Legal Update

BELL & ROPER, P.A.

August/September 2013

## BAD FAITH/APPRAISAL AWARD/ CRN NEED NOT STATE "CURE" AMOUNT

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In Hunt v. State Farm Florida Ins. Co. 38 FLW D774 (2nd District April 5, 2013), the 2nd District Court of Appeal reversed the trial court's order granting summary judgment in favor of State Farm in this bad faith lawsuit.

Hunts' home sustained sinkhole damage in 2006. In 2007 he filed suit against State Farm and filed a Civil Remedy Notice of insurer violation (CRN) pursuant to FSA § 624.155. The trial court granted State Farm's motion for appraisal and abated the lawsuit. In 2008 State Farm paid an appraisal award in Hunt's favor in the amount of $162,571.61. Hunt then voluntarily dismissed the lawsuit against State Farm.

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## Increased Burden on Plaintiffs in Title VII Retaliation Actions

University of Texas Southwestern Medical Center v. Nassar, 133 S. CT 2517 (2013).

In this case, the Plaintiff alleged that he was the victim of racial and religious discrimination and was subjected to retaliation after he filed a complaint of discrimination. The Plaintiff prevailed on the retaliation claim before a jury. On appeal, the Fifth Circuit affirmed, finding that the evidence supported the jury's finding that the employer was, at least in part, motivated to retaliate against the Plaintiff because of his discrimination complaint.

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Hunt subsequently filed a bad faith lawsuit against State Farm in 2010. State Farm moved for summary judgment arguing that Hunt had not obtained a judgment against State Farm, and Hunt's CRN did not specify a definite "cure" amount. The trial court granted State Farm's motion for summary judgment and Hunt appealed to the 2nd District Court of Appeal.

The 2nd District Court of Appeal reversed the trial court's order. The 2nd District found that the appraisal award was sufficient to satisfy the requirement that a judgment be obtained as a condition precedent to a bad faith action as expressed in Blanchard v. State Farm Mut. Auto Ins. Co., 575 So.2d 1289 (Fla. 1991).

The 2nd District also concluded that FSA § 624.155 does not require a definite "cure" amount. A footnote to the opinion indicates that Hunt was seeking delay damages in the bad faith action.

The Hunt case illustrates the difficulties faced by insurance carriers when a Civil Remedy Notice is received as the notice rarely sets forth a "cure" amount. If it appears that the plaintiff's claim can be resolved, we suggest that counsel, or the claims professional who is handling the matter, attempt to secure a definite "cure" amount from counsel.

Michael Bell, Esquire

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The standard employed by the trial court and affirmed by the Fifth Circuit, was the same standard used in the 11th Circuit. Courts in both Circuits require that a Plaintiff in a Title VII discrimination case establish that his race, color, religion, sex, or national origin was a "motivating or substantial factor" in the adverse employment action. The Courts in both Circuits likewise employed that same standard, "substantial or motivating" in retaliation cases under Title VII. In other words, a Plaintiff was required to prove that his claim of discrimination was a "substantial or motivating" factor in the retaliatory action taken by his employer.

The United States Supreme Court reversed the Fifth Circuit, and by implication the 11th Circuit, with respect to the standard of proof required of Plaintiffs in Title VII retaliation cases. A Plaintiff now must satisfy a higher standard and prove that retaliatory motivation was the "but for" cause of the adverse employment action. The Supreme Court, in this 5 to 4 decision, reached this conclusion based upon the difference in the language used in Title VII for claims of discrimination as opposed to retaliation claims. The Supreme Court held that the language used in Title VII for retaliation claims was not substantially different from the language used under the ADEA. Therefore, consistent with its decision in Gross v. FBL Financial Services, Inc., 557 U.S. 167 (2009); which held that ADEA claims must be proven under a "but for" causation standard; the "but for" standard is to be employed in Title VII retaliation claims.

This higher "but for" retaliation proof standard under Title VII will likely be applied to claims brought under the Florida Civil Rights Act and the Florida Whistle-Blower's Act, given the fact that both of these statutes use federal decisions as legal authority.

Michael H. Bowling. Esquire

# 2013 LEGISLATIVE SESSION UPDATE

The 2013 Legislative Session produced various proposed changes and additions to the laws of the State of Florida. The following bills were signed into law by the Governor following the 2013 Legislative Session and will have an impact on local government entities and certain constitutional officers. If you have any questions regarding these new laws or any legislation, please do not hesitate to contact our firm.

