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, 2012, through March 31, 2012.

Section 1. Recent Decisions of the Florida Supreme Court.

Municipal Corporations – Special Districts – Home rule powers – Non-ad valorem special assessments – Municipal dependent special districts (MDSD) may not levy non-ad valorem special assessments upon real property owned by independent special district of the state because the MDSD's home rule powers do not extend so far as to allow such assessments.

The North Port Road and Drainage District (NPRDD), a municipal dependent district wholly within the City of North Port, levied non-ad valorem special assessments against property owned by the West Villages Improvement District, an independent special improvement district. West Villages filed a petition for writ of certiorari arguing that there was no explicit or implied legislative authority for NPRDD to levy the assessment against public property owned by West Villages. The Florida Supreme Court held that special assessments levied by NPRDD were limited by the restrictions on home rule powers in Section 166.021(3), Florida Statutes. The court held that West Villages had no way of collecting funds to pay for the special assessment levied by NPRDD because West Villages was not authorized to pass through special assessments levied by NPRDD to property assessed separately by West Villages. The court also held that West Villages' enabling statute did not allow for the taxation and assessment of public property. Consequently, West Villages was not authorized by statutory law to pay NPRDD's assessments. Additionally, the Florida Supreme Court held NPRDD cannot reach through West Villages to force the state to pay NPRDD's assessments because money cannot be drawn from the treasury without a legislative appropriation. *North Port Road and Drainage Dist. v. West Villages Improvement Dist.*, 37 Fla. L. Weekly S67 (Fla. February 2, 2012).

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

Municipal Corporations – Ordinances – Ordinance providing that owners of single-family dwellings may rent their property for a period of less than 30 days only three times in a calendar year – Trial court departed from essential requirements of law in finding that the ordinance was unconstitutional as applied to the property owner without determining the economic impact of the ordinance on the property owner by weighing the value of the property before and after the enactment of ordinance.

In 2009, the City of Venice enacted an ordinance prohibiting owners of single-family dwellings in residential neighborhoods from renting their properties more than three times in a calendar year, unless the owners complied with the pre-existing use requirements of the ordinance prior to July 14, 2009, the effective date of the ordinance. Martha Gwynn purchased a property in 2004 for the purpose of renting to seasonal visitors. Gwynn did not comply with the pre-existing use requirements set forth in the ordinance and continued to rent the property in violation of the ordinance. The City of Venice Code Enforcement Board found Gwynn in violation of the ordinance. Gwynn appealed the board's decision to the Circuit Court. Gwynn argued that the ordinance was unconstitutional on its face and as applied to her property. The Circuit Court held the ordinance was not unconstitutional on its face, but it was unconstitutional as applied to Gwynn. To determine whether a regulation unconstitutionally interferes with a property owner's rights, the court must consider the following three elements: the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with investment-backed expectations, and the character of the government invasion. The Second DCA held that the Circuit Court failed to properly determine the economic impact of the ordinance. The Second DCA held the Circuit Court erred in only taking into account the loss of rental income after the ordinance took effect and failing to include the residual economic value that

remained in the property, such as future rental income as a monthly rental, continued short-term rental for three time periods, and its value as an investment property. Since the Circuit Court failed to properly determine the economic impact of the ordinance as required by law, the Second DCA held the Circuit Court departed from the essential requirements of law and reinstated the order of the Venice Code Enforcement Board. *City of Venice v. Martha L. Gwynn*, 37 Fla. L. Weekly D47 (Fla. 2d DCA December 30, 2011).

Contracts – Employment – Releases – Release executed as part of termination package between plaintiff and former employer, which released claims related to employment of plaintiff or termination of employment, or claims for compensation, bonuses, commissions, lost wages, or unused accrued vacation or sick pay, did not release plaintiff's claim for tortious interference with a business relationship with a subsequent employer.

