

CONDEMNATION & EMINENT DOMAIN

Condemnation & Eminent Domain: Inverse Condemnation

HMC Assets, LLC v. City of Deltona,

No. 6:17-cv-1255-Orl-31DCI, 2018 WL 647452 (M.D. Fla. Jan. 31, 2018)

Under Florida law, a mortgage on property is not considered an ownership interest for the purpose of an inverse condemnation claim. However, a mortgagee is entitled to compensation for Fifth Amendment takings and procedural due process deprivations concerning the property.

FACTS AND PROCEDURAL HISTORY

HMC Assets, LLC (HMC) attempted to foreclose on a parcel of land containing a residential building within the city of Deltona (the City). While the final judgment of foreclosure was pending, the City demolished the building. HMC had been properly listed in public records as a mortgage holder for the property, but it was not notified in advance of the demolition or the various ordinance violations and fines that preceded it. Consequently, HMC filed suit against the City, asserting a Florida inverse condemnation claim and federal takings and 42 U.S.C. § 1983 procedural due process claims. The City moved to dismiss all counts for failure to state a claim, and the Middle District of Florida heard the motion.

ANALYSIS

The Middle District began by considering whether HMC had standing to bring the inverse condemnation claim. Inverse condemnation is derived from the Florida Constitution and entitles the owner of property to full compensation when that property is taken for a public purpose. However, reviewing precedent from the Florida appellate courts, the court reaffirmed that a mortgage is a form of lien interest, rather than an ownership interest, and a mortgagee thus lacks standing to bring an inverse condemnation claim. Because HMC had not presented any substantive argument that the Florida Supreme Court would

disfavor this prevailing precedent, the court found that HMC's inverse condemnation claim must be dismissed.

The court then found that HMC could be entitled to relief under the Fifth Amendment's Takings Clause. The Takings Clause prevents private property from being taken by the government for public use without just compensation. The City had argued that HMC would need to show it was deprived of all reasonable beneficial use of the property in order to be entitled to relief, but the court clarified that such a standard applies only in the case of regulatory takings; for a conventional takings claim, HMC would only have to demonstrate government appropriation or invasion of its property. Because "destruction of property can be considered a 'taking,' even though the government does not obtain the property at issue" and "the taking of a mortgagee's rights without compensation can violate the Takings Clause," the court denied the City's motion to dismiss HMC's takings claim. *HMC Assets*, 2018 WL 647452 at *3.

Lastly, the court found that the City did deprive HMC of procedural due process. Under Eleventh Circuit precedent, a claim for a denial of procedural due process under 42 U.S.C. § 1983 requires the plaintiff to prove a deprivation of a constitutionally protected liberty or property interest. However, "[u]nder federal law, a mortgagee possesses a legally protected property interest in the premises for purposes of the Fifth Amendment." *Id.* at *4. Therefore, HMC was entitled to notice and an opportunity to be heard prior to the destruction of the property, and the court denied the motion to dismiss the procedural due process claim.

The court granted the City's motion to dismiss in part with respect to the Florida inverse condemnation claim, and denied the motion in part for the takings and procedural due process claims.

SIGNIFICANCE

HMC Assets establishes that in Florida, a mortgagee is not considered to have an ownership interest in the property for the purpose of an inverse condemnation claim. However, under federal law, a mortgage is considered a protected property interest for the purpose of Fifth Amendment takings and procedural due process claims.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Eminent Domain* § 230 (Westlaw Edge through Mar. 2019).
- 10A Fla. Jur. 2d *Constitutional Law* § 260 (Westlaw Edge through Mar. 2019).
- 10A Fla. Jur. 2d *Constitutional Law* § 477 (Westlaw Edge through Mar. 2019).

William S. Moreau

CONSTITUTIONAL LAW

Constitutional Law: Bert J. Harris Act

*Ocean Concrete, Inc. v. Indian River County, Board of
County Commissioners,*
241 So. 3d 181 (Fla. 4th Dist. Ct. App. 2018)

In order to assert a claim under the Bert J. Harris, Jr. Property Rights Protection Act (the Harris Act), a property owner must demonstrate that government action, short of a taking, inordinately burdened an existing use of the property. An existing use may be proven by showing that the applicable zoning ordinance allows the property to be developed in its intended manner, and an inordinate burden can be proven by showing that the action burdened the landowner's reasonable, investment-backed expectations, as determined by the physical and regulatory aspects of the property.

FACTS AND PROCEDURAL HISTORY

George Maib entered into a contract with Indian River County to purchase a parcel of land to develop and run a concrete batch plant in the Treasure Coast area. The parcel was zoned "light industrial," which allowed for uses such as a concrete batch plant; however, the lands surrounding the parcel were primarily zoned for residential and limited commercial use. After retaining an engineer to confirm the details of the project, Maib was assured by the County that a concrete batch plant was permitted under the zoning code.

Maib then purchased the property and filed a site plan application for review by the County's Technical Review Committee (TRC), which informed Maib at multiple points in the application and development process that his proposal was permissible. As development proceeded, nearby citizens of the County sought to block the project by proposing an amendment to the zoning code. Subsequently, the Board of County Commissioners (BCC) changed the zoning code to restrict industrial uses such as concrete plants to the general industrial

district. The new zoning code applied to Maib's project and did not merit for grandfathering of any vested rights.

Maib filed a declaratory action in circuit court seeking clarification of his rights to proceed under the site plan application and filed a separate request to the County for a one-year extension on his pending application. The County denied the extension and the application due to its expiration. Subsequently, after his administrative appeals were denied, Maib filed a petition for writ of certiorari with the circuit court. The circuit court determined that the County must either grant the extension, state a valid reason for denial, or deny the site plan on its merits. The BCC voted to grant Maib a one-year extension under the old code provisions. Maib's reinstated application could only be approved by the County under the old zoning code if the Community Planning Director (CPD) found a vested right of development under the old code. The CPD found Maib did not have a vested right and denied his application.

Maib appealed the denial to the Planning and Zoning Commission, but because he lost the property to foreclosure while the appeal was pending, his case was dismissed as moot. Maib brought another action in circuit court against the County, this time alleging violations of the Harris Act, regulatory takings, and substantive and procedural due process violations. The court entered judgment in favor of the County for every claim, and Maib appealed to the Fourth District.

ANALYSIS

The Fourth District affirmed without comment the trial court's order on the regulatory taking and violation of due process rights contentions by Maib. However, the court found that the trial court erred in denying relief under the Harris Act.

The court began by explaining that for Maib to prevail in a claim under the Harris Act, Section 70.001(2), Florida Statutes, he must prove that "a specific action of a governmental entity has inordinately burdened an existing use . . . or a vested right to the use of real property." The Harris Act defines "existing use" as "reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses"

The court disagreed with the trial court's decision that the land was not a nonspeculative use because it was not financially

viable or compatible with adjacent lands. Applying the plain language of the Harris Act, the Fourth District explained that the statute's grammatical structure implied that an analysis of whether land use is speculative would be necessary only when the use was not foreseeable. As building a concrete plant was expressly provided for in the zoning ordinance, Maib's predicted use of the land as a concrete batch plant was a reasonably foreseeable, nonspeculative land use before the zoning code was changed. Moreover, the court noted that Maib's use of the property was *per se* compatible with adjacent land uses because the property was zoned for that particular use. Thus, the lower court erred in finding that the plant was not an existing use of the property.

The court then determined that the County's action of changing the zoning code had inordinately burdened Maib's property. A property owner must have "reasonable, investment-backed expectations" for the existing use of a property in order to be inordinately burdened by an action of a governmental entity, and recent case law has shown that "whether a landowners expectations for development are 'reasonable' and 'investment-backed' depends on the physical and regulatory aspects of the property." *Ocean Concrete*, 241 So. 3d at 189. Maib had been led to believe that the concrete batch plant was a permitted use for the property throughout the site-plan approval process, and had also obtained services to improve the property. Therefore, Maib was inordinately burdened by the County because his expectations for the development of the property, coupled with his investment-backed expectations, were reasonable.

The Fourth District thus affirmed in part and reversed in part the trial court's finding under the Harris Act.

SIGNIFICANCE

Ocean Concrete demonstrates that the Harris Act entitles a property owner to compensation when he or she is affected by government action that does not rise to the level of a taking, but has inordinately burdened an existing use of the property. Under the Harris Act, an "existing use" of property must be reasonably foreseeable and nonspeculative, and an inordinate burden may be shown through the property owner's reasonable, investment-backed expectation for the use of the property, as demonstrated by the physical and regulatory aspects of the property.

RESEARCH REFERENCES

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 197 (Westlaw Edge through Mar. 2019).
- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 112 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Constitutional Law: Civil Rights § 1983***Bing v. Landreville,***

No. 3:16-cv-1140-J-34JRK, 2018 WL 1121610 (M.D. Fla. March 1, 2018)

For a plaintiff to hold a municipality liable for constitutional violations by a police officer under 42 U.S.C. § 1983, that plaintiff must assert sufficient facts to prove that an official policy or custom of the municipality itself caused the constitutional violation in order for their claim to survive a motion to dismiss. Additionally, in a Florida Wrongful Death Claim, a plaintiff can plead that either an individual employee or, in the alternative, a municipality may be liable.

FACTS AND PROCEDURAL HISTORY

On May 22, 2016, Officer Tyler Landreville (Landreville) shot and killed Vernell Bing Jr. (Bing Jr.) in the City of Jacksonville (the City) following a brief pursuit where Landreville rammed his patrol vehicle into Bing Jr.'s car. The car had been reported stolen in March 2016, but Landreville otherwise had no indication that Bing Jr. was the thief. After being rammed, Bing Jr. exited the car unarmed, began to limp away, and was shot repeatedly by Landreville. Bing Jr.'s father (Bing Sr.) filed an action against Landreville and Jacksonville Sheriff Mike Williams (Williams) claiming wrongful death damages per Sections 768.16–768.21, Florida Statutes, and alleging that the City Sheriff had a policy of permitting officers to use deadly force in violation of the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983. The City moved to dismiss due to sovereign immunity and failure to state a claim, on the grounds that Bing Sr. had not demonstrated that Bing Jr. was deprived of a constitutional right as a result of any official policy by the City. The Middle District of Florida heard the motion.

ANALYSIS

The Middle District began by noting that in order for a complaint to survive a motion to dismiss, it must meet the minimum requirement of giving the defendant fair notice of a claim and the grounds upon which it rests, and the claim must allege sufficient facts to be plausible on its face. While the

complaint need not use specific facts, mere conclusory statements and allegations are not enough to survive a motion to dismiss; thus, the court's standard of review focused on whether the complainant had asserted sufficient facts to state a claim to relief that is facially plausible.

The court then evaluated Bing Sr.'s 42 U.S.C. § 1983 claim asserting that Williams, in his capacity as Sheriff, established policies that ultimately caused Bing Jr.'s death; failed to instruct, supervise, train, discipline, or control officers who use excessive force; and failed to retrain police officers who had military experience that may make them more likely to engage in violence. Citing U.S. Supreme Court precedent, the court confirmed that respondeat superior is not a basis for municipal liability in § 1983 actions, so in order to hold a municipality liable under § 1983, a plaintiff must establish that an official policy or custom of the municipality itself, as opposed to its employees, was the moving force behind the constitutional deprivation at issue. To sufficiently allege a municipal policy or custom, a plaintiff must assert facts showing a persistent and widespread practice of constitutional violation, either by the official choice of city policymakers, or by the city's ratification of or deliberate indifference to the acts of its subordinates. Upon reviewing the statistics relating to police shootings in Jacksonville that Bing Sr. cited to demonstrate the City's policy, the court determined that the allegations referenced the number of people who had been shot by police, but contained no information about whether these shootings were unjustified, resulted from unlawful deadly force, or were caused by deliberate indifference of the need for training. Furthermore, Bing Sr. had not shown that officers with military experience were more often engaged in deadly force and thus needed to be retrained. Therefore, the court found that Bing Sr. had alleged speculative and conclusory facts insufficient to show a policy or custom by the City, and thus dismissed his § 1983 claim.

The court then considered Bing Sr.'s Florida Wrongful Death Claim pursuant to Sections 768.16–.21, Florida Statutes. First, the court noted that while a plaintiff is precluded from recovering from both the City and its employee, federal rules permit a plaintiff to plead in the alternative against both the City and the employee. The City had argued that allegations made by Bing Sr. in his 42 U.S.C. § 1983 claim asserting that Landreville acted

“brutally and maliciously” should be applied to the Florida Wrongful Death claim as well, rendering only Landreville liable individually. However, the court distinguished the 42 U.S.C. § 1983 claim and the Florida Wrongful Death Claim, noting that “Bing Sr. is permitted under the alternative pleading rules to plead both that Landreville may be liable for malicious behavior, and in the alternative, that the City is liable for Landreville’s actions if he acted in wrongfully committing an intentional tort.” *Bing*, 2018 WL 1121610, at *9. Lastly, the court considered the merits of Bing Sr.’s case, concluding that because Bing Jr. was unarmed and defenseless at the time he was shot, and Florida law allows the use of deadly force by police officers against a fleeing suspect only when the suspect poses a serious threat of death or serious harm to the officer or others, a jury could conclude that Landreville’s actions were not permissible uses of deadly force. Thus, the court found that Bing Sr. sufficiently alleged that Williams could be liable for Landreville’s actions in his capacity as Sheriff, and the allegations could survive the City’s motion to dismiss.

SIGNIFICANCE

Bing reinforces the level of specificity with which facts must be alleged in a complaint in order for a 42 U.S.C. § 1983 claim against a city to survive dismissal. It also further clarifies the pleading differences between a 42 U.S.C. § 1983 claim and a Florida Wrongful Death claim pursuant to Section 768.16–.21, Florida Statutes. Finally, it refines what behavior constitutes reasonableness as it relates to police shootings.

RESEARCH REFERENCES

- 40 Fla. Jur. 2d *Pleadings* § 134 (Westlaw Edge through Mar. 2019).
- 40 Fla. Jur. 2d *Police, Sheriffs, Etc.* § 115 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Constitutional Law: Voting Rights***Hand v. Scott,***

285 F. Supp. 3d 1289 (N.D. Fla. 2018)

Florida's felon voting rights re-enfranchisement scheme giving the Florida Governor unfettered discretion to restore voting rights with no time constraints is unconstitutional under the First and Fourteenth Amendments. However, the Florida Governor's policy of preventing felons from applying for voting rights restoration until five to seven years after the completion of their sentences, depending on the severity of the crime, is constitutional.

FACTS AND PROCEDURAL HISTORY

Under the Florida Constitution, anyone convicted of a felony is automatically disenfranchised from voting. Voter re-enfranchisement is handled by an executive clemency board (Board) consisting of the Florida Governor and at least two other board members. Under the Board's own procedural rules, felons must wait between five to seven years from the completion of their sentence to apply for voting restoration, depending on the severity of their crimes, and if clemency is denied, they must wait at least two years to reapply. By rule, the Board has unfettered discretion to decide which applicants to grant a hearing and when, what evidence to consider, and whether to grant the application. Furthermore, while the entire Board must agree to grant clemency, the Florida Governor may unilaterally deny clemency at any time, for any reason.

Plaintiffs, nine disenfranchised former felons, brought suit against Florida Governor Rick Scott and other officials (Defendants) challenging Florida's voting re-enfranchisement system. In their facial challenge, Plaintiffs alleged that the Board's unfettered discretion to grant clemency violated their First Amendment rights to free expression and association and the Fourteenth Amendment's Equal Protection Clause. Plaintiffs also contended that the waiting periods and lack of a timeframe for that process violated the First and Fourteenth Amendments. Both sides filed cross-motions for summary judgment, and the Northern District of Florida ruled on the motions.

ANALYSIS

The Northern District began by confirming the constitutionality of felon disenfranchisement itself under the Fourteenth Amendment. However, the court emphasized that any disenfranchisement process must comply with the rest of the Constitution; neither disenfranchisement nor re-enfranchisement may be based on arbitrary or discriminatory reasons, nor may the process suppress freedom of expression or association.

The court then considered whether the Board's unfettered discretion to restore voting rights was consistent with the First Amendment rights to free association and free expression. Emphasizing the historical policy importance of the First Amendment, the court spoke at length about how the freedom to express opinions and associate with others without censorship, particularly for political purposes, is a foundational aspect of liberty and essential to the functioning of a representative democracy. While the United States Supreme Court has not explicitly characterized voting as a form of expression, it has also not excluded it as a form of expression, and similar acts of political advocacy have been found protected forms of expression. As such, courts evaluate official acts infringing upon the public's First Amendment rights with the strictest scrutiny: to be constitutional, such an act must be narrowly tailored to a compelling state interest unrelated to the suppression of ideas, and the state interest could not be achieved through less restrictive means.

The court acknowledged Florida's prospective interest in limiting voting rights to responsible individuals, as well as its history of felon disenfranchisement. However, the court found that the Board's unfettered discretion to restore voting rights was highly restrictive and incompatible with the First Amendment, since this lack of standards carried an inherent risk of allowing Board members to freely make discriminatory decisions centered on the felon's viewpoints or associations. As examples, the court pointed to past cases in which felons who professed similar political associations as Board officials or mentioned having previously voted for the Governor were re-enfranchised, while others were not. As the court explained, it did not matter whether officials actually engaged in discrimination; rather, that this unfettered discretion allowed Board officials the *ability* to engage in discrimination violated the Constitution. While Defendants

argued that executive clemency decisions are immune from judicial review, the court noted that this case concerned a challenge to the entire clemency process rather than any specific decision, and that clemency decisions are not immune from judicial intervention if unconstitutional. Thus, the court granted Plaintiff's motion for summary judgment as to the claim that Board officials' unfettered discretion violated the First Amendment.

The court then addressed that the Florida scheme's lack of clear time limits in processing and deciding applications also violated the First Amendment, as allowing an indefinite amount of time to determine re-enfranchisement could also allow bias and viewpoint discrimination to taint the process. Because officials could defer the decision indefinitely, former felons could be denied their rights indefinitely for any reason, or the speed of their potential re-enfranchisement might depend on their associations or expression. Notably, the court decried Florida's practice for effectively stripping felons of their First Amendment rights along with their voting privileges: "It is legal chicanery to argue an individual convicted of a crime loses her First Amendment associational and expressive interests in the political sphere simply because these rights relate to voting." *Hand*, 285 F. Supp. 3d at 1306. Therefore, the court granted Plaintiffs' motion for summary judgment as it related to the lack of time limits in processing voter-restoration applications.

The court then turned to Plaintiffs' claim that the unfettered discretion afforded by Florida's voter-restoration scheme also violated the Fourteenth Amendment's Equal Protection Clause. While the Fourteenth Amendment allows states to disenfranchise felons, in doing so, states may not discriminately or arbitrarily prioritize one person's vote over another, such that felons are denied equal protection of the laws. Defendants relied on U.S. Supreme Court precedent to argue for broad executive clemency powers inured from judicial review except in cases of grave violations. However, the court reaffirmed that no amount of discretion in the clemency process allows unconstitutional behavior: "[E]xecutive clemency schemes are not immune from federal court review simply because they are executive clemency schemes. . . . When the risk of state-sanctioned viewpoint discrimination skulks near the franchise, it is the providence and duty of this Court to excise such potential bias from infecting the

clemency process.” *Id.* at 1307–1310. Here, the Florida scheme allowed officials to arbitrarily consider anything they wished, including a felon’s identity or perceived voting affiliation. Thus, the court concluded that Florida’s re-enfranchisement scheme violated the Equal Protection Clause and granted Plaintiff’s motion for summary judgment on that count.

Evaluating the Plaintiffs’ claim as to the unconstitutionality of the five- and seven-year waiting periods, the court found that because they were uniformly and narrowly applied, presenting little risk of viewpoint discrimination, the state could justify its time restrictions. As such, Defendants’ motion for summary judgment on this issue was granted.

Therefore, the court granted summary judgment to Plaintiffs on the three counts relating to the Board’s unfettered discretion to restore voting rights, and for Defendants on the one count regarding the waiting periods. Furthermore, the court ordered the parties to file briefings related to injunctive relief to inform the court’s development of an appropriate remedy.

SIGNIFICANCE

Hand declares Florida’s voting rights re-enfranchisement system, as it existed prior to November 2018, unconstitutional. The Florida system’s five- and seven-year waiting periods, however, are constitutional.

RESEARCH REFERENCES

- 21 Fla. Jur. 2d *Elections* § 43 (Westlaw Edge through Mar. 2019).
- 10A Fla. Jur. 2d *Constitutional Law* § 336 (Westlaw Edge through Mar. 2019).
- 15B Fla. Jur. 2d *Criminal Law—Procedure* § 2976 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Constitutional Law: Voting Rights

League of Women Voters of Florida, Inc. v. Detzner,
314 F. Supp. 3d 1205 (N.D. Fla. 2018)

An interpretation issued by Florida's Secretary of State of a state statute concerning the locations that can be used as early-voting sites violates fundamental voting rights under the First and Fourteenth Amendments of the United States Constitution, and is intentionally discriminatory based on age under the Twenty-sixth Amendment, when it categorically prohibits colleges and universities from being considered for designation as early-voting sites by supervisors of elections. Furthermore, such an interpretation is not precluded from review by a federal court under the *Pennhurst* doctrine.