**SB 2 — Ethics**

Among other things, this law expands the authority of the Commission on Ethics (COE) to investigate complaints referred by law enforcement agencies and the Governor, and enhances the COE's authority to collect unpaid fines from government officials who have violated ethics laws. The bill also bans former legislators from lobbying any state agency for two years after they leave office, and prohibits legislators in certain situations from accepting second jobs on public payrolls.

These provisions became law on May 1, 2013.

**SB 4 — Ethics**

This bill complements SB 2 and provides that ethics complaints referred to the COE by law enforcement agencies and the Governor are not subject to public disclosure until a determination has been made as to their validity. This bill also authorizes the COE to meet in private to initially discuss new ethics complaints.

These provisions became law on May 1, 2013.

**HB 7013 — Florida Election Code**

This bill extends early voting in Florida for up to 14 days and equips counties with flexibility to select multiple voting sites to ease problems associated with long voting lines. The bill also provides a mechanism to cure unsigned absentee ballots, and confirms that military personnel and their family members are eligible for late voter registration.

This bill will take effect on January 1, 2014, except where otherwise provided.

**CS/CS/HB 203 — Agricultural Lands**

This bill prohibits a governmental entity (not just a county, as is provided by current law) from adopting or enforcing any prohibition, restriction, regulation, or other limitation or from charging a fee on any activity of a bona fide farm operation on land classified as agricultural land under certain circumstances if the activity is already regulated through best management practices adopted by rule by DEP, DACS or a water management district or if the activity is regulated by USDA, EPA or the Army Corps of Engineers.

The bill also clarifies that the existing preemption of local regulation provided for farm buildings, farm fences and farm signs is limited to those located on lands used for bona fide agricultural purposes, and the bill defines such bona fide agricultural purposes.

The effective date of this bill was July 1, 2013.

# 2013 LEGISLATIVE SESSION UPDATE

**CS/CS/CS/HB 319 — Community Transportation Projects**

This bill amends the Community Planning Act (CPA) relating to transportation concurrency. Under the new CPA, local governments could opt out of transportation concurrency. This bill clarifies that local governments that implement transportation concurrency are encouraged to follow existing guidelines. The bill also encourages implementation of a mobility fee-based funding system and requires local governments to set standards for proportionate share development agreements to fund transportation infrastructure.

This bill became effective on May 30, 2013.

**CS/HB 7019 — Development Permits**

This bill requires cities and counties to attach disclaimers to development permits that include a condition that all other applicable state or federal permits must be obtained before commencement of the development. This is intended to address concerns by FEMA with legislation enacted in 2012.

This bill also provides yet another opportunity to qualify for the additional two-year permit extension enacted in 2011 for any building permit and any environmental resource permit (ERP) that has an expiration date from January 1, 2012, through January 1, 2014. The holder of the permit or other authorization that is eligible for the two-year extension must notify the authorizing agency in writing by October 1, 2013 (the prior deadline was December 31, 2012, which last year was extended from December 31, 2011), identifying the specific authorization for which the holder intends to use the extension and the anticipated timeframe for acting on the authorization.

The bill also extends for three years any building permit or ERP in certain parts of the Florida Keys Area of Critical State Concern that has an expiration date from January 1, 2012, through January 1, 2016.

This bill became effective on July 1, 2013.

**CS/HB 655 — Employment Benefits**

This bill amends current law to prohibit political subdivisions, such as counties and municipalities, from requiring an employer to provide certain employment benefits not required by state or federal law. The term "employment benefits" is defined as anything of value that an employee may receive from an employer in addition to wages and salary. The term includes, but is not limited to, health benefits; disability benefits; death benefits; group accidental death and dismemberment benefits; paid or unpaid days off for holidays, sick leave, vacation and personal necessity; retirement benefits; and profit-sharing benefits. The term "employer" is defined as any person who is required to pay a state or federal minimum wage to the person's employees. The bill does not limit the authority of a political subdivision to establish a minimum wage or provide employment benefits not otherwise required under state or federal law for its own employees or for the employees of an employer contracting with, or receiving a direct tax abatement or subsidy from, the political subdivision. The bill further specifies that provisions of the act do not apply to a domestic violence or sexual abuse ordinance, order, rule or policy adopted by a political subdivision.

