FLORIDA MUNICIPAL ATTORNEYS ASSOCIATION

FLORIDA MUNICIPAL LAW REPORTER

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Editor's Note: The following case law summaries were reported for the period of January 1, 2011, through March 31, 2011.

Section 1. Recent Decisions of the Florida Supreme Court

None Reported.

Section 2. Recent Decisions of the Florida District Courts of Appeal

Elections – Resign to Run – Trial court erred in finding that by qualifying as a candidate to run for mayor, defendant automatically resigned his position as a captain in city's police department – Under 1999 amendment to statute, swearing of the Oath of Candidate does not act as a resignation by operation of law.

In July 2007, Marion S. Lewis, a captain in the Tampa Police Department, qualified to run for the position of mayor of Tampa. While conducting his campaign for mayor, Lewis failed to resign from his position with the Tampa Police Department, claiming that his resignation was not required by Section 99.012(5), Florida Statutes. The City of Tampa disagreed with Lewis's premise and, in response to his refusal to resign his position with the police department, filed a complaint seeking a declaratory judgment that would determine if: (1) the statute did apply to Lewis and (2) by his filing his Oath of Candidate form, he had by operation of law submitted his resignation from the police department. In his answer, Lewis denied the law required him to resign his current position and, if he lost the election, he would return to his position with the police department. Both parties filed motions for summary judgment with the trial court. The court denied the city's motion but granted Lewis's. The City of Tampa appealed the final summary judgment and the 2nd DCA reversed, finding that Section 99.012, Florida Statutes, did in fact require Lewis to resign his position in order to run for mayor. On remand, the trial court entered partial summary judgment in favor of the city, stating Lewis was required to resign. However, subsequent to that judgment, Lewis was granted an amended answer and counterpetition that alleged improper discharge of employment. The trial court then entered final summary judgment in the city's favor, citing *Baker v. Alderman,* 766 F.Supp. 1112 (M.D. Fla. 1991), which stated that "through section 99.012(7), F.S., each candidate for nomination or election of elected office shall take and subscribe an oath or affirmation in writing that he has resigned from any office from which he is required to resign pursuant to Section 99.012, Florida Statutes. Hence, when Plaintiff signed the Oath of Candidate, he made a sworn affirmation of resignation." Subsequent to the decision in *Baker,* the Florida Legislature amended Section 99.012 in 1999 by adding subsection (6), which reads, "the name of any person who does not comply with this section may be removed from every ballot on which it appears when ordered by a circuit court upon the petition of an elector or the Department of State." This amendment indicates that the Legislature intended to remove the candidate's name from the ballot, rather than automatically dismiss him or her from employment. Upon return to the circuit court, the court found that the 1999 amendment nullified the *Baker* decision's conclusion that the swearing of the Oath of Candidate acts as a resignation by "operation of law." The appellate court concluded the trial court erred in entering the final judgment which determined that Lewis automatically resigned from his employment by filing his Oath of Candidate form. The court reversed the final judgment and remanded the case with instructions that the trial court enter a final judgment on the city's complaint consistent with its opinion and consider the remaining allegations of Lewis's counterpetition. *Marion S. Lewis v. City of Tampa,* 17 Fla. L. Weekly Supp. 268a. (Fla. 2d DCA January 14, 2011).

Municipal Corporations – Code Enforcement Liens – City ordinance granting its code enforcement liens superiority over a prior recorded mortgage conflicts with Section 695.11, Florida Statutes, and ordinance must yield to statute – Trial court properly entered summary judgment finding that prior recorded mortgage had priority over code enforcement liens.

In 1997, the City of Palm Bay enacted Ordinance 97-07, which created its Code Enforcement Board. Generally, Chapter 162, Florida Statutes, governs the procedures and

