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 July 1, 2011, through September 30, 2011.

Section 1. Recent Decisions of the Florida Supreme Court

None Reported.

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

Public employees – Discipline – Firefighters Bill of Rights (FBR) – Municipal corporations – Action by firefighter alleging that city violated FBR by failing to advise him of his rights prior to imposing disciplinary action and seeking various monetary damages for these alleged violations – Trial court correctly concluded that FBR does not create cause of action for damages and that, accordingly, the amended complaint failed to set forth a cause of action.

Firefighter Rick M. Curtis brought a claim against the City of West Palm Beach under the Firefighters Bill of Rights (FBR) for monetary damages. In his complaint, Curtis alleged that the city failed to advise him of his rights prior to imposing disciplinary action and the failure to do so violated the FBR. The City of West Palm Beach filed a motion for summary judgment, basing its motion on the argument that the claims had been previously litigated in a separate lawsuit and, therefore, were barred by collateral estoppel. Upon conducting a hearing on the city's motion for summary judgment, the trial court ruled damages were not available as a remedy under the FBR. "Remedies sought in an action brought under a statute which creates a statutory right or duty are generally limited to those specified within the statute." *Dascott v. Palm Beach County,* 988 So. 2d 47, 48 (Fla. 4th DCA 2008). The FBR reads, "if an agency employing firefighters fails to comply with the requirements of this part, a firefighter employed by such agency who is personally injured by such failure to comply may apply directly to the circuit court, . . . for an injunction to restrain and enjoin such violation." Section 112.83, Florida Statutes (2007). The court opined that had the Legislature intended to allow claims seeking damages for violations of the FBR, it would have done so, clearly. In its final ruling, the appellate court held that the trial court correctly concluded the FBR does not create a cause of action for damages, and Curtis' complaint therefore failed to set forth a cause of action. *Rick M. Curtis v. City of West Palm Beach,* 36 Fla. L. Weekly D1330 (Fla. June 22, 2011).

Wrongful death – Drowning – Public parks – Municipal corporations – Counties – Trial court properly dismissed with prejudice a complaint filed against city and county board of commissioners by parents whose son was caught in ocean rip current off public park and who alleged defendants breached duty to warn public of dangerous conditions in the ocean – Statute that exempts local governmental entities from liability for any injury or loss of life caused by changing surf and other naturally occurring conditions along coastal areas creates limitation on liability of local governments for death and injuries resulting from rip currents – Statute unambiguously provides that government entities may not be held liable for death or injury due to changes in surf or other naturally occurring conditions along the coast, whether or not warnings are displayed.

On October 7, 2007, Eric Brown Jr. entered South Beach Park, located in the City of Vero Beach and Indian River County, with a group of friends. Late in the afternoon, a female companion of Eric was struggling against the ocean current. Eric went in the water to assist his friend without knowing that a severe rip current was taking place. The rip current was the ultimate cause of Eric's death. Eric's parents, as personal representatives of his estate, brought a wrongful death action against the City of Vero Beach (Vero Beach) and the Indian River County Board of County Commissioners (Indian River) alleging both parties breached their duty to warn the public of dangerous conditions in the ocean. The complaint alleged negligence against both Vero Beach and Indian River, asserting that: (1) they had a duty of care to warn the public of any dangerous conditions of which they knew or should have known; (2) they breached their duty of care by failing to warn both the public and Eric that rip currents existed or were possible based on the conditions

being favorable for rip currents; (3) this hazardous and dangerous condition was known to Vero Beach and Indian River or it had existed for a sufficient length of time that they reasonably should have known of the hazardous and dangerous condition; and (4) that as a result of Vero Beach's and Indian River's negligence, the survivors suffered losses. Vero Beach and Indian River filed motions to dismiss the complaint, arguing the plaintiff's cause of action was barred by Section 380.276(6), Florida Statutes, which exempts local governmental entities from liability for any injury or loss of life caused by changing surf and other naturally occurring conditions along coastal areas. The trial court agreed and dismissed the complaint with prejudice. The appeal concerns whether Section 380.276(6), Florida Statutes (2007), creates a limitation on the liability of local governments for death and injuries resulting from rip currents. Section 380.276(6), Florida Statutes, provides, "Due to the inherent danger of constantly changing surf and other naturally occurring conditions along Florida's coast, the state, state agencies, local and regional government entities or authorities, and their individual employees and agents, shall not be held liable for any injury or loss of life caused by changing surf and other naturally occurring conditions along coastal areas, whether or not uniform warning and safety flags or notification signs developed by the department are displayed or posted." The plaintiffs argued that the statute is ambiguous. Relying on *Breaux v. City of Miami Beach,* 899 So. 2d 1059 (Fla. 2005), the plaintiffs argued that a governmental entity has an operational level duty to maintain a safe premises and a duty of reasonable care, just like a private individual, to make those premises safe or to warn of problems that may occur on their premises. The court opined Section 380.276(6), became effective on July 1, 2005, after *Breaux,* therefore, the enactment of that specific subsection overrides the analysis in *Breaux.* The appellate court held the allegations fell squarely under the statute's provision for governmental immunity in the event of injury or death caused by the changing surf or other naturally occurring conditions along Florida's coastal area and affirmed the trial court order dismissing the complaint with prejudice. *Eric T. Brown and Dorothy Scott v. City of Vero Beach and Indian River Board of County Commissioners,* 36 Fla. L. Weekly D1380 (Fla. June 29, 2011).

