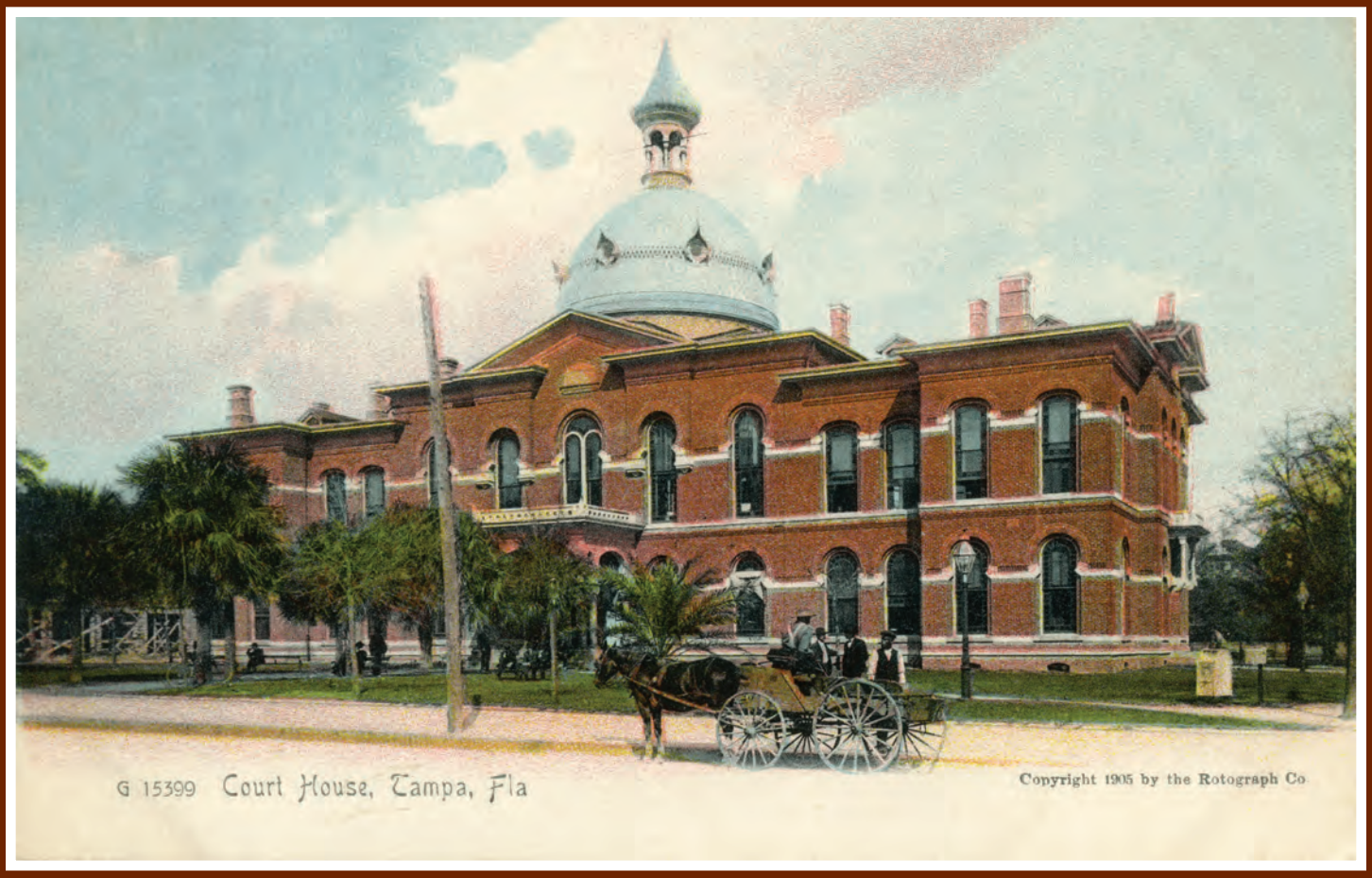
LAWYER

THE HILLSBOROUGH COUNTY BAR ASSOCIATION
TAMPA, FLORIDA | JAN - FEB 2021 | VOL. 31, NO. 3



IS 'TO THE BEST OF MY KNOWLEDGE' GOOD ENOUGH?