remedies dealing with local code enforcement; however, Palm Bay altered its ordinance to fit its individual needs. Among the changes, Palm Bay provided that any liens created by its Code Enforcement Board and "recorded in the public record shall remain liens coequal with the liens of all state, county, and district and municipal taxes, superior in dignity to all other liens, titles and claims until paid, and may be foreclosed pursuant to the procedure set forth in Florida Statutes, Chapter 173." In 2007, Wells Fargo bank filed an action to foreclose its mortgage, recorded in 2004, on residential property located in Palm Bay. The city was named a defendant in the foreclosure suit due to two code enforcement liens it recorded subsequent to the mortgage. In its answer, Palm Bay claimed its code enforcement liens had priority pursuant to Ordinance 97-07. At the hearing for Wells Fargo's motion for summary judgment, the trial court reasoned the Legislature intended that code enforcement liens do not have priority over mortgages and, thus, the common-law principle of first in time, first in right, applied. Palm Bay argued that the home rule powers granted to it by Section VIII, Article 2(b) of the Florida Constitution grant them the authority to enact 97-07, and thus grant its code enforcement liens superpriority. The court relied on *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008) to enforce the preemption authority of state law. The *Phantom* decision states that although a municipality has broad home rule powers, those ordinances may not conflict with state statutes. Florida statutes provide any instrument that must be recorded is deemed recorded once given an official register number, and that recorded instruments with a lower official number will have priority over one with a higher number. Therefore, the court found the ordinance enacted by Palm Bay, which granted its code enforcement lien superpriority, was in violation of a state statute and, therefore, was invalid. The final decision of the appellate court was to uphold the trial court's order granting summary judgment in favor of Wells Fargo. *City of Palm Bay v. Wells Fargo Bank*, 36 Fla. L. Weekly D161 (January 21, 2011).

Limitation of Actions – Contracts – Where city and plaintiff entered into contract that gave city water rights in connection with a lake on property owned by a plaintiff, with city agreeing to ongoing obligations including continuing maintenance and repairs to an existing dam and spillway, city's ongoing nonperformance of its obligation to maintain and repair dam and spillway constituted a continuing breach while contract remained in effect – Trial court properly rejected city's statute of limitations defense, which was based on city's assertion that five-year limitation period commenced on date city made its decision to cease maintaining and repairing the dam and spillway.

The City of Quincy appeals an order from the trial court that awarded damages to Miles K. Womack, upon the city's breach of contract. The City of Quincy contends that the appellee's lawsuit was not filed within the limitations period allowed under Section 95.11(2)(b), Florida Statutes. The city calculated the time from its initial breach of a continuing obligation under the contract. The City of Quincy entered into a contract with Womack, which gave the city water rights in connection with a lake on property owned by Womack. The city agreed to perform obligations, such as continuing maintenance and repairs to an existing dam and spillway. A short time after entering into the contract, the city made the decision that it would not need the water rights moving forward, and it ceased making repairs and maintenance on the spillway and dam. The city made this decision in February 2003 but did not alert Womack until May 2008, after Womack contacted the city to complain about a lack of maintenance on the spillway. Womack filed his lawsuit after realizing the city would no longer conduct maintenance and repairs on both the spillway and the dam after significant rain had caused structural damage in 2008. The city asserted its statute of limitations defense, stating the five-year limitation found in Section 95.11(2)(b), Florida Statutes, applied. The trial court rejected the city's assertion. The appellate court found the city ignored its continuing obligations to Womack, and its ongoing nonperformance constituted a continuing breach while the contract remained in effect. The appellate court agreed with the trial court in that Womack's claim was valid against the breach of the city. *City of Quincy v. Miles K. Womack*, 36 Fla. L. Weekly D470 (March 2, 2011).

Municipal Corporations – Code Enforcement – Circuit court departed from essential requirements of law in permitting the discovery depositions of members of city Tree Commission in de novo proceeding before special magistrate regarding violations of tree protection provisions in code of ordinances – Court improperly determined that tree commissioners became fact witnesses subject to discovery depositions as result of site visits.

The City of Key West's Tree Commission appealed a trial court ruling, claiming the court departed from the essential requirements of law when it permitted the respondents to take the discovery depositions of three members of the Tree Commission in a matter pending before the special magistrate. Pursuant to city ordinances, on February 19, 2008, the urban forestry manager for the City of Key West issued a Notice of Administrative Hearing before the Tree Commission to the respondent, Radim Havlicek. The notice alleged that several trees on Havlicek's property fell under the protected tree list and were in violation of city ordinance. Several months later, an administrative hearing was held. Havlicek appeared, represented by counsel. The Tree Commission found 35 irreparable violations of the tree protection ordinance by Havlicek. Because he refused to enter into a compliance settlement agreement, the case was forwarded to a special