As part of a termination severance package, Frank Caballero executed a release that limits claims against his former employer, Phoenix American Warranty Company, that in any way relate to the employment of Caballero by Phoenix; Caballero's termination; or claims for compensation, bonuses, commissions, lost wages, or unused accrued vacation or sick pay. Subsequent to the execution of release, Caballero brought a claim against Phoenix alleging, among other things, tortious interference with a business relationship. The trial court granted summary judgment in favor of Phoenix holding the release exonerated Phoenix from all claims. The Third DCA reversed the trial court's ruling holding the terms of the release only related to Caballero's past employment with Phoenix and, therefore, did not exonerate Phoenix from claims arising from his subsequent employment or allegations that accrued after the release was executed. *Frank C. Caballero v. Phoenix American Holdings, Inc. et al.*, 37 Fla. L. Weekly D188 (Fla. 3d DCA January 18, 2012).

Municipal Corporations – Trial court properly determined that community college enjoys sovereign immunity from suit for nonpayment of city's stormwater utility fees – State has not waived sovereign immunity with respect to stormwater utility fees.

In 2001, Key West enacted an ordinance creating a stormwater utility system and establishing stormwater utility fees to pay for the system. The fees applied to all developed property in Key West city limits, including the property of Florida Keys Community College. Under protest, the college paid Key West a total of $160,529.60 in stormwater fees. The college filed suit seeking a declaration that the college enjoyed sovereign immunity with respect to the stormwater fees and a refund of the fees already paid. The trial court granted the college's motion for summary judgment and ordered a refund of all fees. The city appealed, arguing the court erred in granting summary judgment because the State of Florida waived sovereign immunity with respect to the imposition of stormwater fees, sovereign immunity is a shield rather than a sword, and the college paid the fees voluntarily. The city argued the Florida Legislature waived its sovereign immunity through Chapters 403 and 180, Florida Statutes. Chapter 403 requires local governments to develop stormwater programs and allows for the imposition of fees to fund stormwater programs. The city argued that Chapter 403 does not specifically exempt state-owned property from the payment of stormwater utility fees. The Third DCA held an exemption is different from sovereign immunity because sovereign immunity is the rule rather than the exception, and an exemption is the exception rather than the rule. Sovereign immunity must be expressly waived and, conversely, an exemption must be expressly granted. In the instant case, the court held that since the Legislature did not specifically grant a waiver of sovereign immunity for stormwater utility fees in Chapter 403, no waiver exists. Chapter 180 allows municipalities to recover fees charged by specified municipal utilities by suit in court. The city argued that the state waived sovereign immunity through Chapter 180 because the waiver of sovereign immunity for some utilities should be construed as a waiver of sovereign immunity for all utilities, including stormwater utilities. The Third DCA held that a waiver of sovereign immunity for stormwater utilities cannot and does not apply by inference since Chapter 180 specifically lists the types of utilities subject to suit in court, the city established its stormwater utility under a different statutory chapter, and Chapter 180 does not contain an express waiver of sovereign immunity. The Third DCA held that sovereign immunity was not used as a "sword" in the instant case because the trial court's decision to order a refund of the stormwater fees was not based on the doctrine of sovereign immunity but rather a mutual mistake of law. The Third DCA held the college's payment of the stormwater fees was involuntary because the college only agreed to pay the fees after the city threatened to use enforcement measures including the threat of litigation, the imposition of late payment fees, the denial of permits and the discontinuance of utility service. Based on the above rationale, the Third DCA affirmed the trial court and ordered a refund of all stormwater fees paid by the college. *City of Key West v. Fla. Keys Cmty. Coll.*, 37 Fla. L. Weekly D178 (Fla. 3d DCA January 18, 2012).

Eminent domain – Inverse condemnation – Counties – Venue – Home venue privilege – Action in Hillsborough County against Pinellas County, alleging action of Pinellas County has caused plaintiff's property in Hillsborough County to be permanently flooded – Complaint for inverse condemnation invoked sword-wielder exception to Pinellas County's home venue privilege.