Municipal corporation – Building permit and inspection fees – Declaratory judgment – Class actions – Plaintiffs seeking declaration that city's practice of collecting excess building permit and inspection fees, the excess of which was not returned to contractors but placed in city's general fund, was contrary to provisions of Section 553.80, Florida Statutes, which requires any excess funds to be refunded or used solely for purposes of carrying out enforcement of building code – Circuit court did not abuse its discretion in determining that class action status was not necessary to effectuate relief to which plaintiffs might be entitled under the statute, as relief by one in declaratory judgment action would also entitle all others similarly situated to relief – No merit to individual plaintiff's concern that the city could at this point either refund plaintiff's money or move an equivalent amount of money into authorized account and thus destroy standing – Suit for declaratory judgment may be maintained by any interested party, and plaintiffs, a building contractor that has paid fees and an association of contractors who have also paid such fees that they claim are excessive, are interested parties in the payment and collection of building permits.

In the instant case, the plaintiffs asked the court to declare the City of Sunrise's practice of collecting excessive building permit and inspection fees, the excess of which was not returned to the contractors but placed in the city's general fund, was contrary to the provisions of Section 553.80, Florida Statutes (2009), which require any excess funds to be refunded or used solely for the purposes of carrying out enforcement of the building code. The plaintiffs also requested restitution of excessive fees. Originally, the trial court denied the plaintiffs' motion for class certification in their declaratory judgment action against the City of Sunrise. The city opposed class certification and submitted to the court the statutes, specifically Section 553.80(7), Florida Statutes, expressly gave the city discretion to either refund the excess or allocate those funds to future allowable activities. The city also argued that there was no need for class certification because if the declaratory relief sought by the plaintiffs were granted, then the benefits would automatically accrue to others similarly situated. The trial court denied class certification. In *Department of Health and Rehabilitative Services v. Alice P.,* 367 So. 2d 1045 (Fla. 1st DCA 1979), the court held there was no necessity to bring an administrative rule challenge as a class action, because if a single plaintiff was successful in invalidating an administrative rule, the agency could not enforce it against any other person. Similarly, in this case a declaratory decree could find the city would have to abide by the terms of the statute by either refunding excessive fees or allocating those funds to allowable activities. The circuit court concluded that the trial court did not abuse its discretion in determining class action status was not necessary to effectuate the relief requested and affirmed the lower court's ruling. *North Ridge Electric, Inc., and Associated Builders and Contractors Florida East Coast Chapter, Inc. v. City of Sunrise,* 36 Fla. L. Weekly D1401 (Fla. June 29, 2011).

Municipal corporations – Disability discrimination in employment – Circuit court, appellate division, departed from essential requirements of law in affirming order of Miami-Dade County Commission on Human Rights, which found that police chief engaged in disability discrimination by failing to appoint police lieutenant who has Parkinson's disease to serve as a Neighborhood Enhancement Team commander – City

was denied procedural due process when circuit court affirmed findings of commission without benefit of full transcript of hearing before hearing officer – Where lieutenant presented prima facie case of discrimination by circumstantial evidence, police chief presented legitimate, nondiscriminatory reasons for employment action, and lieutenant failed to offer any evidence that the reasons articulated by police chief were false and that decision not to promote lieutenant was not legitimate and was a pretext, it was a departure from essential requirements of law to affirm commission's findings – Commission applied wrong standard in evaluating claim and improperly shifted burden to city to prove lack of pretext.

