

**OSCA/OCI'S FAMILY COURT CASE LAW UPDATE**  
**July 2011**

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## Delinquency Case Law

### ***Florida Supreme Court***

D.J. v. State, \_\_\_ So. 3d \_\_\_, 2011 WL 2637451 (Fla. 2011). **TRESPASS ON SCHOOL GROUNDS PURSUANT TO S. 810.097(2), F.S. (2010), REQUIRES THE STATE TO PROVE THAT THE DEFENDANT WAS WARNED TO LEAVE BY EITHER THE SCHOOL'S PRINCIPAL OR A PERSON TO WHOM THE PRINCIPAL HAD GRANTED AUTHORITY TO RESTRICT ACCESS TO THE PROPERTY.** A school security guard encountered the juvenile on the school's property and recognized that he was not a student. The juvenile was told to leave. The next day, the juvenile was again observed on school grounds. The school's police officer was notified, and the juvenile was arrested. The Third District Court of Appeal in D.J. v. State, 43 So. 3d 176 (Fla. 3d DCA 2010), upheld the juvenile's conviction for trespassing on school grounds. On appeal, the Florida Supreme Court found that s. 810.097(2), F.S. (2010), required the State to prove, as an essential element of the trespass offense, that the defendant was warned to leave the school either by the school's principal or by a person to whom the principal had granted authority to restrict access to the property. In the instant case, the State failed to present such evidence of the security guard's authority to restrict access to the school. As a result, the Third District's decision was quashed and the juvenile's conviction for trespassing was vacated. The case was remanded to the district court for further proceedings consistent with this opinion.

<http://www.floridasupremecourt.org/decisions/2011/sc10-1852.pdf> (July 7, 2011).

### ***First District Court of Appeal***

B.C. v. State, \_\_\_ So. 3d \_\_\_, 2011 WL 2752869 (Fla. 1st DCA 2011). **CONVICTION FOR TRESPASS ON SCHOOL GROUNDS PURSUANT TO S. 810.097(2), F.S. (2010), WAS REVERSED WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE JUVENILE WAS ORDERED TO LEAVE THE SCHOOL GROUNDS BY THE SCHOOL'S PRINCIPAL OR HIS/HER DESIGNEE.** The juvenile appealed his conviction for trespass on school grounds, arguing that there was no evidence showing that the principal or his designee had ordered him to leave school grounds. The First District Court of Appeal found that, according to the language of s. 810.097(2), F.S. (2010), the order to leave must come from the principal or his or her designee. In the instant case, the State failed to establish this required element. Although the issue was not properly preserved by the juvenile, the First District held that the lack of evidence establishing the offense constituted fundamental error and warranted a reversal of the juvenile's conviction. Accordingly, the juvenile's conviction was reversed. To the extent that this decision did not comport with the Third District's opinion in D.J. v. State, 43 So. 3d 176 (Fla. 3d DCA 2010), the First District certified conflict.

<http://opinions.1dca.org/written/opinions2011/07-18-2011/10-5917.pdf> (July 18, 2011).

### ***Second District Court of Appeal***

D.J.P. v. State, \_\_\_ So. 3d \_\_\_, 2011 WL 2652447 (Fla. 2d DCA 2011). **JUDGMENT AFFIRMED WHERE THE JUVENILE'S MOTION TO SUPPRESS WAS NOT DISPOSITIVE.** Upon consideration of the juvenile's motions for rehearing and rehearing en banc, the Second District Court of Appeal

granted the juvenile's motion for rehearing to the extent that the court's opinion dated May 6, 2011, was withdrawn, and this opinion, which was amended to add a concurrence, was issued in its place. The motion for rehearing en banc was denied. The juvenile admitted committing the offenses of burglary of an unoccupied dwelling and grand theft of a firearm. The juvenile had attempted to reserve his right to appeal the denial of his motion to suppress his confession. The Second District found that at the hearing on the motion to suppress, the trial court and the State noted that there was no stipulation that the motion was dispositive. Further, the trial court noted that the State had refused to stipulate because they believed they could go forward even if the motion had been granted. Thereafter, at the change of plea hearing, the State asserted that there were other witnesses who could identify the juvenile. Accordingly, the Second District held that the juvenile's motion was not dispositive and affirmed the adjudication for burglary of an unoccupied dwelling and grand theft of a firearm. [http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2008,%202011/2D10-2439%20rh.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2008,%202011/2D10-2439%20rh.pdf) (July 8, 2011).

### ***Third District Court of Appeal***

D.R. v. State, \_\_ So. 3d \_\_, 2011 WL 3111001 (Fla. 3d DCA 2011). **ORDER GRANTING MOTION TO SUPPRESS WAS REVERSED AND REMANDED FOR A NEW HEARING TO DETERMINE WHETHER POLICE OFFICERS HAD A REASONABLE SUSPICION TO SEARCH DURING AN ONGOING DETENTION.** The State of Florida appealed from an order granting the juvenile's motion to suppress. The Third District Court of Appeal held that the trial court's order relied upon an incorrect sequence of events. The trial court's order correctly stated that the car the juvenile was riding in was stopped because it matched a BOLO description and the purpose of the stop was to wait for the victim to arrive for a possible identification. However, the order incorrectly stated that the officers searched the juvenile after the victim showed up and failed to identify the suspects as her assailants. The officers' testimony showed that the juvenile had been arrested for possessing a concealed firearm in his boot before the victim showed up to identify suspects. At the time that the juvenile was asked to remove his boot, the initial purpose of the investigatory stop was ongoing and had not yet been resolved. Although the trial court was correct about the legal principle involved, it based its decision on a line of cases that were factually distinguishable. Those cases held that an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. In the instant case, the officers were not yet finished with the investigatory stop when the juvenile aroused the officers' suspicion by his behavior. There was clear error in the historical facts relied upon by the trial court in granting the motion to suppress. If the purpose of the BOLO stop was met prior to the juvenile being searched, then the detention had ended and any further search was illegal. If, however, the purpose of the BOLO stop was not yet achieved, then the detention was ongoing and the search was not illegal if based on reasonable suspicion. Accordingly, the Third District reversed the order granting the juvenile's motion to suppress and remanded for a new hearing to determine whether, given the officers' experience and observations, they had reasonable suspicion to search the juvenile during the context of an ongoing detention. <http://www.3dca.flcourts.org/Opinions/3D10-2479.pdf> (July 27, 2011).

