Presently in our society the existence of video recordings has become ubiquitous, including red light cameras, dash cameras, and the ever present cell phone video. As a result, there are more and more instances where there is a video recording of an event that results in litigation. One would think that video of what occurred would be the best evidence of what happened and should be dispositive of what happened, absent some evidence the video had been altered or doctored. Not so fast my friends. Florida courts have started to weigh in on this subject and you might find the present status of the case law in Florida to be confusing, if not dumbfounding.

To place the current case law in context it is of benefit to look at Cont’d 7b

SUPREME COURT AND ELEVENTH CIRCUIT APPLY A STRONG PRESUMPTION OF CONSTITUTIONALITY FOR ESTABLISHED RELIGIOUS SYMBOLS

Last year, the Supreme Court of the United States decided *American Legion v. American Humanist Association*, and held that a 32-foot tall Latin cross—an “undoubtedly” Christian symbol—atop a large pedestal, on public land, and in a traffic island at the center of a busy intersection did not violate the Establishment Clause. To reach that conclusion, the Supreme Court applied a “strong presumption of constitutionality” for established, religiously-expressive monuments, symbols, and practices. The Supreme Court notably declined to use the three-part test from its prior decision, *Lemon v. Kurtzman*, that often (but not always) deems religious symbols, monuments, and practices to violate the Establishment Clause.

*American Legion* is a heavily fractured decision, with the Justices authoring seven separate opinions. This makes it particularly difficult to discern any clear legal rule from the case. More Cont’d 6
The Emergency Family And Medical Leave Expansion Act ("EFMLAEA") Fact Sheet

Effective date: Effective April 1, 2020; the law expires on December 31, 2020.

Covered Employer: An employer with fewer than 500 employees. However, small businesses with less than 50 employees are exempt when the imposition of the requirements of the Act would jeopardize the viability of the business as a going concern.

Public agencies such as Federal, State or Local employers are also covered regardless of the number of employees.

Eligible Employee: Any full-time or part-time employee who has been employed for at least 30 calendar days by the employer. However, employers can exclude certain health care providers and emergency responders from this definition.

Qualifying Need Related to a Public Health Emergency: This term means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or if the child care provider of such son or daughter is unavailable, due to a public health emergency.

Public Health Emergency: This term means an emergency related to COVID-19 declared by Federal, State or Local authority.

Reasons for FMLA leave: Eligible employees are entitled to take up to 12 weeks of expanded FMLA leave for “a qualifying need related to a public health emergency.”

Notice: Where leave is foreseeable, an employee should provide notice of leave as practicable.

Unpaid Leave for First 10 Days: The first 10 days (2 weeks) are unpaid, but an employee can substitute accrued vacation leave, personal leave, or medical or sick leave. This election and substitution includes emergency paid sick leave which will be addressed below. It is unclear whether an employer can require the employee to use accrued paid leave during the first 10-day period under the EFMLEA. The law is silent on this latter issue; however, the Emergency Paid Sick Leave Act ("EPSLA") strictly forbids employers from requiring employees to use other paid leave provided by the employer before the employees uses the paid sick time under the EPSLA: 80 hours (10 days).

Paid Leave: The remaining 10 weeks are paid at 2/3 of the employee’s regular rate for the number of hours the employee would otherwise be scheduled to work. However, the maximum payment is $200 per day and $10,000 in total.
**Overtime Calculation:** Employers are required you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

**Restoration to Position:** Emergency FMLA leave is job-protected, meaning the employer must restore an employee to the same or equivalent position upon their return to work. However, the new law includes an exception to this requirement for employers with fewer than 25 employees, if the employee’s position no longer exists following leave due to operational changes occasioned by a public health emergency (e.g., a dramatic downturn in business caused by the COVID-19 pandemic), subject to certain conditions.

Notably, if the small employer does not return the employee because of operational changes, the employer must make reasonable efforts to contact a displaced employee for up to one year after they are displaced if an equivalent position becomes available.