Donna Baldwin owned property adjacent to land owned by Pinellas County. Both parcels of land lie in Hillsborough County. Baldwin filed a complaint in inverse condemnation in Hillsborough Circuit Court alleging Pinellas County

had engaged in a "taking" of her property by causing her land to be permanently flooded. Pinellas County filed a motion to dismiss Baldwin's complaint arguing venue was improper in Hillsborough County and, due to the home venue privilege, the complaint should be filed in Pinellas County. Baldwin argued the sword-wielder exception to the home venue privilege applied, and venue was proper in Hillsborough County. The trial court agreed and held venue was proper in Hillsborough County. In Florida, the home venue privilege provides, absent waiver or exception, civil actions against the state, or one of its agencies or subdivisions, must be brought in the county where the government entity maintains its principal headquarters. One of the exceptions to the home venue privilege is the sword-wielder doctrine. The sword-wielder exception applies in cases where the primary purpose is to obtain judicial protection against an alleged invasion of a constitutional right where the threat of the invasion is real and imminent. The Second DCA held that the governmental taking of private property in violation of Article X, Section 6 of the Florida Constitution is an unlawful invasion of constitutional rights sufficient to invoke the sword-wielder exception to the home venue privilege. The Second DCA affirmed the trial court's holding that venue was proper in Hillsborough County. *Pinellas Cnty. v. Donna K. Baldwin*, 37 Fla. L. Weekly D207 (Fla. 2d DCA January 20, 2012).

Municipal corporations – Ordinances – Voluntary annexation – Where municipality followed statutory procedures for voluntary annexation, once property was annexed, property became subject to all laws, ordinances and regulations in force in municipality upon effective date of annexation.

On September 11, 2008, the Village of North Palm Beach granted a voluntary annexation petition filed by Live Oak Plaza, LLC, which operated a strip mall on the property to be annexed. A tenant, Foster's Pub, operating under the laws of unincorporated Palm Beach County, served alcohol until 5:00 a.m. The village Code of Ordinances prohibits the sale of alcohol between 2:00 a.m. and 7:00 a.m. Foster's filed a motion for declaratory relief to prevent the village from enforcing the alcohol ordinance. The trial court granted Foster's motion, holding the leasehold agreement between Foster's and Live Oak created a vested right in operating hours that could not be restricted by the village's ordinance for the duration of the lease, thus granting Foster's grandfather status until the lease expired. The Fourth DCA held the village had the authority to regulate alcohol sales pursuant to Section 562.14, Florida Statutes. The court held the village followed proper procedures for annexation in Section 171.044, Florida Statutes, and consequently, under Section 171.062(1), Florida Statutes, once the property was annexed, Foster's had to comply with all laws in force in the village at the time of annexation. The Fourth DCA held the trial court erred in granting Foster's grandfather status because grandfather status is only created by a provision in a zoning ordinance, not by judicial action. In the instant case, there is no zoning ordinance that confers grandfather status. The case was remanded for entry of declaratory judgment in favor of the village. *Village of N. Palm Beach, Fla. v. S&H Foster's Inc., d/b/a Foster's Pub*, 37 Fla. L. Weekly D462 (Fla. 4th DCA February 22, 2012).

Wrongful death – Negligence – Municipal corporations – Police officers – Police, upon legally releasing an impaired person from custody at a police station or jail, do not thereafter owe duty of care to that person when the police have not created any risk which that person may face upon release.

A City of Boca Raton police officer stopped a vehicle driven by Christopher Milanese. The officer noticed that Milanese has been drinking and took Milanese into custody. Approximately one hour later, the officer released Milanese and called a cab to pick up Milanese from the police station. For some reason, Milanese did not get into the cab. Instead, he walked out of the police station and lay down on nearby railroad tracks. A train struck and killed Milanese. At the time of his death, Milanese's blood alcohol level was .199. Milanese's estate filed suit against Boca Raton for negligence alleging the police had a duty to ensure the safety of Milanese following his release from custody. The trial court granted the city's motion to dismiss on the grounds that the city owed no duty of care to Milanese because he was not in custody at the time the train killed him, and because the city did not create a foreseeable zone of risk. In a law enforcement context, a "duty of care" exists when officers place people within a zone of risk by creating or permitting dangers to exist, by taking people into police custody, detaining them, or otherwise subjecting them to danger. In the instant case, the Fourth DCA held the city owed no duty of care to Milanese because they did not create his impaired condition or the surrounding area of the police station, they did nothing to render Milanese more vulnerable to any dangers that existed, and they were following their legal obligation by releasing Milanese. The court held that the police placed Milanese in no worse position than if they had not acted at all and, in fact, actually improved Milanese's position by calling him a cab. The Fourth DCA upheld the trial court's dismissal of Milanese's complaint. *Peter Milanese, as personal representative of the Estate of Christopher Milanese v. City of Boca Raton, Fla.*, 37 Fla. L. Weekly D466 (Fla. 4th DCA February 22, 2012).