B.M. v. State, 2011 LEXIS 10563 (Fla. 3d DCA 2011). **CONVICTIONS FOR RESISTING ARREST WITH VIOLENCE AND BATTERY ON A LAW ENFORCEMENT OFFICER WERE REVERSED WHERE TRIAL COURT ERRED IN EXCLUDING IMPEACHMENT EVIDENCE.** The juvenile was charged with resisting arrest with violence and battery on a law enforcement officer. At trial, the juvenile was precluded from adducing evidence that the officer, whom he allegedly resisted, used excessive force during and following the arrest, and about an internal affairs complaint the juvenile brought against that officer. The Third District Court of Appeal found that the trial court erred in excluding this impeachment evidence. The Sixth Amendment, as incorporated into the Fourteenth Amendment, guarantees a defendant in a state criminal prosecution the right to a full and fair opportunity to cross-examine prosecution witnesses in order to show their bias or motive to be untruthful. Further, the juvenile also had the right to offer additional evidence to show the bias of prosecution witnesses. Therefore, when a prosecution witness is under internal investigation for the incident which gave rise to the charges against a defendant, or when there is a pending civil suit or criminal charge against the witness arising out of the incident, those matters may be inquired into on cross-examination or developed in the defense case. The Third District could not say that the improper exclusion of the impeachment evidence was harmless. Therefore, the case was reversed and remanded for a new trial. <http://www.3dca.flcourts.org/Opinions/3D10-2676.pdf> (July 6, 2011).

D.P. v. State, \_\_ So. 3d \_\_, 2011 WL 2652389 (Fla. 3d DCA 2011). **POLICE OFFICER HAD REASONABLE SUSPICION TO JUSTIFY A PROTECTIVE PAT-DOWN SEARCH AFTER RECEIVING A FACE-TO-FACE ANONYMOUS TIP THAT THE JUVENILE HAD A CONCEALED FIREARM.** The juvenile appealed the denial of his motion to suppress and the adjudication of delinquency for carrying a concealed firearm and possession of a firearm by a minor. The juvenile argued that the arresting officer did not have reasonable suspicion to justify the pat-down search that led to the discovery of the firearm. The police officer responded to a call at 1:00 AM regarding juveniles loitering in a parking lot. When the officer arrived, a young woman described as “very nervous and fearful” approached him. She pointed directly at the juvenile and told the officer, “he just pointed a gun at me, and he has a gun.” The officer approached the juvenile and advised him that someone reported that he had a gun. The juvenile said it was some other boy. The officer then asked to conduct a pat-down search for officer safety. The juvenile began backing away from the officer, at which point the officer became concerned that the juvenile might be armed. The officer directed the juvenile to put his hands on a nearby vehicle, and then conducted a pat-down search. Feeling a hard metallic object in the right front pocket, the officer removed what turned out to be a firearm. After taking the juvenile into custody, the officer discovered that the young woman had left. The officer had failed to get the young woman’s identity. The Third District Court of Appeal found that the circumstances in the instant case were largely indistinguishable from United States v. Heard, 367 F. 3d 1275 (11th Cir. 2004). Distinguishing Heard from the line of anonymous tip cases, the Eleventh Circuit found it significant that the officer had an opportunity to judge the reliability of the face-to-face informant in that case. A face-to-face anonymous tip is presumed to be inherently more reliable than an anonymous telephone tip because the officers receiving the information have an opportunity to observe the demeanor and perceived credibility of the informant. In the

instant case, the Third District held that: (1) the woman who provided the anonymous tip to police officer that juvenile was carrying a gun bore a greater resemblance to a citizen informant than to a truly anonymous tipster, when assessing the reliability of her tip for purposes of reasonable suspicion for protective pat-down of juvenile; and (2) the officer had reasonable suspicion for a protective pat-down. Therefore, the trial court properly denied the motion to suppress and the adjudication was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D10-1139.pdf> (July 5, 2011).

C.P. v. State, \_\_ So. 3d \_\_, 2011 WL 2586419 (Fla. 3d DCA 2011). **TRESPASS FINDING WAS REDUCED TO ATTEMPTED TRESPASS.** The juvenile and a friend were playing outside of a vacant mobile home. The juvenile found a metal bar and applied it to the mobile home door. When a neighbor yelled at them, the juvenile and his friend dropped the bar and ran. There was \$352.74 in damage to the door. The juvenile was charged with criminal mischief over \$200 but less than \$1,000, attempted burglary of an unoccupied structure, and possession of burglary tools with intent to commit a burglary or trespass. After the State rested, defense counsel moved for a judgment of dismissal, claiming the State failed to prove the requisite intent for each count. The trial court denied the motion. The juvenile then testified that he and his friend found a bar on the stairs to a vacant mobile home. They noticed a hole in the door, and the juvenile put the bar inside the hole. The juvenile testified that he did not intend to enter the home and that they were scared off when the neighbor yelled. The defense rested and renewed all previous motions. The motions were denied and the trial court found the juvenile delinquent for criminal mischief over \$200 but less than \$1,000, the lesser offense of trespass rather than burglary, and possession of burglary tools. The trial court withheld adjudication, ordered restitution, and placed the juvenile on probation with conditions. On appeal, the juvenile contended that the trial court erred in denying the motion for judgment of dismissal and convicting him of the three charges because the State failed to prove these offenses beyond a reasonable doubt. The Third District Court of Appeal found that the evidence was sufficient to uphold the criminal mischief and possession of burglary tools findings. However, the Third District found that the State failed to prove trespass. In order to prove trespass, the State had to prove that the juvenile, without being authorized, licensed, or invited, willfully entered or remained in a structure or conveyance. The juvenile never entered the mobile home and there was no evidence that the area around the mobile home was enclosed. The Third District held that there was sufficient evidence to find attempted trespass. Accordingly, the Third District reversed the trespass conviction and instructed the trial court to reduce the trespass finding to attempted trespass. The Third District affirmed the trial court's finding for criminal mischief and possession of burglary tools.