The City of Miami sought certiorari relief from a decision rendered by the Circuit Court for Miami-Dade County, Appellate Division, affirming a final order entered by the Miami-Dade County Commission on Human Rights. The commission found the city's police chief, Chief Timoney, engaged in disability discrimination by failing to appoint Lt. Miguel Hervis, who has Parkinson's disease, to serve as a Neighborhood Enhancement Team (NET) commander. Hervis had been with the city since 1988. He was promoted to the rank of sergeant in 1994 and lieutenant in 2001. In 2004, Hervis was diagnosed with Parkinson's disease and, shortly thereafter, symptoms of his condition became apparent to his co-workers and superiors, including Timoney. In 2006, Timoney had seen Hervis' motor skills decline to significantly enough to require Hervis to take a fitness for duty determination, which Hervis passed. As his condition worsened, Hervis requested to be considered for the position of NET commander, an executive-level position that is described as requiring independence of action and judgment. Hervis was also undergoing treatment in order to have a surgical procedure that might improve his declining motor skills. In December 2006, three other officers with equal experience and seniority were promoted to the position of NET commander. After the surgical procedure was performed, Hervis' condition substantially improved, and in the summer of 2008, he was cleared for normal duty. In the interim, on June 15, 2007, Hervis filed a Notice of Charge of Discrimination, alleging disability discrimination with the commission. Hervis claimed he was passed over for the promotion because of his disability, Parkinson's disease. The commission assigned the investigation of the charge to the Miami-Dade County Equal Opportunity Board. The Equal Opportunity Board investigated the charge and issued a Recommended Order in favor of Hervis. The board recommended that Hervis be promoted to the next available NET commander position, compensated for the pay differential retroactive to May 2007, with interest, and reimbursed for his reasonable attorney's fees and costs. Pursuant to Chapter 11A-8 of the Miami-Dade County Code, the city requested a de novo hearing, which was held on June 11, 2009, before a hearing officer. In that hearing, Chief Timoney testified that promotions to NET commander were within his discretion and there were nondiscriminatory reasons for his decision to not promote Hervis. The hearing officer entered his Final Order on July 13, 2009, finding that, although there was no direct evidence of disability discrimination, there was circumstantial evidence that the city discriminated against Hervis due to his disability. The city appealed to the circuit court. After the record was prepared by the commission and provided to the circuit court, the city notified the commission that a transcript of the hearing was not included in the record, and requested from the commission a copy of the hearing transcript, at its own expense. In response, the commission sent the city an inaudible tape recording of the proceedings. Thereafter, the city filed a motion to with the circuit court requesting that it issue an order requiring the commission to comply with its obligation to provide a transcript of the hearing. The circuit court granted the city's motion. The commission, however, provided the circuit court with an incomplete transcript, which omitted a portion of Timoney's testimony and all of Deputy Chief Burden's testimony. The city objected to the incomplete transcript. The circuit court, however, affirmed the commission's order, without written opinion. Section 11A-28(9)(b) of the Miami-Dade County Code provides that "testimony taken at a hearing shall be under oath and a transcript shall be made available at cost to any interested party." The city requested a copy of the transcript at the city's cost and was given an inaudible recording. Because the commission was required to conduct a de novo review and Chief Timoney and Deputy Chief Burden's testimony was material and critical, there is no possibility that the circuit court was able to provide meaningful review of the commission's findings, thus depriving the city of the most basic Due Process protections. The court held there was no dispute, and the incomplete record did not reflect that Hervis met his burden of establishing a prima facie case of discrimination. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1971), the U.S. Supreme Court established the order and allocation of proof in circumstantial evidence cases alleging discrimination. The plaintiff must first establish a prima facie case for discrimination, and Hervis' testimony failed to rebut and/or dispute that he performed poorly in the past and that other officers who received the promotion to NET commander were unqualified. Because Hervis failed to meet his burden as required by *McDonnell Douglas,* the commission clearly erred in finding disability discrimination, and the circuit court departed from the essential requirements of law in affirming the order under review. The court concluded the city was denied due process, and the circuit court departed from the essential requirements of law resulting in a miscarriage of justice, see *Custer Med. Ctr. v. United Auto Ins. Co.*, 35 Fla. L. Weekly S640, (Fla. Nov. 4, 2010). The court granted the petition of certiorari relief, quashed the opinion of the circuit court, and remanded with directions. *City of Miami, v. Miguel A. Hervis,* 36 Fla. L. Weekly D1448 (Fla. July 5, 2011).

Public records – Email – Neither email sent by mayor from her personal email account, using her personal computer, with blind carbon copies to friends and supporters, nor attachments to email, consisting of three articles mayor had written as a contributor to a newspaper, constituted public records where email was not made pursuant to law or in connection with the transaction of official business by the city or sent by mayor in her official capacity, and city played no role in mayor's decision to write the articles, in determining the content of the articles, or in the decision to distribute or not to distribute the articles.

Appellant Michael Butler appeals a final judgment in a declaratory action filed by the City of Hallandale Beach, which sought a declaration that a list of recipients of a personal email sent by Hallandale Beach Mayor Joy Cooper was not sent in connection with the discharge of any municipal duty, and therefore, is not a public record under Florida's Public Record Law, Chapter 119, Florida Statutes (2009). The email in question was brief, containing three articles Cooper had written as a contributor to the *South Florida Sun Times* as an attachment. The email was sent to both friends and supporters of the mayor. The three articles in question were: (1) a transcript of the 2009 State of the City address; (2) a transcript of part two of the State of the City address; and (3) an article about tax questions raised at prior commission meetings. The trial court found that Cooper was under no obligation pursuant to the statute or ordinance to notify her friends and supporters that a column had been published, and further that the city played no role in Cooper's decision to send the email to friends. Therefore, Butler was not entitled to the names and email addresses of the recipients of the email. In accordance with Subsection 119.011(2), Florida Statutes, Cooper qualifies as an "agency," since the mayor is a municipal officer acting on behalf of the municipality and is thus subject to the directives of this section. "The determination of what constitutes a public record is a question of law entitled to de novo review." *State v. City of Clearwater,* 863 So. 2d 149, 151 (Fla. 2003). In *City of Clearwater,* the Florida Supreme Court analyzed the issue of whether emails are considered public records. In that case, a reporter requested that the city provide copies of all emails either sent from or received by two city employees over the city's computer network. At issue was whether the emails, by virtue of the city's possession on their network, were public records. The court concluded that the definition of public records is limited to public information related to records, and further defined the term "records" as those materials that have been prepared with the intent of perpetuating or formalizing knowledge. The court emphasized that the mere placement of an email on a government network is not controlling in determining whether it is a public record, but rather, whether the email is prepared in connection with the official business of an agency and is "intended to perpetuate, communicate, or formalize knowledge of some type." *Id.* The court held the city played no role in Cooper's decision to write articles for the *Times,* nor did it play a role in choosing the topics with which Cooper would write. The email was not made pursuant to law, nor did it perpetuate, formalize or communicate the city's business. It was simply to provide a copy of the articles to Cooper's friends and supporters. The court affirmed the trial court's determination that these emails were not public records under Chapter 119, Florida Statutes. *Michael Butler v. City of Hallandale Beach,* 36 Fla. L. Weekly D1547 (Fla. July 20, 2011).

