Legal Update

ROPER, TOWNSEND & SUTPHEN, P.A.

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U.S. SUPREME COURT CAUTIONS PUBLIC OFFICIALS AND EMPLOYEES ON SOCIAL MEDIA USE

On March 15, 2024, the Supreme Court of the United States decided *Lindke v. Freed* (No. 22-611), which provides important caution for government officials and employees regarding their use of Internet social media. James Freed created a Facebook account and eventually converted it to a public page, meaning anyone on Facebook could see and comment on his posts. Freed was later appointed city manager of Port Huron, Michigan. He used his Facebook account mostly to post about his personal life. He also posted information about his job and would sometimes solicit work-related feedback from the public and respond to city residents about city-related matters. His page was not designated either "personal" or "official."

During the COVID-19 pandemic, Kevin Lindke visited Freed's Facebook page and expressed his dissatisfaction with the city's pandemic response. Freed deleted Lindke's comments and later blocked Lindke so that he could see Freed's posts but not comment on any of them. Lindke sued Freed, claiming that Freed violated his First Amendment rights through viewpoint discrimination by deleting his comments and blocking him. The trial-level court

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CHARTER SCHOOLS AND SOVEREIGN IMMUNITY

On May 8, 2024 the Fourth District Court of Appeals decided the matter of *Soto v. Franklin Academy Foundation Inc.* involving a claim that Plaintiff's child suffered injuries due to a playground accident. The lower court granted the charter school's motion to dismiss Plaintiff's complaint for failing to comply with the pre-suit notice requirements of Fla. Stat. § 768.28(6)(a) (2018). Plaintiff appealed this ruling as well as the lower court's denial of his motion for rehearing.

On appeal Plaintiff argued that he was not required to comply with the pre-suit notice provisions. Believing that a charter school was not a "state" agency, but was a "county" agency. The 4th DCA noted this was a matter of first impression, ruling that a charter school is a "state" agency. Therefore, Plaintiff was required to comply with the conditions precedent within Fla. Stat. § 768.28(6)

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granted summary judgment in favor of Freed, and the United States Court of Appeals for the Sixth Circuit affirmed.

The Supreme Court began its unanimous opinion by repeating that while Freed was a public official, he still had his own First Amendment right to speak as a citizen addressing matters of public concern. That right includes the ability to speak about information related to or learned through public employment, so long as the speech is not itself ordinarily within the scope of Freed's duties. Editorial control over speech and speakers on Freed's properties or platforms is part of Freed's First Amendment rights. So, the Supreme Court evaluated whether Freed acted in his private capacity when he deleted Lindke's comments and blocked him.

Freed's status as a government employee was not itself enough to determine whether Freed engaged in government action against Lindke. Instead, a "closer look" was required. The Court held that a public official's social media activity constitutes government action under § 1983 only if the official (1) possessed actual authority to speak on the government entity's behalf, and (2) purported to exercise that authority when he or she spoke on social media. For the first part, it is necessary to evaluate the scope of the employee or official's power with attention to the relevant statute, ordinance, regulation, custom, or usage. For the second part, since Freed's page was not designed either "personal" or "official," raising the prospect that it was "mixed use," categorizing posts required a fact-specific undertaking in which the post's content and function are the most important considerations.

Also, the Court explained that deleting Lindke's posts and blocking Lindke were legally distinct. Because blocking operated on a page-wide basis, a court will have to consider whether Freed engaged in government action with respect to *any* post on which Lindke wished to comment. So, "[i]f page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts."

Ultimately, the Supreme Court remanded the case for further proceedings. The Court explicitly cautioned public officials and employees about mixed-use social media: "A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability."

By: Frank M. Mari

(a) (2018) and FS § 768.28(6)(b) (2018). This included presenting Plaintiff's claim in writing to the charter school and the Department of Financial Services within three years of accrual of the claim.

The lower court noted that the parties agreed that the charter school was a not-for-profit organization and granted charter by the county school board. However, Plaintiff argued that the charter school fell under the "county" exception of FS § 768.28(a) since it is within the county school district and chartered by the county school board. In support of his argument, plaintiff relied on Article IX, Section 4(a) of the Florida Constitution. Which provides: "Each county shall constitute a school district."

This argument was not convincing, the lower court noted this section of the Florida Constitution simply provides a physical description of the school district. Section 4(a) also provides "two or more contiguous counties may be combined into one district." This language makes it clear this section was only meant to delineate the parameters of a district. It was not intended to make a school district functionally synonymous with a county.

