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Worry No More – Maps and Images Subject to Judicial Notice in Florida

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The Florida Legislature has voted in support of CS/HB 677, which will create a new subsection of the Florida Evidence Code on the subject of judicial notice. Specifically, when it goes into effect on July 1, 2022, Section 90.2035, Florida Statutes, will now allow permissible judicial notice of an "image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool," as long as the image, map, etc. "indicates the date on which the information was created."

The new statute goes on to discuss the mechanisms for requesting judicial notice and articulates that in civil cases, a request for judicial notice under this section creates a rebuttable presumption that the information should be judicially noticed. In criminal cases, the court must instruct the jury as to whether it may or may not accept the noticed fact as conclusive.

This new statute is hugely impactful for litigants in Florida across a wide array of practice areas in which images, maps, and location information can prove hugely informative and decisive, particularly in civil cases. For example, in property insurance cases, the ability to seek judicial notice of aerial or street-level photographs from prior to the alleged date of loss can conclusively establish pre-existing damages, potentially thwarting frivolous and costly litigation. In liability claims, historical images may show a changed condition to property, or instead, establish a long-term condition that should have been known to a claimant or defendant, thereby potentially bolstering or reducing a comparative negligence defense.

Prior to this change in the evidence code, photographs, as well as images from mapping services like Google Maps, could only be admitted pursuant to one of two methods – "pictorial testimony" or "silent witness" testimony. *City of Miami v. Kho*, 290 So. 3d 942 (Fla. 3d DCA 2019) (citing *Dolan v. State*, 743 So. 2d 544, 545-46 (Fla. 4th DCA 1999)). "Pictorial testimony" requires a witness with personal knowledge to testify that the image or photograph fairly and accurately depicts a scene. *Id.* (citing *Hannewacker v. City of Jacksonville Beach*, 419 So. 2d 308 (Fla. 1982)) Under the "silent witness" testimony, the trial court may only admit a photograph or image into evidence after considering five separate factors: (i) evidence establishing the time and date of the photographic evidence; (ii) any evidence of editing or tampering; (iii) the operating condition and capability of the equipment producing the photographic evidence as it relates to the accuracy and reliability of the photographic product; (iv) the procedure employed as it relates to the preparation, testing, operation, and security of the equipment used to produce the photographic product, including the security of the product itself; and (v) testimony identifying the relevant participants depicted in the photographic evidence. *Kho, supra.* (citing *Wagner v. State*, 707 So. 2d 827, 831 (Fla. 1st DCA 1998)). In *Kho*, the court denied the plaintiff's request to have an image from Google Maps authenticated under the silent witness method, finding that *Kho* failed to satisfy the above factors. *Kho* has sought to introduce the photograph to establish that the City of Miami was aware of a "dangerous and defective condition," namely a sudden change in elevation of a sidewalk. As is evident, the "silent witness" method is an extremely difficult burden to meet, requiring onerous discovery directed to a reluctant third party, who often times will be located out of state.

Without question, this welcomed rule change will greatly reduce the burden of the party seeking to have the photograph or image information admitted as evidence in a proceeding and is consistent with the general

policy that relevant evidence – that which tends to prove or disprove a material fact – should be admissible. We can expect that shortly after the new statute goes into effect on July 1, 2022, requests for judicial notice of images, maps, calculations, and the like will be filed in a flurry, as such evidence may be critical proof required in both prosecution and defense of all types of claims.

Please contact [Eve A. Cann](#) or [David B. Levin](#) for assistance.