FACTS AND PROCEDURAL HISTORY

After Florida voters experienced excessively long lines on election day and during the early voting period in 2012, the Secretary of State, Kenneth Detzner (Defendant), urged the Florida legislature to amend the early voting statute so that locations other than offices, city halls, and public libraries could be eligible for designation as early-voting sites. The legislature complied with Defendant's request and, as a result, Section 101.657(1)(a), Florida Statutes, now permits "any city hall, permanent public library facility, fairground, civic center, courthouse, county commission building, stadium, convention center, government-owned senior center, or government-owned community center" to be designated as an early-voting site by supervisors of elections.

Subsequently, a group of students from the University of Florida (UF) addressed the Gainesville City Commission and inquired whether an early-voting site could be designated on the UF campus. The City Attorney of Gainesville submitted the question to Defendant by asking whether the UF student union on campus was considered a "government-owned community center" or "convention center" under the amended early voting statute. In response, Defendant issued ECF No. 24 (Opinion), interpreting these terms to broadly exclude all public colleges and

universities in the state from being designated early-voting sites because of their status as educational institutions.

Plaintiffs, six university students and two organizations, filed a motion with the United States District Court for the Northern District of Florida asking that Defendant be preliminarily enjoined from categorically barring public colleges and universities from designation as early-voting sites. Plaintiffs asserted that Defendant's Opinion violated their voting rights under the First, Fourteenth, and Twenty-sixth Amendments.

ANALYSIS

The Northern District of Florida first established that they had jurisdiction over the claim by rejecting Defendant's argument that the *Pennhurst* doctrine precluded the federal court from enjoining Defendant under the Eleventh Amendment. The *Pennhurst* doctrine only applies to preclude federal courts from enjoining state officials from violating *state* laws, and Plaintiffs' claims were issues of federal, not state, law. Although Defendant's Opinion is technically only an *interpretation* of state law, the court concluded that it nevertheless has the effective force of law because all supervisors of elections treat it as such and perceive Defendant's interpretations as indicative of how the state election laws will be enforced.

The court then analyzed whether it could grant Plaintiffs' motion for preliminary injunction. A district court can grant a motion of preliminary injunction only if the movant shows (1) the merits of their claims have a substantial likelihood of success; (2) they will suffer irreparable injury if the injunction does not issue; (3) the threatened injury to the movant outweighs the damage an injunction would cause the opposing party; and (4) if the proposed injunction is issued, it is not adverse to the public interest.

To determine whether Plaintiffs have established a likelihood of success on the merits of their claims, the court analyzed Plaintiffs' alleged violations of their First and Fourteenth Amendment rights to vote under the *Anderson-Burdick* test, which is a "sliding-scale balancing analysis" whereby courts weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *League of Women Voters*, 314 F. Supp. 3d at 1219

(quoting in part *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). Under the *Anderson-Burdick* test, the court found that Defendant's Opinion violates Plaintiffs' First and Fourteenth Amendment voting rights because the burdens imposed on their voting rights outweighed the asserted government interests. Despite evaluating the Opinion under a more lenient standard by categorizing it as a "reasonable and nondiscriminatory" restriction, rather than a "severe" restriction, the court noted that Florida college students have demonstrated a particularly high interest in early voting, with 43 percent of them participating in early voting in the 2016 election. The court concluded that the Opinion effectively creates a secondary class of voters who are blocked from access to convenient early-voting sites due to various constraints characteristic of college communities, such as disproportionate lack of access to transportation. Furthermore, Defendant's asserted interests in preventing parking issues and campus disruptions were either speculative issues better addressed by supervisors of elections or a wrongful attempt by Defendant to extrapolate a prohibition from a statute enacted only to permit the expansion of access to early-voting sites. For the aforementioned reasons, the court found the Plaintiffs established a likelihood of success on the merits of their First and Fourteenth Amendment rights because the burdens imposed on Plaintiffs by Defendant's Opinion outweighed the Defendant's asserted interests, none of which were given any weight by the court.

The court also found Plaintiffs established a likelihood of success on the merits of their Twenty-sixth Amendment claim. The court evaluated Plaintiffs' Twenty-sixth Amendment claims using the *Arlington Heights* standard, which evaluates whether the impact of the official action bears more heavily on one age group over others. Finding that the Opinion had a lopsided effect on college students, to the point that it was facially discriminatory and unexplainable on grounds other than age, the court found that Plaintiffs demonstrated a substantial likelihood of success on their Twenty-sixth Amendment claims.

The court then evaluated the other prongs of the preliminary injunction test. The court concluded that Plaintiffs would suffer an irreparable injury if Defendant were not enjoined because irreparable injury is assumed when voting rights are at issue, as Plaintiffs had asserted here. The threatened injury to Plaintiffs

was determined to outweigh the damage an injunction would cause the Defendant because the Plaintiffs were being stripped of rights under three different constitutional amendments, whereas the Defendant's Opinion would merely lose its effect after being enjoined. Lastly, the court found that "allowing for easier and more accessible voting for all segments of society serves the public interest." *League of Women Voters*, 504 U.S. at 1224. Based on this reasoning, the court granted Plaintiff's Motion for Preliminary Injunction.

SIGNIFICANCE

League of Women Voters of Florida establishes that an Order issued by the Secretary of State interpreting state voting laws has the effective force of state law—and such Order violates fundamental voting rights under the First and Fourteenth Amendments and is discriminatory on the basis of age under the Twenty-sixth Amendment—when it interprets a statute authorizing allowable locations for early-voting sites to categorically prohibit the designation of colleges and universities as early-voting sites.

RESEARCH REFERENCE

- 26 Am. Jur. 2d *Elections* § 250 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

ELECTIONS & VOTING RIGHTS

Elections & Voting Rights: Ballot Title and Summary

Andrews v. City of Jacksonville,
250 So. 3d 172 (Fla. 1st Dist. App. 2018)

Florida law requires the ballot title and summary for a public measure to be clear and unambiguous. It follows that the measure must allow voters to be informed of its chief purpose and cannot contain language to mislead the public.

FACTS AND PROCEDURAL HISTORY

The Jacksonville City Council adopted an ordinance to set a referendum on whether to adopt a one-half-cent sales surtax to address the City of Jacksonville's (the City) problem of underfunded pension liability. Shortly before the election, citizens of Jacksonville (Citizens) brought an action against the City challenging the referendum's placement on the ballot. The case was not decided until after the election.

After the referendum passed, Citizens sought to nullify the election outcome, and the parties filed cross-motions for summary judgment. The trial court granted the City's motion, and the Citizens appealed to the First District.

ANALYSIS

The First District began by addressing the Citizens' argument that the ballot title and summary misled the voters. The court reviewed Section 101.161(1), Florida Statutes, and explained that a ballot summary must be printed in clear and unambiguous language. If a measure is challenged under Section 101.161(1), courts will ask two questions: "first, whether the ballot title and summary 'fairly inform the voter of the chief purpose of the amendment,' and second, 'whether the language . . . as written, misleads the public.'" *Andrews*, 250 So. 3d at 174 (citing *Roberts v. Doyle*, 43 So. 3d 654, 659 (Fla. 2010)).

Agreeing with the trial court, the Fifth District found that the ballot summary clearly articulated the measure's chief purpose. The plain language of the summary made clear reference to the half-cent sales surtax and its dedication to

reducing the City's underfunded pension liability in its first sentence, and asked if such surtax should be adopted in the second. Moreover, the summary alluded to all the other statutory preconditions City would have to follow to actually authorize such a sales surtax, as well as the surtax's life-span. Thus, the summary adequately allowed the voters to comprehend how the surtax will affect the unfunded pension liabilities.

The court then briefly addressed several of the Citizens' other arguments relating to how language concerning the closure of underfunded retirement plans and the significance of a contribution increase could be construed as affirmatively misleading. However, the court found that none of the Citizens' arguments supported these contentions or obscured the purpose of the measure. The summary did not have to contain every detail of the proposed surtax and was sufficient in its description of the surtax's chief purpose. The Citizens also alleged that the City Council lacked the authority to issue the referendum, since the ordinance setting the referendum vote was passed before the effective date of state legislation granting counties the authority to actually levy the surtax. However, the court found that the timing of the adoption of the ordinance by the Council was not unlawful because it did not attempt to actually levy a premature surtax, but merely authorized a vote on whether to adopt the surtax following the effective date of the new Florida surtax laws.

Thus, the First District affirmed the trial court's order granting summary judgment to the City.

SIGNIFICANCE

Andrews demonstrates that in a challenge to a county referendum under Section 101.161(1), Florida Statutes, the plaintiff must show that either the chief purpose of the amendment is not fairly informing to voters or the language itself is misleading to the public.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Constitutional Law* § 24 (Westlaw Edge through Mar. 2019).
- 42 Am. Jur. 2d *Initiative and Referendum* § 40 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Elections & Voting Rights: Ballot Title and Summary

*Department of State v. Florida Greyhound Association,
Inc.,*
253 So. 3d 513 (Fla. 2018)

The ballot title and summary of proposed constitutional amendments are defective if they fail to inform voters of the amendment's chief purpose or mislead voters as to the amendment's scope or effect. An amendment's ballot summary is not misleading if it fails to explain the meaning of prefatory policy statements that lack independent legal significance. Additionally, an amendment's ballot title and summary need not specifically mention which constitutional provisions the amendment would alter unless it would repeal an existing constitutional right.

FACTS AND PROCEDURAL HISTORY

Florida Greyhound Association (Appellee) filed suit contesting the ballot title and summary of a proposed amendment to the Florida Constitution, slated to appear on the ballot in 2018 as Amendment 13. Amendment 13, in its entirety, read, "ENDS DOG RACING. -Phases out commercial dog racing in connection with wagering by 2020. Other gaming activities are not affected." The trial court held that the ballot language of Amendment 13 was clearly and conclusively defective because it failed to inform voters of the chief effects the amendment sought to achieve, and the court accordingly issued an injunction prohibiting the amendment's publication on November 2018 election ballots. The Florida Department of State and Secretary of State appealed the ruling to the First District, and the case was streamlined to the Florida Supreme Court for immediate resolution due to its certification as a question of great public importance in the weeks preceding the general election.

ANALYSIS

The Florida Supreme Court reviewed the circuit court's decision de novo, declaring that if the ballot language clearly and conclusively did not meet the requirements of the law, the proposed amendment was defective and had to be stricken from

the ballot. The court then reviewed the language to determine whether it would either mislead the voting public or fail to provide fair notice of the amendment's chief purpose. In contrast to the lower court's analysis, which hinged on the subjective intent of the Constitution Revision Commission, the Florida Supreme Court applied an objective reasonable voter standard, reading the ballot title and summary as a single text to determine how a reasonable voter would perceive the amendment.

First, the court examined the circuit court's holding that the ballot language was defective for failing to inform voters that the measure added constitutional language recognizing the humane treatment of animals as a "fundamental value." The court centered its analysis on the language's main effect in relation to the amendment's chief purpose. Because the term "fundamental value" lacked any independent legal significance, the court held that the language was merely prefatory and need not be disclosed. "Amendment 13's fundamental value provision is devoid of any legislative or judicial mandate: it bestows no rights, imposes no duties, and does not empower the Legislature to take any action." *Fla. Greyhound Ass'n*, 253 So. 3d at 521.

Second, the court scrutinized the circuit court's holding that the ballot language was defective for failing to inform voters of Amendment 13's material effects on other constitutional provisions. Appellee argued that Amendment 13 significantly impacted Article X, Section 23 of the Florida Constitution, which allowed counties to permit slot machines and card games in pari-mutuel facilities that held dog races in the two years prior to that provision's enactment. However, the court found that Amendment 13 applied only to future dog racing, whereas Article X, Section 23 applied to racing in years past and imposed no future requirements. Additional licensure requirements would be removed, but only those enforced by statute, not the Florida Constitution. Thus, Amendment 13 did not have any effect on the provision, much less a material one.

Third, the court analyzed whether the ballot summary accurately described the amendment's scope. The circuit court had reasoned that the summary's language would mislead voters to believe that all forms of dog racing and wagering on dog racing would be prohibited, though the amendment would not bar in-state betting on out-of-state dog racing. The Florida Supreme

Court reversed this holding and reasoned that the plain language of Amendment 13's ballot title and summary, read together, was narrow enough for a reasonable voter to conclude that wagering on out-of-state dog racing would not be prohibited by the amendment. Because the amendment's packaging provided sufficient notice to voters, the court ruled the amendment was not clearly and conclusively defective. The lower court's judgment was reversed, and the injunction was vacated with an order to publish Amendment 13 on November 2018 ballots.

Justice Quince dissented, arguing that there was no practical way for voters to tell how Amendment 13 would impact pari-mutuel operations because the amendment does not address how facilities operating slot machines and card games statutorily contingent upon dog racing permits would be impacted. Justice Quince would thus have affirmed the lower court's ruling and struck the amendment from the ballot.

SIGNIFICANCE

Florida Greyhound Association reinforces that when reviewing the validity of a proposed constitutional amendment for placement on a ballot, courts must ensure voters are provided with fair notice through clear and unambiguous ballot language that describes the proposed amendment's chief purpose, explains the amendment's effects on other constitutional provisions, and limits the amendment's scope to the issue at hand. The case also clarifies that an amendment's ballot title and summary are not rendered misleading by failing to explain either prefatory language of no legal significance or how the amendment would affect statutes when existing constitutional language is unaffected.

RESEARCH REFERENCES

- Patrick L. Imhof, *Amendment 13: Ends Dog Racing*, 92 Fla. B.J. 26 (2018).
- 10 Fla. Jur. 2d *Constitutional Law* § 30 (Westlaw Edge through Mar. 2019).

Robert "Robby" McDonald

Elections & Voting Rights: Ballot Title and Summary

Department of State v. Hollander, 256 So. 3d 1300 (Fla. 2018)

In Florida, the ballot title and summary of proposed constitutional amendments must fairly inform voters of the chief purpose of the amendment without being misleading. A ballot title and summary need not explain every detail or potential outcome of the proposed amendment, but nonetheless may not fly under false colors when read together. Additionally, the single-subject requirement of the Florida Constitution does not apply to proposals from the Constitution Revision Commission.

FACTS AND PROCEDURAL HISTORY

Various private citizens and civil rights advocacy groups (Appellees) brought suit against the Florida Department of State (Appellant), challenging the constitutionality of a proposed constitutional amendment to be placed on the statewide ballot in 2018. The amendment, entitled “Rights of Crime Victims; Judges” and appearing as Amendment 6 on the ballot, would create several new procedural rights for a specified category of crime victims; raise state judges’ mandatory retirement age to seventy-five; remove language allowing judges to serve out their term if they have already served at least half their term by retirement age; and require judges to review all agency interpretations of law de novo (effectively eliminating the common law principle of *Chevron* deference in Florida). Appellees alleged that the ballot title and summary were affirmatively misleading, did not adequately inform voters of the chief purpose of the amendment, and violated the constitutional single-subject requirement.

The circuit court initially ruled in favor of Appellees, finding the amendment text misleading and issuing an injunction barring it from appearing on the ballot. After Appellant appealed, the First Circuit certified the question as being of great public importance and requiring immediate resolution, thus granting the Florida Supreme Court jurisdiction to review the case itself.

ANALYSIS

The Florida Supreme Court began by clarifying that the purpose of a ballot title and summary is to provide fair notice to voters so they may cast an informed ballot. Thus, when reviewing a proposed amendment, courts examine whether the ballot title and summary, read together, both fairly inform voters of the chief purpose of the amendment and are not misleading. Furthermore, courts take a very deferential posture when reviewing ballot initiatives: the court “must approve an initiative unless it is clearly and conclusively defective,” irrespective of “the merits or the wisdom of the proposed amendment.” *Hollander*, 256 So. 3d at 1307.

Reviewing the substantive text of the ballot, the court found that title and summary did not mislead or fail to inform voters. While the summary did not address the current state of victims’ rights, who would be categorized as a victim, or what new rights would be added, the court emphasized that a ballot need not explain every detail of the proposal and that the amendment would not directly affect defendants’ rights or remove victims’ existing rights. The summary also adequately explained how the amendment would impact judges. Furthermore, the amendment could not be stricken for encompassing more than one subject, since the single-subject rule applies only to amendments proposed through the citizens’ initiative process, and Amendment 6 had been proposed by the Constitution Revision Commission. Thus, the court reversed the circuit court’s order, vacated the injunction, and ordered Amendment 6 to be placed on the ballot.

Justice Lewis dissented without an opinion, and Justice Pariente wrote a dissenting opinion with which Justice Quince concurred. Justice Pariente’s dissent argued that because of the degree to which the amendment would change constitutional rights in Florida, the ballot summary needed to include much more information about the current scope of victims’ rights and how the amendment would affect them to avoid being misleading. She also believed that the bundling of several subjects together in a single amendment would have the effect of confusing voters. Thus, Justice Pariente would have upheld the lower court’s ruling and stricken Amendment 6 from the ballot.

SIGNIFICANCE

Hollander confirms that Florida courts reviewing the constitutionality of a proposed ballot initiative must evaluate

whether the ballot title and summary fairly inform voters of the chief purpose of the amendment and are not misleading. The courts apply a deferential standard of review and will not strike down a proposed amendment from a public vote unless it is clearly defective, accounting for the fact that a proposal need not explain every detail of the amendment. Additionally, amendments proposed through the Constitution Revision Commission are exempt from the single-subject requirement that applies to amendments proposed through the citizen initiative process.

RESEARCH REFERENCE

- 10 Fla. Jur. 2d *Constitutional Law* § 24 (Westlaw Edge through Mar. 2019).

William S. Moreau

FINANCE & TAXATION

Finance & Taxation: Ad Valorem

Central Carillon Beach Condominium Association, Inc. v. Garcia,

245 So. 3d 869 (Fla. 3d Dist. Ct. App. 2018)

In Florida, a condominium association can petition to a county value adjustment board on behalf of individual unit owners to challenge a property appraiser's proposed ad valorem tax assessments against the condominium building. However, Section 194.181(2), Florida Statutes, requires the individual unit owners be listed as the party defendants when the appraiser appeals the value adjustment board's decision to the circuit court.

FACTS AND PROCEDURAL HISTORY

Two condominium associations (Associations) filed separate single joint-petitions to the Miami-Dade County Value Adjustment Board (VAB) on behalf of their unit owners challenging the Miami-Dade's property appraiser's (Appraiser) proposed ad valorem tax assessments of the units in their condominium buildings. As a result of these petitions, each Association received a ruling from the VAB substantially reducing the assessed value of the condominium units. The Appraiser then appealed the VAB decisions to the circuit court, naming each individual unit owner as a defendant, instead of the Associations on behalf of the unit owners. The Associations moved to dismiss, as well as to strike the individual unit owners as defendants, and to jointly represent them as a defendants' class action. The Associations also sought to pursue the matter with joint representation. The Appraiser moved for default judgment against the unit owners for failing to file individual responsive pleadings. The trial court denied Associations' motion to dismiss and their motion to certify the unit owners as a class. The Associations appealed to the Third District, seeking to quash the order denying their class certification.

ANALYSIS

The Third District began by recognizing a conflict between two Florida statutes concerning who may bring actions on behalf

of condominium unit owners: Section 718.111(3) allows a condominium association to “sue and be sued ‘on behalf of all unit owners concerning matters of common interest,’” and Section 194.181(2) requires the “taxpayer” to be the defendant in a circuit court action brought by a county property appraiser to appeal a VAB administrative determination. Because no jurisprudence had yet resolved this conflict, the court noted that this was a case of first impression for Florida’s appellate courts.

The court then interpreted the function of the statutes. While the court noted the judicial efficiency of a joint petition, the court quickly stated that the plain language of Section 194.181 dictates that the taxpayer must be the party defendant when a county property appraiser brings suit in a circuit court VAB challenge. Further, the statutory definition of taxpayer refers to the person or entity in whose name the property is assessed. Thus, because the condominium units were assessed in the name of the individual owners, the owners, not the association, must be the party defendants.

The court then responded to Associations’ counterarguments concerning the rights of collective bargaining owed to condominium associations under other statutes. Section 718.111(3) allows condominium associations to protest ad valorem taxes on behalf of all unit owners. However, the court explained that in the context of the statute, the word “protest” did not include judicial review petitions to a VAB, and in any case, “section 718.111(3), with its lack of precise application to the Appraiser’s lawsuits against the unit owners, is no match for the precise requirement imposed by the ad valorem litigation provision, section 194.181(2), that when the Appraiser is the plaintiff seeking circuit court review of the VAB decision, ‘the taxpayer **shall** be the party defendant.’” *Central Carillon Beach Condominium*, 245 So. 3d at 872. Additionally, the Associations argued that Rule 1.221 of the Florida Rules of Civil Procedure allows an association to act on behalf of its members in certain specific types of actions. However, the court again deferred to the precise requirements of Section 718.111(3), noting that past precedent applying Rule 1.221 never involved a separate statute with a clear directive specifying individual owners as party defendants. Thus, because Section 718.111(3) precisely stated that the individual taxpayer must be the party defendant, the

court affirmed the denial of the Associations' motions for class certification.