Public records – Exemptions – Municipal corporations – Provision of Public Records Act exempting from the act any examination questions and answers prepared and received by a government agency for purpose of employment applies to pre-employment polygraph report.

The appellant made a public records request for the questions and answers from a pre-employment polygraph

report given as part of a screening test for applicants to become a reserve police officer for the City of High Springs. Prior to releasing the polygraph report, High Springs redacted the questions and answers from the report, claiming they were exempt from the Public Records Act pursuant to Section 119.071(1)(a), Florida Statutes. Section 119.071(1)(a) provides that examination questions and answer sheets from examinations administered by a government agency for the purpose of licensure, certification or employment are exempt from Section 119.071(1)(a) and Article I of the Florida Constitution. The First DCA held, by the plain meaning of Section 119.071(1)(a), a polygraph test falls under the definition of an "examination" in Section 119.071(1)(a) because it meets each element of the statutory criteria. Since a polygraph test is an "examination" for purposes of Section 119.071(1)(a), the plain meaning of the statute exempts the results from the Public Records Act. *Robyn Rush v. High Springs, Fla.*, 37 Fla. L. Weekly D482 (Fla. 1st DCA February 23, 2012).

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.

Employer-employee relations – Family and Medical Leave Act – A pre-eligible employee has a cause of action if an employer terminates her in order to avoid having to accommodate that employee with rightful FMLA leave rights once that employee becomes eligible.

On October 5, 2008, Kathryn Pereda began employment at a senior living facility operated by Brookdale Senior Living Communities, Inc. In June 2009, Pereda informed Brookdale that she was pregnant and would be requesting FMLA leave following the birth of her child on or about November 30, 2009, at which time Pereda would be eligible under the FMLA. To be eligible under the FMLA, an employee must have worked for at least 12 months for a minimum of 1,250 hours during the previous 12 month period, and have experienced a triggering event such as the birth of a child. Pereda alleged that, following the FMLA notification, Brookdale harassed her and treated her unfairly at work. Pereda was fired in September 2009 after 11 months of employment with Brookdale. Pereda filed suit alleging claims for interference and retaliation under the FMLA because Brookdale denied her FMLA benefits and because she was terminated for attempting to exercise those rights. The U.S. District Court for the Southern District of Florida dismissed Pereda's complaint holding that Brookdale could not have interfered with Pereda's FMLA rights because she was not eligible for FMLA leave at the time she requested it. Furthermore, the Southern District held that Brookdale did not retaliate against Pereda because she could not have engaged in any activity protected by the FMLA because she was not eligible for FMLA leave. The U.S. Court of Appeals, 11th Circuit, reversed the District Court and held a pre-eligible employee has a cause of action if an employer terminates the employee in order to avoid having to provide FMLA rights once the employee becomes eligible. The court also held a pre-eligible employee is protected from retaliation by the FMLA. The court held that since the FMLA requires an employee to give an employer a minimum of 30 days notice from the date leave is to commence, it would be illogical to require an employee to give such notice if it could potentially be used by the employer to retaliate or interfere with the employee's rights under the FMLA. If the FMLA was interpreted differently, the court reasoned, it would allow employers total freedom to fire employees at any point before they become eligible under the FMLA to avoid any FMLA protections. As to the retaliation claim, the court held that since a pre-eligibility request for leave was protected by the FMLA, a pre-eligibility claim for retaliation was likewise protected activity under the FMLA and could give rise to a cause of action under the FMLA. *Kathryn Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269, Fla. L. Weekly Fed. C688 (11th Cir. January 10, 2012).

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

None Reported.

Section 6. Announcements.

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July 25-27, 2013 – Amelia Island Plantation

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