

ORIGINAL

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT

CASE NOS. 4D06-1594 and 4D06-1624  
(consolidated)

GUNSTER, YOAKLEY & STEWART  
and DANIEL HANLEY,

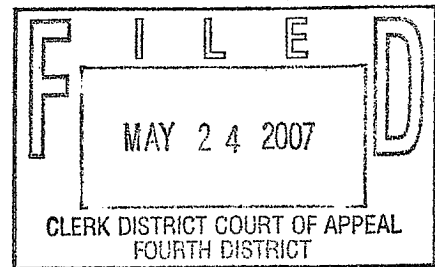
Appellants/Cross-Appellees,

vs-

CHARLES V. McADAM, III and  
FRANK GANNETT McADAM, et al.,

Appellees/Cross-Appellants.

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DISTRICT COURT OF APPEAL  
FOURTH DISTRICT

**REPLY BRIEF OF CROSS-APPELLANTS**

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## PREFACE

This is an appeal from a Final Judgment entered on a jury verdict by the Circuit Court of Palm Beach County, Florida, and a cross-appeal from a Summary Judgment entered in favor of Defendants on one of Plaintiffs' claims. Appellants/Cross-Appellees were the Defendants in the court below and Appellees/Cross-Appellants were the Plaintiffs. Herein the parties will be referred to as they stood in the lower court or by proper name. The following symbols will be used:

- (R ) - Record-on-Appeal
- (T ) - Transcript of testimony
- (PE ) - Plaintiffs' Exhibit
- (AB ) - Appellants' Brief
- (A ) - Appellants' Appendix
- (AA ) - Appellees' Appendix
- (RA ) - Cross-Appellants' Appendix to Reply Brief

## FACTS PERTINENT TO THE CROSS-APPEAL

Decedent's estate tax return filed March 29, 2004 showed a gross estate of \$57,468,895, a taxable estate of \$49,462,923, with **gross estate taxes of \$24,500,831, or 49% of the taxable estate** (PE138;RA10). That single fact demonstrates that although Decedent sought out and paid for Hanley's experience and advice in estate planning in order to minimize estate taxes, his estate did not "save" one dollar in estate taxes. Decedent did not get what he paid for, and neither did his estate or his beneficiaries.

Hanley admitted that he recommended to Decedent that he form a FLP; gave Decedent a FLP "Overview" which stated that a FLP "will" result in estate tax discounts (RA304); and told Decedent that his firm "did these partnerships all the time and that "they work. There is a discount available. It's just a question about the size of the discount" (R7:1237,pp.168;R8:1401,pp.432,441-42). Hanley also testified that FLP discounts are generally recognized by the IRS and the courts (R7:1237,p.275); that the IRS and case law allow assets in QTIP trusts to be placed in a FLP, and discount those assets for estate tax purposes (R8:1401,p.372-74); that if Decedent had formed a FLP, his estate would have saved estate taxes, and that he may have told Decedent his discount would be 20%-30% (R7:1237,pp.276-77).

The testimony of Terrance Boyle, Tim McAdams' attorney, demonstrated that Decedent told him he liked the idea of a FLP, and that he and Hanley were forming

one (R16:3032-33). Boyle confirmed this with Hanley, who assured Boyle that he was preparing a FLP for Decedent (“we’re doing it”) and that he needed no assistance from Boyle’s law firm in preparing the FLP (“it’s under control”) (R16:3020-21,3034). Notwithstanding, Hanley never prepared the FLP before Decedent died.

## **POINT ON CROSS-APPEAL**

### **THE COURT ERRED IN GRANTING SUMMARY JUDGMENT IN DEFENDANTS’ FAVOR ON PLAINTIFFS’ FLP CLAIM**

#### **ARGUMENT**

##### **I.**

**Plaintiffs’ FLP Claim** - Plaintiffs’ FLP claim had two bases. First, Hanley was negligent in failing to form a FLP into which Decedent’s \$26,000,000 personal brokerage account was transferred, as agreed to by Decedent. That negligence caused unnecessary estate taxes. Second, Hanley was negligent in failing to advise Decedent that he could maximize his estate tax savings by also placing the two QTIP trusts into the FLP. Hanley’s negligence in that regard caused an even greater amount of unnecessary estate taxes. Plaintiffs presented sufficient evidence to create a jury question as to both theories.

**Gunster’s Motion for Summary Judgment** - Gunster’s Motion for Summary Judgment did not raise the arguments contained in subsections 2 and 3 of Gunster’s brief on the cross-appeal (AB25-32). Gunster never claimed below that the FLP

would fail, not pass IRS or judicial muster or that the assets that could have been placed in the FLP was entirely speculative. Gunster did not raise those arguments below for a very good reason, Hanley had promoted the FLP as a tax savings device to Decedent; presented Decedent with a "FLP Overview" which informed Decedent that a FLP would save estate taxes, it was just a question of the amount, which Hanley said would be 20-30%; and advised Decedent to form a FLP with his \$26,000,000 brokerage account in order to save unnecessary estate taxes.

In light of that evidence, Gunster obviously knew that neither Judge Gerber nor the jury would "buy" the rather absurd, and inconsistent, argument that FLP's generally fail and are rarely upheld. Gunster is now attempting to see if it can get this Court to "buy" into these arguments. The Court should be mindful of the fact that, since these arguments were not raised below, Plaintiffs had no reason to present evidence to defend against the arguments. Nor did the trial court ever have the opportunity to rule on these arguments.

