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 October 1, 2011, through December 31, 2011.

Section 1. Recent Decisions of the Florida Supreme Court.

Eminent domain – Inverse condemnation – Exactions – The Fifth Amendment to the U.S. Constitution and Article X, Section 6(a) of the Florida Constitution do not recognize an exactions taking under the holdings of *Nollan v. California Coastal Commission,* 482 U.S. 825 (1987) and *Dolan v. City of Tiagard,* 512 U.S. 374 (1994), where there is no compelled dedication of any interest in real property to public use and the alleged exaction is a non-land-use monetary condition for permit approval that never occurs and no permit is ever issued.

In 1994, Coy A. Koontz Sr. requested permits from the St. Johns River Water Management District (SJWMD) to develop a greater portion of his property than was currently allowed by regulation. Koontz sought to develop 3.7 acres of 14.2-acre parcel of land. All but 1.4 acres of the Koontz tract were within a Riparian Habitat Protection Zone, thus the tract is subject to regulation by the SJWMD. The district agreed to grant Koontz the permit if he agreed to perform either offsite mitigation or agreed to deed a portion of his property into conservation status. Koontz refused to agree to the conditions, and the SJWMD subsequently denied the permit. Koontz filed a lawsuit in inverse condemnation against the SJWMD, alleging an improper exaction. The trial court concluded that the SJWMD had "taken" Koontz's property without just compensation. The Fifth DCA upheld the trial court and certified the question to the Florida Supreme Court as one of great public importance. The Florida Supreme Court has interpreted the takings clauses of the U.S. Constitution and the Florida Constitution coextensively. In discussing the leading U.S. Supreme Court cases on exactions – *Dolan v. City of Tigard,* 512 U.S. 374 (1994) and *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825 (1987) – the Florida Supreme Court noted both cases involved exactions that required the owner to dedicate real property in exchange for a permit, and in both cases the permit was actually issued. Consistent with the above cases, the Florida Supreme Court held the rule in Dolan and Nollan is applicable only when the condition of permit approval by the government requires a dedication of or over the owner's real property for public use and only becomes ripe after the government issues a permit. In the instant case, the SJWMD did not require Koontz to dedicate any of his real property to public use, and a permit was never issued to Koontz. Therefore, nothing was ever "taken" from Koontz. As a result, the Florida Supreme Court held Koontz's claim failed on two separate grounds. The Florida Supreme Court quashed the decision of the Fifth DCA and the case was remanded for further proceedings consistent with the opinion. *St. Johns River Water Management District v. Coy A. Koontz,* etc., 36 Fla. L. Weekly S623 (Fla. November 3, 2011).

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

Eminent Domain – Inverse condemnation – Municipal Corporations – Code Enforcement – Demolition of structure classified as public nuisance.

Homeowners Olenza Roberts and Venita Roberts brought an inverse condemnation claim against the City of West Palm Beach. In their complaint, the Robertses alleged a "taking" occurred because the city failed to provide proper notice prior to the demolition of their residence pursuant to a public nuisance abatement ordinance. The Robertses owned a residence in a historic district in West Palm Beach. In 2002, a fire damaged the residence and the Robertses commenced work on repairing the damage. Due to a variety of factors, including the necessity of obtaining special permits for repairs since the residence was located in a historic district, the construction process was lengthy. In 2004, during the course of the repairs, a city official declared the Roberts' residence an unsafe public nuisance and scheduled the residence for demolition. The city's nuisance abatement ordinance prescribes the methods of notice the city must provide to property owners after the city has made a determination that a public nuisance exists. At a bench trial, the Robertses alleged that they did not

receive any notice from the city and were therefore denied the opportunity to contest the demolition proceedings. The City of West Palm Beach disputed the Robertses' claim, arguing substantial compliance with the nuisance abatement ordinance. The appellate court upheld the trial court's ruling that the Robertses received no notice from the city and that a "taking" had occurred. The appellate court also reaffirmed that an appeal to a final judgment in a case automatically stays execution of the judgment. City of *West Palm Beach v. Roberts*, 36 Fla. L. Weekly D2293 (Fla. 4th DCA October 19, 2011).