<http://www.3dca.flcourts.org/Opinions/3D10-2488.pdf> (July 1, 2011).

### ***Fourth District Court of Appeal***

C.G. v. Ken Housel, in his capacity as Superintendent of the St. Lucie Regional Juvenile Detention Center, 4D11-2709 (Fla. 4th DCA 2011). **WRIT OF HABEAS CORPUS GRANTED WHERE THERE WAS NO TESTIMONY THAT THE JUVENILE WAS AN ABSCONDER.** The Fourth District Court of Appeal granted the petition for writ of habeas corpus. There was no sworn testimony at the

detention hearings that established that the juvenile was an “absconder,” who had the intent to avoid the legal process. The case was remanded to the trial court to conduct an evidentiary hearing on August 1, 2011, to determine whether the juvenile was properly characterized as an “absconder” from conditional release from a moderate risk residential program.

<http://www.4dca.org/opinions/July%202011/07-29-11/4D11.2709.op.pdf> (July 29, 2011).

### ***Fifth District Court of Appeal***

K.N. v. State, \_\_\_ So. 3d \_\_\_, 2011 WL 3206865 (Fla. 5th DCA 2011). **VALIDLY STOPPED JUVENILE WHO WAS A PASSENGER LACKED STANDING TO CHALLENGE THE SEARCH OF THE VEHICLE.** Around 2:00 AM, a 911 call was received that a passenger in a white Toyota was running from house to house, peering into vehicles and checking door handles. The area recently had a significant increase in the number of burglaries involving unlocked vehicles. Handguns had been stolen from some of the vehicles. An officer responded and observed the white Toyota. The passenger matched the description provided by the 911 call. After seeing the officer, the vehicle appeared to be attempting to exit the neighborhood. Under the circumstances, the officer decided to execute a high-risk traffic stop while awaiting backup units. Once backup arrived, the officer handcuffed the juvenile, patted him down for weapons, and secured him in the patrol car. The officer then executed the same procedure with the driver. As the juvenile exited the car, the officer swept the car's interior with his flashlight and noticed, in plain view, a flashlight and small multi-tool on the front passenger seat and an iPod on the rear seat. After securing the pair, the officer performed a protective sweep of the trunk to make sure no one was hiding there. Inside the trunk was a laptop computer which the officer knew was a model that was used exclusively by law enforcement. The juvenile and the driver provided unlikely and contradictory explanations of their actions. Based upon the circumstances and the unlikely explanations provided, the officer concluded there was probable cause to arrest the juvenile for loitering and prowling and possession of burglary tools. The officer then searched the passenger compartment of the automobile according to the then-prevailing interpretation of New York v. Belton, 453 U.S. 454 (1981). When the officer turned on the laptop found in the trunk, the warning screen popped up indicating it was the property of the local law enforcement. Before having the vehicle towed for safekeeping, an inventory of the vehicle was conducted and several items collected. The juvenile and the driver were transported to the police station and turned over for questioning. The juvenile then provided a statement admitting to other vehicle burglaries and that stolen property was at his residence. The juvenile signed a consent form and took a deputy to his house. The deputy only searched the juvenile's bedroom and found a handgun and various electronics. At a suppression hearing, the juvenile argued: 1.) there was no probable cause to arrest him, thus, any statements he made while in custody should be suppressed; 2.) the search of the car was illegal under Arizona v. Gant, 556 U.S. 332 (2009); and 3.) any confession or consent to search subsequent to his unlawful detention and arrest should be suppressed as “fruit of the poisonous tree.” The trial court found that the officer had a reasonable suspicion to conduct an investigatory stop of the vehicle. The trial court also found the high-risk traffic stop was warranted. Although the trial court ruled the investigatory stop and questioning were lawful, it applied Gant and ruled that the seizure of the items from the vehicle's passenger compartment

was unlawful and subject to suppression. Based on the perceived illegality of the seizure of items within the vehicle's passenger compartment, the trial court concluded that there was not a sufficient temporal break between the illegal search and the consent and search of the juvenile's residence. Therefore, the trial court ruled that the subsequent confession, consent, and seizure of evidence from the juvenile's residence was tainted and inadmissible. The trial court deemed the officer's actions in executing a protective sweep of the trunk lawful and ruled the seizure of the computer from the trunk was admissible. The trial court was not persuaded by the juvenile's argument that his rights were violated by the continued use of handcuffs in the patrol car after it was determined he was unarmed. The proceedings were stayed pending appeal. The Fifth District Court of Appeal found that the juvenile failed to demonstrate that he had a legitimate expectation of privacy in the Toyota in which he was a mere passenger. He therefore lacked standing to challenge the items seized therein. The Fifth District found the totality of the circumstances warranted an investigatory stop. This level of detention permitted the officer to conduct a limited search or frisk of the individual for concealed weapons. The Fifth District found that the police may properly handcuff a person whom they are temporarily detaining when circumstances reasonably justify the use of such restraint. Neither handcuffing nor other restraints will automatically convert an investigatory stop into a de facto arrest requiring probable cause. Only after the officer returned to the patrol car after sweeping the Toyota did he initiate the questioning that was the purpose of the stop. After the questioning, the officers' reasonable suspicion was elevated to probable cause to arrest. Because the purported illegality of the stop was the juvenile's sole ground to suppress the statements he made in the patrol car, his statements were untainted and not subject to suppression. The juvenile did not assert an independent argument concerning the illegality of the search of his home, which the trial court disapproved based solely on the "fruit of the poisonous tree" doctrine. Because the initial stop and the request that the juvenile and the driver exit the Toyota was determined to be valid, the juvenile had no standing to challenge the search under Gant or any other theory. Even assuming the juvenile had standing to challenge the search, Gant would not require the suppression of evidence in plain view seized from the Toyota. Accordingly, the Fifth District affirmed the trial court's denial in part of the juvenile's motion to suppress, reversed its ruling granting the juvenile's motion to suppress, and remanded for further proceedings. <http://www.5dca.org/Opinions/Opin2011/072511/5D09-4297.op.pdf> (July 29, 2011).

