Legal Update

BELL & ROPER, P.A.

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INDEMNITY AGREEMENT, SECTION 725.06, FLORIDA STATUTES

In *Griswold Ready Mix Concrete, Inc. v. Tony Reddick and Pumpco, Inc.,* 37 FLW D869 (First DC April 12, 2012), the First District Court of Appeal reversed a judgment for contractual indemnity as the indemnity provision of the contract in question did not comply with §725.06, Florida Statutes.

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Griswold, a contract supplier, engaged Pumpco to pump concrete at a construction site to form the foundation of a home under construction in Jacksonville. A hose utilized by Pumpco struck Reddick, the employee of another company, who happened to be on the construction site. Reddick filed suit against Griswold and Pumpco. Pumpco settled Reddick's claim for $65,000 and then sought indemnification from Griswold by cross-claim.

The trial court granted summary judgment in Pumpco's favor. The trial court accepted Pumpco's argument that §725.06, Florida Statutes, was inapplicable as the statute only applied to construction-related contracts where one party was the property owner. *continued to 2A*

FLORIDA SUPREME COURT RULES THAT CLERKS OF COURT MUST DO MORE THAN WHAT IS STATUTORILY REQUIRED TO PROVIDE PROPERTY OWNER WITH NOTICE OF TAX DEED SALE

In *Delta Property Management v. Profile Investments, Inc*., WL 739193 (Fla. March 8, 2012), Delta owned a commercial property located in Jacksonville, Florida. Delta failed to pay the 1997 ad valorem taxes on that property, and as a result, the Duval County Tax Collector issued a tax certificate. In 1998, Profile purchased the tax certificate, and two years later after Delta failed to redeem the tax certificate, Profile applied for a tax deed on the property pursuant to section 197.502 (1), Florida Statutes (1999). Thereafter, the Tax Collector, pursuant to section 197.502(4), Florida Statutes (1999), prepared a statement, specifying Delta as a party entitled to notice of the sale of the property and listing Delta's address as it appeared on the 1999 tax assessment roll - 8701 Phillips Highway, # 104, Jacksonville, Florida 32256. *Id.* at * 1.

On May 30, 2000, the Tax Collector forwarded the statement to the clerk. The clerk prepared a notice of tax sale, which on September 1, 2000, was mailed by certified mail to Delta at the address

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On appeal, the First District Court of Appeal reversed the trial court's order. The court specifically found that Pumpco's contract, more specifically, the indemnity provision of the Pumpco contract, was void as it did not contain a monetary limitation for Griswold's potential indemnity liability pursuant to §725.06, Florida Statutes.

By: Michael Bell

indicated in the Tax Collector's statement. Because Delta was no longer located at the address specified in the statement, the notice was returned to the clerk as undeliverable. Subsequently, on September 27, 2000, Profile placed the winning bid at the tax sale. *Id.* Following issuance of the tax deed, Profile brought an action to quiet title to the property. Delta counter-claimed, asserting that the clerk was required to check the 2000 tax assessment roll, which contained its new address - 410 East Hallandale Beach Boulevard, # 201, Hallandale, Florida 33009 - before issuing the tax sale notice. *Id.* at * 2.

In the case before the Florida Supreme Court, Delta raised an as-applied challenge to the notice requirements of section 197.522. *Id.* at * 5. The Florida Supreme Court found that the clerk had reason to know that the notice of the tax sale intended for Delta had been sent to an incorrect address. *Id.* at * 8. On September 1, 2000, the clerk mailed notice to Delta by certified mail, and before the tax sale on September 27, 2000, the notice was returned to the clerk as undeliverable. Upon learning that delivery of the notice to Delta was unsuccessful, the clerk was not entitled to "simply ignore that information ... and sell the owner's property." *Jones v. Flowers*, 547 U.S. 220, 237 (U.S. 2006).

The Florida Supreme Court ruled that pursuant to *Jones and Vosilla v. Rosado*, 944 So. 2d 289 (Fla. 2006), the clerk had a duty to take additional, reasonable steps to attempt to provide notice to the legal titleholder before selling the property. As identified by those decisions, those reasonable steps depend on the particular circumstances of the case and may include: checking the records of the taxing authorities for a change of address submitted by the legal titleholder; resending notice by regular mail so that no signature is required; posting notice on the property to be sold, not merely at the last known address of the titleholder; or sending a notice addressed to "occupant" by regular mail. *See Jones*, 547 U.S. at 235; *Vosilla*, 944 So.2d at 301.