master with a recommendation that Havlicek be fined one-half the maximum for each individual violation. In December 2008, Havlicek issued three subpoenas duces tecum for the depositions of three members of the Tree Commission. Shortly thereafter, the Tree Commission filed a Motion for Protective Order, which was granted by the special master. Then, Havlicek filed a petition for Writ of Certiorari in the Appellate Division of the Circuit Court in and for Monroe County. Oral arguments followed, and the court granted the petition. The Tree Commission then filed a petition for Writ of Certiorari in the 3rd DCA, which was granted and in effect quashed the writ filed in the circuit court for Monroe County. After an order remanding the case for entry of written order by the magistrate, the special magistrate found the proceeding would be a de novo hearing. Therefore, any and all portions of the Tree Commission's hearing on the matter and any claim of error before the commission would be moot and immaterial. After an unsuccessful review by the special magistrate, Havlicek again filed a Petition for Writ of Certiorari in the Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County. That court granted Havlicek's petition and allowed the discovery depositions of the three members of the Tree Commission. The City of Key West is claiming that the trial court departed from the essential requirements of law when it determined that the subject tree commissioners became fact witnesses subject to discovery depositions as a result of site visits. The appellate court in its decision relied on Section 286.0115(1)(c)(3), Florida Statutes, which provides the authority for local officials to conduct site visits and, as was made clear during oral arguments in this case, that the commissioners were not witnesses in the pending matter before the special magistrate. The court reviewed the order of the special magistrate, depending particularly on his finding that any hearing held before him would be de novo in nature. In particular, "this court will not consider any part of the record pertaining to the Tree Commission's hearing on this matter, and any claim of error before the Tree Commission is moot and immaterial." The special magistrate, in his ruling, stated "it would be the responsibility of the appellate court to determine if the charged violation of the Code was committed and if either of the two respondents committed the alleged violations." Due to the ruling of the special magistrate, the appellate court found that the trial court departed from the essential requirements of the law when it ordered that Havlicek may take the discovery depositions of the three members of the Tree Commission and ruled in favor of the City of Key West. *City of Key West, Tree Commission v. Radim Havlicek,* 36 Fla. L. Weekly D544 (March 16, 2011).

Municipal Corporations – Code Enforcement Liens – Question certified. Whether, under Article VIII, Section 2(b), Florida Constitution; Section 166.021, Florida Statutes; and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to Code Enforcement Board order and recorded in public records of applicable county, shall be superior in dignity to prior recorded mortgages.

The decision of the 5th District Court of Appeal in the case of the *City of Palm Bay v. Wells Fargo,* 36 Fla. L. Weekly D161a (January 21, 2011) has been granted review by the Florida Supreme Court as to whether, under Article VIII, Section 2(b), Florida Constitution; Section 166.021, Florida Statutes; and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a Code Enforcement Board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages. *City of Palm Bay v. Wells Fargo Bank,* 36 Fla. L. Weekly D630 (March 25, 2011).

Section 3. Recent Decisions of the United States Supreme Court

None Reported.

Section 4. Recent Decisions of the United States Court of Appeals, Eleventh Circuit

Employer – Employee Relations – Family and Medical Leave Act – Employee who was demoted after returning from statutorily protected maternity leave sued employer, alleging that her maternity leave impermissibly contributed to her demotion – Employer was entitled to judgment as a matter of law on claims that employer violated Family and Medical Leave Act (FMLA) both by interfering with plaintiff's FMLA rights and retaliating against her for exercising those rights, because reasonable jury would not have legally sufficient evidentiary basis to find in plaintiff's favor on either of her FMLA claims – District court did not err in granting judgment as matter of law in favor of employer on FMLA interference claim where employer offered evidence showing that plaintiff was demoted as result of her ineffective management style, which revealed itself in full only in her absence, and not because she took FMLA leave, and plaintiff did not offer any evidence to the contrary – Discussion of distinction of but-for and proximate causation in FMLA context – District court did not err in granting employer's motion for judgment as a matter of law on FMLA retaliation claim because, even assuming plaintiff successfully established prima facie case for FMLA retaliation, employer met its burden of articulating a legitimate, nondiscriminatory reason for plaintiff's demotion by producing testimony regarding plaintiff's poor management practices, astringent leadership style, and inability to communicate effectively with her subordinates, and plaintiff failed to demonstrate that employer's reasons were merely pretext for discrimination.

