Legal Update

BELL & ROPER, P.A.

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GABBY'S LAW FOR STUDENT SAFETY

"Gabby's Law for Student Safety" which became effective July 1, 2015, amends Section 1006.23, F.S. to revise and expand upon the criteria and procedures which should be used to identify and correct a "hazardous walking condition" for elementary school children, in grade 6 or younger, resulting in increased obligations for school districts, the state and local governments. For walkways parallel to the roadway, the new law:

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• Imposes a requirement for an area at least 4 feet wide adjacent to the road upon which students may walk by specifically excluding drainage ditches, swales, etc., from any calculation of that 4 foot area;

• Reduces the speed limit, to 50 miles per hour or greater, for uncurbed roads requiring that the 4 foot wide walkway be set back 3 feet from the edge of the road; and

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RECENT CHANGES TO THE BERT J. HARRIS PRIVATE PROPERTY RIGHTS PROTECTION ACT

Although Federal law provided a cause of action for unconstitutional exactions, Florida's law related to same has been somewhat unclear until now. New legislation effective October 1, 2015, creates a cause of action to recover damages for landowners where local and state governmental entities impose conditions that rise to the level of prohibited, and therefore unconstitutional, exactions. A Plaintiff in such a cause of action will be required to provide pre-suit notice to the government entity to allow an opportunity to explain or correct the prohibited exaction without need for further litigation. If suit is necessary, the legislation requires the governmental entity to prove the

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• Eliminates the exception to these requirements for a residential area which has little or no transient traffic.

The law also creates new criteria for road crossings to provide that a hazardous walking condition is considered to exist at any uncontrolled crossing site which students must use to walk to and from school if the road has a posted speed limit of 50 miles per hour or greater, or the road has six lanes or more, not including turn lanes, regardless of the speed limit.

The law amends the process for inspection of a perceived hazardous walking condition to provide that, upon a request for review from the district school superintendent, the alleged hazardous condition must be inspected jointly by:

• A representative of the school district;

• A representative of the state or local governmental entity with jurisdiction over the perceived hazardous location;

• A representative of the municipal police department for a municipal road, a representative of the sheriff's office of a county road, or a representative of the Department of Transportation for a State road; and

• If the jurisdiction is within an area for which there is a metropolitan planning organization, a representative of that organization.

If the governmental representatives concur that a condition constitutes a hazardous walking condition, the governmental entity with jurisdiction must report that determination in writing to the district school superintendent, who must initiate a formal request for correction. However, if the governmental representatives are unable to reach a consensus, the reasons for lack of a consensus must be reported to the district school superintendent, who must provide a report and recommendation to the district school board. In this case, the bill provides that the district school board may initiate a declaratory judgment action under Chapter 86, F.S. Prior to pursuing such a legal judgement, the district school board must provide at least 30 days' notice, in writing, to the governmental entity having jurisdiction over the road of its intent to do so. If such a proceeding is initiated, the district school board has the burden of proving such condition by the greater weight of evidence. If the district school board prevails, the district school superintendent must report the outcome to the Department of Education and initiate a formal request for correction of the hazardous walking condition.

The law provides that, upon a determination that a hazardous walking condition exists, the district school superintendent must request a position statement with respect to correction of the condition from the state or local governmental entity with jurisdiction over the road. Within 90 days after receiving such request, the governmental entity must inform the district school superintendent whether the entity will include correction of the hazardous walking condition in its next annual 5-year transportation work program and, if so, when correction of the condition will be completed. If the hazardous walking condition will not be included in the next annual 5-year transportation work program, the factors justifying such conclusion must be stated in writing to the district school superintendent and the Department of Education.

The law provides that, if a civil tort action for damages is brought against a governmental entity under s. 768.28, F.S, the designation of a "hazardous walking condition" is not admissible in evidence. However, it does not specify whether the law could alternatively be used to establish the applicable standard of care in a civil action, such that failure to comply would be deemed to be negligence per se or evidence of negligence, in a suit against the district and/or governmental entity. In the absence of a specific limitation otherwise, we suspect that it will be so applied by the courts.

By: Michael J. Roper, Esquire

SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION AND UNDER TITLE VII

On July 15, 2015, the EEOC issued a decision holding that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII. This decision will allow gay, lesbian and bisexual employees to file workplace discrimination complaints with the EEOC.

Complainant, a gay man, worked as Air Traffic Controller and in October 2010, was appointed a temporary Front Line Manager (FLM) for the Federal Aviation Administration (FAA). Complainant's supervisor was aware of Complainant's sexual orientation and allegedly made several negative comments in the workplace when Complainant mentioned his male partner. In July 2012, Complainant learned that he was not selected for the permanent FLM position.

In December 2012, Complainant filed an EEO complaint with the FAA claiming that he was discriminated against on the basis of sex related to his sexual orientation.

The EEOC found that:

- Claims of discrimination based on sexual orientation are cognizable as sex discrimination claims under Title VII; and may be processed through the EEO complaint process available for federal Title VII discrimination complaints.

The EEOC held that Title VII's prohibition of sex discrimination means that employers may not rely on sex -based considerations or take gender into account when making employment decisions. The EEOC found that, sexual orientation is inherently a sex-based consideration because sexual orientation refers to the sex of those to whom a person is sexually attracted.

The EEOC provided same examples of how sexual orientation can manifest as sex discrimination:

- suspending a lesbian employee for displaying a photo of her female spouse on her desk but not suspending a male employee for displaying a photo of his female spouse; or

- denying spousal employment benefits to employees' same-sex spouses but providing spousal benefits to employees' opposite-sex spouses.