Wrongful death – Negligence – Municipal corporations – Police officers – Decedent struck by train when he was laying parallel to some railroad tracks but failed to move when engineer blew train's horn – Error to dismiss, for failure to state cause of action, complaint which alleged that police officers breached duty of care by taking decedent into custody for driving under the influence and then releasing him, while he was still intoxicated, into an unfamiliar neighborhood in the wee hours of the morning, without first determining the safe mode of transportation away from the area – Officer placed decedent within "zone of risk" by taking him into custody and had duty to act reasonably to protect him from harm.

This appeal stems from a complaint alleging negligence and wrongful death against the City of Boca Raton for the death of Christopher Milanese, which occurred shortly after his release from police custody. The trial court dismissed the complaint with prejudice for failure to state a claim. On the night Milanese was taken into custody, he had consumed large quantities of alcohol, reaching a blood alcohol level of three times the legal limit. Milanese was driving his vehicle in an erratic manner, hitting curbs, etc. Around approximately 3:14 a.m., a city police officer pulled him over and took him into custody. Milanese was being followed by his cousin, and the officer instructed the cousin to leave. At the point of detention, Milanese's blood alcohol level was .24 and he "exhibited overt signs of impairment, drunkenness and inebriation." The officer placed Milanese in his patrol car. He was subsequently brought to the patrol station, issued five traffic citations while detained, and released. The officers at the police station called Milanese a cab to take him home. The officer escorted Milanese to the front door and released him around 4:30 a.m. The cab driver did not see Milanese and left. Milanese was observed lying parallel to the railroad tracks by the conductor of an approaching train. The engineer blew the horn, but Milanese did not move and was struck and killed by the train. At the time of his death, his blood alcohol level was .199. The city filed a motion to dismiss, which was granted by the trial court with prejudice on the basis the complaint failed to allege a duty was owed to Milanese. Although Milanese's death occurred after his release from custody,

the complaint's allegations are focused on the officer's actions while Milanese was still in custody, specifically the officer's manner of releasing him. The court noted that Milanese's cousin had been following in her car and was an alternative means of safe transportation. Where an officer's conduct creates a "zone of risk," a duty is placed on the officer to lessen the risk, or to take precautions to protect others from the harm. See *Henderson v. Bowden*, 737 So. 2d 532, 533 (Fla. 1999). Significantly, the Florida Legislature has enacted a statute regarding the treatment of intoxicated drivers taken into police custody. Section 316.193(9), Florida Statutes (2007), requires that a person who is arrested for DUI may not be released from custody until: (1) that person is no longer under the influence of intoxicating substances and affected to the extent that his or her normal faculties are impaired; (2) the person's blood alcohol level or breath alcohol level is less than 0.05; or (3) eight hours have elapsed from the time the person was arrested. Milanese was not arrested for DUI; rather, the statute is indicative of the care necessary for the release of an intoxicated person. The court held the complaint alleges facts sufficient to survive dismissal and reversed the trial court's ruling. See *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009) ("a duty of care is a 'minimal threshold legal requirement for opening the courthouse doors'"). *Peter Milanese*, as personal representative of the *Estate of Christopher Milanese v. City of Boca Raton*, 36 Fla. L. Weekly D1551 (Fla. July 20, 2011).

Injunctions – Temporary ¬– Irreparable harm – Municipal corporations – Code enforcement – Trial court did not abuse its discretion when it entered order modifying and restating a temporary injunction that allowed city to enter property to abate nuisance that existed due to code enforcement violations and prohibited property owner from preventing entry to the property – Fact that magistrate assessed daily fine for violations until property owner complied with city ordinances does not preclude finding that city would be irreparably harmed if temporary injunction were not entered allowing city immediate access to property to abate public nuisance and clean up property – City had clear legal right to enforce its nuisance abatement order as well as to seek compliance with magistrate's order finding code violation – Further, where government seeks injunction to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed.

William Ridge appealed the trial court's non-final Order Modifying and Restating Temporary Injunction dated August 24, 2010. The order arose from the City of Stuart's attempts to gain entry and access to appellant's property to abate a public nuisance and clean up the property after appellant failed to comply with the code enforcement magistrate's order and subsequently refused to allow the city to access the property. Ridge argued that because the magistrate assessed a $100 per day fine for violations until he complied with the city ordinances, the city was not irreparably harmed. However, the city was not foreclosed from obtaining injunctive relief simply because monetary civil infraction fines for code enforcement violations were also available to it. See *Baylen St. Wharf Co. v. City of Pensacola*, 39 So. 2d 66, 68 (Fla. 1949). Here, the trial court made a specific finding the city would be irreparably harmed if the injunction was not entered in both the original ex parte order granting temporary injunction and each subsequent order modifying the temporary order. The city had a clear legal right to enforce its nuisance abatement ordinance as well as to seek compliance with the magistrate's order finding order violation. See *Keystone Creations, Inc. v. City of Delray Beach*, 890 So. 2d 1119, 1124 (Fla. 4th DCA 2004). Further, although the trial court made a finding of irreparable harm, such was unnecessary because "where the government seeks an injunction in order to enforce its police power, any alternative legal remedy is ignored and irreparable harm is presumed." *Id. William Ridge, IV v. The City of Stuart*, 36 Fla. L. Weekly D1606 (Fla. July 27, 2011).