Appellant Ellen Schaaf worked as a regional vice president for GlaxoSmithKline (GSK), an international health care company, representing the territory of Florida and southern Georgia. Throughout her tenure as regional vice president, the territory Schaaf represented consistently failed to meet the expectations of corporate executives. Schaaf's supervisors continually expressed to her that the shortfalls needed to be addressed in a creative and innovative manner, also indicating the goal of increasing sales should be her first priority. During her first years on the job, sales in the region improved and performance increased markedly. However, in 2002, three district sales managers working under Schaaf filed complaints with human resources at GSK's corporate headquarters alleging Schaaf behaved unprofessionally and managed subordinates ineffectively. Subsequent to the complaints, the human resources department interviewed the employees who filed the complaints, as well as others who worked under Schaaf. The interviews revealed both broad complaints and specific grievances regarding Schaaf and her managerial techniques. Complaints included Schaaf's inaccessibility, poor communication skills, harsh and demanding demeanor, and tendency to play favorites. Following the interviews, GSK interviewed Schaaf to allow her to respond to the allegations of her subordinates, and a Performance Improvement Plan (PIP) was suggested by corporate in an effort to correct Schaaf's shortcomings as a manager. Incidentally, in July 2002, the same month as the initial employee complaints, Schaaf informed her supervisory that she was pregnant with her fourth child and planned to take maternity leave in early 2003. As a result, Schaaf expressed some concern regarding her ability to complete the required PIP goals and standards. Schaaf was given an extension to meet her goals included in the PIP but failed to do so a second time, showing a lack of willingness to cooperate with the company's mitigation plan. While Schaaf was on maternity leave, performance increased, mistakes were corrected in such a fashion that led to employees' reporting that the region was functioning much more smoothly without Schaaf in charge. Upon her return, Schaaf was given the option to accept a demotion to district sales manager or leave the company. Schaaf accepted the demotion but sued, claiming that GSK impermissibly demoted her for reasons related to her statutorily protected maternity leave. Schaaf raises a number of issues on appeal, but her primary argument centered on whether GSK violated Schaaf's rights under the FMLA. Schaaf alleged that GKS violated the statute both by (1) interfering with her FMLA rights and (2) retaliating against her for exercising those rights. The district court granted judgment as a matter of law in GKS's favor on both claims. The FMLA provides that employees may take up to 12 weeks of unpaid leave for the birth and care of a child. Once the 12 weeks is completed, the FMLA requires that the employee be reinstated to the position the employee held when the leave began. If the employee is not reinstated, the employer bears the burden of proving that the employee was discharged for independent reasons unrelated to the employee's leave. *Parris v. Miami Herald Publ'g Co.*, 216 F.3d 1298, 1201 (11th Cir.2000). The appellate court found GSK proved to a legal certainty that Schaaf was demoted for reasons unrelated to her FMLA leave, such that she would have been demoted if she had not taken leave. Schaaf was unable to produce any evidence to the contrary and continued to rely on the false and legally incorrect premise that her maternity leave caused her demotion because, but for the leave, GSK would have had no reason to demote her. Schaaf's second claim likewise centers on the demotion that immediately followed her return from leave. Schaaf argues her demotion does not directly interfere with her FMLA rights, but rather the demotion was retaliation for exercising those rights. To succeed under this theory, Schaaf must show that GSK intentionally "discriminated against her because she engaged in an activity protected by the Act." *Strickland v. Water Works & Sewer Bd. of Birmingham,* 239 F.3d 1199, 1206 (11th Cir.2001). Again, the appellate court failed to find that Schaaf could produce a prima facie case for retaliation on GSK's part. Because a reasonable jury would not have a legally sufficient evidentiary basis to find in Schaaf's favor on either of her FMLA claims, the appellate court found that the district court did not err in granting GKS's motion for judgment as a matter of law. *Ellen Schaaf v. SmithKline Beecham Corporation,* 22 Fla. L. Weekly Fed C1687 (April 6, 2010).