M.M. v. State, \_\_\_ So. 3d \_\_\_, 2011 WL 2923707 (Fla. 5th DCA 2011). **DETERMINATION OF THE AMOUNT OF RESTITUTION TO BE PAID CAN BE MADE BEYOND SIXTY DAYS IF RESTITUTION IS ORDERED WITHIN SIXTY DAYS OF SENTENCING.** The State appealed the trial court's determination that it did not have jurisdiction to issue a restitution order more than sixty days after disposition. The juvenile was charged with burglary of a dwelling and criminal mischief. The juvenile pled no contest to burglary of a dwelling in return for the State dropping the criminal mischief count. The plea agreement provided that the juvenile was to be ordered to pay restitution and that the amount was to be reserved. At the plea hearing, the trial court accepted the plea, and in accordance with the agreement, ordered the juvenile to pay restitution, reserving for later determination the amount of restitution. After 60 days had elapsed, the trial court held that it no longer had jurisdiction to order the restitution amount.

The Fifth District Court of Appeal found that if restitution is ordered within sixty days of sentencing, a determination of the amount to be paid can be made beyond the sixty-day period. Accordingly, the trial court's ruling was reversed and remanded for imposition of a restitution amount. <http://www.5dca.org/Opinions/Opin2011/071811/5D10-3856.op.pdf> (July 22, 2011).

State v. S.A.B. and J.C.C., \_\_\_ So. 3d \_\_\_, 2011 WL 2923704 (Fla. 5th DCA 2011). **SEALING OF JUVENILE COURT RECORDS UPON MOTIONS FILED PURSUANT TO S. 943.059, F.S. (2010), AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.692 WERE AFFIRMED.** In both cases, which were consolidated, the lower courts sealed the juvenile court records upon motions filed pursuant to s. 943.059, F.S. (2010), and Florida Rule of Criminal Procedure 3.692. The State's challenge in each case was directed to those portions of the orders that seal juvenile court records. Although statutory authority exists to seal judicial and non-judicial records of a "minor or an adult," the State contended that, pursuant to Johnson v. State, 336 So. 2d 93 (Fla. 1976), the control of court records is within the exclusive jurisdiction of the judiciary. Because there is no juvenile rule of procedure pertaining to the sealing of juvenile court records, the State contended that the lower courts erred in doing so. The State made no challenge on substantive grounds. The State only argued that juvenile court records need not be sealed because the proceedings were confidential. The Fifth Circuit Court of Appeal held that although the rules of criminal procedure do not generally pertain to juvenile proceedings, rule 3.692 is expressly applicable to "all" petitions to seal or expunge. Even if rule 3.692 is not applicable, the trial court has the authority to utilize this procedure in the absence of a conflicting rule. See Florida Rule Judicial Administration 2.420(c)(9)(A)(vii). The sealing of the juvenile court records by the lower court was affirmed. <http://www.5dca.org/Opinions/Opin2011/071811/5D10-3777.op.pdf> (July 22, 2011).

## Dependency Case Law

### ***Florida Supreme Court***

No new opinions for this reporting period.

### ***First District Court of Appeal***

K.G. v. Florida Department of Children and Families, --- So. 3d ----, 2011 WL 3055413 (Fla. 1st DCA 2011). **CERTIORARI GRANTED AND NEW HEARING ORDERED – DUE PROCESS.** During a shelter hearing, the mother was not allowed to be heard or present evidence, and the mother appealed. The appellate court held that the mother had a due process right to be heard during the shelter hearing and to present evidence. Because the trial court violated this right, the appellate court quashed the shelter order and remanded the matter for further proceedings on whether the child should be detained. The court noted that this decision addressed only the manner in which the proceeding was held, not the merits of the trial court's findings or decision. The appellate court further stated that whether there were grounds to shelter the child must be determined on remand in a full evidentiary hearing. <http://opinions.1dca.org/written/opinions2011/07-26-2011/11-2303.pdf> (July 26, 2011).

A.G. v. Florida Department of Children and Families, --- So. 3d ----, 2011 WL 3055418 (Fla. 1st DCA 2011). **CERTIORARI GRANTED AND NEW HEARING ORDERED**. Following the filing of a shelter petition, the trial court held a hearing on the petition, during which the mother's attorney was present but the father's attorney was not. The trial court did not ask the father if he had secured representation, nor did the trial court clarify whether the father wished to waive his right to counsel. The father appealed the shelter order placing his child in the care of the maternal grandmother and argued that the order was entered in violation of his due process rights as the trial court did not honor his right to counsel during the shelter hearing. The appellate court agreed with the father and granted the petition for writ of certiorari. The court also noted that this decision addressed only the manner in which the proceeding was held, not the merits of the trial court's findings or decision. Whether there were grounds to shelter the child must be determined on remand in a full evidentiary hearing where the parents have been afforded their right to counsel. <http://opinions.1dca.org/written/opinions2011/07-26-2011/11-2298.pdf> (July 26, 2011).

### ***Second District Court of Appeal***

No new opinions for this reporting period.

### ***Third District Court of Appeal***

No new opinions for this reporting period.

### ***Fourth District Court of Appeal***

J.F. v. Department of Children and Families, --- So. 3d ----, 2011 WL 2622679 (Fla. 4th DCA 2011). **DEPENDENCY ADJUDICATION AFFIRMED**. A father appealed the dependency adjudication of his child after the trial court found that the father had neglected the child through domestic violence. The father did not provide the portion of the trial transcript at which the issue of domestic violence was litigated, but contended that the order itself showed that the court erred. According to the order, several incidences of domestic violence between the mother and father occurred in the presence of the child, which can constitute evidence of neglect. The appellate court affirmed the decision. <http://www.4dca.org/opinions/July%202011/07-06-11/4D11-249.op.pdf> (July 6, 2011).