**The Trial Court's Ruling** - Gunster takes great liberties with the trial court's ruling which granted Summary Judgment on Plaintiffs' FLP claim. The court's narrow ruling was that it was too speculative to allow a jury to consider whether Decedent intended to form or fund a FLP. The court relied upon Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1380 (Fla. 1993) and Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So.2d 315 (Fla. 3<sup>rd</sup> DCA 1985) for

the proposition that Decedent's intent could not be proven "other than expressed in the will" (R16:3161). The court's limited ruling was as follows, Id.:

Unlike the Revocable Trust, which was *created* through the decedent's estate planning, this Court agrees with Gunster and Hanley that it is too speculative for a jury to consider whether the decedent intended not just to fund, *but to form*, a family limited partnership. There is no record evidence that the decedent ever instructed Gunster and Hanley to form and fund a family limited partnership. The Florida Supreme Court has warned of the potential problems which arise when trying to divine the unexpressed intent of the decedent, namely "the risk of misinterpreting" that intent and "the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator." Espinosa .... As the Third District noted in Lorraine . . . :

To permit the plaintiff to prove that the testamentary intent was other than that expressed in the will not only would run contrary to the avowed purpose of the statute of wills to guard against fraud, but also would open the door to the fabled triplets of conjecture, speculation and surmise, which have never entitled a litigant to affirmative relief. (emphasis added)

The above constitutes the court's entire ruling on Plaintiffs' FLP claim, and it was based solely on Decedent's intent to form a FLP being too speculative, based upon the "face of the will" doctrine. The court did not find that it was too speculative for a jury to determine when Decedent would have formed the FLP; the amount of assets he would have transferred into the FLP; whether the FLP would be upheld; or, how much discount the IRS would allow etc., as Gunster's brief implies (AB23). The court never considered those issues because Gunster never raised them.

The trial court's reliance upon Espinosa's and Lorraine's "face of the will"

doctrine, which pertains to testamentary intent, was obviously wrong. A FLP is formed as a separate document and is not part of a will, and therefore the face of a decedent's will would never contain his or her intent to form a FLP. In this case, Decedent's will was executed on June 5, 1998. The decision to form a FLP occurred three years later in 2001. The prior will could not possibly have contained Decedent's subsequent intent, arrived at three years later, to form and fund a FLP.

Gunster argues that Plaintiffs' reliance upon Gallo v. Brady, 925 So.2d 363 (Fla. 4<sup>th</sup> DCA 2006) is misplaced because it only ruled on standing, an issue the court decided in Plaintiffs' favor here. Gunster ignores the fact that Gallo **also held** that Espinosa's and Lorraine's "face of the will" doctrine did not apply where a personal representative brings a legal malpractice action. In other words, a personal representative can establish a decedent's intent by use of extrinsic evidence.

Contrary to Gallo, the trial court only looked at extrinsic evidence to see if Decedent expressly instructed Hanley to form a FLP (R16:3161). The court refused to look at extrinsic evidence otherwise to determine the Decedent's intent to form a FLP, incorrectly relying upon Espinosa's and Lorraine's "face of the will" doctrine. That was an incorrect ruling under Gallo. Extrinsic evidence must be considered because Plaintiffs are deprived of the benefit of Decedent's live testimony to counter Hanley's claim that Decedent told him not to form a FLP.

**A Jury Question was Created as to Decedent's Intent** - Florida case law is clear

that where direct evidence as to intent is not available, circumstantial evidence is sufficient to prove intent. See School Bd. of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1<sup>st</sup> DCA 1981) (where there is no direct evidence of intent, circumstantial evidence or inferences may be relied upon to prove intent); Walker v. Florida Dept. of Business & Professional Regulation, 705 So.2d 652, 654 (Fla. 5<sup>th</sup> DCA 1998) (same). See also Florida Bd. of Bar Examiners ex rel. T.J.F., 770 So.2d 676, 677 (Fla. 2000) (“...circumstantial evidence demonstrated that TJF did form an intent...); Northstar Investments & Dev. Inc. v. Pobaco, Inc., 691 So.2d 565, 566 (Fla. 5<sup>th</sup> DCA 1997) (where an admission by the person in question is absent, intent may be established by circumstantial evidence).

Plaintiffs presented sufficient extrinsic evidence to create a jury question as to Decedent’s intent to form a FLP. Boyle testified that Hanley told him that he was preparing a FLP for Decedent. Boyle had checked with Hanley to make sure he was forming the FLP for Decedent, because if he was not going to do so, Boyle’s law firm was prepared to form the FLP. Hanley assured Boyle he was preparing the FLP (R16:3020-21,3032-34;R15:2885-86).

Boyle also testified that Decedent told him he liked the idea of a FLP, and that this was something they (he and Hanley) were doing (R16:3032-33). Gunster’s brief summarily dismisses Boyle’s testimony in that regard as “rank hearsay” (AB34). Decedent’s statements are admissible, as an exception to the hearsay rule, under

§90.803(3)(a) Fla. Stat.<sup>1</sup> as statements of his then-existing state of mind, including statements as to his intent. See Ehrhardt, Florida Evidence §803.3a (2006). Decedent's intent to form a FLP was a matter at issue, and Decedent's own statements to others as to his intent in that regard are admissible under §90.803(3)(a), Fla. Stat.

Gunster states that Boyle's statements in regard to his "understanding," impressions or beliefs are inadmissible (AB34). In fact, Boyle's understanding or conclusion, based upon his personal conversations with Hanley, Decedent and Decedent's son, that the decision had been made to form a FLP, and that Hanley was to form that FLP, are admissible. Those statements are based on Boyle's personal knowledge, not "information and belief," as Gunster claims (AB35).

Gunster argues facts which it claims support its contention that Hanley was never asked to draft a FLP (AB36-37). Gunster's argument is nothing more than a jury argument, not a basis for summary judgment. Gunster claims Plaintiffs can only point to one phone inquiry in October 2001 from Tim's lawyer, Boyle (AB36), ignoring the fact that in that conversation, in response to Boyle's statement that the McAdams family wanted a FLP, Hanley assured Boyle that "we're" preparing the FLP (R16:3020). Gunster states that Boyle never followed up on that phone

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<sup>1</sup>/Section 90.803(3)(a), provides an exception to the hearsay rule for "a statement of the declarant's then-existing state of mind, ... including a statement of intent ...when such evidence is offered to prove the declarant's state of mind ...at that time or at any other time when such state is an issue in the action." (emphasis added)

conversation (AB36), but Boyle had no reason to, in light of Hanley's assurance that "absolutely, we're doing it, ...thanks for your help, but we don't need it ... we're doing it" (R16:3020).