Wrongful death – Civil rights – Qualified immunity — Search and seizure – No Fourth Amendment seizure occurred where officers and fire-rescue personnel acted for purpose of rendering medical assistance to decedent, who was uncommunicative after being involved in an accident and uncooperative with efforts to provide medical treatment, and where there was no attempt to arrest or detain decedent for any law enforcement purpose.

Personal representative of decedent Oral George Brown appealed final summary judgment granted in favor of nine defendants, five Broward County Sheriff's Office deputies and four Broward County Fire Rescue personnel on grounds of qualified immunity. Brown was involved in a single-car rollover crash that required the "jaws of life" to extricate Brown from his vehicle. Following his removal from the vehicle, Brown was incoherent, dazed, unable to talk, unresponsive to police commands, and began to walk away from the scene. Brown was not suspected of any criminal activity. After five minutes of trying to ascertain what was wrong with Brown, the deputies threw Brown to the ground, handcuffed, and eventually hogtied him. At no time did Brown act aggressively toward the deputies or paramedics. Paramedics placed Brown in an ambulance hogtied and face down on a stretcher. During transport to the hospital, Brown was observed having difficulty breathing and suffered a grand mal seizure. The paramedics did not administer any medication or perform any medical treatment typically used to stop a seizure. Brown lost consciousness and later died. The medical examiner determined the cause of death was due to positional asphyxia that led to cardiac and respiratory failure. The representative of Brown filed suit alleging an unconstitutional seizure under the Fourth Amendment and a Fourteenth Amendment deliberate indifference claim. The Fourth DCA reviewed the final summary judgment in favor of the sheriff's deputies and fire rescue personnel and held there was no Fourth Amendment seizure and qualified immunity shielded the deputies and fire rescue personnel from liability. Qualified immunity shields government officials from liability for tort damages while performing discretionary functions unless their actions violate a statutory or constitutional right. To prove qualified immunity does not apply, a plaintiff must show (1) viewing the evidence in the light most favorable to the plaintiff, that the government violated a constitutional right; and (2) if such a violation occurred, it must be determined if that right was clearly established at the time of the incident. As to the deliberate indifference claim, the Fourth DCA held a Fourteenth Amendment deliberate indifference claim cannot stand because there must first be a Fourth Amendment seizure prior to any deliberate indifference claim. Alverna Brown, as Personal Representative of the Estate of Oral George Brown, deceased, and on behalf of the survivors of *Oral George Brown v. Kenneth C. Jenne, et al.*, 36 Fla. L. Weekly D2431 (Fla. 4th DCA November 9, 2011).

Torts – Defamation – Absolute immunity – Public Officials – Section 768.095, Florida Statutes, which provides employers immunity from civil liability for disclosures about former or current employees to a prospective employer unless information disclosed was knowingly false or violated civil right of employee protected under Chapter 760, does not abrogate absolute immunity which common law provides to public officials who make statements within the scope of their duties.

The plaintiff appealed a decision from the circuit court dismissing plaintiff's complaint with prejudice at the pleading stage. The plaintiff filed suit alleging Section 768.095, Florida Statutes, abrogated the absolute immunity that the common law provides to public officials acting in the scope of their duty. Section 768.095 provides that an employer is immune from civil liability if the employer discloses information about a former or current employee to a prospective employer unless it is shown by clear and convincing evidence that the information was knowingly false or violated any civil right of the employee protected under Chapter 760. To abrogate or limit immunity, a statute must be clear. The Fourth DCA held nothing in Section 768.095 indicates the Legislature intended for the statute to limit the common law immunity granted to public officials acting in the scope of their duties. The court further held that Section 768.095 applies only to employers that are not public officials. *Gregory M. Blake v. City of Port St. Lucie, et al.*, 36 Fla. L. Weekly D2491 (Fla. 4th DCA November 16, 2011).

Torts – Automobile accident – Municipal corporations – Trial court erred in dismissing action against city on ground that notice of claim provided to city was not provided within three years after accrual of claim where court had not been informed that city had previously received timely notices of claim.