Leneve v. Leneve, --- So. 3d ----, 2011 WL 2622398 (Fla. 4th DCA 2011). **KEEPING CHILD SAFE ACT DOESN'T APPLY TO DISSOLUTION**. The former husband sought review of a trial court order that denied his motion to dismiss the former wife's motion invoking the Keeping Children Safe Act, §39.0139, F.S. (2010). The former wife intended to use the Act in an upcoming hearing on her motion to modify the final judgment of dissolution of marriage. The former husband, who was awarded shared parental responsibility and shared custody in the final judgment, had been denied any contact with his teenage sons under the auspices of the Act. The appellate court reversed, noting that the Keeping Children Safe Act does not apply outside the context of a Chapter 39 child dependency proceeding, and therefore did not apply to this Chapter 61 proceeding. The court also recognized that the law also contains deficiencies that led one

circuit court to find portions of the Act unconstitutional and noted concerns that an anonymous report to an abuse hotline automatically triggered the "presumption of detriment" under the Act. New legislation was recently enacted which would address these issues and require a circuit court to find probable cause to support the allegations of abuse before the procedures of the Act were triggered. <http://www.4dca.org/opinions/July%202011/07-06-11/4D11-949.op.pdf> (July 6, 2011).

### ***Fifth District Court of Appeal***

C.K. v. Department of Children and Families, --- So. 3d ----, 2011 WL 2937371 (Fla. 5th DCA 2011). **TERMINATION OF PARENTAL RIGHTS AFFIRMED.** The mother appealed the final judgment terminating her parental rights to a child who was originally sheltered at fourteen months of age following allegations of substance abuse and domestic violence. The mother asserted that there was insufficient evidence to support the court's decision. The trial court made various findings, all of which were supported by clear and convincing evidence. The mother's tasks under the case plan consisted of substance abuse counseling, a parenting class, a bio-psychological assessment and necessary follow-up, stable income and housing, and a co-dependency program. The mother's compliance was negligible. Of primary concern to the court was her lack of visitation with the child and continued drug use. The appellate court found no error in the trial court's findings and affirmed the termination. <http://www.5dca.org/Opinions/Opin2011/071811/5D11-482.op.pdf> (July 22, 2011).

## **Dissolution Case Law**

### ***Florida Supreme Court***

In Re: Implementation of Committee on Privacy and Court Records Recommendations—Amendments to the Florida Rules of Civil Procedure; The Florida Rules of Judicial Administration; The Florida Rules of Criminal Procedure; The Florida Probate Rules; The Florida Small Claims Rules; The Florida Rules of Appellate Procedure; and The Florida Family Law Rules of Procedure, \_\_ So. 3d \_\_, 2011 WL 2566360, (Fla. 2011). **ISSUANCE OF A CORRECTED OPINION.** This was a corrected opinion which contained numerous revisions to rules and the forms in an attempt to “minimize the amount of unnecessary personal information included in documents filed with the courts.” The amendments to the rules and forms, which implement recommendations of the Committee on Privacy and Court Records and which were submitted by various committees, will take effect October 1, 2011. There is a 60-day period from the date the opinion issued to submit comments. <http://www.floridasupremecourt.org/decisions/2011/sc08-2443.pdf> (July 8, 2011).

### ***First District Court of Appeal***

Demont v. Demont, \_\_ So. 3d \_\_, 2011 WL 2698685, (Fla. 1st DCA 2011). **FINAL PAYMENT OF NON-COMPETE/NON-SOLICITATION AGREEMENT NOT A MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION.**

Both spouses appealed an amended final judgment of dissolution arguing trial court error. The appellate court reversed the trial court's designation of a future non-compete/non-solicitation payment, to be received by former husband from his former employer, as a marital asset, and remanded for the trial court to adjust the scheme for equitable distribution accordingly. The appellate court reiterated that the "ultimate conclusion" as to whether an asset is marital and subject to equitable distribution is a question of law, subject to de novo review. The appellate court held that the non-compete/non-solicitation agreement did not compensate former husband for past work performed for his employer during the marriage—which could have constituted marital labor and thus been subject to equitable distribution. The appellate court pointed out that the final payment, which was due after the date of filing of the petition of dissolution, and actually received after the amended final judgment, was not comparable to deferred income or a stock option where former husband's rights would have vested during the marriage.

<http://opinions.1dca.org/written/opinions2011/07-12-2011/10-2065.pdf> (July 12, 2011).

### ***Second District Court of Appeal***

Talbi v. Essoufi, \_\_ So. 3d \_\_, 2011 WL 3209941, (Fla. 2d DCA 2011).

**FUTURE TRIAL COURT NOT LIMITED BY CUSTODY MODIFICATIONS OUTLINED IN FORMER TRIAL COURT'S ORDER.**

Former wife appealed the final judgment of dissolution of marriage. The appellate court affirmed, but noted that the trial court's order included specific custody modifications that it would consider making after former wife had completed the specific tasks enumerated in the order. The appellate court held that any trial court considering a future motion to modify custody should not be limited to the custody modifications outlined in the trial court's final judgment of dissolution.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2029,%202011/2D09-4153.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2029,%202011/2D09-4153.pdf) (July 29, 2011).

Tilchin v. Tilchin, \_\_ So. 3d \_\_, 2011 WL 3210028, (Fla. 2d DCA 2011).

**ORDER ON ATTORNEY'S FEES REVERSED AND REMANDED; ENTRY OF FINAL JUDGMENT ON REMAND COULD IMPACT PARTIES' NEEDS AND ABILITY TO PAY.**

Former wife appealed the order on attorney's fees entered after the final judgment of dissolution. Because the final judgment of dissolution had been previously reversed and remanded for reconsideration, (Tilchin v. Tilchin, 51 So. 3d 596 (Fla. 2d DCA 2011)), and the appellate court recognized the possibility the impact a new equitable distribution scheme could have on the parties' needs and abilities to pay, it reversed and remanded the order on attorney's fees as well.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2029,%202011/2D10-2714.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2029,%202011/2D10-2714.pdf) (July 29, 2011).

Bush v. Bush, \_\_ So. 3d \_\_, 2011 WL 3112062, (Fla. 2d DCA 2011).