Gunster primarily relies upon In re Estate of Threefoot, 2006 WL 3114147 (Tenn. App. 2006) to support its argument that Plaintiffs failed to prove Decedent's intent to form a FLP. Threefoot was not a legal malpractice action against an attorney for negligence in failing to form a FLP. The decedent's daughter's lawsuit sought to form a post-mortem FLP, and transfer property to it, based upon the decedent's alleged oral statement to "go ahead or go to it or get it done." The decedent died before a FLP was drafted, or any property was transferred. The court ruled that the evidence was not "clear and convincing," as required by Tennessee law, to prove an oral contract that the decedent agreed to transfer her assets to a FLP. Id. at \*6-7.

Unlike Threefoot, this case is a legal malpractice case, and proof by clear and convincing evidence is not required. Gunster argues that the decedent's "get it done" statement in Threefoot is no different from Hanley's statement to Boyle "we're doing it" (AB34). In fact, there is a tremendous difference. First, the fact that "get it done" does not meet the "clear and convincing evidence" burden of proof in Threefoot, does not mean "we're doing it" does not meet the "preponderance of evidence" burden of proof in this case. Second, as Gunster admits (AB34), Boyle's testimony that Hanley told him that "we're doing" the FLP was an admission against Gunster's interest that

is admissible under §90.803(18), Fla. Stat. That testimony sufficiently establishes that Hanley and Decedent had agreed that a FLP was to be prepared. For all these reasons, Threefoot has no applicability.

Gunster claims that this case comes within the holding of Lane v. Cold, 882 So.2d 436 (Fla. 1<sup>st</sup> DCA 2004). That case merely upheld a summary judgment for an attorney where the plaintiff failed to present countervailing facts, or justifiable inferences from the facts presented, that the attorney was to prepare a buy-sell agreement for his client. As discussed, supra, justifiable inferences exist here.

Gunster argues that whether Decedent would have formed or funded a FLP was too speculative under Drackett Products Co. v. Blue, 152 So.2d 463, 465 (Fla. 1963). That case is inapplicable because it holds that it is error to allow a witness to testify to what he or she would have done, or what action the witness would or would not have taken, if something had occurred which did not occur, or under circumstances which did not exist. Drackett does not apply here, because no witness testified to what he or she, or Decedent, would have done under different facts that never existed. The proven facts were sufficient to allow the jury to draw a reasonable inference that Decedent told Hanley to form the FLP, and that the failure to do so damaged Decedent's estate. The only issue was the amount of damages, \$4.0 or \$9.3 million, and there was no uncertainty in that regard, contrary to Gunster's argument that damages could not be "rationally computed"(AB41). The uncertainty that defeats

recovery is as to the existence of damages, not the amount of damages. Twyman v. Roell, 166 So. 215, 217 (Fla. 1936); Asgrow-Kilgore Co. v. Mulford Hickerson Corp., 301So.2d 441 (Fla. 1974). The amount of Plaintiffs' damages is easily ascertainable, once a jury resolves the factual conflict as to whether Decedent told Hanley to form a FLP.

### **Case Law Supports Plaintiffs' FLP Claim as a Viable Cause of Action -**

Plaintiffs' FLP claims had two prongs: (1) Hanley's negligence in failing to form a FLP with Decedent's \$26 million brokerage account, to which Decedent had agreed; and (2) Hanley's negligence in failing to give Decedent proper advice to maximize his estate tax savings by also placing his QTIP's into the FLP. Case law supports both theories. An attorney rendering estate-planning services is liable for legal malpractice arising from his or her negligence resulting in excess estate taxes being paid by the estate contrary to the decedent's intent. Gallo v. Brady, supra; Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 783 Fn.6 (Tex. 2005).

In Kinney v. Shinholser, 663 So.2d 643 (Fla. 5<sup>th</sup> DCA 1995), the Fifth District reversed a summary judgment on a claim that an attorney and an accountant were negligent in failing to advise the testator's surviving spouse of an option of minimizing estate taxes, where the failure to give that advice resulted in substantially greater taxes. Hanley admitted that he never even talked to Decedent about **also** transferring the QTIP's into a FLP. Therefore, if a jury concludes Hanley was

negligent in not advising Decedent to also transfer the QTIP's into the FLP, that negligence caused a total of \$9.3 million in unnecessary estate taxes, or at least a jury could so determine.

In Hosfelt v. Miller, 2000 WL 1741909 (Ohio App. 2000), Mrs. Schaefer, when dying of cancer, told the attorney she hired for estate planning advice, that she did not want her estate to pay federal estate taxes if possible. After her death, the estate's personal representative sued the attorney for legal malpractice seeking damages in the amount of the estate taxes paid, \$95,000, which could have been avoided but for the attorney's negligence. The trial court granted summary judgment for the attorney and the Ohio appellate court reversed, stating, Id. at \*5:

Appellant has alleged and provided sufficient evidence to create a genuine issue of material fact that Mrs. Schaefer's estate would not have had to pay federal estate taxes but for Appellees' negligence. Every dollar paid by the estate in taxes means that there was one dollar less to distribute as Mrs. Schaefer intended. Mrs. Schaefer's estate was valued, for federal estate tax purposes, at over \$1,000,000.00. Mrs. Schaefer hired Appellees for estate planning advice so that as much of that amount would go to her children and as little as possible would be paid in estate taxes. Although necessary taxes may not constitute an injury to a client's interests, taxes which could have been avoided by the exercise of the knowledge, skill and ability ordinarily possessed and exercised by legal professionals under similar circumstances can be considered as an injury.

In Hosfelt, the appellate court rejected some of the same arguments that Gunster is raising here, Id.:

...Appellees argue that Mrs. Schaefer may not have chosen to

follow their advice had they specifically told her about the tax consequences. Appellees' argument relates to an issue of fact concerning whether their negligence actually caused the alleged harm.

\* \* \*

Appellees also argue that ... any claim for damages is purely speculative.... Appellees are attempting to create ambiguity when there is none. Mrs. Schaefer's federal tax liability became fixed at her death at \$94,574. It is that specific tax liability which is being claimed as damages.... This is a case of a decedent's estate attempting to recover the specific amount paid in estate taxes which the personal representative of the estate argues it would not have been necessary to pay but for Appellees' negligence.

Here, Decedent's estate taxes were 49% of his taxable estate, or \$24,500,831.

Unlike Hosfelt, Plaintiffs are not seeking to recover that entire amount. They are seeking recovery of only 20 to 40% of that amount as unnecessary estate taxes, depending upon what assets a jury decides should have been transferred to a FLP.