SIGNIFICANCE

Central Carillon Beach Condominium is a case of first impression establishing the fact that condominium associations cannot represent individual unit owners as a defense class in a lawsuit brought by a property appraiser to appeal the decision of a value adjustment board.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Condominiums, Etc.* § 51 (Westlaw Edge through Mar. 2019).
- 51A Fla. Jur. 2d *Taxation* § 1086 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Finance & Taxation: Ad Valorem***Crapo v. Provident Group–Continuum Properties, L.L.C.*,
238 So. 3d 869 (Fla. 1st Dist. Ct. App. 2018)**

Housing facilities equitably owned by a public university are immune from ad valorem taxation, even when the property is legally owned by a third party.

FACTS AND PROCEDURAL HISTORY

Provident Group–Continuum Properties, L.L.C. (Appellee), a nonprofit corporation that owned legal title to property used by The University of Florida (the University) for student housing, brought suit in April 2013 against the Alachua County Property Appraiser (Appraiser), seeking both declaratory relief for tax immunity for 2010 through 2014 and a refund of taxes already paid for a portion of 2010 and for 2011. The Appraiser filed a motion to dismiss, which was granted by the Circuit Court of Alachua County based on lack of subject matter jurisdiction. Appellee then filed an amended complaint as a trustee, once again seeking tax immunity and a refund. The trial court again granted Appraiser’s motion to dismiss, but this time when Appellee appealed, the First District reversed and dismissed the order, finding that Appellee now had standing as a trustee. Appellee then filed a second and third amended complaint seeking a declaration of tax immunity for the property (for partial year 2010–2016) and for the tax refund. Thereafter, a non-jury trial at the circuit court found that the property was equitably owned by the University, and as such, the property was immune from ad valorem taxation, and Appellee was entitled to a refund. The circuit court entered final declaratory judgment for Appellee, and Appraiser appealed to the First District.

ANALYSIS

The First District first noted that Appellee owned legal title to the property at issue. However, “property need not be legally owned by an immune entity to be immune from taxation, but can instead be equitably owned.” *Crapo*, 238 So. 3d at 874. Thus, the court primarily considered whether the University had equitable ownership of the property.

After explaining that the 350,000 square-foot property is located near the University and dedicated to student housing, the court then noted that Appellee is a nonprofit corporation that helps public universities obtain, develop, and operate student housing. Appellee's Articles of Incorporation stated that the nonprofit functions exclusively to serve the University and its students, that its purpose was to benefit the University, and that it would not be operated for pecuniary gain. Other important documents, including Appellee's Operating Agreement and Declaration of Covenants and Restrictions, all emphasized the fact that only the University would benefit from the property and project. Upon the winding up of the company, any proceeds would be first distributed to creditors and then to the University; upon repayment of the project's financing, all rights, titles, and interests would be conveyed to the University; and the property would be used exclusively as a housing community for the University, with the University having the ability to enforce all restrictions, covenants, and conditions imposed by the documents. The court determined that these documents amounted to the creation of a trust for the University's benefit.

The court then considered testimony from the previous trial that detailed the infeasibility of the University expanding its student housing without the help of Appellee. Additionally, previous testimony also reinforced that the University, in the end, benefitted from any of Appellee's surplus cash flow or profit. Furthermore, because the University receives the benefit of the property, the University would also receive the benefit if the tax relief was granted, and the lower court had concluded that the University was also the owner of the property for purposes of property tax.

Appraiser argued that immunity from taxation does not inure to benefit a private entity, and that Appellee—not the University—was the equitable owner because Appellee administered the operations of the property. However, the court rejected Appraiser's claim that the University was not involved enough in operation of the property, noting that the University had the right to approve planning, financial, operational, and rental terms of the property. Thus, because the property was held in trust for the University's benefit, and because the documents cited established a benefit solely for the University, the court concluded that the University was the equitable owner of the

property. As such, the First District affirmed the lower court's findings that the property was immune from ad valorem taxation.

SIGNIFICANCE

Crapo confirms that state universities are immune from ad valorem taxation, with the immunity extending to properties that are equitably, even if not legally, owned by the university. *Crapo* further demonstrates a fact pattern under which equitable ownership of a property for the purpose of determining immunity from ad valorem taxes can be established.

RESEARCH REFERENCES

- 52 Fla. Jur. 2d *Taxation* § 1385 (Westlaw Edge through Mar. 2019).
- 52 Fla. Jur. 2d *Taxation* § 1401 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Finance & Taxation: Ad Valorem***Darden v. Singh,***

No. 5D16-4049, 2019 WL 983220 (Fla. 5th Dist. Ct. App. Mar. 1, 2019)

In a judicial challenge to a county value adjustment board's ruling on the valuation of an ad valorem tax assessment, the party bringing the challenge must show by a preponderance of the evidence that the valuation does not represent the just value of the property or was based on arbitrary appraisal practices. If that burden is satisfied, the court may then establish or reinstate an assessment, but the court's valuation must be based on competent, substantial evidence on the record showing compliance with Section 194.301, Florida Statutes, and professionally accepted appraisal practices.

FACTS AND PROCEDURAL HISTORY

In 2013 and 2014, the Orange County Property Appraiser (Appraiser) appraised tangible personal property belonging to Darden Restaurants, Inc. (Darden) for the purpose of calculating Darden's ad valorem tax assessments. Because Appraiser's valuations were higher than Darden's own estimates for both years, Darden challenged the valuations via petition to the Orange County Value Adjustment Board (VAB). In both cases, the VAB sided with Darden and reduced the appraiser's assessments. Appraiser then petitioned for judicial review of the VAB's decisions.

The circuit court consolidated the two actions and, after a nonjury trial, found in favor of the Appraiser and reinstated the original assessments for both years. In issuing its holding, the circuit court did not require Appraiser to provide evidence that its appraisal methodology complied with professionally accepted appraisal practices, as its analysis focused mainly on the administrative authority of property appraisers to determine assessment values. Darden appealed this ruling to the Fifth District.

ANALYSIS

The Fifth District determined that the lower court misapplied the law by not basing its reinstatement of the assessment on evidence of professionally accepted appraisal practices. Section 194.301, Florida Statutes, requires appraisal methodology to be based on professionally accepted practices and standards set forth in other statutes. Section 194.011, Florida Statutes, also provides that when an ad valorem assessment is challenged in court, the party bringing the challenge bears the burden of demonstrating that the assessed value does not represent the just value of the property or was arbitrarily based on improper appraisal methods. If that burden is met, the court may recalculate or reestablish the assessment, but only if there is competent and substantial evidence of value in the record that cumulatively meets the statutory criteria.

Reviewing the evidence on the record, the court determined that Appraiser had met its initial burden by proving that the VAB's valuation of Darden's property was incorrect. The parties agreed that the Appraiser's evaluation methodology (the "cost approach," whereby property is appraised based on its replacement cost in its current condition minus depreciation or obsolescence) was appropriate to use in this case, but the parties presented conflicting evidence as to whether Appraiser had properly "looked to the market" for the sake of calculating reductions in value due to obsolescence. Based on the available evidence, the court concluded that Appraiser had met its burden of proving that the VAB's calculations were incorrect. However, because the trial court had not been provided with "evidence in the record that established compliance with professionally accepted appraisal practices," the "Appraiser failed to meet its additional burden, set forth in section 194.301(2)(b), of showing that there was competent, substantial evidence in the record to support the trial court's valuation of Darden's [tangible personal property]." *Darden*, 2019 WL 983220 at *5.

Therefore, in accordance with Section 194.301(2)(b), the trial court should have remanded the matter to the property appraiser with instructions to calculate the valuation of Darden's property in accordance with professionally accepted appraisal practices. The Fifth District reversed and remanded for further proceedings consistent with its opinion.

SIGNIFICANCE

Darden establishes that courts reviewing the valuation of an ad valorem tax assessment established by a value adjustment board may reinstate or establish an assessment if the party bringing the challenge satisfies its initial burden of showing by the preponderance of the evidence that the assessed value is incorrect. However, the court's own valuation must be based on competent substantial evidence on the record that cumulatively complies with professionally accepted appraisal practices and Section 194.301, Florida Statutes.

RESEARCH REFERENCE

- 51A Fla. Jur. 2d *Taxation* § 952 (Westlaw Edge through Mar. 2019).

William S. Moreau

Finance & Taxation: Ad Valorem

Williams Island Ventures, LLC v. de la Mora,
246 So. 3d 471 (Fla. 3d Dist. Ct. App. 2018)

In Florida, if a taxpayer is successful in challenging an ad valorem property tax assessment, they are entitled to interest on the amount of the pre-paid tax. Additionally, the taxpayer does not need to have a formal hearing determination by a Value Adjustment Board to trigger the interest payment by the tax collector.

FACTS AND PROCEDURAL HISTORY

In 2011, the Florida Legislature enacted Section 194.014, Florida Statutes, requiring taxpayers who file petitions challenging ad valorem tax assessments to pre-pay at least seventy-five percent of the taxes due on the property that is the subject of the challenge. Section 194.014 also entitles the taxpayer to receive interest on the pre-paid tax if a Value Adjustment Board (VAB) “determines” they are entitled to a reduction of the assessment, and consequently a reduction in taxes.

Fernando Casamayor, the Miami-Dade tax collector when the statute became effective, began remitting interest payments to taxpayers who succeeded in obtaining a reduction of an assessment, whether the reduction followed a formal VAB hearing or the execution of a Petition Withdrawal Agreement without a hearing. Subsequently, Marcus L. Saiz de la Mora (de la Mora) succeeded Casamayor as tax collector and unilaterally decided that the statute only required him to pay a taxpayer’s interest on refunds after a formal VAB hearing and the issuance of a written VAB ruling reducing the assessment. Based on this interpretation, in 2014, de la Mora stopped paying interest on refunds related to overpayment during the 2011, 2012, and 2013 tax years, as well as assessments reduced by the Property Appraiser prior to a VAB hearing, resulting in a Petition Withdrawal Form. This policy was applied even to refunds issued under Casamayor’s term, and de la Mora demanded refunds from taxpayers who had already received interest.

Miami-Dade taxpayers seeking to receive interest for overpayment of the 2011, 2012, or 2013 tax assessments or to avoid repaying such interest already received filed a class action suit against de la Mora, asserting claims for declaratory judgment, injunction, breach of contract, promissory estoppel, and slander of title. To bar discovery, de la Mora moved for a protective order, and the trial court decided to grant his motion and entered a stay barring any discovery related to the class action suit until underlying legal issues in the amended complaint were resolved. Taxpayers moved to reconsider the stay order, and de la Mora moved for clarification of the stay order and to dismiss. The court dismissed the complaint without prejudice. The taxpayers amended their complaint, de la Mora again moved to dismiss, and the court again dismissed the case, this time with prejudice.

The taxpayers then appealed to the Third District, arguing that they pled legally sufficient claims that should not have been dismissed with prejudice.

ANALYSIS

The Third District began by examining Section 194.014 to determine that the taxpayers' claim was based on a valid interpretation of the current statute. The statute does not define what constitutes a VAB "determination" that would entitle the taxpayer to interest on overpaid taxes, but the VAB is exclusively responsible for making the final certification of the tax roll. Therefore, the court found that the action of the VAB certifying the final tax roll determines the assessment for each property, the amount of taxes the tax collector is entitled to collect, and the taxpayer's interest under the statute. Noting also that recent tax collectors had adopted this interpretation, the court concluded that "[t]he reduction occurs after the taxpayers file petitions challenging their assessments but before the VAB hearings are held." *Williams Island Ventures*, 246 So. 3d at 476.

Next, the court assessed whether the taxpayers pled factual allegations to satisfy their claims. The measure for sufficiency of a declaratory judgment action is not whether plaintiffs have shown they will succeed in getting a declaration of rights, but merely whether plaintiffs show they are entitled to a declaration of rights at all. Here, the taxpayers pled thirty-two paragraphs of factual allegations in support of two declaratory judgment claims

based on a valid interpretation of the statute. The court found that trial court was premature in deciding to dismiss these claims because the taxpayers made a cognizable claim with sufficient facts, and a trial court cannot rule on the merits of a claim in response to a motion to dismiss. Addressing the remaining counts alleged by the taxpayers, the court pointed to the record and found that the motion to dismiss by the tax collector did not argue that the taxpayers failed to plead facts pertinent to the remaining claims. Thus, the trial court erred in dismissal of all the taxpayers' claims.

Finally, the court held that the trial court committed reversible error by imposing a stay on all pre-certification discovery. The court agreed with the taxpayers that they were entitled to sufficient discovery to determine whether their class certification was warranted, and the information needed to satisfy the class action pleading requirements would have only been obtainable through discovery; thus, any stay on pre-certification discovery was erroneous.

Therefore, the Third District reversed and remanded the Final Dismissal Order and the Stay Order, and it reinstated all Counts of the taxpayer's Second Amended Complaint.

SIGNIFICANCE

Williams Islands Ventures establishes that Section 194.014, Florida Statutes, does not require a formal determination by the VAB for a taxpayer to be entitled to an interest payment once the taxpayer has filed a petition to the VAB and pre-paid the statutory tax amount due, and has successfully received a reduction in the assessment and taxes through actions of either the VAB or property appraiser.

RESEARCH REFERENCES

- 52 Fla. Jur. 2d *Taxation* § 1557 (Westlaw Edge through Mar. 2019).
- 51 Fla. Jur. 2d *Taxation* § 761 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Finance & Taxation: Exemptions

***National Center for Construction Education & Research,
Ltd., Corp. v. Crapo,***
248 So. 3d 1256 (Fla. 1st Dist. Ct. App. 2018).

A non-profit corporation engaged in the development of training materials for the construction industry is not eligible for an education or charitable exemption from ad valorem taxes for use of their property under Section 196.012(1), Florida Statutes. Exemption from ad valorem taxes for use of property for “educational purposes” is only applicable to educational institutions. Furthermore, the “charitable purposes” exemption does not exempt a non-profit corporation just because it engages in an educational function.

FACTS AND PROCEDURAL HISTORY

The National Center for Construction Education and Research, Ltd. (Appellant) filed two separate applications for ad valorem tax exemption on its property in Alachua County. Registered under 501(c)(3) of the Internal Revenue Code, Appellant’s non-profit corporation had built its headquarters, a multi-story office building, on the subject property.

Because Appellant’s non-profit corporation develops training materials for construction workers, one of their applications claimed entitlement to an educational exemption from the ad valorem property tax. Appellant also filed an application for a charitable exemption, claiming that their development of training materials for the construction industry is a charitable purpose under Section 196.012(7), Florida Statutes, because the government allocates funding for education.

The Alachua County property appraiser, Ed Crapo (Appellee), rejected both of Appellant’s applications for exemption. On appeal, both the Alachua County Value Adjustment Board and the Circuit Court for Alachua County upheld Appellee’s denial of Appellant’s applications. Appellant appealed the circuit court decision to the First District.

ANALYSIS

To determine if Appellant's property qualified for an ad valorem tax exemption, the First District began by analyzing whether Appellant's use of its property constituted an exempt "educational purpose" under Section 196.012(1), Florida Statutes. To qualify for the education exemption, an educational institution must be accredited, pursuant to Sections 196.012(5) and 196.192, Florida Statutes. Because Appellant was not an accredited educational institution, the court upheld the denial of Appellant's application for an ad valorem tax exemption based on the use of its property for an "educational purpose."

The court then analyzed Appellant's second application claiming exemption from ad valorem property taxes based on the use of its property for "charitable purposes." Section 196.012(7), Florida Statutes, defines "charitable purpose" as "a function or service which is of such a community service that its discontinuance could legally result in the allocation of public funds for the continuance of the function or service." Appellant argued that because its development of training materials for the construction industry is an educational function, and because public funds are currently allocated to education, their property was being used for a "charitable purpose" under Section 196.012(1), Florida Statutes.

The court rejected Appellant's argument. Relying on precedent case law requiring that statutes be interpreted in light of all statutory provisions, so as to avoid rendering parts of the statute meaningless, the court reasoned "Appellant's interpretation would abrogate the accreditation requirements of [S]ection 196.012(5), Florida Statutes, as any nonprofit engaged in an educational function could receive a 'charitable purposes' exemption, regardless of whether it is an educational institution." *Nat'l Ctr. for Constr. Educ. & Research*, 248 So. 3d at 1259. Furthermore, "[s]tatutes providing for an exemption to an ad valorem tax are strictly construed, and any ambiguity must be resolved against the claimed exemption." *Id.* at 1257-58. Accordingly, the First District upheld the denial of Appellant's applications.

SIGNIFICANCE

National Center for Construction Education & Research confirms that an ad valorem property tax exemption for "educational purposes" is only applicable to property owned by an

accredited educational institution, as defined by Section 196.012(5), and further establishes that a non-profit corporation engaging in an educational function on their property does not qualify under the “charitable purpose” exemption from ad valorem property taxes based solely on that use because permitting such would render meaningless the accreditation requirements of Section 196.012(5), Florida Statutes.

RESEARCH REFERENCES

- 51A Fla. Jur. 2d *Taxation* § 1308 (Westlaw Edge through Mar. 2019).
- 51A Fla. Jur. 2d *Taxation* § 1305 (Westlaw Edge through Mar. 2019).
- 51A Fla. Jur. 2d *Taxation* § 1192 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Finance & Taxation: Tax Deed Sale***Magnolia Florida Tax Certificates, LLC v. Florida
Department of Revenue,***

No. 1D17-2094, 2018 WL 3079333 (Fla. 1st Dist. Ct. App. June
22, 2018)

In Florida, charter counties may enact tax certificate bidding ordinances specifically for business entities as long as the ordinance is consistent with Florida law.

FACTS AND PROCEDURAL HISTORY

Tax certificate bidders (Bidders) brought an action against the Department of Revenue to challenge requirements imposed on tax certificate bidders in Broward, Miami-Dade, and Orange Counties. All three counties had imposed a deposit requirement on general partnerships bidding for tax certificates, and Broward County had also implemented a rule requiring business entities to provide a pre-bid affidavit with background information about the entity. The trial court granted summary judgment on both issues in favor of the Department.

The Bidders appealed to the First District, arguing that the trial court erred in granting summary judgment on both the deposit and affidavit requirement challenges of the complaint.

ANALYSIS

The First District began by explaining that because the Bidders failed to raise any challenges to the deposit requirement at the lower court, the issue was not preserved and could not be addressed for the first time on appeal.

Next, the court analyzed whether the pre-bidding affidavit requirement in Broward County was authorized by Section 197.432, Florida Statutes. The court noted that because Broward County is a charter county, the county can enact an ordinance as long as it does not directly conflict with state law. To this point, the court stated that “[a]lthough section 197.432 provides general procedures for tax certificate sales, it does not specify how tax collectors are to ascertain the identities of bidders or set out what information may be requested of bidders.” *Magnolia Fla. Tax Certificates*, 2018 WL 3079333 at *1. Bidders attempted to argue

that the requirement was contrary to the legislative intent of Section 197.432 because it only required affidavit documentation from business entities and thus discriminated against non-natural persons. However, the court found that the Bidders' interpretation was unsupported, since otherwise, the statute would have to allow business entities to use anonymous "shell" bidders to gain an unfair advantage. Moreover, even if the statute were discriminatory, Broward County has a legitimate governmental interest in protecting the tax certificate sale process that is rationally related to the affidavit requirements imposed on the Bidders.

Thus, the First District did not find that Broward County's affidavit requirement was inconsistent with the express or implied language of Section 197.432, and therefore affirmed the trial court's final judgment against the Bidders.

SIGNIFICANCE

Magnolia Florida Tax Certificates explains that in accordance with Section 197.432, Florida Statutes, a charter county may enact an ordinance that requires business entities to submit specific affidavit documentation prior to bidding on a tax certificate.

RESEARCH REFERENCES

- 52 Fla. Jur. 2d *Taxation* § 1650 (Westlaw Edge through Mar. 2019).
- 52 Fla. Jur. 2d *Taxation* § 1648 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Finance & Taxation: Tax Deed Sale

Rahimi v. Global Discoveries, Ltd., LLC,
252 So. 3d 804 (Fla. 3d Dist. Ct. App. 2018)

In Florida, surplus money following a tax deed sale of a property must be given to any statutorily entitled titleholder, lienholder, or mortgagee of record who held an interest in the property at the time of the sale, regardless of whether the interest expired, terminated, or was released subsequent to the sale.

FACTS AND PROCEDURAL HISTORY

Following the purchase of a condominium, Ila Weiner took out a mortgage loan on the property with Regions Bank (Regions). After the loan was modified two years later, Weiner conveyed the property to the Mayfair 555 as the trust and David Rahimi as the trustee.

The taxes on the property were not paid and the property was sold at a tax deed sale. Regions hired Global Discoveries, Ltd. (Global) to recover \$92,519.89 in surplus funds that remained in the court registry. Rahimi also filed a complaint to quiet title seeking to recover the surplus funds. The clerk of the circuit court refused to disburse the money to either party, so Global then filed a declaratory action to compel disbursement based on the priority held by Regions' mortgage. Rahimi intervened in the declaratory action, and the trial court consolidated the two cases.