- For associating with a person of the same sex. (a form of discrimination that has been consistently applied in race discrimination cases).

- For failing to conform to gender-based expectations, such as the expectation that men should only be attracted to women and women should only be attracted to men.

The EEOC rejected a commonly-made argument that because Congress has not passed legislation expressly prohibiting sexual orientation discrimination, it must have intended to exclude sexual orientation from Title VII. The EEOC conclude that sexual orientation discrimination is sex discrimination when a person is:

- Treated in a way he would not have been treated but for his or her sex.

- Treated differently based on the sex of the person he or she associates with.

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- Is discriminated against because of his employer's stereotype that individuals should only be attracted to someone of the opposite sex.

This decision was issued by the full Commission and is binding on the federal government as an employer. Although technically not binding on other employers, the decision establishes the EEOC's position that sex discrimination under Title VII includes sexual orientation discrimination.

By: Michael H. Bowling, Esquire

WARNING: THE DEATHS OF GOBLE AND THYSSENKRUPP ARE BEING GREATLY EXAGGERATED

The Florida Supreme Court has now held that evidence of plaintiff's eligibility for future benefits from Medicare, Medicaid, or other social legislation is inadmissible as a collateral source at trial. This was recently announced in *John Joerg, Jr., etc., et al. v. State Farm Mutual Automobile Insurance Co.*, No. SC13-1768 (October 15, 2015):

> We conclude that the trial court properly excluded evidence of Luke Joerg's eligibility for future benefits from Medicare, Medicaid, and other social legislation as collateral sources.

Beware of those claiming the Florida Supreme Court has overruled Goble and Thyssenkrupp through its ruling in this case. They are incorrect. Plaintiffs are still limited to the Medicare lien amount when posting damages for past medical expenses at trial.

By: Christopher R. Fay, Esquire

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exaction complies with the standards set by the United States Supreme Court, while the property owner has the burden of proving that it has been damaged by the prohibited exaction. The legislation also clarifies the measure of damages recoverable under such a cause of action, provides for injunctive relief and requires recovery of costs and attorney fees for a prevailing property owner. Governmental entities may recover attorney fees and costs as well if they prevail, but such recovery is at the discretion of the Court rather than required. Finally, impact fees and non-ad valorem assessments are specifically exempt from such causes of action but sovereign immunity is waived to the extent of the damages assessed under the cause of action.

In addition to the new cause of action, the legislation also amends the Bert Harris Act to provide that only those property owners whose real property is the subject of and directly impacted by the action of a governmental entity may bring suit under the Act. The Act's safe harbor provisions for settlement agreements between a property owner and a governmental entity now applies regardless of when the settlement agreement is entered, and actions taken by counties to adopt Federal Emergency Management Agency flood maps for the purpose of participating in the National Flood Insurance Program are not subject to claims under the Act, with certain exceptions.

While these changes are not by any means shocking, now the Act clearly sets forth a new cause of action that did not necessarily exist in Florida before.

By: Sherry G. Sutphen, Esquire

FIRM NEWS

Michael J. Roper was invited to speak at the annual Florida PRIMA Conference, hosted by the Southwest Florida PRIMA Chapter, in Sarasota, Florida, October 11 to 14, 2015, on the subject of "Federal constraints upon public entity drug testing policies".

On September 18, 2015, the Fifth District Court of Appeal ruled in favor of the City of Flagler Beach in an appeal litigated by firm attorneys Michael Roper and Dale Scott. In 2010, Caribbean Condominium Limited Partnership and Ocean Palm Golf Club Partnership sued Flagler Beach under the Bert Harris Act, and asserted inverse condemnation claims. In 2012, the City moved for summary judgment as to all claims. The trial court granted the motion as to the Harris Act claims. The case proceeded to a non-jury trial on the inverse condemnation claims, and the court ultimately entered judgment for the City after determining there had been no taking. The court's judgment was affirmed in all respects by the Fifth District Court of Appeal.

While that appeal was pending, the City filed a motion for attorney's fees and costs. The trial court awarded the City fees for time expended in successfully defending the claims under the Harris Act. It further awarded the City its costs incurred from the inception of the lawsuit through May 18, 2012—the date on which the trial court advised the parties of its intent to enter summary judgment on the Harris Act claims. But, the court declined to award costs subsequently incurred by the City based on its conclusion that a governmental entity is not entitled to recover costs in an inverse condemnation action, even where it is the prevailing party. That is, the court found § 73.091, *Fla. Stat.*, applies even in inverse condemnation cases where the governmental entity defendant prevails. Generally, § 73.091 provides that in eminent domain cases initiated by the government, the condemnee is entitled to recover fees and costs from the condemning authority. Courts have extended § 73.091, as a matter of fairness, to inverse condemnation cases where the plaintiff landowner prevails (i.e., cases where a court has determined the government has taken land without providing just compensation, and failed to initiate an eminent domain proceeding under Chapter 73, *Fla. Stat.*).

The Fifth District Court of Appeal disagreed with the trial court, and held the general cost recovery statute, § 57.041, *Fla. Stat.*, applies, and § 73.091, *Fla. Stat.*, does not apply, to inverse condemnation cases where the governmental entity defendant prevails. The Fifth District held there was no reason, found in the statues or prior cases, that § 73.091 should apply to inverse condemnation cases where there has been a finding that no taking occurred.

This decision bodes well for governmental entity defendants in inverse condemnation cases. These cases can be expenses, particularly potentially high exposure cases where expert costs alone can total over $50,000. This decision simply assures a level playing field by confirming that prevailing governmental entity defendants may recover *all* of their reasonable costs.

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Cindy Townsend at ctownsend@bellroperlaw.com