Injunctions – Municipal corporations – Contracts – Competitive bidding – Unsuccessful bidder's appeal from non-final order of trial court denying motion for temporary injunction against city's award of contract to its own construction division, the lowest bidder, is moot where city, by vote, rejected all bids pursuant to its reservation of this right in its invitation to bid – Court emphasizes that if city desires to perform a project using its own services, employees and equipment, it must comply with requirements of Section 255.20(1)(c)9 and conduct a public meeting pursuant to Section 286.011.

Paul Jacquin & Sons, Inc. (Jacquin), a Port St. Lucie construction company, timely appeals a non-final order of the trial court, denying a motion by Jacquin for temporary injunction. On August 13, 2010, the City of Port St. Lucie put out an Invitation to Bid for the construction of the Ravenswood Community Center Project. In the invitation, the city informed all bidders that it intended to have its construction division submit a bid for the project. The invitation also contained the following statement, "The City of Port St. Lucie reserves the right to reject any and all bids, to waive any and all informalities or irregularities, and to accept with his bid, a bid bond, a bid guaranty, in the amount of five percent (5%) of the bid total, made payable to the City of Port St. Lucie." On September 30, 2010, the city received five bids for the project, with its own construction division submitting the lowest bid; Jacquin submitted the second lowest bid. On January 18, 2011, the City Council voted 3-2 to award the contract to the city's construction division. The following day, Jacquin filed a complaint and motion for temporary injunction, seeking injunctive and declaratory relief against the city for awarding its own construction division the project. On January 26, 2011, after both an ex parte hearing and

an evidentiary hearing, the lower court entered an order denying Jacquin's motion, finding that Jacquin did not prove the elements of irreparable harm, no adequate remedy at law, or that the injunction would serve the public interest. On March 14, 2011, the City Council voted 3-2 to reject all bids and to rebid the project without the city's construction division bidding on the project. On appeal, the city argues the issue is moot because it has decided to reject all bids and rebid the project, pursuant to its reservation of this right in its invitation to bid and by Subsection 255.20(1)(d)1, Florida Statutes. "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State,* 593 So. 2d 211, 212 (Fla. 1992) (citing Dehoff v. Imeson, 15 So. 2d 258 (Fla. 1943)). The court held due to the city's effort to rebid the project, ensuring the construction division of the city would not be allowed to submit a bid has rendered the challenge by Jacquin moot; however, the court warned the city must be vigilant in complying with the public meeting requirement of Subsection 255.20(1)(c)9, Florida Statutes. The record is unclear as to whether or not the city complied with its statutory duty in its invitation to bid. Jacquin's claim is dismissed due to mootness. *Paul Jacquin & Sons, Inc. v. City of Port St. Lucie*¸ 36 Fla. L. Weekly D1613 (Fla. July 27, 2011).

Wrongful death – Municipal corporations – High-speed chase – Appeal from final judgment in wrongful death action in which defendant was found liable for victim's death after victim was killed in an automobile accident that allegedly occurred as a result of a high-speed chase initiated by police in violation of defendant's pursuit policy – Argument – Final judgment is reversed based on inflammatory comment concerning defendant laughing if verdict were rendered in defendant's favor and cumulative effect of objected-to improper comments that acted in concert to deprive defendant of fair trial.