**Other Significant Considerations:** The expanded FMLA leave runs concurrent with traditional FMLA leave. The expanded FMLA leave is not 12 weeks in addition to the 12 weeks (or 26 weeks) of leave provided under traditional FMLA. It simply provides a limited qualifying circumstance for the need for leave: to care for a child whose school or place of child care is closed due to COVID-19.

In short, while the law provides for a new usage of FMLA, it does not provide more than 12 weeks of FMLA leave in a 12-month period for employees who were already eligible. In other words, employees who have exhausted all of their FMLA leave entitlement are not eligible for additional benefits under the new law, and employees who have used some of their FMLA leave entitlement will only be eligible to use their remaining entitlement for the additional benefits.

**The Emergency Paid Sick Leave Act (“EPSLA”) Fact Sheet**

**Effective date:** Effective April 1, 2020; the law expires on December 31, 2020.

**Covered Employer** is any of the following:
1. A private employer with fewer than 500 employees.
2. A public agency (federal/state governments, political subdivisions, schools).
3. Any other entity that is not a private entity.

**Eligible Employee:** Unlike the emergency expanded FMLA requirements addressed above, an employee is immediately eligible for paid sick leave (there is no 30-calendar day requirement).

**Reasons for Paid Sick Leave:** Employers are required to provide paid sick leave to any full-time or part-time employee who is unable to work or telework because:
1. the employee is subject to a Federal, State or Local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a health care provider to self-quarantine because of COVID-19;
3. the employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. the employee is caring for an individual subject to a quarantine or isolation order;
5. the employee is caring for a son or daughter whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 precautions; or
6. the employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

An employer of an employee who is a health care provider or an emergency responder may elect to exclude such an employee from the application of the above.

**Amount of Paid Sick Leave Required:** Employees are entitled to the following:
- **Full-time employees:** 80 hours at their regular rate of pay for reasons 1, 2 and 3 above. However, when caring for a family member (for reasons 4, 5 and 6 above), sick leave is paid at 2/3 the employee’s regular rate of pay.
- **Part-time employees:** the number of hours that the employee works, on average, over a 2-week period for reasons 1, 2 and 3 above. However, when caring for a family member (for reasons 4, 5 and 6 above) sick leave is also paid at 2/3 the employee’s regular rate of pay.

**Limits on Paid Sick Leave:**
- The law limits paid leave to $511 per day and $5,110 in total where leave is taken for reasons 1, 2 or 3 above (generally, an employee’s own illness or quarantine or self-isolation).
- The law limits paid leave to $200 per day and $2,000 in total where leave is taken for reasons 4, 5 or 6 noted above (care for others or school closures).

**Overtime Calculation:** Employers are required to pay only up to 80 hours of paid sick leave over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80 hours.

**Use of Paid Sick Leave:** The use of paid sick leave under this Act shall be made available for use by the employee immediately regardless of how long the employee has worked for the employer.

Cont’d 5
Sequence of Use of Paid Sick Leave: The employer is required to allow the employee to first use sick paid leave provided for under the Act. The employer cannot require the employee to use other accrued paid leave provided by the employer before the employee uses the sick paid leave provided for under the Act.

Other Prohibitions: The employer cannot require, as a condition of granting paid sick leave under the Act, that the employee search for or find a replacement employee to cover for the employee using the paid sick time.

Employer’s Termination of Paid Sick Leave: The right to take paid sick leave ends once the need for the paid sick leave ends and upon the employee’s return to work.

Unused Paid Sick Leave: Paid sick time provided under this Act does not carry over from one year to the next. Employees are not entitled to reimbursement for unused leave upon termination, resignation, retirement, or other separation from employment.

Notices: Employers are required to post and keep posted, in conspicuous places where notices to employees customarily are posted, a notice to be prepared by the Secretary of Labor.

Retaliation
As with other similar laws, these two new acts include anti-retaliation protections and provide for penalties for failure to pay wages.