**ERROR FOR TRIAL COURT TO ASSIGN DEPLETED ACCOUNT TO SPOUSE IN EQUITABLE DISTRIBUTION SCHEME IN ABSENCE OF MISCONDUCT.**

Former wife appealed the final judgment of dissolution of marriage, contending that the trial court had erred in its scheme for equitable distribution and in the amount of alimony it awarded her; the appellate court affirmed in part and reversed in part. Commenting that the trial court had “made an admirable attempt at splitting the marital assets equally,” the appellate court held that, given the parties’ circumstances, there was no abuse of discretion in the trial court’s award to former wife of lump sum alimony and nominal permanent alimony. The appellate court did conclude that the trial court had erred in its equitable distribution scheme when it awarded an account to former wife which she had used during the dissolution proceedings in lieu of temporary alimony and which was depleted by the time of final judgment. The appellate court reiterated that it was error for the trial court to include depleted assets in the equitable distribution scheme in the absence of misconduct.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2027,%202011/2D09-4829.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2027,%202011/2D09-4829.pdf) (July 27, 2011).

Jankowski v. Dey, \_\_ So. 3d \_\_, 2011 WL 2582850, (Fla. 2d DCA 2011).

**ABSENT ORDER DIRECTING FEE AWARD TO ATTORNEY, ATTORNEY HAS NO STANDING TO ENFORCE AWARD; TRIAL COURT HAS INHERENT POWER TO SET ASIDE SATISFACTION OF MONEY JUDGMENT IF IT IS SHOWN TO BE INVALID; TRIAL COURT LACKS JURISDICTION TO AMEND ORDER ONCE IT BECOMES FINAL.**

Former husband appealed a trial court order setting aside the satisfaction of a money judgment for former wife’s fees and amending the money judgment. The appellate court reversed, holding: 1) former wife’s attorney lacked standing to challenge the satisfaction of former wife’s money judgment against former husband; and 2) the trial court lacked jurisdiction to enter an amendment of its prior order after the prior order had become final. Citing Morris N. Am., Inc. v. King, 430 So. 2d 592, (Fla. 4th DCA 1983), the appellate court noted that, although a satisfaction signifies that litigation is over, a trial court has the inherent jurisdiction to set it aside if it is shown to be invalid. The appellate court pointed out that the facts in this case differed from those in Lapidus v. Weil, 672 So. 2d 58 (Fla. 4th DCA 1996), because in the Lapidus case, the fee award was made payable to the attorney. The appellate court held that s. 61.16(1), F.S. (2010), does not give an attorney an independent right to seek a fee award. Absent an order directing payment of the fee award to the attorney, the attorney is without standing to enforce the award. The appellate court emphasized the importance of making an award of fees and costs under chapter 61 directly to a party’s attorney in circumstances where the party owes for services rendered.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2001,%202011/2D09-5388.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2001,%202011/2D09-5388.pdf) (July 1, 2011).

### ***Third District Court of Appeal***

Hill v. Hill, \_\_ So. 3d \_\_, 2011 WL 3191710, (Fla. 3d DCA 2011).

**EARLIER OPINION WITHDRAWN; ORDER AFFIRMED AFTER REHEARING.**

On motion for rehearing, the earlier opinion in this case, issued March 2, 2011, was withdrawn; the trial court’s order was affirmed.

<http://www.3dca.flcourts.org/Opinions/3D09-0590.reh.pdf> (July 29, 2011).

### ***Fourth District Court of Appeal***

Morenberg v. Morenberg, \_\_ So. 3d \_\_, 2011 WL 3109313, (Fla. 4th DCA 2011).

#### **ROYALTIES FROM BOOK WRITTEN POST-DISSOLUTION NOT MARITAL ASSET.**

Former husband appealed the amended final judgment of dissolution of marriage; the appellate court reversed the portion of that judgment requiring that he share with former wife royalties earned post-dissolution from the fourth edition of a book he authored. In the dissolution of a nearly forty-six year marriage, the trial court had ordered the parties to equally divide former husband's royalties from two books he wrote while working as an English professor. On appeal, he argued that the trial court abused its discretion by including royalties from the fourth edition in the scheme for equitable distribution because he began working on it after former wife filed the petition for dissolution; former wife countered that there was no post-dissolution labor involved in the books. Reiterating that a former spouse is not entitled to receive benefits accruing after dissolution and that generally the cut-off date for identifying and classifying marital assets is the date of filing of the petition for dissolution, the appellate court held that newer editions of books written post-dissolution should not be considered a marital asset and that any future royalties from those books should be excluded from income to be split with a former spouse.

<http://www.4dca.org/opinions/July%202011/07-27-11/4D09-4216.op.pdf> (July 27, 2011).

Rossman v. Profera, \_\_ So. 3d \_\_, 2011 WL 3110165, (Fla. 4th DCA 2011).

#### **TRIAL COURT'S FAILURE TO MAKE AN EXPRESS FINDING OF SUBSTANTIAL CHANGE IN CIRCUMSTANCES NOT ERROR DUE TO UNIQUE FACTS OF CASE.**

Former wife appealed a trial court order denying her request for relocation and granting former husband's petition for modification of custody. Concluding that competent, substantial evidence supported both decisions, the appellate court affirmed. The appellate court found that an "unusual situation" was formed as a result of the facts that: 1) the final judgment expressly forbade former wife from relocating with the minor child outside Florida without permission from former husband or the court, 2) she had relocated outside Florida without the minor child prior to the final hearing, and 3) she had made it clear that she would not return to Florida if relocation were denied. The appellate court found that this "unusual situation" created a substantial change in circumstances sufficient to justify a change in custody and that the change in custody was in the child's best interest. Former wife had argued that the order should be reversed because it did not contain an explicit finding that there had been a substantial change in circumstances. The appellate court concluded, under the "unique" facts of this case, that the absence of that finding did not render the order reversible; however, it noted that courts have held that a noncustodial parent's failure to plead substantial change in circumstances coupled with the trial court's failure to include an express finding of a substantial change in circumstances does constitute reversible error.

<http://www.4dca.org/opinions/July%202011/07-27-11/4D09-5242.op.pdf> (July 27, 2011).

Taylor v. Taylor, \_\_ So. 3d \_\_, 2011 WL 2848582, (Fla. 4th DCA 2011).