The City of Orlando appeals a final judgment rendered in a wrongful death action brought by Carmen Pineiro as personal representative of the estate of her son, Edwin Alvarado. The jury originally found the city 55 percent responsible for the death of Alvarado and the *Fabre* defendant, Kenyon Crowe, 45 percent at fault. The city argues that a new trial should be ordered because of (1) numerous improper closing arguments of Pineiro's counsel, and (2) erroneous evidentiary rulings made by the trial court, and concludes that a new trial is warranted in any event because the verdict is contrary to the evidence and the law. The appeal arises from an accident that occurred on the evening of January 20, 2006, when Edwin Alvarado's automobile was struck and he was killed by Kenyon Crowe. Pineiro was appointed personal representative of her son's estate and initially brought suit against both Crowe and the owner of the vehicle. The complaint was later amended to add the city. In her complaint, Pineiro asserts that officers from the city, immediately prior to the accident, negligently engaged in a high-speed pursuit of Crowe in violation of the city's pursuit policy and the pursuit proximately caused or contributed to the accident and Alvarado's death. Pineiro eventually settled her claims with the other parties, and the case proceeded with the city as the lone defendant. The city argues that the trial court committed reversible error in not sustaining four objections made during Pineiro's closing argument and in not granting its post-trail motion for new trial based on those errors. For an unobjected-to improper argument to support a new trial order, the unobjected-to improper argument must be "of such a nature as to reach into the validity of the trial itself to the extent that the verdict could not have been obtained but for such comments." *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). The inflammatory comment in question came at the conclusion of Pineiro's closing argument when counsel stated: "The City of Orlando has to be held accountable for the death of Edwin Alvarado and you must compensate them for an amount equal to their harm. The harm that they suffered. If you fail to do so, they escape responsibility. But more importantly, if you fail to do so in this case, if you see OPD outside the courtroom or in the elevator or in the parking garage, guess what they are going to be doing, folks?" The city objected and a sidebar was held, the city argued that what the Orlando Police Department (OPD) would be doing outside of the courtroom was irrelevant. Pineiro's attorney meant to imply the OPD would be laughing if a judgment were not rendered against them. The court overruled the city's objection to the comment and Pineiro's counsel finished his closing statement by saying, "when you see the City of Orlando folks, outside the courtroom or in the elevator or out in the parking garage, guess what they are going to be doing? They are going to be doing exactly what they were doing at the scene of the accident and at the Citrus Bowl, laughing." On appeal, the city argues the comments were highly inflammatory, without basis in evidence, and were intended to do nothing but prejudice the jury. Regarding closing arguments, "this court has long cautioned attorneys against resorting to inflammatory, prejudicial argument." *Walt Disney World Co. v. Blalock,* 640 So. 2d 1156 (Fla. 5th DCA 1994). The second statement the city objected to was Pineiro's counsel's attempt to send a message regarding the value of a human life. In an attempt to assist the jury in evaluating damages to award Alvarado's parents for Alvarado's death, Pineiro's counsel stated: "The question you may be asking is, how do I possibly put a value on the life of a loved one?" The city correctly objected on the ground that this is not the correct standard of damages. *Fasani v. Kowalski,* 43 So. 2d 805 (Fla. 3rd DCA 2010). The city also raised concerns over Pineiro's counsel's use of "mom" and "dad," which violated an earlier admonition that the parents should be referred to as "mother" and "father." The unobjected-to closing arguments made by Pineiro's counsel that the city believes justify a new trial are a comment regarding the age of

the city's counsel; a reference to the fee paid by the city to its expert witness, among others. Pursuant to *Murphy v. International Robotics Systems, Inc.*, 766 So. 2d 1010, 1031 (Fla. 2000), for unobjected-to comments in closing argument to justify reversal, they must be: (1) improper; (2) harmful; (3) incurable and (4) so damaging to the fairness of the trial that the public's interest in the system of justice requires a new trial. The unobjected-to closing arguments made by Pineiro's counsel did not rise to the level of the *Murphy* test and, therefore, did not warrant reversal. The retrial was ordered on evidentiary issues. The city argued that even though the jury heard that Kenyon Crowe was testifying from prison, about his use of marijuana on the day of the accident and that his blood alcohol level was twice the legal limit, the trial court erred in precluding evidence of Crowe's plea of guilty to DUI manslaughter and his conviction thereof for his part in Alvarado's death. Pineiro responds that because Crowe was no longer a party but merely a *Fabre* defendant, evidence of his conviction was improper and, in any event, its admission would have been unfairly prejudicial because an admission against interest can only be used as it affects the interests of the person making the plea and cannot be used against others. On retrial, evidence of Crowe's guilty plea and a certified copy of the judgment of conviction reflecting Crowe's plea is admissible as an admission against interest because this admitted culpability for the accident and Alvarado's death is a factor for consideration by the jury, pursuant to Section 772.12, Florida Statutes. The city next argues the trial court impermissibly precluded inquiry of Pineiro's eyewitnesses regarding their prior arrests by the OPD. The city asserted, pursuant to Section 90.608, Florida Statutes, evidence of these prior arrests, regardless of lack of conviction, is admissible to demonstrate the witnesses' bias against the city. The appellate court found the trial court failed to apply the proper standard in summarily precluding evidence that may demonstrate bias against the city. The court reversed the final judgment of the trial court based on inflammatory and prejudicial comments. Additionally, the court held the cumulative effect of the objected-to improper comments, acted in concert to deprive the city of a fair trial. *City of Orlando v. Carmen Pineiro*, 36 Fla. L. Weekly D1720 (Fla. August 5, 2011).

Municipal corporations – Development orders – Real property – Lot split – Denial – Appeals – Certiorari – Circuit court sitting in its review capacity departed from essential requirements of law in dismissing amended petition for writ of certiorari challenging city's denial of application to divide a residential lot without addressing substantial due process issues raised in amended petition – Failure of property owners to timely file a separate action pursuant to Section 163.3215, Florida Statutes, to challenge the city's determination that their lot-split application was inconsistent with city's comprehensive plan did not preclude certiorari review where owners not only raised consistency issues, but also contended that numerous due process violations preceding entry of city counsel's final order require that order be quashed as invalid and that they be granted a quasi-judicial hearing on their application, with all its attendant due process protections, before the City Council – On remand, if owners prevail on their contentions before the circuit court, the final order of City Council would be quashed and have no force and effect.