On November 2, 2004, Belki A. Cabral was involved in an automobile accident with an employee of the City of Miami Beach. Pursuant to Section 768.28 Florida Statutes, on November 8, 2004, and December 21, 2004, Cabral's attorneys sent a letter to the city notifying it that they were

representing Cabral in a claim for damages against the city. The city acknowledged receipt of the letters on March 1, 2005. On November 2, 2007, the city received another letter from Cabral's subsequent attorney notifying the city of her claim. On October 31, 2008, Cabral's third attorney filed a lawsuit against the city for negligence. The complaint properly alleged compliance with Section 768.28 but only referenced and included as an attachment the November 2, 2007, letter. The city moved to dismiss the complaint on the grounds that Cabral failed to comply with the three-year notice requirement in Section 768.28, which expired on November 1, 2007. The city did not acknowledge the two letters it had timely received prior to November 2, 2007. The trial judge, unaware of the previous letters, granted a motion to dismiss Cabral's case with prejudice. Cabral's attorneys made a motion for rehearing, which was denied by the trial court. Cabral timely appealed the final judgment to the Third DCA. As a general rule, the question of whether a claim is barred by the statute of limitations should be raised as an affirmative defense rather than in a motion to dismiss. The defense can be raised in a motion to dismiss if the facts on the face of pleadings show that the statute of limitations bars the action. The court held Cabral properly alleged that she had completed all conditions precedent to filing the claim against the city. The burden then shifts to the city to plead an affirmative defense in its answer denying that the required notices were given and to present the issue in either a motion for summary judgment or a motion for judgment on the pleadings. The Third DCA remanded the issue to the trial court with instructions to reinstate the complaint. *Belki A. Cabral v. City of Miami Beach,* 36 Fla. L. Weekly D2355 (Fla. 3d DCA October 26, 2011).

Municipal corporations – Development orders – Plat approval – Action arising out of attempt to declare city's revised plat approval, which authorized expansion and conversion of land uses in connection with an existing racetrack, to be inconsistent with the city's comprehensive plan.

In 2008, the City of Pompano Beach adopted a resolution approving the plat for the Pompano Park Racino. In 2009, the city passed a resolution authorizing the continued use of the racetrack and casino, authorized an expansion and conversion of land uses, increased development thresholds to the park, and provided preliminary approval for compliance with the city's land development code regarding traffic, water management and solid waste disposal. Residents living near the park filed this action for declaratory relief declaring the plat approval was a "development order" under Chapter 163, Florida Statutes, and was subject to a challenge as being inconsistent with the city's comprehensive plan. The city filed a motion to dismiss arguing that a plat approval is not the equivalent of a development order. The trial court agreed and dismissed the complaint. A "development order" is defined as "any order granting, denying, or granting with conditions an application for a development permit." Section 163.3164, Florida Statutes. A "development permit" "includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." Section 163.3164(8), Florida Statutes. The City of Pompano Beach land development code adopts the statutory definition of "development order" and more specifically defines a "development permit" as, "[a]ny building permit, zoning permit, plat approval, site plan approval or rezoning certification, variance, or other action having the effect of permitting development." Pompano Beach, Fla., Code Ordinances §157.01. The Fourth DCA held the specific designation of a plat approval as a development permit in the city ordinance places the plat approval within the definition of "development permit" pursuant to Section 163.3164(8). Since the statutory definition of "development order" includes development permits, the plat approval is equivalent to a development order and subject to challenge pursuant to Section 163.3215(3), Florida Statutes. The case remanded to the trial court for further proceedings. *Barbara Graves, Gary Kast, Randy Martin and Lillian Thames v. City of Pompano Beach,* 36 Fla. L. Weekly D2572 (Fla. 4th DCA November 23, 2011).

Municipal Corporations – Site plan application – Second tier certiorari review of circuit court decision quashing decision of City Commission denying site plan application on ground that applicant was denied due process, that decision of commission was not supported by competent substantial evidence.