**A Jury Question was Created as to Liability and Damages on the FLP Claim -**

John Raymond, Plaintiffs' expert tax and estate planning attorney, filed an Expert Witness Disclosure which opined that Hanley should have, at least, had Decedent place his personal brokerage account into a FLP, which would have resulted in estate tax savings of \$4 million (R2:400-01; R10: 1957,p.102). **Alternatively**, Raymond's Expert Witness Disclosure stated, Gunster should have created a FLP comprised of Decedent's personal brokerage account **and** both QTIP trusts (R2:401), which, assuming those assets were valued at \$66 million, would have resulted in estate tax savings of \$11 to \$15 million (R2:401; R10:1957, p.93-94,180,198-99,205-06).

After filing his Expert Witness Disclosure, and in order to eliminate any uncertainty as to damages, Raymond hired an accountant who actually appraised Decedent's brokerage account and the two QTIP trusts at a net value of \$51,805,597(R14: 2734, 2769; RA9). Using that figure, Raymond and the accountant calculated an estate tax savings of \$9,329,941 that would have resulted if Hanley had formed a FLP using those assets (R14:2734;R10:2223, p.265-72;RA9). Raymond's Expert Witness Disclosure (R2:401-03), his damages model (RA9) and his deposition testimony were sufficient to create a question of fact as to Hanley's negligence and Plaintiffs' damages.

**What Assets Would Have Been Transferred Was Not Speculative** - Extrinsic evidence demonstrated that Decedent had already decided to form a FLP, and had instructed Hanley to do so, or at least a jury could so decide. Even so, Gunster claims that what assets Decedent would have transferred to the FLP was speculative. There is no speculation. Raymond opined that Hanley should have placed **some or all** of Decedent's brokerage account and QTIP's into a FLP (R2:400). **Hanley himself testified** that he contemplated placing Decedent's brokerage account into a FLP (R9: 1601,p.444-45). If Hanley had done so, Decedent's estate would have saved \$4 million dollars in estate taxes. A jury could easily determine that Hanley should have, **at least**, placed Decedent's brokerage account into a FLP, and that he negligently failed to do so, rejecting Hanley's claim that Decedent instructed him not to form the

FLP. No document, including Hanley's notes, or any other testimony supported Hanley's claim in that regard.

**Alternatively**, a jury could have determined, as Raymond opined, that Hanley should have advised Decedent to place his personal brokerage account, **and** the two QTIP's, into a FLP (RA9). Had the Decedent been properly advised to do so by Hanley, Decedent would have had a FLP that created estate tax savings of \$9.3 million.<sup>2</sup> Importantly, **Hanley admitted** that the IRS and case law allow assets in QTIP trusts to be placed into a FLP, and discount those assets for estate tax purposes (R8:1401, p.372-74). Hanley simply claimed he did not recall discussing with Decedent placing the QTIP's into a FLP (R9:1601,p.445). If Hanley did not discuss that with the Decedent, he surely should have, considering the \$9.3 million in estate taxes that would have been saved (RA9).

Gunster argues that Decedent was apparently reluctant to give up control of his brokerage account or the QTIP trusts by transferring them into a FLP. Decedent's decision to relinquish control of those assets would not have been a monumental one, as Gunster suggests. In fact, Decedent had actually gotten beyond that decision since he had already agreed to form a FLP. Moreover, Decedent's brokerage account was

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<sup>2</sup>/The amount of a plaintiff's damages are often illustrated under different hypothetical scenarios or damage models, which are more than appropriate so long as the facts support the different scenarios or models. Here, the facts would allow the jury to determine that either the Decedent's brokerage account, and/or the brokerage accounts plus the QTIP trusts should have been transferred to a FLP.

already managed by Frank (R10:1957, p.209), and Decedent did not “control” the QTIP’s (R12:2223 pp.247-48).

Gunster argues that a FLP could not have been formed after Frank’s telephone calls to Hanley between May and December, 2001, because the IRS would have viewed it as formed solely for tax purposes (AB37). Gunster cites two cases, where there were numerous reasons the FLP’s were found to have been formed **solely** to avoid estate taxes. The age and poor health of the decedents were merely additional reasons supporting that finding. The fact that a FLP is formed shortly before a decedent’s death does not, in and of itself, warrant finding the FLP was formed solely to avoid taxes. See the following cases where FLP’s were held not to have been formed to avoid taxes, even though the decedents died shortly thereafter: Church v. U.S., 2000 WL 206374 (W.D. Tex. 2000), aff’d, 268 F.3d 1063 (5<sup>th</sup> Cir. Tex. 2001) (2 days after); Kimbell v. U.S., 371 F.3d 257 (5<sup>th</sup> Cir. 2004), (2 months after); and Estate of Kelley v. C.I.R., 2005 WL 2542534 (U.S. Tax Ct 2005) (8 months after). These cases are in accord with Lisa Schneider’s testimony that a FLP could have been formed up until Decedent died (R16:3046,p.93).

Gunster also argues that Frank knew Decedent’s brokerage account and the QTIPS, which he managed, had not been retitled in the FLP’s name (AB36). First, Frank testified that he thought Decedent “had done it,” because Decedent kept telling Frank that he was “working on it” (R4:801,p.71). After Decedent began chemotherapy

he was very sick, and from then on Frank and Decedent's focus was on his health (Id. at 88). Second, as Decedent's health got worse, Frank confirmed with Hanley that Decedent's estate was in order and nothing was left to be done (Id. at 71-72). Third, Hanley, not Frank, was responsible for Decedent's estate planning (T1509). Gunster is merely attempting to improperly transfer that responsibility or duty to Frank.

**A Jury Question was Created as to Causation** - Gunster argues that whether Hanley's actions proximately caused damages to Decedent's estate is too speculative. In fact, there was sufficient evidence that Decedent told Hanley to form a FLP, despite Hanley's claim to the contrary, presenting a factual issue for a jury to resolve. If a jury concludes that Decedent told Hanley to form a FLP, it could also conclude that Hanley's failure to properly draft a FLP was the proximate cause of the unnecessary estate taxes. Gunster admits that proof of causation in a legal malpractice case does not differ from an ordinary negligence case, citing Proto v. Graham, 788 So.2d 393 (Fla. 5<sup>th</sup> DCA 2001) (AB40). The plaintiff must present evidence that affords a reasonable basis for the conclusion that the attorney's negligence, more likely than not, was a substantial factor in causing the harm suffered (Id. at 396).