Joe and Mary Bush seek certiorari review of an order of the circuit court dismissing their amended petition for writ of certiorari by which they challenged the denial by the City of Mexico Beach of their application to divide a residential lot (lot-split application). The Bushes filed a lot-split application with the city on September 8, 2009, alleging when they divided their lot into two lots in 2005, they met all the requirements of the city's land-development regulations. Section 7.01.01(b), City of Mexico Beach Land Development Regulations, provides that "a development shall be considered consistent with the adopted comprehensive plan if the development conforms to the provisions set forth in the City of Mexico Beach Land Development Code." See *Bd. of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993) ("A landowner seeking to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance."). A hearing on the lot-split application was held before the Planning and Zoning Board on October 6, 2009, after which the board voted unanimously to recommend denial of the application. The lot-split application was scheduled for public hearing before the Mexico Beach City Council on October 13, 2009. The City Council, however, voted to table the Bushes' application for future consideration. For the next six months, despite numerous requests, the Bushes were unable to obtain a hearing before the City Council on their application. The Bushes then filed a mandamus action against the city to compel the City Council to hold a final hearing. The City Council notified the Bushes that a hearing would be held on April 13, 2010. At the outset of the April 13 hearing, the city again tabled the discussion on the application. While the Bushes' application was pending, the City Council adopted a new ordinance that addressed the subdivision of property and required neighborhood consistency when lots are subdivided. The city adopted this ordinance at the same meeting, April 13, 2010. At its regular meeting on May 11, 2010, the City Council voted unanimously, without discussion, to deny the Bushes' lot-split application. In its final order, the City Council found the application failed to comply with the newly enacted land development ordinance. The Bushes contend the newly passed ordinance cannot be applied to the application, and they neither had been advised that the city was relying on these future land use policies nor given an opportunity to argue in support of their application. The Bushes timely sought certiorari review in the circuit

court, complaining of these numerous alleged due process violations and asserting they never received a quasi-judicial hearing before the City Council. Upon motion of the city, the circuit court dismissed the amended petition based upon the city's argument that the Bushes had failed to timely file a separate action pursuant to Section 163.3215, Florida Statutes, to challenge the city's determination that their lot-split application was inconsistent with the city's comprehensive plan. The circuit court noted, even though there may be due process issues, which could be decided in the Bushes' favor, "any relief this Court could afford the Bushes would be of no practical purpose and would not affect the underlying validity of the City Council's Final Order denying the lot split application." The appellate court did not agree with the conclusions of the trial court. While it is correct that consistency issues must be raised in an action filed pursuant to Section 163.3215 and cannot be brought in a petition for writ of certiorari, see *Stranahan House, Inc. v. City of Ft. Lauderdale*, 967 So. 2d 1121, 1125-26 (Fla. 4th DCA 2007), the Bushes have raised more than consistency issues. The circuit court did not engage in the three-pronged review required by the *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1992), and this constituted "a violation of clearly established principle of law resulting in a miscarriage of justice and, therefore, a departure from the essential requirements of the law." *Clay County v. Kendale Land Dev. Inc.*,969 So. 2d 1177, 1181 (Fla. 1st DCA 2007) (quoting *Broward County v. G.B.V. Int'l Ltd.*, 787 So. 2d 838, 845 (Fla. 2001). *Joe A. Bush and Mary A. Bush v. City of Mexico Beach*, Florida, Fla. L. Weekly D1930 (Fla. August 31, 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

None Reported.

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

Civil Rights – Municipal corporations – Law enforcement officers – Search and seizure – Employees and performers of adult entertainment club brought Section 1983 complaint against city and law enforcement officers arising from execution of search warrant on club, which was based on information gathered during investigation of illegal drug activity at the club – Qualified immunity – Undercover officer who prepared and executed search warrant is not entitled to qualified immunity and may be personally liable under Section 1983 for violation of plaintiff's Fourth Amendment right to be free from unlawful searches and seizures – Although officer was acting within scope of his official duties as a detective with the city police department at the time he drafted and executed search warrant, plaintiffs demonstrated that officer violated their clearly established Fourth Amendment rights where search was conducted pursuant to facially defective warrant that was overbroad and failed to state, with any particularity, any probable cause to search plaintiffs, and where defendant officer lacked individual probable cause to believe that any of plaintiffs had engaged in any illegal drug activity – Municipal liability – Genuine issue of material fact as to whether city is subject to municipal liability under Section 1983 precludes summary judgment on claims that city violated plaintiffs' Fourth Amendment rights by acting on overbroad search warrant and conducting unconstitutional strip search – Speech – Prior restraint – Genuine issue of material fact precludes summary judgment on claims that city violated plaintiffs' First Amendment right against unconstitutional prior restraints by ordering closure of club for remainder of evening after search warrant was executed where there is factual dispute on record regarding whether city closed down the club for the evening – Torts – Battery – Officer who conducted strip search is not entitled to immunity from state-law battery claim under Section 768.28(9)(a), Florida Statutes, where record could support finding of willful/purposeful and wanton conduct on part of officer – Summary judgment is inappropriate on state-law battery claim against officer and city where factual dispute exists regarding reasonableness of officer's action in conducting strip search and there are material facts in dispute concerning municipality's liability for unlawful strip search – Summary judgment is inappropriate on state-law claim for intentional infliction of emotional distress against officer and city where genuine issues of material fact exist as to whether plaintiffs' alleged injuries were severe and whether city is subject to municipal liability for unlawful strip search.