In 2006, Publix submitted a site plan for review to the City of Sunny Isles Beach. The commission declared the plan null and void due to alleged fraudulent representations made by Publix. Publix requested three administrative appeals after the site plan was denied, including one appeal that was to be heard by the commission. The commission maintained its decision that the site plan was null and void. The circuit court quashed the decision of the City Commission, finding the the commission denied Publix due process, the decision of the commission departed from the essential requirements of law, and the decision was not supported by substantial, competent evidence. The city appealed the circuit court's ruling. The Third DCA held Publix was not denied due process because it was notified that the hearing before the commission was to occur, and that any objections Publix had concerning its application, its prior appeals and its objection to the commission's prior decisions were to be heard at the hearing. The Third DCA further held there was no due process violation where the city attorney, who previously made a decision regarding the Publix site plan approval, was present at the commission meeting to provide legal advice to the commission. The Third DCA held the commission did

not depart from the essential requirements of law in declaring the site plan null and void. The city code states that parties appearing before the City Commission must make full and accurate disclosure of all facts presented before the commission. The city code provides that if it is determined that the disclosure was not made fully or truthfully, the matter is voidable. The Third DCA held the circuit court erred by determining on its own that Publix had not engaged in fraudulent conduct and, therefore, the conduct was not forbidden by the city's code and was not voidable. The Third DCA held the circuit court's decision was based on reweighing evidence and engaging in fact-finding, which the court was prohibited from doing based on the procedural posture of the case. The Third DCA held the circuit court erred in finding that the commission did not have substantial competent evidence on which to base its findings of fraud per the city code. The Third DCA held the commission had no burden to prove that Publix engaged in fraud, and therefore, their decision was based on substantial competent evidence. *City of Sunny Isles Beach v. Publix Supermarkets, Inc.*, 36 Fla. L. Weekly D2325 (Fla. 3d DCA October 19, 2011).

Municipal corporations – Ordinances – Traffic infractions –Red light cameras –Trial court erred in finding that ordinance which allows the issuance of notices of violations for red light infractions on basis of red light cameras is preempted by and in conflict with state law.

The plaintiff twice failed to stop at an intersection that was being monitored by red light cameras and was issued citations on January 9, 2009, and January 12, 2009. The plaintiff filed an action for declaratory relief contending that the violation notices were invalid exercises of municipal authority and the ordinance authorizing red light cameras is preempted by Section 316.007, Florida Statutes, and directly conflicts with existing state law. The trial court held the ordinance was invalid and unenforceable because the Florida Legislature did not provide express authority to municipalities to legislate on the subject of red light cameras, and the provision in the ordinance allowing cameras to be the basis for a traffic infraction conflicted with Section 316.640(5)(a), Florida Statutes, which requires that an officer observe a traffic infraction prior to a citation being issued. The City of Aventura appealed the circuit court ruling that the city's ordinance allowing red light cameras is invalid and unenforceable. The Third DCA held Section 316.008, Florida Statutes, expressly confers authority to municipal governments to regulate traffic within its boundaries so long as the regulation supplements but does not conflict with existing state law. The Third DCA held the conflict that the trial court cited with Section 316.640(5)(a) was not applicable because that section only applies to traffic infractions issued pursuant to the statewide Uniform Traffic Control Law in Chapter 316, Florida Statutes, not traffic infractions based on municipal ordinances. Therefore, the ordinance acts to supplement uniform state traffic enforcement on a local level, not to overrule it. Furthermore, since the ordinance requires an officer to review each infraction, the Third DCA held the enforcement mechanism of the ordinance is parallel to the requirements in Section 316.640(5)(a) and does not conflict with state law. The Third DCA concluded by noting the Legislature's passage of a bill implementing a statewide red light traffic enforcement scheme makes clear that the Legislature is aware of municipal red light traffic enforcement programs and does not invalidate existing programs. See Laws of Fla., ch. 2010-80, §§6&7 (2010). *City of Aventura, Florida v. Richard Masone,* Fla. L. Weekly D2591 (Fla. 3d DCA November 30, 2011).

Section 3. Recent Decisions of the U.S. Supreme Court.

None Reported.

Section 4. Recent Decisions of the U.S. Court of Appeals, Eleventh Circuit.

Civil rights – Municipal corporations – Ordinance – Constitutionality – Four homeless plaintiffs challenge constitutionality of municipal ordinance that authorizes city agents to issue temporary trespass warning for city property on which warning recipient violates city or state law, and second ordinance that prohibits storage of personal property on public property.