Civil Rights – Speech – Association – County and fire department officer did not violate a firefighter's First Amendment right to intimate association when they demoted him for an extramarital affair with one of his subordinates, because the county's interest in discoursing intimate, extramarital association between supervisors and subordinates is so critical to effective functioning of fire department that it outweighs a firefighter's interest in extramarital association with a subordinate in workplace, even assuming *arguendo* that First Amendment protects intimate, extramarital associations as a fundamental right.

Randolph Starling, a former firefighter with the Palm Beach County Fire Rescue Department, arranged in 2005 to have Carolyn Smith, another firefighter, transferred to his fire station as his subordinate. Sometime during the following months, Smith and Starling began an intimate relationship. Eventually, Starling and his wife divorced, and upon its conclusion, Starling moved in with Smith. In June 2006, Starling and Smith married. Soon after, Starling learned that Ken Fisher, his direct supervisor, had been using Smith's house for an extramarital affair. Starling advised Smith to cease allowing him to do so because Fisher continually made advances to Smith. Upon hearing this news, Fisher became angered. Starling alleges Fisher threatened him with disciplinary action and told

him to end his relationship with Smith. In the months that followed, Fisher began to follow Starling on site visits and often spoke poorly about him to other co-workers. On January 11, 2006, Fisher issued an Employee Development Form (EDF) stating that Starling's preoccupation with Smith was causing a disruption to the fire station and its employees. Starling countered by filing a complaint with his union official that Fisher had created a hostile work environment. Within 10 days, Starling received notice he was being brought up on formal charges for past conduct, and he was demoted from captain to firefighter/paramedic. Subsequent to his demotion, Starling accepted union representation and filed a grievance that was denied and not pursued further in accordance with the union's belief that Starling's claims lacked merit. Starling then sued Fisher and the county under 42 U.S.C. § 1983 for violating his First Amendment right to intimate association. The defendant moved for summary judgment, claiming that there is no First Amendment right to engage in an "adulterous" relationship. Starling relied on an affidavit filed by his mother, who stated that Brice, a representative from the county, was aware of his relationship with Smith – of which he claimed ignorance in the original motion. Starling also disputed the defendant's assertion the First Amendment did not protect his right to intimate association with Smith. The district court granted the defendant's motion for summary judgment after concluding there was no genuine issue of material fact as to whether Brice – who imposed the discipline – knew of Fisher's allegedly improper motives. In addition, the court ruled that Fisher was entitled to qualified immunity because Starling's First Amendment right to intimate association with Smith was not clearly established. The court did not resolve whether the First Amendment protected Starling's association with Smith. The appellate court relied on the balancing test found in *Pickering v. Board of Education,* 391 U.S. 563 (1968). The Pickering court developed a balancing test to assess the constitutionality of burdens on constitutional rights in the public-employment context. See *Shahar v. Bowers,* 114 F.3d 1097, 1112 (11th Cir.1997).

In conclusion, the court stated the county's interest in discouraging intimate association between supervisors and subordinates was so critical to the effective functioning of its fire department that it outweighed Starling's interest in his relationship with Smith in the workplace. *Randolph Starling v. Board of County Commissioners, Palm Beach County,* 22 Fla. L. Weekly Fed. C1701 (April 6, 2010).

Municipal Corporations – Ordinances – Outdoor Advertising Signs – Constitutionality – Jurisdiction – Case or Controversy – Challenge to constitutionality of repealed version of revised local ordinance governing erection and maintenance of signs in defendant city is moot – Voluntary cessation doctrine is inapplicable, and will not save action from being rendered moot by enactment of new sign ordinance, where city has no intention of reenacting repealed sign ordinance, as evidenced by city's enactment of new sign ordinance in response to communication from plaintiff's counsel and two months prior to suit against city, and by counsel for city's express disavowment at oral argument of any intention of reenacting repealed sign ordinance – Plaintiff did not possess vested right to sign permits at time of application where plaintiff failed to show reasonable and detrimental reliance on provisions of repealed sign ordinance or that city acted in clear display of bad faith in denying the sign permits – Further, where challenged portions of repealed sign ordinance retained by new sign ordinance are fully severable from rest of law, particularly provisions that led to rejection of plaintiff's permit application, there is no need to evaluate whether other portions of new sign ordinance may be unconstitutional because any decision on merits can have no effect on result in case on appeal.