Please contact Cindy A. Townsend, Esquire at ctownsend@bellroperlaw.com or (407) 897-5150 for more information.

By: Cindy A. Townsend

ELEVENTH CIRCUIT HOLDS THAT CLOSED CAPTIONING OF PUBLIC MEETING VIDEOS IMPLICATES CONSTITUTIONAL RIGHT TO PARTICIPATE IN DEMOCRATIC PROCESS

The United States Court of Appeals for the Eleventh Circuit recently decided National Association for the Deaf v. State of Florida, 945 F.3d 1339 (11th Cir. 2020), which concerns the State of Florida’s lack of closed captioning for recorded videos of the Legislature’s sessions. This case confirms that closed captioning of recorded video of public meetings does impact deaf individuals’ fundamental, constitutional right to participate in the democratic process. Therefore, this additional claim pursuant to 42 U.S.C. § 1983 could be an additional cause of action for a deaf individual unable to comprehend recorded video of government meetings due to lack of closed captioning. Most plaintiffs who have filed similar cases in Florida have sued under Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, or both. National Association for the Deaf may be important because claims brought under

Cont’d 7a
recently, the United States Court of Appeals for the Eleventh Circuit had the opportunity to interpret and apply *American Legion* in *Kondrat’Yev v. City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020), which concerned a 34-foot tall, illuminated cross in a city park. The cross was originally installed in 1941 by the National Youth Administration and was later replaced and donated to the city. The Eleventh Circuit initially held that the cross’ presence in the city park violated the Establishment Clause but reheard the case after the Supreme Court decided *American Legion*.

Despite the multiple opinions in *American Legion*, the Eleventh Circuit believed that *American Legion* was clear that: *Lemon* no longer governs Establishment Clause challenges at least with respect to religious monuments and displays; and (2) history and tradition play an important role in Establishment Clause analysis, at least for “guidance.”

The Eleventh Circuit then considered when the “strong presumption of constitutionality” applies. More specifically, the Eleventh Circuit considered whether all, most, some, or perhaps none of the four considerations the Supreme Court mentioned in *American Legion* must be satisfied for the presumption to apply. Those considerations are: (1) that “identifying the original purpose or purposes” of an established monument “may be especially difficult”; (2) that “as time goes by, the purposes associated with an established monument, symbol, or practice often multiply”; (3) that “the message conveyed” by the monument “may change over time”; and (4) that “when time’s passage imbues” a monument with “familiarity and historical significance, removing it may no longer appear neutral” toward religion and instead appear hostile to religion. However, the Eleventh Circuit held that it was unnecessary to resolve the issue because all of the considerations were satisfied in *Kondrat’Yev*.

Next, the Eleventh Circuit considered whether the presumption could be rebutted, and if so, how. The court discussed showing discriminatory intent or deliberate disrespect as possibly sufficient to rebut the presumption, but also avoided resolving this issue because neither was present in the facts presented by *Kondrat’Yev*. Ultimately, the Eleventh Circuit held, in light of *American Legion*, the cross’ presence in the City park did not violate the Establishment Clause.

*American Legion* and *Kondrat’Yev* are generally positive developments in Establishment Clause jurisprudence from the perspective of a governmental entities. These decisions bring a limited amount of helpful clarification to an unclear area of First Amendment law. Very generally, both decisions should help make Establishment Clause cases concerning religious monuments, symbols, and practices more defensible for governmental entities. However, this area of law is still rife with uncertainty, conflict, and nuance, making legal counsel extremely advisable for governmental entities that have or might implement a religious monument, symbol, or practice.

By: Frank M. Mari
§ 1983 do not require a plaintiff to prove deliberate indifference or intentional discrimination to obtain monetary damages, unlike Title II of the ADA and Section 504 of the Rehabilitation Act of 1973.