Here, the evidence shows that Hanley's failure to form a FLP, to which Decedent had agreed, and his failure to effect the transfer of Decedent's brokerage account into the FLP, more likely than not, caused unnecessary estate taxes of, at least, \$4 million. **That is the minimum verdict Plaintiffs would be entitled to on their FLP claim.**

## II.

**Gunster's Arguments Not Raised Below as a Basis for Summary Judgment** - The balance of this brief references arguments which make up a large portion of Gunster's brief on the cross-appeal, and which were never raised below. Gunster's arguments are not only inconsistent with Hanley's and Schneider's testimony, but Plaintiffs feel they are also absurd in light of their testimony. Gunster is raising new arguments because it obviously cannot defend Judge Gerber's ruling based on the reason he gave for his ruling. Gunster has been forced to resort to arguing issues never argued, defended against, nor decided in the trial court.

**Family Limited Partnerships** - Four-and-one-half pages of Gunster's brief (AB25-29) are devoted to explaining why FLP's "often fail" (AB25), stating "only in rare cases will a FLP withstand IRS and judicial scrutiny" (AB29), and "as with many things that sound too good to be true, that is the case here" (AB25). Gunster's argument on appeal is **directly contrary** to the printed "Overview" that Hanley gave to Decedent (RA1-8). The Overview states that minority interest discounts vary between 5% to 35% , and lack of marketability discounts vary between 25% to 45% (RA1-2). In regard to estate tax discounts, the Overview stated (RA3-4):

**B. Estate Tax Discounts.** Properly structured family limited partnerships **will** result in estate tax discounts of the same magnitude as those described above. (emphasis added)

The Overview gave an example applying a 50% discount, effecting an estate tax

savings of over 75% (RA4).

Gunster's argument on appeal is also directly contrary to Hanley's deposition testimony that he recommended Decedent form a FLP, telling Decedent that "they did these partnerships all the time" and that (R7:1237,p.168):

They work. There is a discount available. It's just a question about the size of the discount. (emphasis added)

(See also R7:1237, p.432,441-42). Hanley also testified that FLP discounts are generally recognized by the IRS and the courts (Id. at 275); that if Decedent had formed a FLP, his estate would have saved estate taxes, and that he may have told Decedent his discount would be 20%-30% (Id. at 276-77). Now, for the first time on appeal, Gunster's position is that FLP's are useless, ineffective documents that do not save estate taxes because they are rejected by the IRS and the courts.

**Cases Have Discounted FLP Assets for Estate Tax Purposes** - There is no question that Hanley could have drafted a FLP that would have been upheld by the IRS and the courts (R8:1957,p.204). An example of a few cases that have done so are Kimbell v. U.S., supra; Estate of Schutt v. C.I.R., 2005 WL 1244686 (U.S. Tax Ct. 2005); Estate of Stone v. C.I.R., 2003 WL 22520101 (U.S. Tax Ct. 2003); and Estate of Kelley v. C.I.R., supra. Gunster's brief merely cites "how-not-to-do-it" cases, where FLP formalities were not followed and/or there were obvious abusive uses of a FLP so that it did not meet the requirements of the Internal Revenue Code.

**Hanley Admitted That He Could Draft an Effective FLP To Discount Estate Taxes When He Recommended Decedent Form One**

Hanley recommended that Decedent form a FLP (R7:1390,p.168). Hanley admitted that he told Decedent “They work. There is a discount available. It’s just a question about the size of the discount.” (Id). Hanley also testified that if he had formed a FLP for Decedent, Decedent’s estate would have saved estate taxes (R8:1401,p.276). Therefore, Hanley admitted he could draft an effective FLP for Decedent. Accordingly, Gunster’s new argument on appeal that a FLP would not have been effective has no basis in the facts of this case. Gunster is now taking the position that Hanley not only gave Decedent incorrect advice in advising him to form a FLP and that doing so would save him estate taxes, but they are also taking the position that Hanley’s testimony in this case was also incorrect. Gunster is obviously attempting to “back off of” Hanley’s testimony, but it was what it was.

**Decedent Had Ample Funds Upon Which to Live** - Gunster argues that if all of Decedent’s assets were transferred into a FLP, this would leave him with no means of support, thus evidencing an implicit agreement for Decedent’s living expenses to be paid by unauthorized FLP distributions, which would cause the FLP to fail (AB29-32). There are three responses. First, if Hanley truly believed that all of Decedent’s assets could not be transferred to a FLP, he could have simply drafted a FLP into which was transferred Decedent’s brokerage account and one of the QTIP’s, or just

his brokerage account. All Hanley was required to do was draft an effective FLP that would be in Decedent's best interest. Only a jury can decide the answer to that question.

Second, Decedent's estate tax return shows that Decedent had other assets that were not to be transferred to the FLP, such as his paid-for home and vehicle, plus approximately \$600,000 in other assets (PE138), including an interest in various corporations from which he received about \$225,000 in income yearly (T1502-03). Third, Gunster incorrectly states that if Decedent's brokerage account and the QTIP's were transferred to a FLP, Decedent would have no income. Under an effective FLP, which Hanley represented he could draft, Decedent's interest in the transferred assets would be converted to a 99% limited partnership interest under the FLP, with an accompanying entitlement to 99% of the FLP's net income. Under Florida's Partnership Law during the period that Hanley should have drafted the FLP, **partners were entitled to pro rata distributions** based upon the value of their contribution, but only to the extent that the value of partnership assets exceeded liabilities, and **at the times specified in the partnership agreement.** See §§620.138, 620.139 and 620.147, Fla. Stat. **Therefore, Hanley could have drafted a FLP to provide for Decedent's entitlement to quarterly, semiannual or annual pro rata distributions.** Those distributions would have been more than sufficient to pay Decedent's living expenses. The FLP's anticipated net cash flow was \$6,226,721 a

year, and Decedent's 99% pro rata share would have been \$6,164,454 (R14:2760; R12:2223 p.412). Decedent would not be dependent upon distributions from the FLP, over and above his pro rata distributions, to support his lifestyle. Accordingly, Hanley was correct in telling Decedent that he could draft a FLP that would save him estate taxes.