Regions recorded a release of the mortgage while the cases were pending. However, Global continued to move for summary judgment, asserting that this discharge by Regions did not release the prior titleholder's obligation to pay the loan but only that the property could not serve as collateral for the loan. The trial court concluded that the mortgage lien had priority to the surplus funds regardless of the release and thus granted summary judgment and ordered the clerk to disburse the surplus money to Global.

Rahimi appealed the order of the trial court to the Third District.

ANALYSIS

Rahimi argued that Regions cannot recover the surplus money because it was no longer a mortgagee at the time the trial court decided the conflicting claims. Conversely, Global argued that the entitlement to the surplus is determined at the time of the tax deed sale, and they were therefore entitled to the money because Regions was the mortgagee at the time the condominium was sold.

The Third District addressed the two party's contentions by analyzing the pertinent tax deed statutes to determine if Regions was properly granted the surplus money.

Sections 197.502 and 197.582(2), Florida Statutes, provide that the clerk of the circuit court holds the surplus for the benefit of any titleholder, lienholders, or mortgagees of record at the time of the tax deed sale. Finding that it was undisputed that Regions recorded and retained a mortgage on the property before the tax deed sale, the court affirmed that the clerk properly held the surplus for Regions as the priority lienholder entitled to the surplus under the statute. Lastly, the court determined that under Section 197.522, Florida Statutes, the issuance of the tax deed extinguishes any liens or the new owner's liability for the preexisting debt. Thus, "[i]n exchange for wiping the title clean of non-government liens, the tax deed statutes give former lienholders an interest in the surplus. The extinguishment and the interest in the surplus are exchanged after the sale, when the deed is issued . . ." *Rahimi*, 252 So. 3d at 808.

The court explained that the tax deed statutes consistently state that the determination of entitlement to the surplus money is based on property interests existing at the time of the sale. Because Regions had a lien and a mortgage interest at the time of the sale, and only released the mortgage as to the property after the sale, the Third District affirmed the trial court's summary judgment.

The court's ruling did not address surplus entitlement if a mortgage was satisfied after a tax deed sale, as opposed to merely released but unpaid.

SIGNIFICANCE

Rahimi demonstrates that the Florida tax deed statutes require the clerk of a circuit court to distribute any surplus money following a tax deed sale to any titleholder, lienholder, or

mortgagee of record at the time of that sale. This ruling allows clerks to easily determine who is entitled to the surplus money without waiting for litigation.

This case was decided based on the tax deed statutes in effect prior to July 2018; both Sections 197.502 and 197.582, Florida Statutes, were substantially revised pursuant to Laws of Florida 2018-160.

RESEARCH REFERENCES

- 52 Fla. Jur. 2d *Taxation* § 1719 (Westlaw Edge through Mar. 2019).
- 52 Fla. Jur. 2d *Taxation* § 1718 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

JUDGES

Judges: Discipline

Inquiry Concerning a Judge, No. 16-377 Re: DuPont,
252 So. 3d 1130 (Fla. 2018)

The Florida Judicial Qualifications Commission can file formal charges, conduct hearings, and recommend to the Florida Supreme Court that a judge be removed from office. The Florida Supreme Court then assesses the Commission's findings and makes a final determination of discipline. Judicial conduct such as repeatedly disseminating spurious and unverified false allegations about a political opponent, ordering seizures of money from a defendant in a Family Court hearing, holding first appearances without counsel present, and refusing to ever hold statutes unconstitutional violates the Code of Judicial Conduct and renders a judge unfit for office.

FACTS AND PROCEDURAL HISTORY

The Florida Judicial Qualifications Commission (JQC) recommended to the Florida Supreme Court that Judge Scott C. DuPont of the Seventh Judicial Circuit be removed from office for violations of Canons 1, 2A, 3A, 3B2, and 7A of the Code of Judicial Conduct (Code). The JQC's Hearing Panel (the Panel) had previously conducted an evidentiary hearing and based its recommendations on the following events:

During his campaign for reelection, Judge DuPont published unsubstantiated allegations on his campaign website suggesting his opponent, Malcolm Anthony, had employed aliases and attempted to conceal a criminal history. Despite having been informed by his campaign assistants that the information could be inaccurate, DuPont posted unsubstantiated and inflammatory information on his website insinuating that Anthony's prior legal name change was an attempt to conceal secrets and was connected to his former ownership of a company called "Hideyourpast.com." Additionally, DuPont accused Anthony and members of his family of having several prior arrests and traffic violations, though no such records existed and DuPont later

acknowledged not knowing anything about Anthony's family. DuPont also repeated several of these allegations during a televised public forum, asserting them as facts. Judge DuPont testified that he was careless, did not intentionally disseminate false information, and denied any violations of the judicial canons on the basis that he relied on his assistants for accuracy. The Panel found that Judge DuPont ignored multiple warnings and knowingly published unvetted and damaging information about Mr. Anthony and his family.

Additionally, during a hearing involving child support, Judge DuPont ordered his bailiff to conduct a physical search of a husband who was delinquent on the payments. After the bailiff found \$180 from the search, Judge DuPont ordered the money to be credited to the wife for outstanding child support. Judge DuPont testified before the Panel that he has directed several searches in this manner and was attempting to ensure that the party complied with the law to pay his obligation of support.

During a televised judicial candidate forum, Judge DuPont publicly expressed that he does not find statutes unconstitutional because of his judicial philosophy to not "legislate from the bench." The Panel concluded that this statement violated Canon 7 of the Code.

At one point, Judge DuPont rescheduled first appearance hearings on short notice because of conflicts with his campaign obligations, and then began conducting the hearings hours in advance of the new noticed time, with no notice to anyone and without counsel in attendance. Judge DuPont acknowledged violating the requirements of the Florida Rule of Criminal Procedure 3.130(a).

Several of Judge DuPont's colleagues offered letters, affidavits, and testimony during the hearing attesting to his character and fitness as a judge. However, the former chief judge of the Seventh Judicial Circuit also noted that he had received far more complaints about DuPont than any other judge, mostly relating to "heavy-handedness."

The Florida Supreme Court entered an order approving the JQC's recommendation of Judge DuPont's removal, and this opinion followed.

ANALYSIS

The Florida Supreme Court reviewed the findings of the JQC to determine if the alleged violations were supported by clear and convincing evidence. While the court gives great weight to the JQC's findings, "[u]nder article V, section 12(c)(1) of the Florida Constitution, [the Florida Supreme Court has] the discretion to either accept, reject, or modify the commission's findings and recommendation of discipline." *Re: DuPont*, 252 So. 3d at 1142 (citing *In re Renke*, 933 So. 2d 482, 493 (Fla. 2006)).

First, the court addressed the undisputed charges put forth by the JQC with respect to the statements made by Judge DuPont about his judicial philosophy regarding statute constitutionality and his holding hearings without counsel present. These charges were supported by either audio or video evidence, and Judge DuPont openly admitted to the misconduct. Thus, the JQC's findings of violations of Canon 1, 2A, and 7A were supported by clear and convincing evidence.

Next, the court found that Judge DuPont not only knowingly failed to verify the accuracy of the information he disseminated about Mr. Anthony during his campaign, but also manufactured some of the facts. By carelessly attempting to string together information that contained no connection, the court found that Judge DuPont knowingly misrepresented facts to cause harm to Mr. Anthony. Thus, the court concluded that there was clear and convincing evidence to support the JQC's findings that Judge DuPont again violated Canons 1, 2A, and 7A.

The court also found that DuPont's search during the child support hearing supported the JQC's findings that he violated Canons 1 and 2A by clear and convincing evidence; regardless of his intentions in ordering the search or how often he employed similar techniques, the court noted that Florida has previously condemned judicially ordered seizures in open court as unlawful.

The court then considered the effect of Judge DuPont's misconduct on the public's trust in the judiciary and the likelihood that his misconduct will persist in the future. Pointing to the JQC's findings and Judge DuPont's blatant disregard for the rules of criminal procedure and the rights of inmates during first appearances, the court found that Judge DuPont's misconduct negatively affected the public's trust and confidence in the judiciary, pointed to future misconduct, and demonstrated unfitness for office.

Thus, the court accepted the JQC's recommendation and removed Judge DuPont from office.

SIGNIFICANCE

Re: DuPont demonstrates that the JQC has the authority to file formal charges against a state judge, investigate the charges through an evidentiary hearing, and issue its findings and a recommendation of discipline to the Florida Supreme Court. The Florida Supreme Court gives great weight to the JQC's recommendation if its findings are supported by clear and convincing evidence, but still retains the discretion to accept, reject, or modify the JQC's findings and recommendation of discipline.

RESEARCH REFERENCES

- 13 Fla. Jur. 2d *Courts and Judges* § 322 (Westlaw Edge through Mar. 2019).
- 13 Fla. Jur. 2d *Courts and Judges* § 324 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

LAND USE PLANNING & ZONING

Land Use Planning & Zoning: Bert J. Harris Act

GSK Hollywood Development Group, LLC v. City of Hollywood,

246 So. 3d 501 (Fla. 4th Dist. Ct. App. 2018)

Under the Bert J. Harris, Jr. Private Property Rights Protection Act (the Harris Act) as it existed in 2006, a claim relating to building restrictions does not ripen until after the property owner has sought formal relief from the City, and the City specifically applies the law or ordinance to the property at issue.

FACTS AND PROCEDURAL HISTORY

In 2002, the GSK Hollywood Development Group, LLC (GSK) purchased beachfront property in Hollywood, Florida with the intention of developing a fifteen-story condominium on the property. At the time, the applicable zoning ordinance permitted building heights up to 150 vertical feet. Before GSK purchased the property, the City's Director of Planning and Zoning orally confirmed the 150-foot vertical limit with GSK.

After GSK purchased the property in 2004, it introduced the conceptual plans to city leaders at a local event. At this event, the Mayor informed GSK that residents of a neighboring condominium association, Summit Towers Condos, were in opposition to the plans. The Mayor, receptive to the concerns of Summit's residents, proposed a new height ordinance at the City commission meeting that would limit building height to sixty-five feet. The Mayor's new ordinance was formally approved after being proposed to the commission for the third time.

Subsequently, GSK filed a lawsuit against the City arguing that the new height restriction burdened the use of their property, violating their rights under the Harris Act. The City responded by filing a motion for summary judgment, arguing that GSK had no claim under the Harris Act because an application to develop the property had not been submitted by GSK and, therefore, no specific action was taken by the City against GSK's property. The City's motion was denied, and the case went to

trial. At trial, the City was found liable under the Harris Act. The City appealed to the District Court, again asserting that GSK cannot claim damages under the Harris Act because of its failure to seek formal relief from the City.

ANALYSIS

To determine whether the City was liable to GSK for damages under the Harris Act, the court first examined whether the Harris Act applied to landowners who had yet to apply to develop their property. Evaluating the plain language of Section 70.001, Florida Statutes, the Fourth District found that the statute's references to the need for "specific action" of a governmental entity "as applied to" the property in question expressly indicated that "[a] claim relating to building restrictions under the then-existing version of the Harris [A]ct does not accrue unless the property owner formally applie[s] to develop the property; thus, allowing the governmental entity to specifically apply the law or ordinance to the property in question." *GSK Hollywood Development Group, LLC*, 246 So. 3d at 504. This conclusion was reinforced by prior precedent finding that the Harris Act did not apply where no specific governmental action had been taken against the claimant's property. While the court did acknowledge a limited exception allowing property owners to bring a Harris Act claim before applying to develop their property if the government made changes to a comprehensive development plan that guides all future zoning decisions, a general land development regulation like the one at issue in this case is different from a comprehensive plan because GSK could have acted to escape the requirement after it took effect, such as by asking the City for a variance. Thus, because GSK brought its claim before the City actually applied its ordinance to the property, GSK's claim was not ripe.

Accordingly, the Fourth District reversed the decision of the trial court and held in favor of the City.

SIGNIFICANCE

GSK Hollywood Development Group, LLC establishes that the Harris Act, as written at the time of this dispute, precludes claims by a property owner that relate to building restrictions where the property owner has yet to request relief from the

governmental entity so as to elicit a specific action by the government against the property owner.

RESEARCH REFERENCE

- 7 Fla. Jur. 2d *Building, Zoning, and Land Controls* § 197 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Land Use Planning & Zoning: Development Regulations

14269 BT LLC v. Village of Wellington, Florida, 240 So. 3d 1 (Fla. 4th Dist. Ct. App. 2018)

Under Section 604.50(1), Florida Statutes, nonresidential farm buildings and support structures are exempted from municipal land development regulations. Driveways, swales, and storm-water systems are not considered nonresidential farm buildings for the purpose of Section 604.50(1).

FACTS AND PROCEDURAL HISTORY

In March 2016, the Village of Wellington (Village) cited the operator of a horse farm, 14269 BT LLC (the Farm), for violations of several sections of the Village's land development regulations. The Village claimed violations relating to the Farm's failure to build a secondary storm-water system, failure to obtain necessary permits for grading and construction work done during construction of a driveway and swale across a public right-of-way, failure to obtain building permits for two barns, and having a second barn within the Farm's zoning district. The corrective measures for these violations would require the Farm to obtain building permits, submit a plan for a secondary storm-water system, and remove its second barn. After an evidentiary hearing by a special magistrate, the special magistrate entered an order favoring the Village, and the Farm appealed to the circuit court. On appeal, the circuit court affirmed the magistrate's decision in an unelaborated opinion. The Farm then petitioned the Fourth District for second-tier certiorari review.

ANALYSIS

The Fourth District began by reiterating that second-tier certiorari review is narrow in scope and limited to whether the circuit court failed to give a petitioner procedural due process in an appeal, or committed a grave error that would result in a miscarriage of justice. The court also noted that a circuit court's failure to follow the plain language of a statute can constitute grounds for second-tier review.

The court then considered whether the circuit court departed from the applicable statutory law. Section 604.50(1), Florida

Statutes, states that “any nonresidential farm building . . . that is located on lands used for bona fide agricultural purposes is exempt from the Florida Building Code and any county or municipal code or fee” When interpreting statutes, if the plain language is clear and unambiguous, a court need not look to other rules of statutory interpretation. Nonetheless, the court also considered the legislative history of the statute, remarking that the legislature had recently broadened the statute by exempting nonresidential buildings from any county or municipal code, as opposed to just building codes. Further, the court referenced a 2013 advisory decision by the Florida Attorney General concluding that nonresidential farm buildings were exempt from all municipal land development regulations. Thus, because the plain language of Section 604.50(1) exempts nonresidential farm buildings from any county or municipal code or fee, and the property was undisputedly zoned for agricultural use and was being used for a bona fide agricultural purpose, the court found that the circuit court had directly contravened the statute. Furthermore, a grant of second-tier certiorari was appropriate, since failure to correct this error would require the Farm to demolish its second barn, which would be a miscarriage of justice.

However, the court declined to find that the Farm was exempt from the Village’s storm-water regulations, noting that nothing within the statute “permits a farm owner to encroach upon a public-right-of-way without seeking approval. Furthermore, driveways, swales, and storm-water systems do not fall within the meaning of ‘nonresidential farm buildings.’” *14268 BT LLC*, 240 So. 3d at 4. Further, the Farm’s claim that the magistrate’s factual findings as to the violations of the storm-water regulations were not supported by competent substantial evidence was inappropriate for review by second-tier certiorari.

Therefore, the court granted the petition in part and quashed the circuit court’s affirmance, but denied the petition in part with respect to the farm’s violations of the Village storm-water regulations.

SIGNIFICANCE

14269 BT LLC confirms that Section 604.50(1), Florida Statutes, exempts all nonresidential farm buildings and support structures from municipal land development regulations. But for

the purpose of the statute, driveways, swales, and storm-water systems are not considered nonresidential farm buildings.

RESEARCH REFERENCES

- 4A Fla. Jur. 2d *Automobiles and Other Vehicles* § 290 (Westlaw Edge through Mar. 2019).
- 27 Fla. Jur. 2d *Fences* § 4 (Westlaw Edge through Mar. 2019).

Sandrine Guez

MUNICIPAL AUTHORITY

Municipal Authority: Budgets

City of Sweetwater v. Lopez,
245 So. 3d 863 (Fla. 3rd Dist. Ct. App. 2018)

Even in a municipality with a “strong mayor” form of government in which all executive power vests in the mayor, summary judgment favoring that executive power is not appropriate where a genuine issue of material fact exists as to a mayor’s authority to veto City Commission budgets or resolutions.

FACTS AND PROCEDURAL HISTORY

In July 2015, Orlando Lopez (Lopez), Mayor of The City of Sweetwater (the City), submitted his proposed budget for the fiscal year of 2015–2016. Lopez sought to increase the City’s millage rate by almost 40 percent, but the City Commission proposed adopting the same millage rate as the prior fiscal year. To offset the Commission’s rejection of his proposed budget, Lopez unilaterally instituted several layoffs. The Commission then approved several resolutions in response to Lopez’s actions, including rescinding the layoffs and preventing any further layoffs. Lopez vetoed every resolution and issued a new proposed final budget, and the Commission overruled his vetoes. Subsequently, the Commission adopted this final budget with several amendments, and Lopez once again vetoed the final budget, whereupon the Commission again overruled his veto and authorized filing a lawsuit against Lopez to resolve the dispute. Lopez then filed suit against the Commission, alleging that their proposed final budget violated Florida law and the City Charter, and that the Commission’s resolutions rescinding Lopez’s layoffs infringed on his executive powers. Soon after, the City filed its counterclaim seeking declaratory relief to compel Lopez to implement its final budget. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of Lopez, finding: (1) the Commission’s budget was unenforceable because it violated both the City Charter and Florida law; (2) the Commission usurped Lopez’s executive authority by passing its resolutions related to the layoffs; and (3)

the Commission lacked authority to legislate funding. The Commission then appealed to the Third District.

ANALYSIS

The Third District first analyzed the summary judgment in favor of Lopez finding the final budget unenforceable. Lopez's argument relied upon the City Charter, which operates the City under a "strong mayor" form of government in which the legislative power is vested in the City Commission, and the executive power is vested in the mayor. The Charter gives the Commission authority to amend the City budget, but it also states that the City must comply with state law. Furthermore, the court noted that Section 166.241(2), Florida Statutes, requires that a municipality's proposed budget be balanced "as required by law and sound financial practices." Both Lopez and the City had produced evidence and expert affidavits disputing whether the City budget was balanced and prepared in accordance with general accounting principles. Thus, the court concluded that because a grant of summary judgment is only proper in the absence of genuine issues of material fact, and the competing evidence here constituted a genuine issue of material fact, the lower court's grant of summary judgment with respect to the budget was improper.

The Third District then turned to the summary judgment in favor of Lopez's challenge to the validity of the Commission's action overruling his veto of the resolutions. Here, the court noted that Lopez brought suit about the resolutions after they had expired. Further, the resolutions were expressly rescinded by the City during the pendency of the action. Thus, since there was no controversy a judicial ruling could affect, nor was the controversy capable of recurring at the time of the action, the court found the action moot and reversed the trial court's summary judgment decision regarding the resolutions.

In its decision, the court did not wade into analysis of potential separation of powers concerns, but a footnote cautioned that "[t]he circumstances of this case involve the executive and legislative branches of a local government opposing one another regarding issues that at least touch upon aspects of a political question, further cautioning against judicial intervention." *City of Sweetwater*, 245 So. 2d at 868 n.6. By declaring the action moot,

the court did not have to weigh in on Lopez's administrative or executive authority.

SIGNIFICANCE

Despite not specifically analyzing a political question, *City of Sweetwater* further cautions the judiciary about delving into issues of political questions. By reversing and remanding the summary judgment decisions in favor of Lopez, *City of Sweetwater* may be interpreted to limit executive authority to override the actions of a City Commission, even for cities with a "strong mayor" form of government.

RESEARCH REFERENCES

- 49 Fla. Jur. 2d *Summary Judgment* § 14 (Westlaw Edge through Mar. 2019).
- 3 Fla. Jur. 2d *Appellate Review* § 283 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Municipal Authority: Red Light Programs

Jimenez v. State,
246 So. 3d 219 (Fla. 2018)

Section 316.0083, Florida Statutes, authorizes local governments to employ private third-party vendors to review and sort images captured from red-light traffic cameras, in accordance with written guidelines provided by the local government, before sending those images to a traffic control officer. Such vendor may review the information for any purpose short of making the probable cause determination as to whether a traffic infraction was committed.

FACTS AND PROCEDURAL HISTORY

After being cited for driving through a red light, Luis Torres Jimenez (Jimenez) brought an action against the City of Aventura (the City) challenging the legality of its red-light camera program. The City employed a third-party vendor to review and sort pictures taken at traffic lights and to make an initial determination of which pictures to forward to City traffic control officers, so as to filter out unusable pictures. The vendor utilized guidelines provided by the City officers to determine which videos to forward, and the City had access to the rejected images, but City police typically only reviewed images the vendor provided. Jimenez alleged that by giving the vendor unfettered discretion over the initial review of the images, the program exceeded the City's statutory authority to have an "authorized employee or agent" conduct a "review" of traffic camera information, pursuant to Section 316.0083, Florida Statutes.

