\_\_\_\_ )

**CERTIFICATE OF COMPLIANCE**

The appellants in the above entitled matter hereby certify that they have complied with rule 9.210 of the Florida Rules of Appellate Procedure, regarding the font used in the preparation of the Appellants' Brief. The font used was courier new 12 point font.

Dated:

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CERTIFICATION

I hereby certify that a copy of the foregoing Appellants' Opening Brief has been forwarded by U.S. first class mail to all counsel of record, being Jonathan B. Sbar, located at the Law Office of Rocke, McLean & Sbar, 2309 S. MacDill Avenue, Tampa, FL 33629, and Attorney Herbert Donica, located at 106 S. Tampania Avenue, Suite 250, Tampa, FL 33609, on this the \_\_\_\_ day of August, 2012.

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