Gunster states in footnote 22 that Raymond opined that McAdam would have transferred 100% of his assets into the FLP. Gunster then claims that Raymond's "100% scenario would have failed under IRS scrutiny," citing tax cases that have rejected estate tax discounts for FLP's where 100% of a decedent's property was transferred to a FLP, and all of his or her living expenses were paid by FLP income, over and above his or her pro rata share of FLP income.

First, Raymond did not opine that McAdam would have transferred 100% of his assets to the FLP. He simply ran two different scenarios, but neither of them placed 100% of Decedent's assets into a FLP. Raymond's testimony was that Hanley should have advised Decedent to place **either** his personal brokerage account, **or** one or both QTIP's, or **all of them**, into the FLP (R2:400-01;R10:1975,p.89,92-94). Under Raymond's different scenarios, the failure to transfer Decedent's brokerage account into a FLP resulted in damages of \$4 million in avoidable and unnecessary estate taxes; whereas, the failure to transfer the brokerage account and both QTIP's into a FLP resulted in damages of \$9.3 million in avoidable and unnecessary estate

taxes (Id.; R14:2734;RA9). Because Raymond never opined, as Gunster claims, that McAdam would have transferred 100% of his assets to a FLP, the tax cases cited by Gunster do not apply (AB26-28).

**The Tax Cases Cited by Gunster Do Not Support Summary Judgment - Not one**

of the tax cases cited by Gunster (AB26-28) was decided on summary judgment. In each case there was a trial before an IRS Commissioner and his or her factual findings and rulings were affirmed by the tax court, and/or the tax court's ruling was further appealed to the federal circuit court and affirmed. In contrast, this FLP claim was decided on summary judgment, which was error. See also Keller v. U.S., No. V-02-62 (2005), where the federal district court denied the IRS's motion for summary judgment on a claim for discounted estate taxes based on a FLP, stating that the issues were "factual, rather than legal, in nature, and that the matter should proceed to trial on its merits." Cases concerning FLP issues are "fact-intensive," and the results of other cases, under different facts, cannot control the outcome here. The reasons that negated the estate tax benefits of the FLP's in the cases cited by Gunster do not exist here. Whether a FLP would save Decedent estate taxes under these facts, as Hanley represented that it would, was a jury issue.

**CONCLUSION**

Plaintiffs' FLP claim should be reversed and remanded for trial.

**CERTIFICATE OF SERVICE**

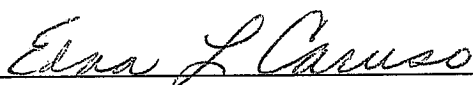
I HEREBY CERTIFY a true copy of the foregoing was furnished to: **L. Louis Mrachek, Esq. and Alan B. Rose, Esq.**, Page, Mrachek, Fitzgerald & Rose, P.A., *Attorneys for Appellants*, 505 South Flagler Drive, Suite 600, West Palm Beach, FL 33401, by U.S. mail on April 27, 2007.


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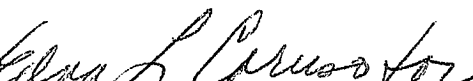
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**CERTIFICATE OF TYPE SIZE & STYLE**

Appellees/Cross-Appellants hereby certify that the type size and style of the  
Reply Brief of Cross-Appellants is Times New Roman 14pt.

By:   
EDNA L. CARUSO  
Florida Bar No. 126509

**APPENDIX TO REPLY BRIEF OF CROSS-APPELLANTS**

	<b><u>PAGE</u></b>
Gunster's Overview of Limited Partnerships	1-8
Calculation of \$9.3 million in estate tax savings	9
Decedent's estate tax return	10

Mem of ... Sept 10, 2001  
A.C.

**FAMILY LIMITED PARTNERSHIPS**

**AN OVERVIEW**

**I. PURPOSES OF FAMILY LIMITED PARTNERSHIPS**

**A. Discounted Gifts.** Minority interests in closely-held businesses are worth significantly less than similar interests in publicly traded companies or direct interests in underlying assets. The primary discounts applicable to minority interests in closely held businesses are:

1. **Minority Discount.** A minority interest discount reflects the fact that the owner of a minority interest lacks the ability to control or even substantially influence the affairs of the business. The minority owner cannot buy or sell the business' assets, alter the products or services offered by the business, declare cash distributions or liquidate the business. Minority discounts vary between 5% - 35% depending upon management structure, the extent of a minority owner's interest in the business and the risk associated with the business.

(a) Revenue Ruling 93-12: Prior to 1993, the Internal Revenue Service (the "Service") considered the interests of family members in the aggregate when determining whether or not a gifted interest constituted a "minority interest." Gifts of business interests between family members would

**EXHIBIT**  
62

not attract minority interest discounts if the combined family interest in the business exceeded 50%. The Service changed its position in 1993 after losing several prominent cases on this issue. As a result of this change, the interest in family partnerships has increased dramatically over the last few years.

2. Lack of Marketability. Few, if any, investors would be interested in acquiring an ownership interests in a business controlled by the members of a closely knit family. There is no established market for reselling interests in closely held businesses and such interests are generally restricted. Several well regarded surveys have found that privately held interests sell at a discount of 25% - 45% off the price of similar publicly traded business interests.

Example. Mom and Dad own real property (the "Property") worth \$10,000,000 and have determined that they want to take steps to reduce the value of assets ultimately included in their taxable estates. Mom and Dad would like to gift interests in the Property to their two children and four grandchildren but do not want to pay any gift tax. Accordingly, Mom and Dad have decided to make an immediate gift of an interest in the Property to their children and grandchildren in an amount equal to their combined unified credit of \$\_\_\_\_\_ M. In addition, Mom and Dad will both make gifts of interests in the Property valued at \$11,000 to each child and grandchild in each of the 15 succeeding years. The annual gifts are tax-free gifts of present interests qualifying for the \$11,000 per donee annual exclusion. Dad dies owning only his remaining interest in the Property which he leaves to Mom. No estate

tax is due until Mom's death. Mom owns only her remaining interest in the Property. Assume that the Property appreciates at the rate of inflation so that the tax savings reflect current dollar values.