The opinion discusses deaf citizens being denied the opportunity to monitor the legislative actions of their representatives and hold their elected officials accountable for legislative acts. So, the remaining question is whether the fundamental right to participate in the democratic process is implicated if a deaf individual is unable to comprehend recorded video of a public meeting at which the individual has no elected representative (e.g. a city in which the individual cannot register to vote). Litigation in National Association for the Deaf is ongoing (with a pending motion for rehearing by the full Eleventh Circuit), and we will continue to monitor the case for developments that may be relevant to governmental entities in Florida.

By: Frank M. Mari

the United States Supreme Court case of Scott v Harris, 550 U.S. 372, 127 S. Ct. 1769, 1776, 167 L.Ed 2d 686 (2007). The Scott case involved a police pursuit where the actions of the fleeing driver were in question as to whether or not his actions were placing the public in great danger, thereby warranting a pit maneuver on his vehicle to terminate the pursuit. There was video of the pursuit from the chasing police vehicles which clearly captured the reckless driving of Mr. Scott and the danger he posed to the public. Mr. Scott contended he did not drive recklessly and did not pose a threat to the public, in direct contradiction to what was on the video. Justice Scalia’s majority opinion stated as follows:

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

A proper reading of the Scott opinion would hold where the record is clear based on video evidence, a court need not rely on contradictory testimony and should not adopt a version of the facts that is discredited by the record. In tort cases it was reasonable to assume based on the holding in Scott where a defendant had a video which blatantly contradicted what the oral testimony presented by the plaintiff, a court could use the video evidence to disregard the oral testimony and grant summary judgment. In summary, the video evidence should trump the blatantly wrong oral testimony.
In *Korman v. Law Offices of David J. Stern, P.A.*, 45 Fla. L. Weekly D427 (Fla 4th DCA February 26, 2020), the court misapplied the rule that there only needs to be proper service of process of the initial complaint on a defendant and that service of process of an amended complaint is not required except when a default has been entered against that defendant and new or additional claims against that defendant are asserted in an amended complaint.

In *Korman*, Mr. and Ms. Korman brought a cause of action against Attorney Stern and his law firm. The specific allegations of the complaint are not set forth in the appellate opinion. A quick review of The Florida Bar website reflects that Mr. Stern was disbarred and ineligible to practice law in Florida as of January 7, 2014. Apparently, Mr. Stern was practicing in the area of foreclosure law.

The plaintiffs obtained proper service of process of the first amended complaint on the law firm. The plaintiffs were then granted leave by the court to file a second amended complaint against the law firm adding additional counts. However, the plaintiffs failed to list the law firm on the certificate of service of the second amended complaint.

When the law firm failed to timely respond to the second amended complaint, the plaintiffs moved for and obtained a default against the law firm which the law firm subsequently moved to vacate due to the failure to obtain service of process of the second amended complaint. In response, the plaintiffs filed an affidavit attesting that a copy of the second amended complaint had been mailed (served) to the law firm’s address.

The court at first mistakenly entered an order granting a motion to dismiss the second amended complaint as opposed to a motion to vacate the default that had been entered on the second amended complaint. That order was corrected to only vacate the default. The vacation of the default was held to be proper.

The law firm then moved to dismiss the second amended complaint based upon the plaintiffs’ failure to obtain service of process of the second amended complaint. That motion was granted which resulted in the appeal.

The appellate court held that service of process of the second amended complaint was not required as service of process of the first amended complaint was properly obtained. The court went on to say that this case did not involve adding new or additional claims after a default has been entered; the new or additional claims were alleged or asserted before the default was entered.