Construction Law Section

Chairs: Debbie Crockett - Cheffy Passidomo, P.A. & Katherine Heckert, Carlton Fields

Author: Melanie Senosiain - Shutts & Bowen LLP

Be wary; personal knowledge is not enough. An affidavit based on unsupported opinions and conclusions of fact and law will be insufficient.

The year is 2021. The world has been turned on its head, but you are ready to move forward. You submit your Rule 1.510(e) expert affidavit in support of your Opposition to Defendant's Motion for Summary Judgment detailing facts in question and noting that the affiant's testimony was made "to the best of his knowledge."

You arrive (virtually or in person) at the Motion for Summary Judgment hearing ready to explain your case but, to your surprise, the judge refuses to consider the affidavit attached to your pleading. This has become an all too familiar scene poised to demolish your defense. What did you do wrong and how can you be sure this never happens again?

Under Florida law, affidavits, oaths, and acknowledgments administered by a notary public of the State of Florida are governed by section 92.50(1), Florida Statutes. Section 92.50(1) requires the signature and official seal of the officer or person taking or administering the oath. However, the notary's signature and seal are properly placed on the expert affidavit. You have passed this test.

Florida Rule of Civil Procedure 1.510(e) further provides requirements for supporting or opposing affidavits. Specifically, Rule 1.510(e) states that affidavits must be based on personal knowledge, set forth facts admissible in evidence, show that the affiant is competent to testify in the matters stated therein, and include sworn or certified copies of documents referred therein.

Importantly, an affidavit must be based on personal knowledge. Affidavits not made on personal knowledge mean that the affiant is not competent to testify to the matters set forth therein.[1] Qualifying verifications using the words "to the best of his/her knowledge" are insufficient.[2] Further, affidavits based on information and belief are insufficient because it is not made on personal knowledge.[3] You have determined the error of your ways, the simple acknowledgement that the information provided was to the best of the expert's knowledge was not enough.

How can you be certain this will not happen to you again? A helpful example of verification based on personal knowledge that was approved by the supreme court for filing motions for post-conviction relief states that:

> "Before me, the undersigned authority, this day personally appeared _____, who first being duly sworn, says that he is the Defendant in the above-styled cause, that he has read the foregoing Motion for Post-Conviction Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.
>
> _____
>
> (your signature)[4]"

Be wary; personal knowledge is not enough. An affidavit based on unsupported opinions and conclusions of fact and law will be insufficient.[5] Recently the Second District Court of Appeal held that a corporate representative's affidavit was insufficient because it lacked details of the affiant's title and specific corporate duties, the relevant skill sets or experiences that the affiant possessed to testify competently, and an acknowledgement of the affiant's personal knowledge of the testimony.[6]

The moral of this tale is when you are relying on an affidavit to support or oppose a motion for summary judgment, you must be sure the affidavit is based on personal knowledge, competency, and admissible facts. ■

[1] *Elser v. Law Offices of James M. Russ, P.A.*, 69 So. 2d 309, 312 (Fla. 5th DCA 1996).

[2] *See Scott v. State*, 464 So. 2d 1171, 1172 (Fla. 1985) (holding that a motion

Continued on page 29

Continued from page 28

with the qualifying words "to the best of his knowledge" is not under oath as contemplated by Fla. R. Crim P. 3.850); *Mengore v. State* 718 So. 2d 368 (Fla. 4th DCA 1998) (holding defective verification that stated "true and correct to the best of my knowledge").

[3] *Elser v. Law Offices of James M. Russ, P.A.*, 69 So. 2d 309, 312 (Fla. 5th DCA 1996); *Thompson v. Citizens Nat'l Bank of Leesburg*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) ("An affidavit based on information and belief rather than personal knowledge is not admissible into evidence and should not be considered by the trial court on a motion for summary judgment.").

[4] *Scott v. State*, 464 So. 2d 1171, 1172 (Fla. 1985).

[5] *Rodriguez v. Avatar Prop. & Cas. Ins. Co.*, 290 So. 3d 560, 563-64 (Fla. 2nd DCA 2020).

[6] *Id.* at 563.

Author: Melanie Senosiain - Shutts & Bowen LLP

Construction Law Section CLE

On October 15, HCBA's Construction Law Section hosted a CLE webinar on Co-Primary Defense Cost Contribution under 624.1055. During this webinar, the topics included a scope of section 624.1055, potential defense cost allocation methods, and open issues. A special thank you to Steve Rawls of the The Law Office of Jeffrey Zwirn for sharing his knowledge during this webinar!