- (i) Gifts of Direct Interests in the Property: The Service has taken the position that gifts of partial interests in real property do not qualify for any discount except a "cost-to-partition" discount of approximately 5%. Under the facts described above, and assuming a 5% discount is applied to each gift of an interest in the Property, Mom and Dad would have made gifts amounting to approximately \$3M. Mom's taxable estate would be \$7M resulting in an estate tax of approximately \$3.5M.
- (ii) Gift of Minority Interests in Family Limited Partnership: Assume alternatively that Mom and Dad transfer ownership of the Property to a family limited partnership and make gifts of minority interests in the partnership to the children and grandchildren. Minority interests in a family limited partnership will typically be valued at 50% of the value of the underlying asset, thereby allowing Mom and Dad to transfer almost twice as big an interest in the Property without paying any gift tax. Assuming a 50% discount, Mom and Dad would have made aggregate inter-vivos gifts sufficient to reduce Mom's taxable estate to \$4M. Mom's estate would have a resulting estate tax liability of approximately \$1.8M, a savings of more than \$1.6M in estate tax.

B. Estate Tax Discounts. Properly structured family

limited partnerships will result in estate tax discounts of the same magnitude as those described above. Generally, in order to qualify for significant estate tax discounts, the decedent and his or her personal representative must not possess the unilateral right to liquidate the partnership. This is usually accomplished either through shared ownership of a corporate general partner or a "reconstitution provision" coupled with the decedent's ownership of less than a majority interest in the partnership as of the date of his death.

Example: Assume in the preceding example that neither Mom nor her personal representative had the unilateral right to liquidate the partnership because Mom owned less than a 50% interest in the corporate general partner as of the date of her death. Mom's interest in the partnership, valued at \$4M by reference to her percentage interest in the underlying Property, would attract a discount of approximately 50%, reducing her estate to \$2M and her estate's tax liability to approximately \$800,000. Accordingly, a properly drafted family partnership agreement can effect an estate tax savings of over 75% (\$800,000 vs. \$3.5M).

C. Facilitate Annual Gift Giving. Senior family members may have difficulty in making gifts of undivided interests in certain types of property, particularly real property (i.e., new deeds to be recorded every year). If assets are contributed to a family limited partnership, on the other hand, senior family members can execute a very simple one page assignment each year to assign a portion of their limited partnership interest to children or grandchildren.

**D. Parents can Retain Control.** A common fear of many clients is that substantial transfers of wealth to their children or grandchildren will result in unmotivated and underproductive children and grandchildren. However, if a client transfers part of his or her limited partnership interest in a family limited partnership to his or her children, those children will only receive their share of the distributable cash flow to the partnership. If the parents wish to manage the partnership by reinvesting significant portions of the earnings of the partnership into new investments, there will be low cash flow distributions to the partners of the partnership. Moreover, it may be possible to structure the partnership so that the parents, as general partners, retain discretion with respect to distributions of partnership cash flow.

**E. Retention of Assets in the Family.** Frequently, family partnership agreements are drafted with buy-sell provisions which help ensure that the properties will be kept in the family. If any family member attempts to assign his or her interest in the partnership to a person outside of the family, the partnership agreement may provide that the other partners, or the partnership, may acquire that assigned partnership interest on the same terms offered by the non-family member assignee. Our agreement would typically allow the partnership or the remaining partners to purchase the offered interest at a price equal to the lesser of fair market value (taking into consideration all applicable discounts) or the price offered by the non-family member assignee. Moreover, the purchase price may be paid over a term of several years.

F. **Asset Protection.** The creditor of an individual limited partner cannot attach partnership property to satisfy the debt. Under Florida Limited Partnership law, only a "charging order" can be entered against a limited partner's interest. The "charging order" entitles a judgement creditor only to profits, surplus, or capital actually distributed by the partnership to the limited partner. Moreover, the limited partnership agreement may be drafted to provide that an involuntary transfer of the partnership interest to a creditor, or any third party, is not a permissible transfer and the transferred interest may be purchased back by the family limited partnership, or remaining partners at its fair market value (taking into consideration all applicable discounts). In addition, the general partner generally will control distributions of partnership cash flow so that the value of a charging order may be somewhat limited. Although the law remains unclear, it is possible that a family partnership may send the holder of a charging order a partnership K-1 reflecting such creditor's share of partnership profit while at the same time withholding cash distributions.

Creditors of the general partner, on the other hand, generally have the option to foreclose the general partner's interest in the partnership, typically a nominal interest. Topically, the general partner's interest is nominal, usually 1%, and the limited partners can elect a new general partner and continue the business.

G. **A Family Limited Partnership May Provide Some Asset Protection Against Failed Marriages.** To the extent the wealth of a client's child consists of gifts of interests in a limited partnership, the gifts may be

protected from being awarded to a divorced spouse. Most jurisdictions will not award separate property to a divorced spouse. Additionally, even if a divorce court awards part of the limited partnership interests to a divorced spouse, the family partnership agreement may provide that such transfers are involuntary transfers subject to the buy-sell provisions described above.

- H. **A Partnership Agreement is Comparatively Flexible.** In comparison to an irrevocable trust which may not be amended, a limited partnership agreement is a flexible document. If all of the partners of the partnership agreement agree, the partnership agreement may be amended or terminated. In contrast, an irrevocable trust generally may not be amended or terminated without court participation and participation by a guardian ad litem. Secondly, partnerships may be terminated without adverse tax consequences. In contrast, severe tax consequences may be present on termination of a corporation. In addition, the family partnership provides flexibility in the area of profit and loss allocations and partnership freeze transactions which are not available through the use of closely held corporation.
- I. **Ancillary Probate.** Real property located in a jurisdiction other than the jurisdiction of the decedent's domicile is subject to a separate probate proceeding in the foreign jurisdiction. If, however, real estate is owned through a family limited partnership, the Partnership interest rather than the underlying real property would be subject to probate in the decedent's domicile.
- J. **Reduction of Florida Intangible Tax Liability.** Interests in a limited partnership are not subject to

Florida's intangible tax. If the family partnership is formed in a jurisdiction which does not impose an entity-level intangible tax, it may be possible to contribute portfolio assets to a Family Limited Partnership and remove such assets from the reach of Florida's intangible tax.