Of course, service of the second amended complaint (as opposed to service of process of the second amended complaint) was still required. A proper certificate of service is prima facie proof that service has been made pursuant to the applicable procedural rule. However, here, there was no prima facie proof as the law firm was not on the certificate of service for *Cont’d 9b*
However, Florida appellate courts have not adopted the reasoning in Scott as most recently seen in the case of Lopez v. Wilsonart, LLC, 275 So. 3d 831 (Fla. 5th DCA 2019). The Lopez case involves a motor vehicle accident in Osceola County where Jon Lopez crashed into the rear of a tractor trailer and died as a result of the impact. The evidence in the case presented by his estate placed blame on the truck driver for the accident. Plaintiff presented testimony from an independent witness that the truck driver swerved out of his lane just prior to the impact and presented an affidavit from an expert that the truck was partially in the lane of decedent when the accident happened. In response to that evidence, the defendants presented a video taken from the truck’s in-cab video system. The video clearly showed the truck never left its lane of travel, did not commit any traffic infractions, and took no actions of any kind that could be considered negligent prior to the decedent striking the rear of his truck. Based on the video evidence, which conclusively showed the truck driver was not negligent and that the plaintiff’s version of events was wholly unbelievable, Judge Mike Murphy granted summary judgment for the defendant.

The Fifth District Court of Appeal (Fifth DCA) overturned the summary judgment, finding there was a genuine issue of material fact that only a jury could resolve. The court concluded that Florida’s summary judgment rule is far more restrictive than the federal rule relied upon in the Scott v Harris case. The Fifth DCA held that where there is a factual dispute in the record, here between the eye witness testimony and the video, the rule prohibits the judge from weighing the evidence. The only resolution is to allow the case to go to the jury as they are the only entity under Florida law permitted to weigh the evidence and not the judge. The Fifth DCA did certify a question to the Florida Supreme Court asking if there should be an exception to the present summary judgment standards that would allow the grant of summary judgment in cases where there is video evidence that completely negates or refutes the conflicting evidence presented.

The certification of this question does give defendants hope that the Florida Supreme Court will answer the question in the affirmative. Presently, the courts are operating under a system where they are to ignore what their eyes are clearly telling them, and to disregard a conclusive video of what actually happened. We hope this anomaly will be rectified by the Florida Supreme Court in the near future.

By: Joseph D. Tessitore

the second amended complaint. Therefore, a motion to strike the second amended complaint was the proper remedy; not a motion to dismiss. On the motion to strike, it would need to be determined by the court whether service was properly had upon the affidavit. If the affidavit was determined to be insufficient to show service of process, the remedy would be to strike the second amended complaint.

By: David B. Blessing
On March 4, 2020, the Florida House of Representatives passed HB 7071 (2020), which would create a strong presumption in favor of using only the lodestar fee method of calculating prevailing claimant attorneys’ fee awards, and not using contingency risk multipliers, in property insurance policy claims brought under Fla. Stat. § 627.428. HB 7071 would add the following provision to § 627.428:

In an award of attorney fees under this section for a claim arising under a property insurance policy, a strong presumption is created that a lodestar fee is sufficient and reasonable. Such presumption may be rebutted only in a rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner.

For background, under the “American Rule,” each party is responsible for its own attorney fees unless a contract or statute provides an entitlement to prevailing party fees. In Fla. Patient’s Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), the Florida Supreme Court adopted the federal lodestar approach for computing reasonable prevailing party attorneys’ fees, whereby the court (1) determines the number of hours reasonably expended on the case by the attorney, (2) determines a reasonable hourly rate, and (3) multiplies the reasonable number of hours expended by the reasonable hourly rate.

In Rowe, the Court also explained that once the trial court arrives at the lodestar figure, “it may add or subtract from the fee based upon a ‘contingency risk’ factor and the ‘results obtained.’” Rowe, 472 So. 2d at 1151. In other words, trial courts in Florida have the discretion to increase the lodestar figure by multiplying that figure by a “contingency fee multiplier,” taking into consideration: whether: (1) the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) the attorney was able to mitigate the risk of nonpayment in any way; and (3) any of the factors set forth in Rowe are applicable, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and the client. Joyce v. Federated Nat’l Ins. Co., 228 So. 3d 1122, 1124, 1126 (Fla. 2017). The Florida Supreme Court has also imposed caps on the contingency fee multiplier as follows:

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<th>Contingency Fee Multiplier</th>
<th>Case’s Likelihood of Success at Outset</th>
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<tr>
<td>1.0 to 1.5</td>
<td>More likely than not</td>
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<tr>
<td>1.5 to 2.0</td>
<td>Approximately even</td>
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<tr>
<td>2.0 to 2.5</td>
<td>Unlikely</td>
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Id. at 1125 (citing Standard Guar. Ins. Co. v. Quanstrom, 555 So. 2d 828, 834 (Fla. 1990). Cont’d 11
However, subsequent to Rowe, a series of United States Supreme Court decisions limited the use of contingency fee multipliers in federal cases. See, e.g., City of Burlington v. Dague, 505 U.S. 557 (1992); Perdue v. Kenny A. ex rel. Winn, 559 U.S. 542, 543 (2010). Regardless, the Florida Supreme Court has repeatedly rejected the United States Supreme Court’s analysis of contingency fee multipliers. See Joyce, 228 So. 3d at 1123.

In response, for property insurance claims only, HB 7071 sought to apply the federal standard for awarding a contingency risk multiplier, permitting the multiplier only in “rare and exceptional” circumstances. HB 7071 would have created a strong presumption that the lodestar fee is a sufficient and reasonable award of attorney fees in a claim arising under a property insurance policy. This presumption would be rebuttable only in rare and exceptional circumstances by evidence that competent counsel could not be retained in a reasonable manner. Only when such evidence is presented to the court could a contingency fee multiplier be applied in property insurance litigation.

As noted above, HB 7071 was passed by the Florida House of Representatives on March 4, 2020, sending the Bill to the Florida Senate for consideration. Also before the Senate was SB 914 (2020), which was the Senate’s own identical companion bill to HB 7071. HB 7071 was referred to the Banking and Insurance, Judiciary, and Rules Committees in the Florida Senate. However, on March 14, 2020, HB 7071 was indefinitely postponed and withdrawn from consideration and died in the Banking and Insurance Committee. Regarding SB 914, after receiving passing votes by both the Banking and Insurance and Judiciary Committees, on March 14, 2020, the bill was indefinitely postponed and withdrawn from consideration, dying in the Rules Committee.

At this time, the reason for these bills being withdrawn from consideration is unclear, especially given their support by both the Florida House of Representatives and multiple Senate committees. Given their potential impact on Florida property insurance claims, we will continue to monitor the Florida Legislature for any comparable future bills.

By: John M. Janousek
Attorneys Joseph D. Tessitore and Jennifer C. Barron represented the Osceola County Sheriff in a case arising from a motor vehicle accident wherein the plaintiff claimed injuries to her low back. The plaintiff repeatedly denied prior treatment and denied any prior/subsequent injuries to her low back. However, records from the plaintiff’s out of state former primary care physician revealed prior chiropractic and orthopedic treatment to her hips and low back. Employment records also revealed numerous prior and subsequent work-related injuries, including injuries to the low back, which were not disclosed by the plaintiff. Through social media discovery of plaintiff’s Facebook and Instagram accounts we learned of other undisclosed medical care providers. The records from the undisclosed medical providers revealed the plaintiff sought treatment for low back pain—less than 60 days before the vehicle accident. That prior treatment was never disclosed by the plaintiff at two depositions or in two sets of interrogatory answers from the plaintiff. We filed a Motion for Fraud Upon the Court based upon the plaintiff’s 30+ misrepresentations and falsehoods. On the eve of the hearing on the Motion for Fraud Upon the Court the plaintiff voluntarily dismissed her case.
FIRM NEWS

The IOA Corporate 5k originally scheduled for April 9, 2020, has been postponed until October 1, 2020. As this event nears, we will provide further details.

CONGRATULATIONS

WE WOULD LIKE TO CONGRATULATE CHRISTOPHER R. FAY ON BECOMING A FLORIDA SUPREME COURT CERTIFIED CIRCUIT COURT MEDIATOR.
If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting John Janousek at jjanousek@bellroperlaw.com.

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