#### **TRIAL COURT'S FACTUAL DETERMINATIONS CANNOT BE BASED ON UNSWORN STATEMENTS; JUDGMENT ENTERED WITHOUT NOTICE TO A PARTY IS VOID.**

Former husband appealed the denial of his request for relief from the final judgment of dissolution and a subsequent award of personal property to former wife, arguing that he had not received notice of either the final hearing or the subsequent one at which the property was awarded. The appellate court agreed and reversed. The appellate court held that the only basis upon which the trial court could have denied former husband's motion that the final judgment and subsequent order were void would have been its acceptance of former wife's lawyer's statement that he had an email notifying former husband, a pilot stationed in Saudi Arabia, of the final hearing; however, the trial court neither put the lawyer under oath nor ordered that he show former husband the email. The appellate court held that unsworn statements cannot serve as the basis for a trial court's factual determinations and that a judgment entered without notice to a party is void. <http://www.4dca.org/opinions/July%202011/07-20-11/4D09-3358.op.pdf> (July 20, 2011).

Leneve v. Leneve, \_\_ So. 3d \_\_, 2011 WL 2622398, (Fla. 4th DCA 2011).

**SECTION 39.0139, F. S. (2010), APPLIES TO CHAPTER 39 PROCEEDINGS, NOT CHAPTER 61.**

Former husband appealed a trial court order which denied his motion to dismiss former wife's motion under s. 39.0139, F.S. (2010), (Keeping Children Safe Act). The appellate court held that statute applies only to Chapter 39 child dependency proceedings, and not to Chapter 61 proceedings. Accordingly, it reversed and ordered the trial court to strike former wife's motion. <http://www.4dca.org/opinions/July%202011/07-06-11/4D11-949.op.pdf> (July 6, 2011).

Hahn v. Hahn, \_\_ So. 3d \_\_, 2011 WL 2622400, (Fla. 4th DCA 2011).

**DOWNWARD MODIFICATION OF ALIMONY INSUFFICIENT IN LIGHT OF FINANCIAL AFFIDAVITS AND MAGISTRATE'S FINDINGS; ABUSE OF DISCRETION TO ORDER SPOUSE TO PAY OTHER'S FEES IF ON EQUAL FINANCIAL FOOTING.**

Former husband argued that the trial court's downward modification of his monthly alimony obligation, based on a change in circumstances, was insufficient; the appellate court agreed. Based upon the parties' financial affidavits and the magistrate's findings, the appellate court concluded that the trial court had abused its discretion. Accordingly, it reversed and remanded with instructions to the trial court to either terminate the obligation or reduce it to a nominal amount in order to retain jurisdiction to modify upon a subsequent showing of substantial change in circumstances. The appellate court noted that an award or denial of attorney's fees will not be reversed absent an abuse of discretion. It concluded that here, both spouses were in "relative financial parity;" therefore, although each appeared to have a need, neither had the ability to pay the other's fees.

<http://www.4dca.org/opinions/July%202011/07-06-11/4D10-1112.op.pdf> (July 6, 2011).

### ***Fifth District Court of Appeal***

Foster v. Foster, \_\_ So. 3d \_\_, 2011 WL 2650851, (Fla. 5th DCA 2011).

**CERTAIN FINDINGS REQUIRED IF TRIAL COURT ORDERS SPOUSE TO SECURE HIS/HER OBLIGATIONS WITH LIFE INSURANCE; ABUSE OF DISCRETION TO ORDER ONE SPOUSE TO PAY OTHER'S FEES IF THEY ARE ON EQUAL FINANCIAL FOOTING.**

Former husband appealed the final judgment of dissolution. The appellate court held that although a trial court has the authority, pursuant to s. 61.08(3) and 61.13(1)(c), F.S. (2010), to require a spouse to purchase and maintain life insurance in order to secure his or her alimony or child support obligations, the trial court is required to make specific evidentiary findings regarding the availability and cost of the insurance, the obligor's ability to afford the insurance, and the special circumstances warranting the requirement for security. Failure to make the necessary findings constitutes reversible error. The appellate court pointed out the additional requirements that the amount of insurance must be related to the extent of the obligation being secured and that the trial court must specify whether the insurance is security for unpaid support obligations. The appellate court concluded that, in the instant case, the trial court did not make the required findings; accordingly, it reversed and remanded for entry of those findings. The appellate court also concluded that the trial court abused its discretion in ordering former husband to pay former wife's attorney's fees after having found that the parties were in relatively equal financial positions after dissolution.

<http://www.5dca.org/Opinions/Opin2011/070411/5D10-55.op.pdf> (July 8, 2011).

Hill v. Hill, \_\_ So. 3d \_\_, 2011 WL 2650874, (Fla. 5th DCA 2011).

#### **TRIAL COURT AND PARTIES BOUND BY TERMS OF CONSENT FINAL JUDGMENT; PARTITION TREATED ON REMAND AS MOTION FOR RELIEF FROM JUDGMENT.**

Pursuant to the terms of a consent final judgment, former husband was granted exclusive use and possession of the parties' rental home and was required to attempt to refinance the home. If former husband were successful, he would pay former wife for her interest in the home; if he were not, the property would be sold and the proceeds split equally. When former husband failed to obtain financing, former wife moved for contempt. In response, trial court granted former wife a judgment equal to the amount of her interest; former wife then petitioned for partition. Reasoning that former wife was precluded from seeking partition by having been granted the judgment, the trial court dismissed her petition. The appellate court found that the trial court erred in awarding former wife the judgment because that was not the relief she had sought in her motion for contempt; also, it conflicted with the terms of the consent final judgment. The appellate court held that the parties and the trial court were bound by the terms of that judgment. It stated that instead of filing a petition for partition, former wife should have either sought relief from the judgment, pursuant to Florida Rule of Civil Procedure 1.540(b), or appealed the money judgment; thus, it remanded for the trial court to treat the petition for partition as a motion for relief from judgment and enforce the terms of the consent judgment.

<http://www.5dca.org/Opinions/Opin2011/070411/5D10-549.op.pdf> (July 8, 2011).

## **Domestic Violence Case Law**

### ***Florida Supreme Court***

No new opinions for this reporting period.

## ***First District Court of Appeal***

No new opinions for this reporting period.