357764.1



Reply to: Tampa office

March 18, 2005

**CONFIDENTIAL**

John Raymond  
 raymond@butzel.com

**Re: McAdam Family v. Gunster Yoakley**

Dear John:

Enclosed you will find the Appraisal of a 99% Hypothetical Limited Partner Interest in the McAdam Family Limited Partnership, A Hypothetical Entity.

In addition to the above referenced report, I have calculated the estate tax savings that would have resulted had the FLP been properly created and funded. My findings are as follows:

Amounts included in Estate	<u>Alt. Value</u> \$ 51,805,597
Value of Hypothetical FLP	<u>32,764,900</u>
	19,040,697
Estate Tax Bracket	<u>49%</u>
Damage due to no FLP	<u>\$ 9,329,941</u>

	<u>Asset Value</u>	<u>% of Total</u>	<u>Damage Allocation</u>
Charles V. McAdam Assets	\$ 15,951,075	31%	\$ 2,872,713
TUW Sarah G. McAdam	14,150,622	27%	2,548,460
Sally G. McAdam Trust	21,703,900	42%	3,908,769
	<u>\$ 51,805,597</u>	<u>100%</u>	<u>\$ 9,329,941</u>

If you have questions, please call me.

Sincerely,

C. Brett Cooper, CPA\*•ABV, ASA, BVAL, Cr.FA

CBC/rk  
 Enclosure

\* The CPA designation is regulated by the State of Florida

Exhibit No. 5

Form **706**  
(Rev. August 2003)

# United States Estate (and Generation-Skipping Transfer) Tax Return

Estate of a citizen or resident of the United States (see separate instructions).  
To be filed for decedents dying after December 31, 2002, and before January 1, 2004.  
For Paperwork Reduction Act Notice, see the separate instructions.

OMB No. 1545-0015

Department of the Treasury  
Internal Revenue Service

Part 1—Decedent and Executor	1a Decedent's first name and middle initial (and maiden name, if any) <b>Charles V.</b>	1b Decedent's last name <b>McAdam, Jr.</b>	2 Decedent's Social Security No. <b>99-20-4763</b>	
	3a Legal residence (domicile) at time of death (county, state, and ZIP code, or foreign country) <b>Palm Beach County, FL 33414</b>	3b Year domicile established <b>Prior to 1990</b>	4 Date of birth <b>06-19-23</b>	5 Date of death <b>01-03-2003</b>
	6a Name of executor (see page 3 of the instructions) <b>Schedule Attached</b>	6b Executor's address (number and street including apartment or suite no. or rural route; city, town, or post office; state; and ZIP code) <b>Schedule Attached</b>		
	6c Executor's social security number (see page 3 of the instructions) <b>Schedule Attached</b>			
	7a Name and location of court which will was probated or estate administered <b>Circuit Court, Probate Division, Palm Beach County, FL</b>	7b Case number <b>2003CP00028</b>		
8 If decedent died testate, check here <input checked="" type="checkbox"/> and attach a certified copy of the will. 9 If Form 4768 is attached, check here <input checked="" type="checkbox"/>				
10 If Schedule R-1 is attached, check here <input type="checkbox"/>				

Part 2—Tax Computation	1 Total gross estate less exclusion (from Part 5, Recapitulation, page 3, item 12)	1	57,468,895
	2 Total allowable deductions (from Part 5, Recapitulation, page 3, item 23)	2	8,005,972
	3 Taxable estate (subtract line 2 from line 1)	3	49,462,923
	4 Adjusted taxable gifts (total taxable gifts (within the meaning of section 2503) made by the decedent after December 31, 1978, other than gifts that are includible in decedent's gross estate (section 2001(b)))	4	961,631
	5 Add lines 3 and 4	5	50,424,554
	6 Tentative tax on the amount on line 5 from Table A on page 4 of the instructions	6	24,508,831
	7 Total gift tax payable with respect to gifts made by the decedent after December 31, 1978. Include gift taxes by the decedent's spouse for such spouse's share of split gifts (section 2513) only if the decedent was the donor of these gifts and they are includible in the decedent's gross estate (see instructions)	7	8,000
	8 Gross estate tax (subtract line 7 from line 6)	8	24,500,831
	9 Maximum unified credit (applicable credit amount) against estate tax	9	345,800
	10 Adjustment to unified credit (applicable credit amount). (This adjustment may not exceed \$6,000. See page 5 of the instructions)	10	
	11 Allowable unified credit (applicable credit amount) (subtract line 10 from line 9)	11	345,800
	12 Subtract line 11 from line 8 (but do not enter less than zero)	12	24,155,031
	13 Credit for state death taxes (cannot exceed line 12). Attach credit evidence (See instructions). Figure the credit by using the amount on line 3 less \$60,000. See Table B in the instructions. Enter the amount here from Table B $7,380,868 \times .50$	13	3,690,434
	14 Subtract line 13 from line 12	14	20,464,597
	15 Credit for Federal gift taxes on pre-1977 gifts (section 2012) (attach computation)	15	-0-
	16 Credit for foreign death taxes (from Schedule(s) P). (Attach Form(s) 706-CE)	16	-0-
	17 Credit for tax on prior transfers (from Schedule Q)	17	-0-
	18 Total (add lines 15, 16, and 17)	18	-0-
	19 Net estate tax (subtract line 18 from line 14)	19	20,464,597
	20 Generation-skipping transfer taxes (from Schedule R, Part 2, line 10)	20	-0-
	21 Total transfer taxes (add lines 19 and 20)	21	20,464,597
	22 Prior payments. Explain in an attached statement	22	20,481,416
	23 United States Treasury bonds redeemed in payment of estate tax	23	
	24 Total (add lines 22 and 23)	24	20,481,416
	25 Balance due (or overpayment) (subtract line 24 from line 21)	25	(16,819)

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge.

X

Signature(s) of executor(s)	Date
Signature of preparer other than executor	Date
	3-29-04
444 Madison Avenue New York, N.Y. 10022	Address (and ZIP code)