Plaintiff-appellant Seay Outdoor Advertising, Inc. (Seay) is an outdoor advertising company that buys or leases land to construct signs for commercial and noncommercial speech. In June 2001, Seay contracted with property owners in Mary Esther, Fla., to construct seven billboards throughout the city. In accordance with city code, Seay submitted seven applications for permits to post the signs within city limits. Article 16 of Mary Esther's land development code regulates the erection of signs. On the basis of this section, which does not allow billboards, each of Seay's seven applications was denied. In lieu of litigation, Seay began communications with Mary Esther's city attorney to discuss possible amendments to the ordinance. On November 5, 2001, the City of Mary Esther adopted Ordinance 2001-12 (a new sign ordinance), which repealed and replaced the former sign ordinance; however, the ban on billboards remained intact. Seay filed suit against the City of Mary Esther on January 17, 2002, alleging the repealed sign ordinance is unconstitutional; however, it made no mention of the new sign ordinance, which repealed the former one. Moreover, although Seay's permits were denied because of the particular provision banning billboards, Seay did not claim that the particular provision was unconstitutional. Rather, Seay claims the repealed sign ordinance is unconstitutional in its entirety because it violated the First Amendment to, and the Equal Protection Clause of, the U.S. Constitution and has resulted in an unconstitutional taking. Mary Esther moved to dismiss due to mootness. The district court denied that motion, finding that the case had not been rendered moot by the new sign ordinance. The district court applied the voluntary cessation doctrine and stated as its reasoning that Mary Esther had not established the likelihood of further violations was sufficiently remote to dismiss Seay's complaint as moot. In addition, the court stated Seay's potential vested right to the permits may have also been sufficient to defeat Mary Esther's

mootness argument. The appellate court decided to focus on the issue of mootness in its opinion. If a suit is moot, it cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it. *Coral Springs Street Systems, Inc. v. City of Sunrise,* 371 F.3d 1320, 1328 (11th Cir.2004). The appellate court opined that Seay did not possess a vested right to the sign permits at the time of application. The right was not reasonably and detrimentally relied upon because the initial sign ordinance did not allow billboards. To reinforce the lack of detrimental reliance, the court pointed to the lease agreement between Seay and the land owners which stated that no payment would be made to the landowners until the date of construction of the billboards. Seay eventually lost on appeal. The appellate court reversed the grant of summary judgment and remanded with instructions to dismiss the case for lack of subject matter jurisdiction. *Seay Outdoor Advertising, Inc. v. City of Mary Esther,* Florida 22 Fla. L. Weekly Fed. C1774 (January 14, 2005)

Municipal Corporations – Ordinances – Constitutionality – Vagueness – Civil Rights – A business did not have standing to sue a municipality under 42 U.S.C. Section 1983 to recover damages it sustained by cautiously complying with ordinance that business claims is unconstitutionally vague under Fourteenth Amendment where business failed to demonstrate that its constitutional rights were violated – Business has not suffered a constitutional injury at city's hands sufficient to permit judicial review of municipal ordinance for vagueness concerns, where business has not been prosecuted, lost its license or been fined, and alternatively, has not availed itself of pre-enforcement review of vague law – Injunctions – Mootness – Issues of whether injunction permanently enjoining enforcement of ordinance and declaration that ordinance is unconstitutionally vague are now moot because municipality repealed the ordinance after district court entered judgment is appropriately remanded to district court, where issuers were raised for first time on appeal and appellate court has no factual record before it.