In Delta, the clerk did not make any additional effort to locate Delta after the certified mail was returned undelivered. Furthermore, the clerk "did nothing else" to effect notice. The Florida Supreme Court held that in light of this inaction, Delta was "no better off than if the notice had never been sent." *Jones*, 547 U.S. at 230 (quoting *Malone v. Robinson*, 614 A.2d 33, 37 (D.C.1992) (per curiam)). Because the clerk's office did not take any additional reasonable steps to notify the property owner after it learned that the attempt to provide notice by certified mail was unsuccessful, Delta is entitled under *Jones* and *Vosilla* to prevail on its claim that the tax deed is invalid.

By Cindy Townsend

THE POWER OF THE LITIGATION HOLD

Both state and federal laws require parties who are sued, or receive notice of potential litigation, to preserve evidence that is relevant or reasonably likely to be the subject of a discovery request in such litigation. It should become your procedure to issue a memorandum notifying the appropriate individuals of a lawsuit or claim against your entity and set forth the requirements for preserving all potential evidence related to the matter.

Your notice should be directed to all officials and/or employees known to have, or potentially have, evidence related to a claim and it should make clear that such evidence includes, but is not limited to, written documents, memoranda, letters, transcripts, reports, applications, evaluations, plans, permits, citations, photographs, videotapes, audiotapes, digital recordings, electronic documents, emails, spreadsheets, voicemail and computer files. It is imperative that the individuals be made aware that evidence could also include data contained on personal computers, cellular telephones and other electronic media. Additionally, physical materials, natural materials, parts, components and/or any other relevant physical property could be considered evidence as well. It is also important for the officials and/or employees to understand that a document, or other item, which may not be considered a public record, or which is exempt from the public records law, may still be discoverable evidence for litigation purposes.

The duty to preserve evidence means any and all items which are in your entity's possession, custody or control. Even those materials which are being warehoused or saved by electronic or computerized means are included in this preservation requirement. Additionally, the duty extends to documents, data or materials being held by third parties, within your entity's control, including architects, engineers, consultants, and the like, who are performing work for your entity. As such, in the event of a lawsuit or claim, you should make the appropriate persons in your organization responsible for contacting any such third parties, within their control, regarding these preservation requirements.

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Failure to preserve evidence could result in serious and costly legal consequences for your entity and/or its officials and employees. Making it your practice to issue a litigation hold, notifying all appropriate individuals in your organization, or within your organization's control, could prove to be a great savings in the long run.

By: Sherry Hopkins

Gail Bradford Appointed To Animal Law Committee

The Firm is pleased to announce that Bell & Roper Associate Gail C. Bradford has been appointed to the Animal Law Committee of the Florida Bar. The Animal Law Committee is one of six substantive law committees of the state Bar. The Committee monitors and educates both attorneys and the public regarding all aspects of Animal Law and takes an active role in communicating about and reviewing proposed legislative changes regarding Animal Law. Ms. Bradford's appointment will begin July 1, 2012.

CHOICE OF LAW OF BAD FAITH

The Fifth District Court of Appeal determined that the choice of law analysis applicable to a first party bad faith claim is *lex loci contractus*.

In *Higgins v. West Bend Mutual Insurance Company,* 37 FLW D757 (Fifth DCA, March 30, 2012), the Fifth District Court of Appeal affirmed an order of the trial court granting summary judgment in favor of West Bend Mutual Insurance Company ("West Bend").

At all times material, West Bend issued an automobile insurance policy to Anthony and Ann Higgins, residents of Minnesota. The policy provided uninsured motorist benefits of $100,000/$300,000.

While vacationing in Florida in 1999, the Higginses were involved in a motor vehicle accident. The Higginses filed suit in Florida against the at-fault driver (who was underinsured) and West Bend. The carrier for the at-fault driver settled the Higginses' claim for policy limits, $100,000. The case proceeded to trial against West Bend. The jury returned a verdict in favor of the Higginses in the amount of $260,000.

To recover the $60,000 in excess of coverage, the Higginses filed a bad faith action against West Bend pursuant to §627.727(10), Florida Statutes. West Bend moved for summary judgment, arguing that Minnesota law, which does not provide for first party bad faith claims, was applicable and, therefore, the court should enter summary judgment in West Bend's favor. The trial court agreed and granted summary judgment in favor of West Bend.

On appeal, the trial court's order was affirmed by the Fifth District Court of Appeal. The Fifth District noted that the doctrine of *lex loci contractus* controlled and approved the trial court's order determining that Minnesota law applied.

By: Michael Bell

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Sherry Hopkins at shopkins@bellroperlaw.com.

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