On December 14, 2009, Gudrun Kastritis, Joedith R. Dice, Heather Buchanan, Nikki Sias and Tanya Sias filed an action in federal court against the City of Daytona Beach Shores, and Daytona Beach Shores Public Safety Department Detective Trevor R. Wyman and Officer Susanne Williams (collectively "defendants"), pursuant to 42 U.S.C. § 1983, for violations of plaintiffs' First and Fourth Amendment rights under the U.S. Constitution. The defendants moved to dismiss the plaintiffs' complaint, after consideration of the defendants' motion and plaintiffs' responses, the U.S. magistrate judge recommended dismissal of Counts III, VI, VII and X, in their entirety. The facts are as follows: in January 2009, a confidential informant notified the Daytona Shores Department of Public Safety that certain employees of Biggins Gentleman's Club were selling prescription pills and other illegal narcotics to patrons. The informant also told the department that his

friend, and general manager of the club, died of a drug overdose from pills he purchased from one of the dancers. Defendant Wyman initiated an investigation of the club. During the investigation, three individuals, Rosalie Kain, Amanda Jean Deavers and Rose Anna Marie Gustin, had engaged Wyman in illegal drug transactions while he was undercover as a patron of the club. Based on the information gathered, Wyman prepared an affidavit and a search warrant, which included vehicles in the parking lot and patrons in the club. On September 18, 2009, police officers, including defendants Wyman and Williams, executed the search warrant. The patrons and employees were detained, questioned and photographed. During this time, Williams strip searched each of the plaintiffs. Plaintiffs Kastritis, Dice, Buchannan and Glenn performed at the club as exotic dancers; their "uniform" consisted of a bikini. As bartenders, plaintiffs N. Sias and T. Sias wore shorts, shirts and blouses. The search warrant did not authorize a strip search of anyone in the club. To sustain a claim under Section 1983, a plaintiff must demonstrate that a person acting under the color of state law deprived her of a federal right. See *Cook v. Randolph County*, 573 F.3d 1143, 1151-52 (11th Cir. 2009). Qualified immunity shields a law enforcement officer who is sued in his or her individual capacity for alleged federal constitutional violations that may arise during the performance of his or her discretionary functions. *Case v. Eslinger*, 555 F. 3d 1317, 1325 (11th Cir. 2009). In invoking qualified immunity, the defendant officer must first prove that he was acting within the scope of his discretionary authority when the alleged unconstitutional act took place. *Id at 1325.* After the defendant officer invokes qualified immunity, the plaintiff must then prove: (1) that the officer violated her constitutional rights and (2) that the right was clearly established "in light of the specific context of the case, not as a broad general proposition." *Id at 1326.* The court found that Wyman is not entitled to qualified immunity and may be personally liable under a Section 1983 claim. The plaintiffs contend the warrant upon which Wyman relied was overbroad, lacked probable cause and was supported by an affidavit that contained false information. Wyman maintains that he is protected from suit by the doctrine of qualified immunity because his actions were not "so obviously wrong" or "plainly incompetent" that it can be fairly said that no reasonable officer in his circumstance would have acted in the manner he did. The court did not come to a conclusion regarding the validity of the warrant based on an analysis that construed the unsworn allegations in a light most favorable to the plaintiffs. Rather, the court determined the warrant was unconstitutionally overbroad after conducting an independent review of the text of the actual warrant. Evidence of the record also shows that Wyman lacked individual probable cause to believe that any of the plaintiffs had engaged in illegal drug activity. In his deposition testimony, Wyman admitted that he lacked probable cause to search the particular plaintiffs and that, at best, he had only a reasonable suspicion that some of the club's exotic dancers were dealing drugs. "Reasonable suspicion is not adequate justification for a search and seizure; rather, a search warrant must only be issued upon a showing of particularized probable cause." *Ybarra v. State of Illinois*, 444 U.S. 85 (1979). For the reason the warrant was overbroad and failed with any particularity to state probable cause to search the plaintiffs, a violation of the plaintiffs' Fourth Amendment rights was established. The court next examined whether Williams was acting within the scope of her authority at the time of the alleged strip search of the plaintiffs. "Under the law, a law enforcement officer may subject an individual to a strip search only upon a particularized showing of probable cause that would justify 'going beyond a search of the outer clothing and belongings.'" *Safford Unified School District No. 1 v. Redding*, 557 U.S. ___, 129 S.Ct. 2633, 2641 (2009). The court found the plaintiffs were not under arrest at the time of search. Additionally, the search warrant did not authorize a strip search of any of the individuals and, therefore, the record evidence shows defendant Williams violated the plaintiffs' Fourth Amendment rights to unlawful searches.

Section 6. Announcements

Mark Your Calendar

Future Dates for Florida Municipal Attorneys Association Seminar:

- July 19-21, 2012, Marco Island Marriott

FMAA Seminar Notebooks Available

Notebooks from the 2007 and 2009 FMAA Seminars are still available for $25.00 each. Please contact Tammy Revell at (850) 222-9684 or *trevell@flcities.com* to place your order.