Four homeless plaintiffs challenged the constitutionality of two ordinances in St. Petersburg and the enforcement of those ordinances. One ordinance, Section 20-30, authorizes city agents to issue a trespass warning for city land, barring the recipient of the warning from entering certain city property, if the agent determined the person violated state or city law. The second ordinance, Section 8-321, prohibits the storage of personal property on city land, such as parks or rights of way. The district court dismissed the plaintiffs' claims. The plaintiffs appealed to the U.S. Court of Appeals for the Eleventh Circuit. The plaintiffs challenged the constitutionality of the first ordinance on three grounds: (1) a violation of procedural due process under Section 1983; (2) the First Amendment overbreadth doctrine; and (3) the right to intrastate travel in the Florida Constitution. The plaintiffs argue that the second ordinance is void for vagueness under the Due Process Clause. A Section 1983 procedural due process claim requires a plaintiff to prove three elements: (1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process. In the instant case, the Eleventh Circuit held the plaintiffs were deprived of liberty or property interest in two ways – by enforcing the trespass

to prohibit access to a specific park that was open to the public and by enforcing the ordinance to prohibit access to all public parks in the city. This satisfies the first prong of the 1983 test. Both parties agreed state action was present, which satisfies the second prong of the 1983 test. The court held the third prong of the test was satisfied because there was no mechanism in place for the recipient of a trespass warning to contest the issuance of the warning, which served as a de facto injunction prohibiting access to all city parks. The only method to challenge the warning was to violate the ordinance, be charged with a misdemeanor violation of the ordinance, and contest the charge in a criminal proceeding. Furthermore, the court held the wide variety of city employees that could issues the permits created a substantial risk for an erroneous deprivation of liberty. Thus, the court held Section 20-30 was invalid on its face and as applied to the plaintiffs. As to the plaintiffs' second claim that Section 20-30 was facially unconstitutional and overbroad, the court held the ordinance did not create a risk of the suppression of ideas in every application and upheld the district court's ruling dismissing the overbreadth claim. The plaintiffs' third claim alleges that Section 20-30 is an unconstitutional violation of the right to intrastate travel under the Florida Constitution. FLA CONST. art I, §2. The plaintiffs allege that the enforcement of the trespass ordinance enjoins them from the use of public sidewalks around the public parks and the use of bus shelters located on public sidewalks around public parks. To enforce the ordinance on sidewalks surrounding public parks, the city would have to prove that the ordinance is narrowly tailored to advance a compelling government interest. The Eleventh Circuit held that the city ordinance did not did not pass the strict scrutiny test required under Florida law. The plaintiffs challenge Section 8-321 under the Due Process Clause as being impermissibly vague. The ordinance provides that if a warning is issued for the unlawful storage of personal items on public property, the person issued the warning has 36 hours to remove the property before it is removed by the city. The plaintiffs argue the ordinance is vague because it does not define the terms "unlawful storage" or "unattended." If a party bringing a challenge for vagueness is engaged in conduct that is clearly proscribed by the ordinance, the party cannot challenge the enforcement for the ordinance as applied to others. In the instant case, the court held the plaintiffs were clearly in violation of the "storage" element of the ordinance, and therefore, the ordinance was constitutional as applied to them. Thus, the plaintiffs could not bring a challenge on behalf of the public at large. The court held the plaintiffs did not clearly violate the "unattended" element of the ordinance. The court held that the ordinance was not vague, however, because in the vast majority of the intended applications of the ordinance, the application of the ordinary meaning of the word "unattended" would not lead to arbitrary or discriminatory enforcement. *Anthony Catron, Jo Anne Reynolds, William Shumate, Raymond Young, Charles R. Hargis, et al. v. City of St. Petersburg*, 23 Fla. L. Weekly Fed. C447 (11th Cir. September 28, 2011).

Section 5. Recent Decisions of the U.S. District Courts for Florida

None Reported.

Section 6. Announcements

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July 19-21, 2012 – Marco Island Marriott
July 25-27, 2013 – Amelia Island Plantation

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