The county court found for Jimenez and dismissed his citation, and the City appealed to the Third District Court of Appeal. The appellate court affirmed in part and reversed in part, finding that the City's program was within its statutory authority since the vendor's role was essentially clerical and City officers retained full discretion to decide whether to issue a citation. Both lower courts also certified the question of whether cities may contract with private vendors to review and sort red-light camera information before sending it to traffic enforcement officers as one

of great public importance, prompting the Florida Supreme Court to grant review.

ANALYSIS

The Florida Supreme Court's analysis centered around interpreting Section 316.0083, Florida Statutes, to determine the scope of a city agent's authority to "review" traffic camera information. Deferring to rules of statutory interpretation, the court determined that the plain language of the word "review," in the context of the statute, "indicates some evaluative component" by which "the Legislature contemplated that [an] agent would conduct an initial review . . . before a traffic enforcement officer determines whether probable cause exists to issue a traffic citation." *Jimenez*, 246 So. 3d at 228–29. "As part of this express authorization, the Legislature has permitted a local government's agent to review information from red light cameras for any purpose short of making the probable cause determination as to whether a traffic infraction was committed." *Id.* at 230. While *Jimenez* brought up statements from the legislative history of the Mark Wandall Traffic Safety Act to argue for a narrower reading, the court found that the actual text of the statute took precedence, and it accordingly held that the City's program was a proper exercise of statutory authority.

The court also briefly addressed *Jimenez's* secondary argument that the City program violated Section 316's requirement of uniformity among local government traffic ordinances. The court found this argument without merit due to the degree of discretion inherent in local traffic enforcement and the inevitability that some infractions would go unnoticed anyway.

Thus, the Florida Supreme Court affirmed the Third District's ruling and held that the City had proper statutory authority to enact its red-light camera review program. While the ruling was unanimous, Justice Canady concurred specially to emphasize that Section 316.0083 contemplated a broad use of "review" that gave local government agents authority extending up to the point that only local law enforcement officers may issue traffic citations, not employees of a vendor.

SIGNIFICANCE

Jimenez interprets the Mark Wandall Traffic Safety Act to allow third-party vendors to contract with local governments in order to review information from red-light traffic cameras before sending it to local traffic control officers. Such vendor is an agent of the local government, and its review authority extends to any point short of making determinations as to whether to issue a traffic citation.

RESEARCH REFERENCE

- 4A Fla. Jur. 2d *Automobiles and Other Vehicles* § 361 (Westlaw Edge through Mar. 2019).

William S. Moreau

ORDINANCES & REGULATIONS

Ordinances & Regulations: Challenges

Easter v. City of Orlando,
249 So. 3d 723 (Fla. 5th Dist. Ct. App. 2018)

In Florida, the common law voluntary payment defense can be used by a municipality to prevent a plaintiff from recovering fines improperly imposed under unlawful ordinances. Additionally, courts may take the potential applicability of the defense into account when reviewing motions for class certification.

FACTS AND PROCEDURAL HISTORY

The City of Orlando (the City) adopted an ordinance (the Ordinance) that authorized the use of traffic cameras to record vehicles that failed to stop at red lights for the purpose of assessing civil fines for traffic infractions as well as administrative charges in the amount of the City's costs, as determined by city-appointed hearing officers, if the violator's appeal of fines was denied.

In August 2009, Orlando drivers brought a class action suit against the City seeking a declaration that the Ordinance was preempted by state law. The trial court held that the Ordinance was preempted. However, the trial court also denied the class representative's motion to certify the class, noting that most members of the class who paid the fine would most likely be barred by the doctrine of voluntary payment. The Fifth District affirmed, but certified conflict with a Third District case upholding the validity of a similar ordinance.

In April 2010, the City notified Richard Easter of an infraction under the same Ordinance. After the infraction was upheld by a hearing officer, Easter paid the fine, but he subsequently filed the instant class action case against the City, seeking a refund and arguing that the Ordinance was unlawful. The parties jointly moved to stay litigation until the Florida Supreme Court issued a decision resolving a conflict between other pending cases concerning whether the Ordinance was

preempted by state law. In 2014, the Florida Supreme Court issued a decision finding that the Ordinance was expressly preempted by state law in *Masone v. City of Aventura*, 147 So. 3d 492 (Fla. 2014). Relying on this decision, the trial court denied Easter's motion for class certification, finding that the voluntary payment defense would defeat elements of Easter's claim for class certification. Easter appealed to the Fifth District, challenging both the denial of class certification itself and the trial court's consideration of the voluntary payment defense when deciding whether to grant the certification.

ANALYSIS

The Fifth District began by considering whether the trial court properly considered the voluntary payment defense when denying class certification. The Florida Supreme Court has consistently affirmed the use of the common law voluntary payment defense, which holds that "where one makes a payment of any sum under a claim of right with knowledge of the facts such a payment is voluntary and cannot be recovered." *Easter*, 2018 WL 2746467 at *2 (quoting *City of Miami v. Keaton*, 115 So. 2d 547, 551 (Fla. 1959)). To this point, the court noted that the illegality of the demand of payment does not by itself provide grounds for relief; the plaintiff must show that the fine was coerced or involuntarily paid. Easter argued that the trial court's consideration of the defense was inconsistent with a prior Florida Supreme Court decision determining that a plaintiff could seek a full refund for an illegal tax. However, the court distinguished Easter's argument by noting that prior precedent held only that illegal taxes may be refunded, but not fines; moreover, the common law voluntary payment defense has been supplanted by statutes that authorize several situations for a refund of a paid tax. Thus, since the defense is applicable to traffic fines, the trial court had properly considered the defense in the motion for class certification.

The court also found that Easter failed to prove the required elements to establish class certification. Since the trial court would have to evaluate each member of the purported class differently to determine whether the City's voluntary payment defense would apply to them, Easter's course of conduct with payment and raising legal challenges to the validity of the Ordinance was significantly different than the other members of

the proposed class. Therefore, the claim failed the “commonality” requirement that all claimants raise common questions of law or fact, as well as the “typicality” requirement that each member of the class assert a claim or defense typical to the class. Additionally, because the class members’ individual issues would necessarily predominate over the common issues of the class—and resolving their issues through a class action would be highly time-consuming and expensive—the motion for certification also failed the “predominance” and “superiority” elements.

Therefore, the Fifth District affirmed the denial of Easter’s motion for class certification.

SIGNIFICANCE

Easter clarifies that Florida municipalities may assert the common law voluntary payment defense to prevent plaintiffs from recovering fines paid voluntarily under a claim of right with knowledge of the facts, even if the fine was imposed under a preempted ordinance. This defense may also be considered in reviewing motions for class certification, and it defeats elements required for the certification.

RESEARCH REFERENCES

- 39 Fla. Jur. 2d *Payment and Tender* § 18 (Westlaw Edge through Mar. 2019).
- 39 Fla. Jur. 2d *Parties* § 34 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Ordinances & Regulations: State Preemption

Florida Carry, Inc. v. Thrasher,
248 So. 3d 253 (Fla. 1st Dist. Ct. App. 2018)

While the state of Florida has preempted the field of firearms regulation under Section 790.33, Florida Statutes, the preemption does not prevent a state university from enacting regulations that prohibit electric defensive devices such as stun guns on its campus. Additionally, Section 790.06, Florida Statutes, does not create a civil cause of action for holders of concealed weapons licenses, and individuals may not be held liable for enacting rules that violate Section 790.33, except in the case of knowing and willful violations.

FACTS AND PROCEDURAL HISTORY

Florida Carry and Rebekah Hargrove (Appellants) filed an action against Florida State University (FSU), its president, and its police department chief (Appellees). Florida Carry is a non-profit corporation with the purpose of protecting the rights of its members to keep and bear arms. Ms. Hargrove was a member of Florida Carry, an FSU student, and a concealed-weapons licensee (CWL). The Appellants alleged that a provision of FSU's Student Conduct Code (Code) that prohibited certain firearms and defensive devices violated Section 790.33, Florida Statutes, which preempts regulation of firearms by entities other than the Florida Legislature. Appellants alleged that: (1) the Appellees knew or should have known that they were without authority to regulate the possession of firearms on a state university; (2) FSU improperly prohibited Ms. Hargrove and certain CWLs from carrying specified defensive devices (including stun guns) while on FSU's campus; and (3) FSU improperly prohibited lawful possession of firearms in vehicles.

The parties stipulated that Appellees would limit enforcement of Code's firearms provision while litigation was pending. Both parties filed for summary judgment. In support of the Appellees' motion, Chief Perry of the FSU police department submitted an affidavit attesting that FSU believed Section 790.115(2)(a)(3), Florida Statutes, authorized the school to waive

the requirements that persons be permitted to keep guns in motor vehicles on school property.

The trial court issued an order granting summary judgment for the Appellees on all issues. The trial court concluded that Section 790.115(2)(a) did not permit electronic weapons or devices on school property, and FSU could thus ban defensive devices such as stun guns under the Code. Additionally, the court concluded that FSU's prohibition on possession of firearms in vehicles was moot because FSU expeditiously ceased enforcement following the First District's clarification of the issue.

Appellants moved to disqualify the trial judge and vacate the order granting summary judgment. After their motions were denied, Appellants appealed to the First District.

ANALYSIS

The First District began by analyzing the Florida Legislature's preemption of the field of firearms through the language of Section 790.33. Pointing to recent decisions, the court expressly affirmed that public colleges in Florida cannot adopt regulations pertaining to the possession of firearms. While Section 790.115(2)(a)(3) allows school districts to prohibit otherwise lawful possession of firearms in vehicles, a state university is not considered a "school district" and thus cannot prohibit lawful possession of firearms in vehicles. However, in order for a local rule to violate Section 790.33(a), the rule must be promulgated or enforced; merely republishing such a rule does not violate state law. Furthermore, Section 790.33 precludes the award of damages against individuals.

The court clarified that the trial court was correct in granting summary judgment on the issue of the Code's prohibition of defensive device possession by CWLs, though it erred in relying solely on Section 790.115(2)(a). Section 790.115(2)(e), read in conjunction with 790.06(12)(a), exempts CWLs from Section 790.115(2)(a) and allows them to carry defined defensive devices such as stun guns on state university campuses. To this point, the court explained that "statutes should be read in such a way as to harmonize and reconcile them so as to give effect to all provisions of all statutes if possible." *Thrasher*, 248 So. 3d at 259 (citing *Florida Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 142 (Fla. 1st Dist. Ct. App. 2015)) (citations omitted). Furthermore, the preemption in Section 790.33(1) applies only to firearms, not

other defensive devices, and does not create a cause of action for civil liability. Because Hargrove, as a CWL, was not actually prohibited from carrying a defensive device on the FSU campus, and also did not have a cause of action against FSU, the court affirmed the trial court's summary judgment with respect to the issue of the Code's prohibition of defensive devices by CWLs.

The court also affirmed summary judgment on the issue of whether President Thrasher and Chief Perry could be liable as individual defendants. A plain reading of Section 790.33 precludes any remedy against a "person"; thus, the individual defendants cannot be liable for damages under this section. Additionally, Thrasher and Chief Perry were not found to be liable for civil fines because they did not knowingly and willfully violate the Legislature's preemption of firearms. The court noted that Chief Perry's unchallenged affidavit shows that FSU immediately undertook action to comply with recent decisions that clarified the law at issue.

The court disagreed with the trial court's finding of mootness regarding FSU's prohibition of firearms in vehicles. Although FSU did not enforce the Code to the extent that it was inconsistent with Florida law, the Code still contained inconsistent regulations over a year and a half after Section 790.33(1) was clarified. Under Section 790.33(3)(a), FSU can be liable if the prohibitions in the Code were enacted or caused to be enforced in opposition to the preempted field. Here, the court found that there were questions of material fact as to the exact date of promulgation of the Code; thus, summary judgment was improper with respect to this issue, and the court reversed and remanded.

The court also briefly addressed the trial court's rejection of Appellants' motion to disqualify, affirming the trial court's rejection because the allegations were untimely.

Thus, the First District reversed and remanded in part the issue of the Code's prohibition of firearms in vehicles but affirmed the other issues.

SIGNIFICANCE

Thrasher affirms that a state university may be liable if it has enacted or enforced regulations in its Code that contradict preempted firearm and ammunition law. However, universities may enact rules prohibiting other defensive devices, such as stun

guns, because the state has only preempted the regulation of firearms and ammunition. Additionally, individual defendants are precluded from liability for damages under a violation of Section 790.33 because the statute does not allow for recovery from a “person.” Civil fines against individual defendants may only be given if the individuals were knowingly and willfully violating the preempted firearm law.

RESEARCH REFERENCES

- 57 Fla. Jur. 2d *Weapons* § 4 (Westlaw Edge through Mar. 2019).
- 57 Fla. Jur. 2d *Weapons* § 16 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Ordinances & Regulations: State Preemption***Orange County v. Singh,***

No. SC18-79, 2019 WL 98251 (Fla. Jan. 4, 2019)

The Florida Legislature's preemption of the regulation of local elections extends only to subjects enumerated in the Florida Election Code and does not include regulation of the listing of county constitutional officers' party affiliations on a general election ballot. Additionally, elections for county constitutional officers must be held during a general election, not a primary election.

FACTS AND PROCEDURAL HISTORY

Orange County voters passed an amendment to a county ordinance that would impose new four-year term limits on county constitutional officers, require them to be elected during the primary election, and require that their elections be conducted in a nonpartisan fashion by withholding candidates' party identification from the ballot. Several county constitutional officers brought suit challenging the constitutionality of the ordinance. Upon cross-motions for summary judgment, the trial court upheld the portion of the amendment regarding term limits but struck the provision for nonpartisan elections, reasoning that the subject of elections was preempted to the state legislature. The Fifth District affirmed, and the Florida Supreme Court granted certiorari.

ANALYSIS

The Florida Supreme Court analyzed the ordinance's consistency with several state laws concerning elections and determined that the specific subject of regulating whether county constitutional officers' party affiliations appear on a ballot is not preempted to the state. Counties may not enact ordinances on subjects preempted to the state, and preemption may occur in one of two ways: (1) express preemption, which requires a specific legislative statement, or (2) implied preemption, which occurs when the legislative scheme of a subject is so pervasive as to evince a clear intent to preempt the particular area. Reviewing Section 97.0115, Florida Statutes, the court determined that the legislature had expressly preempted everything in the Florida

Election Code, but “[w]hether the county constitutional officers must stand for election in partisan or nonpartisan elections is not a matter set forth in the Florida Election Code and is, therefore, not preempted.” *Singh*, 2019 WL 98251 at *3.

The court also examined Sections 100.041 and 100.051, Florida Statutes, determining that Section 100.051 does not strictly require party affiliation to be listed on the ballot since candidates may qualify for the general election by means other than a party nomination. However, Section 100.041 requires that elections for county constitutional offices appear only on a general election ballot, rendering the ordinance’s requirement that such elections be held during the primary elections inconsistent. Noting that the ordinance’s purpose of holding nonpartisan elections could be achieved in a manner consistent with state law solely by omitting party affiliation information from a general election ballot, the court severed the primary election requirement from the ordinance and upheld the remainder. Therefore, the Florida Supreme Court quashed the Fifth District’s decision.

Justice Polston wrote a lengthy dissent contending that the language of the Florida Election Code expressly preempted the entire field of regulating elections to the state and rendered the ordinance unlawful. Furthermore, because the Florida Election Code generally contemplates partisan elections, Polston believed that its allowance of nonpartisan candidates to appear on a ballot without a party affiliation does not give rise to a general right for a partisan candidate to appear without one. Thus, Justice Polston would have held the Orange County ordinance unlawful, as would Justices Canady and Lawson, who concurred with Polston’s dissent.

SIGNIFICANCE

Singh establishes that the state legislature’s express preemption of election law extends only to those subjects encompassed in the Florida Election Code. Thus, because the Florida Election Code permits county constitutional officers to appear on a general election ballot without a listing of party affiliation, counties may conduct nonpartisan elections by omitting party information from their ballots, though such officers may only be elected during a general election.

RESEARCH REFERENCE

- 12A Fla. Jur. 2d *Counties, Etc.* § 84 (Westlaw Edge through Mar. 2019).

William S. Moreau

PRACTICE & PROCEDURE

Practice & Procedure: Affirmative Defenses

Pope v. State,

246 So. 3d 1282 (Fla. 1st Dist. Ct. App. 2018)

Under Florida's 911 Good Samaritan Act, an individual who contacts 911 with the intention of obtaining medical assistance for someone experiencing a drug-related overdose, regardless of whether they subsequently act contrarily to those intentions, has acted in good faith for the purpose of receiving immunity from prosecution under the Act.

FACTS AND PROCEDURAL HISTORY

In an effort to encourage people to seek medical assistance when aware of or in the presence of someone suffering from a drug-related overdose, the Florida Legislature passed the 911 Good Samaritan Act in 2012, which grants immunity from prosecution for drug possession if the evidence for possession was obtained as a result of an individual's good faith attempt to seek medical attention for a person experiencing an overdose.

In 2016, Thomas Pope and two of his friends were using heroin at Pope's home when one of Pope's friends, Ashley, overdosed and stopped breathing. Pope immediately called the police to seek medical attention and, in the course of his 911 call, provided his address, updates on Ashley's condition, and followed the operator's instructions to help Ashley breathe.

Before first responders arrived, but sometime after the 911 call, Pope moved Ashley to his front porch, left her unattended, and rearranged things inside his home in an attempt to hide the heroin. Pope then refused to answer the door upon the arrival of first responders, and once he finally did answer the door, Pope claimed that he did not know Ashley or what had happened to her. Although Ashley survived the overdose as a result of Pope's call, the State charged Pope with possession of marijuana and heroin after searching his home. Pope's motion to dismiss both charges under the 911 Good Samaritan Act was denied by the trial court, which found that Pope, despite initially acting in good faith by calling 911 to seek medical attention for Ashley, had later acted in a way that did not benefit Ashley's medical

assistance. Pope appealed the order denying immunity to the First District.

ANALYSIS

The First District reviewed the trial court *de novo* and considered whether Pope sought medical assistance in good faith pursuant to the 911 Good Samaritan Act. The court, in determining that “the Legislature did not condition immunity on doing more than seeking medical assistance in good faith,” found that Pope’s actions following the 911 call were irrelevant because they were taken *after* Pope had sought medical assistance. *Pope*, 246 So. 3d at 1283. As a result, the court concluded that Pope acted in good faith for the purpose of obtaining immunity under the 911 Good Samaritan Act because his call for medical assistance was made in good faith and his actions afterward were irrelevant for the purpose of the statutory immunity.

SIGNIFICANCE

Pope establishes that a person acts in good faith for the purpose of qualifying for immunity under the 911 Good Samaritan Act when they call 911 with the intention of obtaining medical assistance for someone experiencing a drug-related overdose. Actions that are taken after medical assistance is sought, such as uncooperative behavior or leaving the overdosed person unattended, do not negate immunity under the 911 Good Samaritan Act as long as the initial call for medical assistance was made in good faith for purposes of the statute.

RESEARCH REFERENCE

- 15A Fla. Jur. 2d *Criminal Law - Procedure* § 2482 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Practice & Procedure: Appellate***Pettway v. City of Jacksonville,***

No. 1D17-2279, 2018 WL 3799624 (Fla. 1st Dist. Ct. App. August 10, 2018)

Under the Florida Rules of Appellate Procedure, plaintiffs have thirty days from the rendition of a local government's quasi-judicial order to petition for certiorari review of the order. For the purpose of jurisdictional timing, a newly enacted order is rendered when a signed, written order is filed with the clerk of the lower tribunal. A city rule considering the date of rendition to instead be the date the affected parties are sent notice of the ordinance by certified mail is consistent with the Florida Rules of Appellate Procedure.

FACTS AND PROCEDURAL HISTORY

Kevin Pettway and other residents in a Jacksonville neighborhood sought to block Jacksonville from passing an ordinance rezoning a nearby property and allowing its owner, Saleebas 2216 Oak Street LLC (Saleebas), to open a restaurant. After several quasi-judicial hearings, the rezoning ordinance was approved by Jacksonville's City Council on May 24, 2016. The next day, on May 25, 2016, the ordinance was signed by the Council President and Secretary and made available online for public review. Due to clerical oversight, the ordinance was not filed into the Jacksonville Ordinance Book until June 14, 2016, and certified copies of the ordinance were not mailed to affected property owners until June 20, 2016.

Pettway then attempted to have the ordinance reviewed by the circuit court. Because the Florida Rules of Appellate Procedure mandate a petition to review a local government's quasi-judicial action be filed within thirty days of its rendition, Pettway filed his petition for writ of certiorari with the circuit court on July 20, 2016—exactly thirty days from the mailing of the certified copies in compliance with Rule 6.310 of Jacksonville's City Rules, which holds an order rendered and final on the date mailed to affected parties. However, because Pettway's petition lacked a separately filed appendix as required by court rules, the clerk of the circuit court initially rejected the

petition and did not consider it filed until the appendix was received on July 25, 2016.