Bankshot Billiards (Bankshot) owns and operates a billiards bar in Ocala, Fla., which opened in 1995. In 2004, the business expanded to include a nightclub that was housed on the second story of the building in which the business operated. The night club offered a dance floor and music, but was only open during a limited window each week. The billiard bar below was open every day. Bankshot serves alcohol on the premises pursuant to a liquor license obtained from the State of Florida, as well as a limited menu of food and non-alcoholic beverages. The business does not have an age restriction for entry onto the premises. Patrons of all ages are allowed both in the billiard room and the upstairs night club. In 2005, the City of Ocala enacted several ordinances to prevent people under the age of 21 from entering establishments serving alcohol. After complaints were raised by several businesses within the city, including a suit filed by Bankshot and others, the ordinance was relaxed and amended to include exemptions for billiard bars and several categories of businesses. The exemption stated that billiard halls would be exempted when the operation of billiards was the primary attraction held out to the public. In July 2006, Bankshot, seeking to expand its night club operation, purchased the lot next to its current structure. It applied for a building permit on the site and also solicited a city attorney opinion regarding what effect the expansion would have on its billiard hall exemption. The city attorney opined that after expansion, the premises will likely have many more people dancing than playing pool, negating Bankshot's billiard hall exemption from the ordinance. If this were the case, they would have to exclude people under the age of 21. Subsequently, the city passed two ordinances that amended the original age restriction to further narrow the billiard hall age exemption. One of those amendments, which passed in January 2007, excluded establishments from claiming the billiard hall exemption if they engaged in certain alcohol sales activities, such as minimum drink purchases, ladies nights and serving drinks without charge as Bankshot often did. Believing that this categorically barred it from claiming the exemption, Bankshot stopped allowing people under 21 on the premises. Bankshot's gross revenues dropped from $62,023.75 a month to $33,566.64. In March 2007, Bankshot sued the city in the circuit court of Marion County. In its pleading, Bankshot requested injunctive and declaratory relief from the January 2007 amendments of the ordinance. In response, the city again amended the ordinance in April 2007; Ordinance 5650 rewrote the city's age restriction scheme with many exemptions. Under the definitions of the ordinance, Bankshot was considered a nightclub and would be prohibited from allowing anyone under the age of 21 into the business. After the city passed Ordinance 5650, Bankshot amended its complaint to address the amendments and filed a supplemental complaint. The supplemental complaint alleged the amendment violated Bankshot's rights under the Due Process Clause of the Fourteenth Amendment because the ordinance was "vague and ambiguous on its face as enforced." In its supplemental complaint, Bankshot demonstrated the ordinance's deficiencies by describing hypothetical situations that would result in illogical and unintended consequences if the ordinance was applied as written. As a prayer for relief, Bankshot requested a declaratory judgment, temporary and permanent injunctions, and money damages under 42 U.S.C. § 1983. The § 1983 claim was a new claim in the supplemental complaint. The city moved for summary judgment, arguing Bankshot did not have standing to bring an enforcement challenge to the ordinance because it had not shown a "realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." The district court found Bankshot did have standing to challenge because the unduly vague portions of the ordinance applied to it; however, Bankshot's § 1983 claim

was dismissed because it had not yet suffered any harm by virtue of enforcement of the ordinance. The district court did, however, side with Bankshot with regard to the claim that the ordinance was unconstitutionally vague. Both parties appealed. Bankshot challenges the denial of the § 1983 damages, arguing that the city's unconstitutionally vague ordinance was a municipal policy sufficient to sustain liability. The city's separate appeal raises three issues challenging the declaratory judgment and injunction. On appeal, Bankshot argues the ordinance's incomprehensible wording violated its constitutional rights and caused it to lose revenue. To recover damages under § 1983, Bankshot must show: "(1) its constitutional rights were violated; (2) the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) the policy or custom caused the violation." *McDowell v. Brown,* 392 F.3d 1283, 1289 (11th Cir. 2004). The appellate court affirmed the district court's ruling with regard to § 1983 damages, opining Bankshot had not demonstrated that its constitutional rights were violated. The district court permanently enjoined the ordinance and declared its provisions unconstitutionally vague on its face. After the court rendered this judgment, the city repealed the ordinance. On appeal, the city argues this repeal renders the district court's judgment moot and submits that, without a proper Article III case or controversy, the appellate court must vacate the injunction. Ultimately, the appellate court held that because these issues were raised for the first time on appeal, they should be remanded as to both injunctive and declaratory relief to the district court. *Bankshot Billiards, Inc. v. City of Ocala,* 22 Fla. L. Weekly Fed C1881 (March 11, 2011).

Section 5. Recent Decisions of the United States District Courts of Florida

None Reported.

Section 6. Announcements

Mark Your Calendar

Future Date for Florida Municipal Attorneys Association Seminar:

- July 19-21, 2012, Marco Island Marriott

FMAA Seminar Notebooks Available

Notebooks from the most recent FMAA Seminars are available for purchase. 2007 Annual Seminar notebooks are $25 each; 2009 Annual Seminar notebooks are $50 each; and 2010 Annual Seminar notebooks are $75 each. Please contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com* to place your order.