The bill also creates an 11-member Employer-Sponsored Benefits Task Force to analyze employment benefits and the impact of the state preemption of the regulation of such benefits. Task force findings and recommendations are to be included in a report submitted to the Governor, the President of the Senate, and the Speaker of the House by January 15, 2014. Workforce Florida, Inc. shall provide administrative and staff support for the task force.

This bill became effective on July 1, 2013.

# 2013 LEGISLATIVE SESSION UPDATE

**CS/CS/SB 50 — Public Meetings**

Neither the Florida Constitution nor the Sunshine Law specifies that members of the public have the right to speak at public meetings. This bill creates a new section of law that requires members of the public to be given a reasonable opportunity to be heard on a proposition considered by the board or commission of a state agency or local government. Such opportunity does not have to occur at the same meeting at which the board or commission takes official action if certain requirements are met. The bill excludes specified meetings and acts from the opportunity to be heard requirement.

The bill authorizes a board or commission to adopt certain reasonable rules or policies governing the opportunity to be heard. If a board or commission adopts such rules or policies and thereafter complies with them, it is deemed to be acting in compliance with the section.

The bill authorizes a circuit court to issue injunctions for the purpose of enforcing the section upon the filing of an application for such injunction by any citizen of Florida. If such an action is filed and the court determines that the board or commission violated the section, the bill requires the court to assess reasonable attorney fees against the board or commission. The bill also authorizes the court to assess reasonable attorney fees against the individual filing the action if the court finds that the action was filed in bad faith or was frivolous. The bill excludes specified public officers from such attorney fee provisions. If a board or commission appeals a court order finding that it violated the section and the order is affirmed, the bill requires the court to assess reasonable appellate attorney fees against the board or commission.

The bill provides that any action taken by a board or commission that is found to be in violation of the section is not void as a result of such violation.

This bill becomes law on October 1, 2013.

By: Sherry G. Hopkins, Esquire

# FLORIDA BAN ON TEXTING WHILE DRIVING

The new law signed by the Governor on May 28, 2013, related to the use of wireless communications devices while driving, prohibits the operation of a motor vehicle while manually typing or entering multiple letters, numbers, symbols, or other text in a handheld wireless communication device, or sending or reading data in the device, for the purpose of non-voice interpersonal communication. The law makes exceptions for emergency workers performing official duties, reporting emergencies or suspicious activities and for receiving various types of navigation information, emergency traffic data, radio broadcasts and autonomous vehicles. The law also makes an exception for interpersonal communications that can be conducted without manually typing the message or without reading the message.

The prohibition is enforceable as a secondary offense. A first violation is punishable as a nonmoving violation, with a fine of $30 plus court costs that vary by county. A second violation committed within five years after the first is a moving violation punishable by a $60 fine plus court costs. The law allows for the admissibility of a person's wireless communications device billing records as evidence in the event of a crash resulting in death or personal injury.

In addition to the fines, unlawful use of a cell phone which results in a crash will earn six points on the offender's driver license record and the unlawful use of a cell phone while committing a moving violation within a school safety zone will result in two points on the offender's driver license record in addition to the points for the moving violation. This law will take effect on October 1, 2013.

By: Sherry G. Hopkins, Esquire

# FIRM SUCCESS

Recently, Sherry G. Hopkins, of Bell & Roper, successfully defended against a property owner appeal to the 1st District Court of Appeals on behalf of Dixie County in the *Wakulla Bank, et al. vs. Dixie County* case. In June of 2011, the firm obtained Summary Judgment related to various claims filed by multiple land owner Plaintiffs, stemming from the River Shores at Jena development located in Dixie County. The land owner Plaintiffs filed an appeal of the Summary Judgments entered in favor of Dixie County. The Circuit Court Orders were upheld primarily based on the fact that the landowners had not made a meaningful application related to the development following a Comprehensive Plan Amendment and, therefore, their "as applied" takings claim was not ripe for consideration. Additional arguments related to the property owners' inability to show a loss of all beneficial use of their property, related to their "facial' takings claim, were affirmed as well. Bell & Roper congratulates Dixie County in this favorable outcome, and looks forward to serving the interest of the County in the future.

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Christian Anderson at canderson@bellroperlaw.com

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