Subsequently, Saleebas moved to dismiss the petition as untimely because it was filed more than thirty days after the date of rendition, which Saleebas argued was the date the ordinance was signed, not the date it was mailed. The trial court dismissed Pettway's petition for untimeliness by deciding that May 25, 2016 was the date of rendition of the ordinance. In deciding such, the trial court rejected the City's Rule 6.310. The trial court's decision made it unnecessary to address the date stamp change on Pettway's petition from July 20, 2016 to July 25, 2016.

Pettway petitioned the First District Court of Appeals for a Writ of Mandamus.

ANALYSIS

The First District began by noting that Pettway's petition should be considered filed on July 20, 2016, since the clerk of the circuit court had a ministerial duty to accept and file the petition on the day it was received.

The court then determined that the City's Rule 6.310 governed the timing of rendition and comported with Florida Appellate Rule 9.020(i). Under Florida Appellate Rule 9.020(i), rendition of an ordinance requires that the order be written, signed, and filed with the clerk of the lower tribunal. Under the City's Rule 6.310, however, rendition of an ordinance in a quasi-judicial proceeding does not occur until the ordinance is sent, via certified mail, to the affected parties. The court noted that, although the ordinance was *written* and *signed* by the Council President and Secretary on May 25, 2016, it was not *filed* in a way that paralleled typical judicial proceedings by putting affected parties on notice of the ordinance. The District Court reasoned that, if an ordinance is deemed rendered on the date that it is signed and made available online for public review, the "affected property owners could easily lose their right to contest final orders about which they are not notified via the certified mail process." *Pettway*, 2018 WL 3799624 at *2. In this case, the affected parties did not receive a certified copy of the notice until almost a month after the ordinance was signed and posted online. Because the City's Rule 6.310 brought predictability to the termination of the quasi-judicial process and ensured that affected parties would be given sufficient notice of

the ordinance, the First District gave effect to the rule and found it to be consistent with the requirements of Florida Appellate Rule 9.020(i), meaning the ordinance was rendered on June 20, 2016, and Pettway's petition on July 20, 2016 was timely. Further, the court held that the clerk had the ministerial duty to file the petition when proffered on July 20, 2016, regardless of the lack of a separate appendix.

The court therefore granted the petition for mandamus and quashed the lower court's order.

SIGNIFICANCE

Pettway establishes that a city rule modifying the timing for rendition of a quasi-judicial order is consistent with Rule 9.020(i) of the Florida Rules of Appellate Procedure when those conditions have the same effect as "filing" the order by putting the affected parties on notice.

RESEARCH REFERENCE

- 2 Fla. Jur. 2d *Administrative Law* § 423 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Practice & Procedure: Jurisdiction

Key v. Almase,
253 So. 3d 713 (Fla. 3d Dist. Ct. App. 2018)

Florida appellate courts have jurisdiction to review a non-final order, such as an order denying a motion to dismiss, when the order specifically states that a party is not entitled to immunity as a matter of law.

FACTS AND PROCEDURAL HISTORY

Appellees, the representatives of four individuals killed in a vehicle collision while being pursued by police officers, brought civil actions against local police chiefs and a city manager (Appellants). At trial, Appellants moved to dismiss on the basis of immunity under Section 768.28(9)(a), Florida Statutes, alleging that they were immune from suit in their individual capacities. The trial court denied the motion, but it did not specifically state as the basis of its denial that Appellants were not entitled to immunity. Appellants made an interlocutory appeal of the denial of the motion to dismiss to the Third District, and their cases were consolidated.

ANALYSIS

The Third District determined that it lacked jurisdiction to review the order. An order denying a motion to dismiss is a non-final order, typically not reviewable by an appellate court. However, Florida Rule of Appellate Procedure 9.130(a)(3)(C)(x) does allow for appellate review of non-final orders that determine as a matter of law that a party is not entitled to immunity. Deferring to precedent from the Florida appellate courts, the Third District held that it lacked jurisdiction to hear the appeal because the lower court's order did not specifically state that Appellants were not entitled to immunity. Additionally, the Third District certified the question “regarding the specificity with which a court must deny an immunity motion “as a matter of law” to permit interlocutory appellate review” as a question of great public importance. *Key*, 253 So. 3d at 715 (quoting *Florida Highway Patrol v. Jackson*, 238 So. 3d 430, 430 (Fla. 1st Dist. Ct. App. 2018)).

SIGNIFICANCE

Key establishes that Florida appellate courts have jurisdiction to review non-final orders determining as a matter of law that a party is not entitled to statutory immunity. However, such order must specifically state that a party is not entitled to immunity. The exact specificity with which a court must deny an immunity motion has yet to be ruled upon.

RESEARCH REFERENCE

- 3 Fla. Jur. 2d *Appellate Review* § 60 (Westlaw Edge through Mar. 2019).

William S. Moreau

PUBLIC EMPLOYMENT

Public Employment: Civil Procedure

City of Miami v. Miami Lodge #20, Fraternal Order of Police,

247 So. 3d 618 (Fla. 3d Dist. Ct. App. 2018)

In Florida, civil service workers seeking review of disciplinary action against them may only elect one grievance procedure if multiple options are available, and they will be barred from pursuing further options once there has been an initial action for redress that has been fully litigated.

FACTS AND PROCEDURAL HISTORY

Former City of Miami (the City) police officer Larry Hagan (Hagan) was suspended for 120 hours without pay on November 12, 2013 for workplace misconduct. Hagan was notified of his right to either: (1) appeal his suspension to the City of Miami Civil Service Board (the Board) or (2) initiate the grievance procedure outlined in his governing Collective Bargaining Agreement (the Agreement).

Hagan originally elected his first option by appealing to the Board under the City of Miami's Code of Ordinances (the Code). Under this process, the Board makes a recommendation to the City Manager, who may sustain, reverse, or modify the Board's recommendations. The City Manager's determination may be appealed to the appellate division of the circuit court, or by petition to the district court of appeal. Although the Board recommended to the City Manager to uphold Hagan's suspension, the City Manager modified the suspension to a termination of employment.

After obtaining this ruling, Hagan filed a grievance under the Agreement and also sought review of the City Manager's determination to the circuit court appellate division. The court overturned the City Manager's termination, and thereafter the City filed a petition to the Third District seeking review of the court's reversal of Hagan's termination. The Third District concluded that the City Manager had the authority to terminate Hagan.

While Hagan's case was pending with the Third District, a separate grievance filed under the Agreement by the Fraternal Order of Police (FOP) on Hagan's behalf was denied. After the FOP's attempt to arbitrate the denial of the grievance was also denied, the FOP then filed an unfair labor practice claim against the City. The Public Employees Relations Commission (PERC) entered a final order against the City, which included in pertinent part for the City to arbitrate Hagan's grievance.

The City appealed to the Third District, challenging PERC's order directing the City to address Hagan's grievance.

ANALYSIS

The Third District began its analysis by examining Section 447.401, Florida Statutes, in addition to the governing Agreement to determine that PERC erred in addressing Hagan's grievance. Focusing on the limiting language of both the statute and the Agreement, the court concluded that Section 447.401 precludes career service employees from availing themselves of more than one grievance procedure. The Agreement also explicitly limited the election of remedies that any member covered under the Agreement could pursue. To this point, "Florida courts have consistently applied section 447.401 to bar attempts to pursue more than one avenue of redress." *Miami Lodge #20, Fraternal Order of Police*, 247 So. 3d at 624. Thus, because Hagan initially elected for the Board's review, in opposition to the grievance procedure, the Third District found that the City was not required to arbitrate Hagan's grievance.

The court then addressed Hagan's counterargument that his grievance action should not be barred because he had only been suspended before he appealed to the Board, and he was subsequently terminated. Reviewing the City Code, the court confirmed that Hagan was completely barred from further pursuing the grievance procedure for two reasons: first, because he was on notice that the City Manager had the authority to modify the discipline recommended; and second, because he had already fully litigated his claims. Under the Code, the City Manager has discretion to affirm, reverse, or modify disciplinary actions from a civil service board. Recommending a harsher penalty was simply a modification of discipline well within the City Manager's authority. Addressing its second point, the court noted that Hagan had already thoroughly litigated his claim

originally by appealing to the Board, appealing the Board's determination to the circuit court appellate division, and finally to the Third District. As such, the court shut down Hagan's attempt at relitigating a claim that had already been litigated through the Board and was clearly barred by Section 447.401 and the Agreement.

Therefore, because the FOP could not pursue the same grievances that Hagan had already fully litigated with his initial election of appeal to the Board, the Third District reversed PERC's final order requiring the City to arbitrate the grievance and finding that their refusal to arbitrate constituted an unfair labor practice.

SIGNIFICANCE

Miami Lodge #20, Fraternal Order of Police affirms that under Section 447.401, Florida Statutes, a civil service worker cannot pursue more than one grievance procedure after he or she has already fully litigated an initial action for redress, even if alternative procedures are available under a collective bargaining agreement.

RESEARCH REFERENCES

- 34 Fla. Jur. 2d *Labor and Labor Relations* § 160 (Westlaw Edge through Mar. 2019).
- 34 Fla. Jur. 2d *Labor and Labor Relations* § 87 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Public Employment: Corruption***Robinson v. Commission on Ethics,***
242 So. 3d 467 (Fla. 1st Dist. Ct. App. 2018)

A contracted city attorney acts “corruptly,” in violation of Section 112.313(6), Florida Statutes, if they create new government positions shortly before being discharged and advances a sense of urgency to convince a city commission to appoint them as their without hiring outside counsel or considering other applicants. Additionally, Section 112.313(16)(c) prohibits city attorneys from representing clients before the entity to which they provide legal services, but they may represent themselves or their private law firms.

FACTS AND PROCEDURAL HISTORY

Robert K. Robinson served as the city attorney for the City of North Port, Florida for over thirteen years. In 2014, the City hired a new in-house attorney and stopped renewing its contract with Robinson. Shortly before Robinson’s contract expired, he presented the city commission with ordinances creating the new positions of Code Enforcement Special Magistrate and Zoning Hearing Officer. Robinson told the city commission that the positions needed to be filled immediately and, claiming to be “uniquely qualified,” convinced them to appoint him to both positions without considering other candidates. As a result, a resident of the city filed a complaint with the Commission on Ethics (Commission).

Following an investigation, the Commission found probable cause that Robinson had violated several provisions of Section 112.313, Florida Statutes, and subsequently referred the case to the Division of Administrative Hearings. After a public hearing, the administrative law judge issued a recommended order finding that Robinson violated Section 112.313(6) and (16)(c) and recommending a \$10,000 fine.

Robinson filed exceptions to the Commission regarding the recommended order, arguing that he had not violated Section 112.313(6) because the evidence failed to establish that he had “corruptly” used his position to his benefit. Robinson also asserted that he had not violated Section 112.313(16)(c) because other provisions of the statute authorized him to refer business to

his law firm. Rejecting Robinson's exceptions, the Commission accepted the recommended order and further recommended the Florida Governor issue a public censure and reprimand of Robinson. Robinson appealed to the First District Court of Appeals.

ANALYSIS

The First District reviewed the factual findings of the Commission's final order and determined that competent substantial evidence supported the finding that Robinson had violated Section 112.313(6), but not (16)(c).

The court began by affirming the Commission's findings that Robinson's actions were corrupt within the meaning of Section 112.313(6). Section 112.313(6) prevents public officers from "corruptly" using their official positions to secure a special benefit for themselves. Section 112.312(9) defines "corruptly" as "done with a wrongful intent . . . inconsistent with the proper performance of the [official's] public duties." Focusing primarily on Robinson's position of influence within the City, the court reasoned that "Robinson's failure to advise the city commission to hire outside counsel when creating and establishing the qualifications for the Zoning Hearing Officer and Code Enforcement Special Magistrate positions—coupled with his creating a sense of urgency in the appointments and giving the city commissioners no other options—establishes that Robinson knew or should have known that his actions were wrong and unethical." *Robinson*, 242 So. 3d at 472.

With respect to Section 112.313(16)(c), the court held that the Commission had misinterpreted the statute by finding that it precluded Robinson from representing himself before the city commission. Section 112.313(16)(c) prevents city attorneys from "represent[ing] a private individual or entity before the unit of local government to which the [attorney] provides legal services." Reviewing the plain language of the statute, the court assessed that the statute's use of "represent" implies that city attorneys are prohibited only from representing private "clients" while in office, and the term "client" did not include Robinson's representation of himself or his own law firm. These findings were reinforced by precedent case law finding that Section 112.313(16)(c) does not prohibit city attorneys from solely representing their own personal interests before a board, and

because holding otherwise would contradict the purpose of the statute, which allows Robinson to refer legal work to his law firm because his contract with the City expressly permits that conduct.

Consequently, the court affirmed the Commission's findings that Robinson had violated Section 112.313(6), but reversed with respect to its findings that he had violated Section 112.313(16)(c) and remanded the case to the Commission to reconsider its recommended penalty.

Judge Makar wrote a separate opinion concurring with the court's findings regarding Section 112.313(16)(c) but dissenting with respect to the presence of competent substantial evidence supporting a violation of Section 112.313(6) by Robinson. Emphasizing Robinson's exemplary service to the city for over a decade, Judge Makar contended that there was insufficient evidence to support a finding that Robinson had acted corruptly, and he argued that Section 112.313(6) was intended to target only egregious misconduct by civil servants and should not apply to what could reasonably be considered a mutually advantageous arrangement. Thus, Judge Makar would have reversed the Commission's findings in their entirety.

SIGNIFICANCE

Robinson demonstrates what can constitute "corrupt" conduct by a city attorney for the purpose of Section 112.313(6), Florida Statutes. Robinson also confirms that while Section 112.313(16)(c) prohibits city attorneys from representing clients before the entity to which they provide legal services, they are not prohibited from representing themselves or their law firms.

RESEARCH REFERENCES

- 9 Fla. Jur. 2d *Civil Servants* § 159 (Westlaw Edge through Mar. 2019).
- 9 Fla. Jur. 2d *Civil Servants* § 158 (Westlaw Edge through Mar. 2019).
- 9 Fla. Jur. 2d *Civil Servants* § 174 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Public Employment: Fair Labor Standards Act

Llorca v. Sheriff, Collier County, Florida,
893 F.3d 1319 (11th Cir. 2018).

Pursuant to the Fair Labor Standards Act, sheriff deputies are not entitled to compensation for (1) the donning and doffing of police gear, as this activity is not integral to the performance of law enforcement duties or (2) time spent commuting to work in a marked police vehicle, despite being required to listen to their radios and watch for traffic violations, because these activities are incidental, rather than indispensable, to the performance of law enforcement duties.

FACTS AND PROCEDURAL HISTORY

Sheriff deputies in Collier and Lee Counties do not receive compensation for time spent putting on and taking off police gear, despite being required to arrive to their shifts in uniform and protective gear; nor are they compensated for the time spent commuting to and from work in a marked patrol vehicle, despite being required by their employer to listen to calls on their radios and observe their surroundings for traffic violations. Carlo Llorca, a former sheriff deputy, along with several other former sheriff deputies (Appellants), brought an action against the Collier and Lee County sheriffs (Appellees) asserting that they were in violation of the overtime provisions of the Fair Labor Standards Act (FLSA) and the minimum wage provisions of the Florida Minimum Wage Act (FWMA) by failing to compensate their deputies for these activities.

Granting summary judgment in favor of the Appellees, the district court held that Appellants' time spent donning and doffing police gear and commuting to work in a marked police vehicle was not compensable under the FLSA or FWMA. Appellants appealed the district court's grant of summary judgment to the Eleventh Circuit.

ANALYSIS

The Eleventh Circuit analyzed each of Appellants' claims to determine whether they were entitled to compensation under the FLSA. With respect to the FLSA claim seeking compensation for

the donning and doffing of uniforms, the court relied on the 1947 Portal-to-Portal Act, 29 U.S.C. § 254(a) (as amended in 1996), which exempts employers from compensating employees under the FLSA for the following activities: (1) “walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such an employee is employed to perform,” and (2) “activities which are preliminary to or postliminary to said principal activity or activities.” The court then applied United States Supreme Court precedent to establish that a “principal activity” must be both integral *and* indispensable to the productive work that an employee has been employed to perform.

After establishing that law enforcement duties are the “principal activities” that deputies are employed to perform, the court found that the donning and doffing of police gear, though arguably *indispensable* to the performance of law enforcement duties, is not *integral* to the deputies’ performance of their law enforcement duties. The court reasoned that the activity was not integral because the “mere fact that the deputies must go through the activity of donning and doffing the gear in order to have it available when they are on duty does not make the donning and doffing process an intrinsic element of law enforcement.” *Llorca*, 893 F.3d at 1324–25. This conclusion was further supported by congressional intent behind the Portal-to-Portal Act, which was passed by Congress in order to reverse judicial interpretations of the FLSA that had created employer liability for activities that had traditionally been non-compensable, like the donning and doffing of uniforms. Furthermore, Department of Labor regulations provide that changing clothes under the conditions normally present is preliminary or postliminary to an employee’s principal activities. Accordingly, the donning and doffing of police gear was held to be non-compensable under the FLSA.

As to Appellants’ second claim, the court again referenced the plain language of the Portal-to-Portal Act to conclude that time spent commuting to and from work in a marked police vehicle and listening for emergency calls is not compensable under the FLSA. The Act specifically provides that commuting to work in an employer’s vehicle is generally not compensable. Furthermore, activities performed by an employee incidental to the use of an employer’s vehicle for commuting are specifically excluded from the employee’s principle activities. Even if monitoring the roads

for traffic violations while driving were *integral* to the performance of law enforcement duties, the court found they were not *indispensable* because “deputies could fully perform their law enforcement duties during their shifts even if the sheriffs did not require them to engage in traffic law enforcement during their commutes.” *Id.* at 1328. To support this conclusion, the court acknowledged that the Federal and Sixth Circuits had also concluded that officers are not entitled to compensation for the same activities, and the Department of Labor had also passed a regulation stating that police officers are not working when they are required to leave their radios on during travel time.

Because Appellants’ claims for compensation under the FLSA failed, the court held that their claims also fail under the FMWA; only individuals entitled to receive a federal minimum wage under the FLSA may be eligible to receive the state minimum wage under the FMWA, and the FMWA specifically provides that it must be consistent with the FLSA. Therefore, the court affirmed the lower court’s ruling.

Judge Hull concurred with the majority opinion that the donning and doffing of police gear was not compensable under the FLSA or FMWA, but dissented with respect to the court’s opinion that the time spent commuting to and from work while being required to monitor the radio and road for emergencies and traffic violation was not compensable. Emphasizing that there are exceptions to the general rule against compensation for commutes, Judge Hall cited to precedent case law that distinguished between active and passive duties and concluded that Appellants should be entitled to compensation for their time spent commuting to and from work because they were required to *actively* perform duties that were principal law enforcement activities, and failing to perform these activities would be dangerous and highly inappropriate. Judge Hall would thus have reversed the lower court’s ruling in part.

SIGNIFICANCE

Llorca establishes that the donning and doffing of police gear is not integral to the performance of principal law enforcement activities and is, therefore, not an activity that an employee must be compensated for under the FLSA or FMWA. *Llorca* also establishes that commute time to and from a scheduled shift in a marked police vehicle, while being required to monitor the radio

and road for emergencies and traffic violations, is not a compensable employee activity under the FLSA or FWMA because it is not indispensable to the principal law enforcement activities of a deputy.

RESEARCH REFERENCES

- 1 Wage and Hour Law *Compensable Time* § 6:8 (Westlaw Edge through Nov. 2018).
- 1 Wage and Hour Law *Compensable Time* § 6:12 (Westlaw Edge through Nov. 2018).

Alyssa Castelli

PUBLIC RECORDS & MEETINGS

Public Records & Meetings: Attorneys' Fees

*State Attorney's Office of the Seventeenth Judicial Circuit
v. Cable News Network, Inc.,*
254 So. 3d 461 (Fla. 4th Dist. Ct. App. 2018)

In Florida, attorney's fees may only be awarded under the Public Records Act if a defendant unlawfully denies proper requests for records and does not base its denial on an exemption from disclosure within the Act.

FACTS AND PROCEDURAL HISTORY

This case follows a separate opinion in which the Fourth District affirmed a circuit court order finding that certain video footage taken by security cameras at Marjory Stoneman Douglas High School after a school shooting was not statutorily exempt from disclosure under Florida's Public Records Act and must be disclosed to appellants (the Media). Subsequently, the Media filed a motion for appellate attorney's fees, claiming that Section 119.12, Florida Statutes, entitled them to fees from appellants—the State Attorney's Office of the Seventeenth Judicial Circuit and the School Board of Broward County, Florida (the School Board)—for unlawfully refusing to release the footage. The Fourth District heard the motion.

ANALYSIS

In denying the motion for attorney's fees, the Fourth District began its discussion by examining Section 119.12 to find that neither defendant “unlawfully refused to permit a public record to be inspected or copied” within the meaning of the statute. *Cable News Network*, 254 So. 3d at 462. This provision of the statute is designed to make it less likely that public agencies will deny proper requests for public records due to the requirement to pay attorney's fees and costs to parties that are wrongfully denied.