## ***Second District Court of Appeal***

Cerny v. State, --- So. 3d ----, 2011 WL 2936744 (Fla. 2d DCA 2011). **PROBATION REVOCATION REVERSED.** The appellant received four sentences of probation to run concurrently as part of a plea agreement after an adjudication of guilty. On August 5, 2009, the probation officer filed an affidavit of violation of probation, alleging that the appellant had violated his probation in all four cases by committing four new law violations. The alleged new law violations were aggravated battery, domestic violence by strangulation, false imprisonment, and tampering with a witness. After a hearing, the circuit court dismissed the charges in all but the charge of aggravated battery, and it revoked the appellant's probation in all four cases based upon that new law violation, and invoked the maximum sentence of five year's prison on each of the appellant's underlying third degree felonies. The resulting sentence was twenty years in prison, and the appellant appealed the order revoking his probation and his resulting sentences. Because the State failed to prove by a preponderance of the evidence the new law violation upon which the circuit court based the order revoking the appellant's probation, the appellate court reversed. It noted that a review of the record revealed that the State did not present any proof--through either hearsay or direct evidence--that any kind of battery occurred. The appellate court also noted that under the circumstances of this case, double jeopardy did not bar a second revocation proceeding on remand based on the filing of a new affidavit alleging the same violations.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2022,%202010/2D09-5338.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2022,%202010/2D09-5338.pdf) (July 22, 2011).

S.C. v. A.D., --- So. 3d ----, 2011 WL 2731941 (Fla. 2d DCA 2011). **INJUNCTION REVERSED.** A girl lived with her mother and S.C. from the time she was about six or eight years old until she was seventeen. In 2004, the daughter, her mother, and S.C. had an altercation. This incident resulted in the filing of criminal charges against S.C. and the issuance of two injunctions for protection against domestic violence. One of the injunctions was in favor of the mother; the other was in favor of the daughter. S.C. did not appeal from the two injunctions issued against him and did not seek to have them dismissed. On July 18, 2008, for reasons not explained in the record, the circuit court dismissed the injunction issued in favor of the mother, but the injunction for the protection of the daughter was still in effect up to the date of the hearing that resulted in the entry of the injunction at issue in this appeal. The mother and S.C. separated. S.C. went to Iraq, and later returned to Florida. When the daughter discovered that S.C. had returned to Florida, she filed a new petition for protection against domestic violence. The daughter's reasons for petitioning the court for a new injunction were (1) her incorrect assumption--based on the allegedly erroneous information provided by the Pasco County Clerk--that the existing injunction issued for her protection was no longer in effect, (2) her additional incorrect assumption that S.C. was not allowed to contact his son, and (3) that she did not want S.C. to involve her in his attempt to see his son, something which he had not attempted to do. The circuit court observed that there was an existing indefinite injunction in place. However,

noting that there was a considerable amount of misinformation and confusion about the status of that injunction, the trial court decided to issue a new injunction "because of this confusion over the other case." The circuit court reached this determination despite its acknowledgment that a new injunction would be "duplicative." The circuit court also noted that S.C. had been found guilty of a misdemeanor battery arising out of the 2004 altercation and indicated that it was, in part, basing its decision to issue the new injunction on that fact as well. The circuit court issued the injunction in favor of the daughter and S.C. appealed. Because there was no competent, substantial evidence in the record to support the issuance of the domestic violence injunction, the appellate court reversed.

According to the appellate court, this was a case driven by misinformation. An injunction was claimed to exist for the protection of the daughter's brother that, in fact, did not exist. The daughter was led to believe that her perfectly valid and enforceable domestic violence injunction was not in force. Under these facts, the appellate court appreciated the trial judge's desire to clear the air. But the new injunction was issued under circumstances where the only act of domestic violence had occurred five years earlier, and the petitioner failed to establish a reasonable fear that she was in imminent danger of becoming the victim of an act of domestic violence. There was therefore no legal support for the issuance of a "duplicative" injunction based solely on the existence of an earlier valid and enforceable indefinite injunction. Under these unusual circumstances, the appellate court reversed.

[http://www.2dca.org/opinions/Opinion\\_Pages/Opinion\\_Page\\_2011/July/July%2015,%202011/2D10-953.pdf](http://www.2dca.org/opinions/Opinion_Pages/Opinion_Page_2011/July/July%2015,%202011/2D10-953.pdf) (July 15, 2011).

### ***Third District Court of Appeal***

No new opinions for this reporting period.

### ***Fourth District Court of Appeal***

Wigley v. Hares, --- So. 3d ---, 2011 WL 3111898 (Fla. 4th DCA 2011). [INTERNATIONAL CUSTODY PURSUANT TO HAGUE CONVENTION](#). The appellant father, a resident of St. Kitts, appeals the trial court's denial of his petition for the return of his minor child, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, the terms of which have been codified in 42 U.S.C. § 11601. Where a child has been wrongfully removed from his home country, the court must order his return unless the party removing the child can show at least one of a few narrow exceptions. The trial court found that the child had become settled in his environment, within the meaning of the Convention, and that return of the child would constitute a grave risk to the child. The appellate court concluded that the trial court misapplied the Convention in finding that the child should not be returned because he is settled in his environment. However, because the review was limited to whether competent substantial evidence supported the trial court's order, the court affirmed the trial court's conclusion that the mother proved return would put the child at grave risk of harm. The mother's testimony provided competent substantial evidence to support the trial court's finding that the child faced a grave risk of physical harm by return to St. Kitts, due to the father's violence against the

mother in the presence of the child and his threat of harm to the child.

<http://www.4dca.org/opinions/July%202011/07-27-11/4D10-3213.op.pdf> (July 27, 2011).

J.F. v. Department of Children and Families, --- So. 3d ----, 2011 WL 2622679 (Fla. 4th DCA 2011). **DEPENDENCY ADJUDICATION AFFIRMED**. A father appealed the dependency adjudication of his child after the trial court found that the father had neglected the child through domestic violence. The father did not provide the portion of the trial transcript at which the issue of domestic violence was litigated, but contended that the order itself showed that the court erred. According to the order, several incidences of domestic violence between the mother and father occurred in the presence of the child, which can constitute evidence of neglect. The appellate court affirmed the decision. <http://www.4dca.org/opinions/July%202011/07-06-11/4D11-249.op.pdf> (July 6, 2011).

### ***Fifth District Court of Appeal***

No new opinions for this reporting period.