The Fourth District pointed to its separate opinion affirming the order to produce the video footage and noted that the School Board's objection to the video footage was not “unlawful” because it was based on the “security plan” exemption from disclosure

contained in Section 119.071(3)(a). While the School Board did not know whether the “good cause” exception to exemption would ultimately apply to compel disclosure at trial, “[t]he School Board’s conduct did not become ‘unlawful’ because it pursued this unsettled area of the law on appeal.” *Id.* at 463. Thus, the School Board was not responsible for attorney’s fees.

Furthermore, the Media could not be entitled to fees from the State Attorney because the State Attorney was never the custodian of the public records at issue. The State Attorney was only involved in the action to assist with the “active criminal investigative information” exemption to disclosure.

Therefore, the Fourth District denied the Media’s motion for attorney’s fees against the School Board and the State Attorney.

SIGNIFICANCE

Cable News Network confirms that attorney’s fees can only be awarded under the Public Records Act if the defendant has unlawfully denied access to the public records, as opposed to denying them due to a statutory exemption to disclosure.

RESEARCH REFERENCES

- 44 Fla. Jur. 2d *Records and Recording Acts* § 142 (Westlaw Edge through Mar. 2019).
- 44 Fla. Jur. 2d *Records and Recording Acts* § 72 (Westlaw Edge through Mar. 2019)

Evan P. Dahdah

Public Records & Meetings: Exemptions

O'Boyle v. Town of Gulf Stream,
257 So. 3d 1036 (Fla. 4th Dist. Ct. App. 2018)

In an action concerning whether requested public records are subject to disclosure, courts must perform an in-camera inspection of the messages upon a properly pled motion of the requester to determine whether any qualify as public records, thus balancing the public's right to public records and the official's individual privacy rights. In addition, full disclosure of the requested records while a claim for failure to disclose is pending does not render such claim moot when there are collateral issues still undecided.

FACTS AND PROCEDURAL HISTORY

Martin O'Boyle and Asset Enhancement, Inc. (Appellants) filed public records requests with the Town of Gulf Stream (the Town) to acquire: (1) copies of text messages sent or received by the Town's mayor on his personal cell phone and (2) copies of bills and payments for legal services provided to the Town by its attorney. Appellants felt that the records initially produced were incomplete due to redactions and alleged withholding of additional text messages. Appellants therefore brought suit seeking a court order requiring the Town to fully disclose the records. Appellants also filed a Motion for Mandatory In-Camera Inspection of Record, requesting that the court evaluate whether, as the Town asserted, the redacted legal bills fell within the "work product" exception of the Public Records Act. The Town provided the unredacted documents one week later, then filed a motion to dismiss, which the court granted while leaving Appellants the opportunity to amend within ten days. Appellants instead requested that a final judgment be entered, and the trial court accordingly dismissed the complaint. Appellants appealed the judgment to the Fourth District, arguing the Town was in violation of Florida's Sunshine and Public Records Laws and requesting declaratory and injunctive relief against the Town. Included in the Town's response was a claim that the issue regarding the attorney's bills and payments was moot because the Town had provided the requested records before the dismissal hearing began.

ANALYSIS

The Fourth District evaluated each claim separately, summarily affirming the dismissal of the Sunshine Law claims before examining the issue of the text messages sought by Appellants. The court first established that text messages on a privately owned phone can constitute public records when they are made within the scope of an official's employment. In analogizing text messages to e-mails under the Public Records Act, the court reasoned that the messages must be reviewed to determine whether some or all do not meet the definition of "public record" or are exempted from the request, and those found to be "relevant" and "non-privileged" must be produced. The court found that a judicial in-camera review of the messages prior to dismissal of Appellants' claim was necessary to determine the relevancy and privilege of the records, balancing the public's right to access public records with individual constitutional and statutory privacy rights. Thus, because the Town did not demonstrate that the Public Records Act exempted the records from disclosure before the lower court dismissed Appellants' properly pled claim, the court reversed the dismissal of Appellants' complaint and remanded the matter to the trial court to conduct an in-camera inspection of the messages to determine which, if any, qualify as public records.

Next, the court addressed the redacted attorney's bills. The Town had argued the dismissal should be upheld because the claim was rendered moot when the Town supplied Appellants with the unredacted records prior to the dismissal hearing. However, the court explained that an otherwise moot case will not be dismissed where "collateral legal consequences that affect the rights of a party flow from the issue to be determined." *O'Boyle*, 257 So. 3d at 1043 (quoting *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992)). Here, several collateral issues remained unresolved, including "whether the Town's initial redactions of the bills were proper, and whether any reasonable attorney's fees, costs, and expenses, should be awarded." *Id.*

Therefore, the Fourth District affirmed the lower court's dismissal of Appellants' Sunshine Law claims, but it reversed the dismissal of Appellants' claims under the Public Records Act and remanded those claims for an in-camera review of the unsupplied

text messages and determination of collateral issues involved in the Town's supplying of redacted records.

SIGNIFICANCE

O'Boyle affirms that in claims for disclosure of public records, judicial review is necessary prior to dismissal of such claims to determine which, if any, messages are subject to release while also preserving a public official's constitutional and statutory rights to privacy. It also affirms that a claim against a local government for failure to disclose public records is not rendered moot if the records are released during litigation while collateral issues remain unresolved.

RESEARCH REFERENCE

- 44 Fla. Jur. 2d *Records and Recording Acts* § 39 (Westlaw Edge through Mar. 2019).

Mary Grace Henley

Public Records & Meetings: Exemptions

*State Attorney's Office of the Seventeenth Judicial Circuit
v. Cable News Network, Inc.,
251 So. 3d 205 (Fla. 4th Dist. Ct. App. 2018)*

In Florida, public records that are otherwise exempt from disclosure under the Public Records Act may nonetheless be released if the court determines that there is good cause for disclosure, as evaluated on a case-by-case basis.

FACTS AND PROCEDURAL HISTORY

Following a school shooting at Marjory Stoneman Douglas High School (the School), the Broward County Sheriff's Office (BSO) executed a search warrant and seized the School Board's surveillance camera footage of the school. Soon after, various media outlets (the Media) petitioned for access to the camera footage pursuant to the Public Records Act, Chapter 119, Florida Statutes. The petition averred that there was an "extreme public interest" in the response of law enforcement officers during and immediately after the shooting that necessitated disclosure.

Addressing this petition, the State Attorney's Office argued that the footage is exempt from disclosure under the Public Records Act because it was part of "active criminal investigative information." The School Board also argued that the footage was exempt from disclosure as a "security plan." After the circuit judge issued the first order requiring the BSO to release the footage to the Media, the Media then filed a Motion for Further Relief and argued that the footage released was not entirely responsive and wanted "full disclosure" of the records. The School Board opposed releasing any additional footage because the Media had not stated any "good cause" for the additional footage that captured events after the law enforcement response.

During the hearings for the release of the additional footage, the Media specified that it was seeking footage that only depicted law enforcement personnel's response from certain buildings. The School Board opposed again and argued that releasing any additional footage would expose the vulnerabilities of the school's security system.

The court issued an order finding that the footage is public record and rejected the State Attorney's attempt to bar disclosure under the "active criminal investigative information" exemption. The court also found that good cause existed to permit disclosure and rejected the School Board's attempt to bar disclosure under the "security plan" exemption.

Both the State Attorney and the School Board timely appealed to the Fourth District. The School Board also motioned to certify a question relating to the level of evidence needed for a showing of the "good cause" exception to exemption as one of great public importance.

ANALYSIS

The Fourth District began its discussion by determining that the exemption for "criminal investigative information" did not apply because the footage was created before the criminal investigation began and was not compiled by a law enforcement agency. A public record is "compiled" within the meaning of the exemption when the custodial agency originally accumulates the materials. To this point, the court noted that a public record cannot transform into protected "active criminal investigative information" if it is transferred to a law enforcement agency. Thus, the exemption could not apply because the State Attorney's Office gathered the footage from the School Board as the original custodial agency before the criminal investigation began.

Next, the court assessed the School Board's assertion of the "security plan" exemption and found that the "good cause" exception to this exemption applied. Section 119.071(3)(a), Florida Statutes, exempts "audio and video presentations . . . relating directly to the physical security or firesafety of the facility" from public records disclosure. The court determined that the footage from the surveillance cameras did relate directly to the security system at the School, and would therefore be protected from disclosure to the public absent further analysis. However, under Section 119.071(3)(a)3, public information that is exempt from disclosure may be disclosed "upon a showing of good cause before a court of competent jurisdiction." In determining "good cause," the Fourth District concluded that "the legislature intended the courts to apply a common law approach to 'good cause,' . . . on a case-by-case basis, and courts arrive at a desirable equilibrium between the competing needs of disclosure

and secrecy of government records.” *Cable News Network*, 251 So. 3d at 214. Moreover, the policy of the Public Records Act strongly favors openness, so exemptions from disclosure are to be construed narrowly. Thus, because the need for the public to evaluate the footage showing the response of law enforcement personnel during and immediately after the active shooting outweighed the possible harms from releasing information relating to the security system, the court upheld the trial court’s order that the footage be released to the Media.

Judge Conner dissented in part, emphasizing the uncontested testimony at trial by two expert witnesses that detailed the risks to the security system of the School as well as to other school campuses in the district if the footage was released. To this point, Judge Conner agreed with the majority that the public has the right to evaluate the law enforcement response to an active shooter; however, he disagreed that the majority’s finding of “good cause” outweighed the risks posed to the security of the schools. Therefore, he concluded that the “security plan” exemption should have applied.

Lastly, the court denied the School Board’s motion for certification because the decision was not a legal issue of great importance. Pointing to the carefully tailored holding from the specific facts of the case, the court found that the holding did not create any further exceptions to the exemptions and pointed to the legislature’s intent in the creation of the “good cause” exception as used in the holding. Judge Conner dissented, writing that the legislature or the Florida Supreme Court needs to give further guidance for the balancing test of what constitutes a good faith exception when disclosure puts public safety at risk.

SIGNIFICANCE

Cable News Network demonstrates that although an entity can prevent disclosure of public records from an exemption to the Public Records Act, a court can balance the competing needs of disclosure against the public’s need for information and find that “good cause” applies as an exception to the exemptions under the Act. Additionally, courts determine “good cause” on a case-by-case basis and must use the specific facts of the case to determine if certain exemptions can be superseded by this exception.

RESEARCH REFERENCES

- 44 Fla. Jur. 2d *Records and Recording Acts* § 39 (Westlaw Edge through Mar. 2019).
- 44 Fla. Jur. 2d *Records and Recording Acts* § 72 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah

Public Records & Meetings: Public Records Act Exclusions***State v. Wooten,***

260 So. 3d 1060 (Fla. 4th Dist. Ct. App. 2018)

Search warrants are considered judicial records for which discovery is governed by the Florida Rules of Judicial Administration, rather than the Public Records Act. Furthermore, the Florida Rules of Criminal Procedure entitle the defendant in a criminal trial to discover search warrants, except in limited circumstances to protect a confidential source or a compelling governmental interest.

FACTS AND PROCEDURAL HISTORY

Respondent Dacoby Wooten was arrested for murder. The arrest came after police officers obtained search warrants to track his cell phone. The court that authorized the search warrants ordered them to be sealed, and the state subsequently failed to properly file the warrants and associated documents with the clerk of court.

When Wooten sought disclosure of the warrant documents for discovery, state attorneys filed the warrant documents with the court, but only offered to provide Wooten with redacted versions, arguing that the documents were exempt from public disclosure because they contained confidential “investigative techniques.” The Palm Beach Post newspaper intervened in the suit, and both it and Wooten moved to unseal the unredacted warrant documents. After reviewing the warrant documents in camera, the trial court found that the state’s reasons for restricting disclosure did not constitute a compelling government interest, and thus granted the motion to unseal and ordered that unredacted records be made publically available. The state petitioned to the Fourth District for certiorari review of the motion to unseal, and the trial court stayed public disclosure of the documents while review was pending.

ANALYSIS

The Fourth District determined that it lacked jurisdiction for certiorari review of the order to unseal. The court began by confirming that an invocation of certiorari jurisdiction requires a

showing that the lower court's order constituted a departure from the essential requirements of law and caused the state material harm that could not be adequately remedied on appeal.

The court then addressed several reasons why the lower court did not depart from the essential elements of law by ordering disclosure of the warrant documents. Firstly, the state had failed to preserve the issue for appeal by failing to specifically assert a "surveillance technique privilege" or any of the exemptions from public records disclosure outlined in Chapter 119, Florida Statutes. Even if the issue were preserved, trial courts have broad discretion to grant or limit criminal discovery, and because the trial court properly reviewed the documents in camera before ordering disclosure, its decision did not rise to the level of a reversible abuse of discretion.

Secondly, Florida Rule of Criminal Procedure 3.220 provides that the state must disclose to the defendant any documents relating to a search or seizure, except in certain cases where disclosure would put confidential sources at risk. Because no such sources were involved here, disclosure was thus mandatory in order to ensure due process and a fair trial.

Lastly, even if the state had asserted an exemption, the Public Records Act does not apply to pretrial discovery, nor does the judiciary recognize a procedural exemption for "surveillance techniques." Rule 2.420 of the Florida Rules of Judicial Administration governs public access to judicial branch records such as search warrants, and it does not recognize search warrants as confidential and exempt from disclosure. While Rule 2.420 does recognize a limited exemption for documents that the government has a "compelling governmental interest" in protecting, the state failed to provide any basis for why its interests would be harmed by disclosure of the warrant documents, since cell phone tracking is a widely known surveillance technique. Furthermore, Florida's public policy strongly favors openness and access to records from judicial proceedings. "Thus, rule 2.420 is a codification of the common law right of access to public records." *Wooten*, 260 So. 3d at 1071. Because the state failed to assert that the trial court abused its discretion by authorizing disclosure of the warrant records, the petition for certiorari review was denied.

Judge Conner dissented in part to contend that the Public Records Act did in fact apply to this case. Arguing that the

legislature intended for the courts to follow the same model of public records disclosure as the other branches of government, Judge Conner would have given the state more deference in its claim that the warrant documents contained surveillance techniques that were either exempt under Chapter 119 or confidential under Rule 2.420. However, Judge Conner would not have ruled differently since the state still failed to meet the burden of its certiorari petition or to preserve the issue for appeal.

SIGNIFICANCE

Wooten establishes that in criminal trials, discovery of search warrants by the defendant is mandatory under both Florida Rule of Criminal Procedure 3.220 and Florida Rule of Judicial Administration 2.420. Furthermore, search warrants are a form of judicial record that are not governed by the Chapter 119, Florida Statutes, except to the extent that Chapter 119 is expressly adopted by the judiciary.

RESEARCH REFERENCE

- 3 Fla. Jur. 2d *Appellate Review* § 465 (Westlaw Edge through Mar. 2019).

William S. Moreau

Public Records & Meetings: Sunshine Law

City of St. Petersburg v. Wright,
241 So. 3d 903 (Fla. 2d Dist. Ct. App. 2018)

Florida Sunshine Law requires that all official meetings of government boards or commissions be held in public. Official actions taken in violation of this requirement are void. Though public entities may hold nonpublic meetings with city attorneys, such exception applies only when the subject matter of the meetings is limited to discussion of settlement negotiations or litigation expenditures for pending litigation to which the entity is a party.

FACTS AND PROCEDURAL HISTORY

Reverend Bruce Wright (Plaintiff) filed suit against the City of St. Petersburg (the City), seeking declaratory and injunctive relief and alleging that the St. Petersburg city council violated the Sunshine Law by conducting a nonpublic “shade” meeting purportedly to discuss a pending lawsuit involving a city trespass ordinance. Plaintiff alleged that both the meeting itself and an amendment to the trespass ordinance conceived at that meeting violated Section 286.011, Florida Statutes, and were therefore unlawful. On Plaintiff’s motion for summary judgment, the circuit court held that the City’s shade meeting did not violate the law, but the City did violate statutory notice requirements by voting on a section of the trespass ordinance immediately afterward. Both parties cross-appealed to the Second District.

ANALYSIS

The court began by confirming that the purpose of the Sunshine Law is to protect the public’s ability to both hear and be heard during every step of the legislative process. As noted by the court, Section 286.011, Florida Statutes, mandates that all official meetings of state agencies must be open to the public, and no official acts are binding unless made at such a meeting. The Sunshine Law functions “to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” *Wright*, 241 So. 3d at 905 (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)). The Florida Supreme Court has also observed that the legislature’s

intent with the Sunshine Law was to cover any meetings where foreseeable action would be taken by a governing body. The Sunshine Law does allow a limited exception for private meetings between public entities and city attorneys to discuss pending litigation, but only if settlement negotiations or strategy sessions regarding litigation expenditures are the only subjects of the private meetings. Analyzing the private meeting transcripts, the court found that the purpose of the meeting was primarily to propose and draft amendments to the trespass ordinance in order to moot the pending litigation; the participants did not limit their discussion to settlement or litigation expenditures; and action was taken to amend the ordinance immediately after the meeting. Thus, because the private meeting was used to “crystallize a secret decision to a point just short of ceremonial acceptance,” the City violated Section 286.011(1), and the trespass ordinance devised at the meeting was invalid. *Id.* at 907. Plaintiff was therefore entitled to summary judgment.

SIGNIFICANCE

Wright confirms that Florida Sunshine law exempts private meetings between government entities and city attorneys from the typical requirement that official meetings be held in public, but this exception applies only to meetings limited to discussions involving the settlement or litigation expenditures of presently pending litigation.

RESEARCH REFERENCES

- 12A Fla. Jur. 2d *Counties, Etc.* § 185 (Westlaw Edge through Mar. 2019).
- 2 Fla. Jur. 2d *Administrative Law* § 62 (Westlaw Edge through Mar. 2019).

Sandrine Guez

TORT LIABILITY & GOVERNMENTAL IMMUNITY

Tort Liability & Governmental Immunity: Claims Against Government Entities

Chakra 5, Inc. v. City of Miami Beach,
254 So. 3d 1056 (Fla. 3d Dist. Ct. App. 2018)

In Florida tort claims, the affirmative defense of statute of limitations may be raised in a motion to dismiss. But for dismissal to be proper, the defendant must allege sufficient facts to conclusively establish that the plaintiff's claim is barred as a matter of law, as well as conclusively negate any ability of the plaintiff to prove otherwise. Tort claims otherwise time-barred by a statute of limitations may nonetheless survive a motion to dismiss if they are continuing torts stemming from repeated tortious acts, as opposed to lasting effects of a completed tortious act. Corporate entities administratively dissolved by the Secretary of State are barred by state statute from bringing lawsuits, but this procedural defect may be cured by reinstatement. Additionally, analysis of substantive due process violations is generally only appropriate for violations of federally protected rights, not state law, and for injuries stemming from legislative functions that affect the general population, as opposed to executive functions applying the law to a specific circumstance.

FACTS AND PROCEDURAL HISTORY

Appellants, Chakra 5, Inc. and 1501 Ocean Drive, LLC, were organized to purchase and run an entertainment club in Miami Beach, Florida (the City). Appellants alleged that the City's code enforcement department had discriminatorily applied existing regulations to Appellants' club over the course of several years in an attempt to shut their business down and extort money. Appellants further claimed that the City's actions resulted in financial losses that forced Appellants to default on their loans and give up the club in 2010. Subsequently, Chakra 5 and 1501 Ocean Drive were administratively dissolved by the Florida Secretary of State, and then later reinstated.

Appellants' initial action, filed May 20, 2013 against the City and seven City employees, was amended in 2015 to assert two counts of substantive and procedural due process deprivation under 28 U.S.C. § 1983. In response, the City filed a motion to dismiss arguing that Appellants had failed to state a claim, could not proceed with their claims because they had been administratively dissolved, and were barred by statute of limitations from recovering for injuries occurring before May 20, 2009. The trial court granted the motion to dismiss with prejudice, and Appellants subsequently appealed to the Third District.

ANALYSIS

The court began its analysis by addressing whether the administrative dissolution of Chakra 5 and 1501 warranted dismissal of Appellants' complaint. While the trial court did not address the dissolution in its order to dismiss, the City argued that the trial court's decision should be affirmed as "right for the wrong reasons" under the "tipsy coachman doctrine" because dissolved entities may not bring a lawsuit under Florida law. However, analyzing prior Third District precedent interpreting Sections 607.1420 and 607.1421, Florida Statutes, the court determined that sanctions such as the inability to bring a lawsuit are intended to benefit the State, not a third-party (i.e. the City), and should not be applied to allow defendants to take advantage of a plaintiff's default and escape liability. Therefore, dissolution only prevents a plaintiff from bringing an action until reinstatement. Accordingly, because Appellants provided the court with certificates from the Florida Secretary of State showing that both companies had since been reinstated, the court held that dismissal based on the companies' prior dissolution would be improper on appeal. Application of the "tipsy coachman" doctrine was improper in light of the trial court's failure to grant Appellants an opportunity to correct the dissolution of entities.

Next, the court held that the trial court's dismissal of Appellants' § 1983 claims based on the four-year statute of limitations was proper as to injuries occurring prior to May 20, 2009, but improper as to injuries alleged to have occurred after May 20, 2009 or for which a date was not specified. The court reviewed U.S. Supreme Court precedent to conclude that a cause of action under § 1983 accrues when the plaintiff knew or should

have known (1) that they have suffered the injury that formed the basis of their complaint and (2) the identity of the party causing that injury. It then held that dismissal of Appellants' claims was proper in those instances in which the facts within the complaint conclusively established that those claims were barred by the statute of limitations. While Appellants argued that the continuing tort doctrine applied to render these claims timely, the court also rejected this argument by holding that the doctrine applies only to continual tortious acts, rather than continual harmful effects from completed acts, and "[t]he fact that multiple discrete acts occurred over a period of time does not convert those acts into a continuing tort under Florida law. Instead, successive causes of action accrued from each alleged violation of Appellants' due process rights." *Chakra 5*, 254 So. 3d at 1065.

Furthermore, the court held that Appellants failed to state a claim for violation of substantive due process. "A plaintiff asserts a claim under § 1983 against a municipality by alleging (1) a deprivation of a constitutional right; (2) the municipality had a policy that amounts to 'deliberate indifference' to that right; and (3) the policy caused the constitutional violation." *Id.* at 1065–66. The court looked to binding federal cases and found that Appellants' claims that they were precluded from pursuing their occupation of choice did not implicate an unenumerated, federally protected due process right because substantive due process rights are created only by the Constitution. The injuries alleged here stemmed from the enforcement of state laws, and to the extent that one's right to hold private employment implicates a protected liberty or property interest under the Fifth Amendment, Appellants were nonetheless not prohibited from operating their business at a different location. Furthermore, the court noted a distinction between due process deprivations caused by "legislative" or "executive" acts, observing that substantive due process analysis is generally inappropriate for executive acts based on enforcement of existing law. Because Appellants' claims implicated the abuse of state laws by executive officials, the court concluded that Appellants' substantive due process claims were properly barred.

Finally, the court briefly addressed the claims for violation of procedural due process from injuries within the limitations period, deciding that the trial court erred in dismissing said claims because too many inferences had to be drawn to conclude

that there was a failure to state a claim for the purpose of a motion to dismiss. As a result, the case was reversed in part and remanded to the trial court with respect to the claims for violation of procedural due process that were not time-barred, and it was affirmed in part for all other claims.

Judge Scales concurred without an opinion, and Judge Emas concurred in part with respect to the court's decision to affirm the dismissal of the substantive due process claims and reversal of the dismissal of procedural due process claims. However, Judge Emas dissented from the majority's conclusion that the injuries occurring before May 20, 2009 were time-barred, contending that the continuing tort doctrine should have applied because the complaint alleged an ongoing and pervasive pattern of conduct sufficient to overcome the statute of limitations.

SIGNIFICANCE

Chakra 5 establishes that a dismissal of tort claims on the basis of statute of limitations is improper when the defendant has not asserted facts conclusively establishing the plaintiff's claims were time-barred. However, injuries stemming from multiple tortious acts over a period of time may not be subject to a statute of limitations under the continuing tort doctrine. Additionally, *Chakra 5* confirms that Florida law allows corporate entities to be administratively dissolved as a sanction, but that dissolution is intended to benefit the state rather than third parties and therefore only bars an entity from bringing a lawsuit until reinstated. Lastly, in 28 U.S.C. § 1983 claims, substantive due process analysis is disfavored with respect to injuries stemming from state law rather than federal law, or from executive functions as opposed to legislative ones.

RESEARCH REFERENCE

- 35 Fla. Jur. 2d *Limitations and Laches* § 67 (Westlaw Edge through Mar. 2019).

Alyssa Castelli

Tort Liability & Governmental Immunity: Duty of Care

City of Dunedin v. Pirate's Treasure, Inc.,
255 So. 3d 902 (Fla. 2d Dist. Ct. App. 2018)

In Florida, government agencies have no common law or statutory duty of care to provide individual members of the public with accurate information. This duty of care consideration is a threshold matter in tort litigation distinct from determinations of sovereign immunity.

FACTS AND PROCEDURAL HISTORY

In order to renovate its commercial property, Pirate's Treasure, Inc. arranged a meeting with Matthew Campbell and other employees of the City of Dunedin (the City) to confirm that the renovation plans would comply with the city code. At this meeting, Campbell and other employees alerted Pirate's Treasure to procedures set forth in the City's development code, and further indicated that the City's final approval of the project was never in question. Relying on representations made at this meeting, Pirate's Treasure submitted its final site plans in 2007, and the City approved the plans in August 2009. The City, however, later objected to aspects of the plans and ultimately terminated the site plan approval, instead requiring Pirate's Treasure to submit a new proposal that complied with the revised development code that took effect in December 2010.

In response, Pirate's Treasure sued the City in September 2011. In 2016, Pirate's Treasure amended the complaint to include claims for fraud and negligent misrepresentation against both the City and Campbell. The City moved to dismiss due to sovereign immunity. The trial court dismissed the fraud claim with prejudice but denied the motion to dismiss the negligence claim. The City appealed the denial of its motion to the Second District.

ANALYSIS

The Second District began by clarifying that determinations of municipal tort liability are preliminary to determinations of sovereign immunity. Negligence claims require that a plaintiff first demonstrate the defendant has a duty to care for the

plaintiff; if there is no duty of care, the government need not invoke sovereign immunity because there is no tort liability from which to seek protection. Sovereign immunity does not render an act non-tortious. Instead, the sovereign is immune to suit because it has not consented to be sued for that type of action. Therefore, before the court needed to consider whether sovereign immunity could apply, *Pirate's Treasure* first had to establish the City owed them a duty to furnish accurate information about whether their plan complied with the city's development code.

"[F]or there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct." *Pirate's Treasure*, 255 So. 3d at 905 (quoting *Hillsborough County v. Morris*, 730 So. 2d 367, 368 (Fla. 2d Dist. Ct. App. 1999)). The court found no statutes that would impose a duty for the City to furnish accurate information regarding its city code and noted *Pirate's Treasure* provided none for the court to consider. Thus, there was no statutory duty. Turning to common law duty, the Second District determined Florida courts have consistently eschewed requiring government entities to maintain and provide accurate information in public records. Furthermore, the court noted "[t]he disinclination of Florida courts to attach liability to sovereign entities has even been extended to instances involving the active dissemination of inaccurate information." *Pirate's Treasure*, 255 So. 3d at 905. Therefore, the City owed no duty to *Pirate's Treasure* to provide accurate information about whether the site plan complied with the City's development code.

Having found that, as a threshold consideration, no duty of care exists, the court declined to consider the sovereign immunity claim. Since no liability existed, the Second District reversed the trial court's denial of the City's motion to dismiss the negligent misrepresentation claim.

SIGNIFICANCE

Pirate's Treasure confirms that courts need not consider the applicability of sovereign immunity if no tortious act is identified in the first place. *Pirate's Treasure* also explains that government entities do not have a statutory or common law duty to provide accurate information to the public regarding their laws and codes.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 2 (Westlaw Edge through Mar. 2019).

Joshua Schow

Tort Liability & Governmental Immunity: Sovereign Immunity

Bean v. University of Miami,
252 So. 3d 810 (Fla. 3d Dist. Ct. App. 2018)

The Florida Legislature properly has the power to enact Sections 768.28(9) and 768.28(10)(f), Florida Statutes, in order to expand sovereign immunity to preclude medical-negligence actions against the agents of a teaching hospital providing patient services through an affiliation agreement with a nonprofit independent university. Additionally, Sections 768.28(9) and 768.28(10)(f) do not violate the Florida Constitution's: (1) equal protection and due process clauses; (2) provision on open courts; (3) provision on the right to trial by jury; or (4) provision generally banning direct or indirect obligation by the public body to pay a debt of a third party.

FACTS AND PROCEDURAL HISTORY

In 2011, the Florida Legislature amended Section 768.28(9)(b) and 768.28(10)(f), Florida Statutes, to extend sovereign immunity from medical-negligence tort claims to nonprofit independent universities that own or operate medical schools or provide patient services under contract with a teaching hospital. Subsequently, University of Miami's Leonard M. Miller School of Medicine (the University) signed a contract with the Miami-Dade County Public Health Trust (Trust) that met all conditions necessary to comply with Section 768.28 and to dismiss medical-negligence actions brought by plaintiffs injured by University doctors through the Trust.

Two plaintiffs injured by medical procedures subsequently brought medical-negligence actions against the University, which responded to both cases by asserting the affirmative defense of sovereign immunity under Sections 768.28(9)(a) and 10(f). The plaintiffs then contended that Sections 768.28(9) and 10(f) violated the Florida Constitution by granting sovereign immunity to private enterprises, depriving plaintiffs of their equal protection and due process rights, using the state's taxing power for the aid of private corporations, and by being impermissible special laws. The trial court ruled against plaintiffs in both cases, granting the University's motion to dismiss in one and granting

summary judgment for the University in the other. Both plaintiffs appealed, and their cases were consolidated on appeal.

ANALYSIS

The Third District began by affirming that the state legislature had authority to pass statutes extending sovereign immunity to non-state actors. While Article X, Section 13 of the Florida Constitution limits the authority of the legislature to provide for the liability of state actors, Florida's state and federal courts have repeatedly found that immunity per Section 768.28 may be extended to private companies or employees when they are operating under state control. "To determine the degree of control, [courts] look to the contract between the private company and the state agency, and any statutes or regulations that govern the relationship between the two." *Bean*, 252 So. 3d at 816. In this case, the contract between the University and the Trust specifically stated that University employees were considered to be agents of the Trust and operated under the Trust's direction. The agreement also gave the Trust broad, exclusive control and responsibility over management and operational decisions, including appointments, funding, setting and enforcing internal policies, and individualized authority over all care and treatment decisions for all patients. Therefore, because the contract expressly created an agency relationship over the University, the application of Sections 768.28(9)(b) and 768.28(10)(f) to the University did not violate the Florida Constitution.

The court then rejected plaintiffs' arguments that Sections 768.28(9) and 10(f) violated rights provided for in Article I of the Florida Constitution. The court deferred to Florida Supreme Court precedent rejecting due process and equal protection challenges to Section 768.28 immunity, holding that the statute represented a "permissible legislative objective" with a "rational relationship between the statutory classifications of tort victims and the object of the legislation." *Id.* at 820–21 (quoting *Cauley v. City of Jacksonville*, 403 So. 2d 379, 387 (Fla. 1981)). Thus, the statute did not violate Article I, Sections 2 or 9. Similarly, the court also found that the statute did not violate Article I, Sections 21 and 22 (concerning the right to open courts and a trial by jury), since other cases that examined the constitutionality of the statute found that it did not limit causes of action or access to the courts.

Finally, the court addressed the plaintiffs' claim that sections 768.28(9) and 10(f) violated Article VII, Section 10 of the Florida Constitution, which prohibits the lending or use of the state's taxing power or credit to aid private third parties. The court held that Sections 767.28(9) and 10(f) did not implicate the state's taxing powers because, in order to qualify as an agent of a public hospital under the statute, the university must indemnify that hospital in their contract, relieving it of any liability incurred and thus ensuring the state's purse is not on the line. Because the University had such indemnification in its contract with the Trust, the statutes did not violate Article VII, Section 10 either.

Accordingly, the court affirmed both the summary judgment for the University and doctor against one plaintiff and the judgment for the University and another doctor against the other plaintiff.

SIGNIFICANCE

Bean establishes that Sections 768.28(9) and 10(f), Florida Statutes, are constitutional and do not conflict with provisions in the Florida Constitution concerning the application of sovereign immunity to non-state actors; due process; equal protection; the right to a jury trial; the right to access the courts; or the Florida Legislature's inability to use its taxing power to aid private corporations.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 20 (WestlawEdge through Mar. 2019).

Alyssa Castelli

Tort Liability & Governmental Immunity: Sovereign Immunity

Florida Fish and Wildlife Conservation Commission v. Daws,

256 So. 3d 907 (Fla. 1st Dist. Ct. App. 2018)

In Florida, the state is not protected from tort actions by the doctrine of sovereign immunity if the plaintiff asserts a legally sufficient claim based on a constitutional violation, or if the state owed the plaintiff a duty of care with respect to a non-discretionary governmental act. Additionally, the separation of powers doctrine prevents the judicial branch from directing discretionary functions of an agency through an injunction.

FACTS AND PROCEDURAL HISTORY

In 2016, homeowners who lived within public lands (Appellees) filed suit against the Florida Fish and Wildlife Conservation Commission (FWC), claiming that the FWC's issuance of hunting licenses and permits allowed hunters and their dogs to trespass onto Appellees' private property. Appellees argued that the trespasses deprived them of their right to exclude people from their private property, constituting both inverse condemnation and a nuisance. Additionally, Appellees sought an injunction requiring the FWC to abate the nuisance of the trespass. The FWC moved for summary judgment, contending that Appellees failed to plead the required elements of a constitutional takings claim, and that the nuisance claim was barred by sovereign immunity and the separation of powers doctrine. The trial court denied summary judgment as a matter of law, but granted the injunction, reasoning that ordering the FWC to abate the trespasses would not interfere with its discretion to issue hunting licenses or redraw hunting areas. FWC appealed to the First District, challenging the denial of summary judgment and the order granting the temporary injunction. After an initial ruling, the case was decided on rehearing.

ANALYSIS

The First District began by addressing the issue of whether sovereign immunity barred the Appellees' takings and nuisance claims. In Florida, sovereign immunity is a rule, not an exception;

it always applies unless the plaintiff's claim is based on a violation of the state or federal constitutions or the state has waived its immunity. Additionally, while Florida law explicitly waives the state's immunity from damages for tort liability, "this statutory waiver is strictly limited to circumstances where the State owes the plaintiff an underlying common law or statutory duty of care and where the challenged actions are not discretionary and inherent in the act of governing." *Daws*, 256 So. 3d at 912 (emphasis omitted). Thus, to determine whether sovereign immunity applied to the FWC, the court had to review the merits of Appellees' takings and nuisance claims.

A legally sufficient claim for takings requires the plaintiff to show that the state either: (1) required landowners to submit to a permanent physical occupation of their land, or (2) enacted a regulation or imposed a condition that deprived the landowners of all economically beneficial use of their land. Since no permanent occupation occurred here, the intrusions onto Appellees' property did not deprive them of all economic benefit from their property—and Appellees were free to pursue criminal or civil remedies against the trespassers. The court found that the constitutional takings claim was not legally sufficient to defeat the FWC's immunity.

Turning to the nuisance claim, the court had to determine whether the FWC owed Appellees an underlying common law or statutory duty of care with respect to its hunting authorizations, and whether those actions were discretionary, to determine whether the exception to the general waiver of sovereign immunity applied. The court determined that the FWC did not owe Appellees any duty to stop third parties from trespassing on their property, since the FWC rules require it to authorize permits and licenses for hunting on public land, and in any case, hunters trespassing on Appellees' land were doing so in violation of their hunting permits. Further, there is no common law duty to prevent the misconduct of third parties. Even if a duty of care was owed, the FWC's core function of determining where, when, and what types of hunting is permitted on public land is an exercise of its constitutionally granted legislative power, and thus constitutes discretionary acts, invoking the doctrine of sovereign immunity and barring Appellees' nuisance claims.

Lastly, the First District considered whether the injunction ordering the FWC to abate the nuisance was overly broad or

violated the separation of powers. The Florida Constitution requires a strict separation of powers between the branches of government, and the judiciary violates this separation if it interferes with discretionary acts of an administrative agency by directing the agency to perform its duties in a particular manner. Since the injunction's directive to "abate the nuisance" reflected an intent to preclude the FWC from issuing hunting permits at its own discretion, the court that found the injunction violated the separation of powers. The court also found the injunction to be overly broad, as it left FWC in doubt as to what it was permitted to do, and the FWC also could not possibly comply with the injunction, since it would require FWC to control the actions of unlicensed hunters.

Thus, the First District reversed and remanded the trial court's denial of summary judgment and dissolved the injunction.

Judge Lewis wrote a dissenting opinion focusing primarily on how the merits of the Appellees' claims should have been legally sufficient to defeat the FWC's sovereign immunity. Emphasizing the extent to which trespassing hunters and dogs had disrupted Appellees' land, and how the FWC had the capacity to prevent these trespasses, Judge Lewis argued that questions of the legal sufficiency of the takings claims, the FWC's duty to Appellees, and the discretionary nature of their permit issuances should have been allowed to go before a jury. Judge Lewis also argued that the injunction was not unconstitutionally overbroad, since it gave the FWC a clear directive to abate the nuisances and afforded flexibility in how this directive was to be accomplished. Judge Lewis would thus have affirmed the trial court's ruling.

SIGNIFICANCE

Daws demonstrates the limits of a state agency's sovereign immunity with respect to both common-law tort claims and those based on constitutional violations. It also highlights the extent to which the doctrine of separation of powers protects the discretionary governmental acts of a state agency from being controlled by an injunction.

RESEARCH REFERENCES

- 28 Fla. Jur. 2d *Government Tort Liability* § 6 (Westlaw Edge through Mar. 2019).

- 21 Fla. Jur. 2d *Eminent Domain* § 53 (Westlaw Edge through Mar. 2019).

Sandrine Guez

Tort Liability & Governmental Immunity: Sovereign Immunity

Sanchez v. Miami-Dade County,
245 So. 3d 933 (Fla. 3d Dist. Ct. App. 2018)

In Florida, a government's discretionary decision on how to allocate limited law enforcement personnel is a strategic planning decision that is not subject to civil liability and is protected under sovereign immunity.

FACTS AND PROCEDURAL HISTORY

After purchasing a Miami-Dade County Park Foundation membership, Eli Salgado rented a shelter at the Miami-Dade County's Benito Juarez Park (the Park) for an event. Miami-Dade County (the County) does not provide security for private parties and events because of the high demand for police services throughout the County's public recreational facilities. Salgado received a copy of the Park's rules and regulations, which state that the renter is responsible for providing off-duty police officers and any necessary permits if expecting a certain number of guests, and the County would not be responsible for the renter's failure to meet these obligations. The rules and regulations were also posted at the Park. Salgado acquired a teenage volunteer and a part-time Park Service Aide as private security for the event. Park Service Aides are only responsible for park maintenance, are not trained in crime prevention or authorized to "police" the parks, and do not provide security.

While attending Salgado's party, Christopher Sanchez and another attendee, Noel Pozos, were shot. In separate lawsuits, Sanchez and Pozos both sued the County for negligent failure to allocate off-duty police officers to the event as security. The County moved for summary judgment on sovereign immunity grounds in both cases. The trial court in Sanchez's case granted the County's motion, whereas the *Pozos* court denied the motion. Pozos' appeal was subsequently dismissed, though the *Pozos* court did not determine as a matter of law that the County was not entitled to sovereign immunity. Sanchez appealed to the Third District, arguing that his claim should not have been barred by sovereign immunity.

ANALYSIS

The Third District began by addressing the test for determining when a governmental entity is entitled to sovereign immunity. To this point, the court explained that the Florida Constitution's separation of powers doctrine renders discretionary governmental policy-making or planning decisions immune from tort liability, whereas operational decisions that actually implement policy or planning generally do not enjoy sovereign immunity. Because nearly every governmental decision involves some use of discretion, "it is the governmental quasi-legislative discretion exercised at the policy-making or planning level which is protected from tort liability." *Sanchez*, 245 So. 3d at 936 (citing *Wallace v. Ed Dean*, 3 So. 3d 1035, 1053 (Fla. 2009)).

The court determined that the County's decisions in allocating its police officers were quasi-legislative discretionary policy or planning decisions. Because the County has only a limited amount of police officers, it must make decisions regarding "the manner in which compliance and enforcement of the law and the protection of the public would be effectuated." *Id.* at 938. In using this discretion, the County created a policy to notify individuals of their obligations and responsibilities when renting a shelter at the Park through the rules and regulations they received.

In dismissing Sanchez's negligent security claim, the Third District sought to clarify the distinction between its ruling and the *Pozos* court's, confirming that the strategic decisions made by the government in its allocation of law enforcement personnel cannot be undermined by the court through traditional tort liability. Because questions of sovereign immunity are conceptually distinct from issues of tort liability, the court had no need to evaluate the potential existence of a duty of care after determining sovereign immunity. Therefore, the court affirmed the trial court in its finding that the County must be shielded from liability to protect its policy and planning decisions.

Dissenting, Judge Salter pointed to the County's functions and activities with the Park and argued that these were "operational functions" that would not enjoy sovereign immunity. Salter also argued that the County had a common law duty to operate the parks and recreational facilities safely, and questions of material fact existed as to whether such duty was met. Thus, Judge Salter contended that foreseeability of a danger in the

Park was a genuine issue of material fact that warranted reversal.

SIGNIFICANCE

Sanchez reaffirms that the discretionary planning decisions of a governmental agency are protected under sovereign immunity. A government's decisions on where to allocate its police resources are discretionary decisions that cannot be subject to civil liability, as tort liability cannot attach to the policy-making, planning, and judgment calls by the government.

RESEARCH REFERENCES

- 28 Fla. Jur. 2d *Government Tort Liability* § 1 (Westlaw Edge through Mar. 2019).
- 28 Fla. Jur. 2d *Government Tort Liability* § 15 (Westlaw Edge through Mar. 2019).

Evan P. Dahdah