Furthermore, Fla. Stat. § 1002.33(1) (2018) provides "All charter schools in Florida are public schools and shall be part of the state's program of public education." Clearly, the legislature defined schools to be part of the State and not a county or municipality. The Plaintiff was unable to provide authority from statute, the Constitution, or precedent to support his argument. Therefore, Plaintiff was required to provide his notice of claim to the Department of Financial Services before November 2, 2021. This was not accomplished until March 8, 2022. As such, Plaintiff was unable to cure the error through amending his complaint. The motion to dismiss was granted with prejudice.

In affirming the ruling, the 4th DCA adopted, in its entirety, the lower courts well-reasoned basis for granting the charter school's motion to dismiss. Noting that the Florida Supreme Court ruled that the notice requirements of Fla. Stat. § 768.28(6)(a) (2018) are a condition precedent to maintaining a cause of action against a school district. *Levine v. Dade Cnty. Sch. Bd.*, 442 So. 2d 210, 212-13 (Fla. 1983). Additionally, the Federal Southern District of Florida found that pre-suit notice is a condition precedent in brining a cause of action against a charter school. *Washington v. Sch. Bd. of Hillsborough Cnty.*, 731 F. Supp. 2d 1309, 1321 (M.D. Fla. 2010); *Turner v. Charter Schs. USA, Inc.*, No. 18-24005-CIV, 2020 WL 924253, at *1 (S.D. Fla. Feb. 26, 2020).

This decision would seem obvious based on the plain reading of Florida Statute § 1002.33 (1). Thankfully, Charter Schools now have affirmative authority to support a Charter School's state agency status. Additionally, this authority creates clear authority that a plaintiff is required to provide notice to the Charter School and the Department of Financial Services. This decision provides Charter Schools with a powerful, effective tool through which they can defend against a plaintiff's claim.

By: David A. Belford

NEW LEGISLATION PROVIDES NEW CAUSE OF ACTION INCLUDING AWARD OF ATTORNEY'S FEES

(HB 1365 - Florida Statutes, Section 125.0231)

It is no secret that the homeless population across the State of Florida has increased over the past several years. This year's session brought forth new legislation which likely stems from the growing homeless population found hanging around in the rights-of-way and in other public areas of most counties in Florida. It has been said that it is simply less expensive to ignore the loitering individuals than to make an arrest, provide for the individual in the local jail (meals and/or medical needs) and thereafter proceed through the court system including the appointment of a public defender.

Ignoring the problem will no longer be a solution. Effective October 1, 2024, Florida Statutes, Section 125.0231, provides that a county or municipality ***may not authorize or otherwise allow*** any person to regularly engage in public camping or sleeping on any publicly owned property, at any public building or its grounds and on any public right of way under the jurisdiction of the local government. Ignoring or being complaisant about a person camping or sleeping in public falls into the category of "otherwise allowing."

The most concerning and dangerous part of the new statute is that any resident or owner of a business in a county/municipality or the Attorney General may bring a civil action against the county or municipality for failure of abide by the above stated requirements and ***if the resident or business owner prevails in a civil action, the court may award reasonable expenses incurred in bring the action including court costs and attorney's fees, investigative costs, witness fees and deposition costs***.

In order to assist with avoiding penalties related to the homeless conundrum, a county or municipality may, by majority vote, designate a public property for use by homeless populations. A county or municipality does not have to designate a public property for such use but if it does, there is a rather onerous list of things that the entity must do in order to maintain a property for such purpose, including but not limited to:

1. The designated property can only be maintained for a "homeless camp" for a continuous period of not more than one year;
2. The site cannot cause a reduction in value to a residential or commercial property adjacent to the designated area;
3. The designated property must be approved by the Department of Children and Families;
4. The county must develop a plan to ensure the following standards at the designated property:
   - -safety and security
   - -clean and operable restrooms and running water
   - -coordinate access to behavioral health treatment resources
   - -prohibit illegal substances
   - -publish standards on website

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THIRD DISTRICT COURT OF APPEAL HOLDS CITY IS ESTOPPED FROM ARGUING SOVEREIGN IMMUNITY BARS FORMER EMPLOYEE'S BREACH OF IMPLIED OR ORAL CONTRACT CLAIM

Sovereign immunity, which derives from the separation of powers provision of the Florida Constitution, protects the state and its subdivisions (and cities, counties, etc.) from civil liability unless such immunity is waived by legislative enactment or constitutional amendment. Any waiver of sovereign immunity must be clear and unequivocal, and waiver will not be found as a product of inference or implication. It is well-established in Florida that the waiver of sovereign immunity for contract claims pertains only to suits on express, written contracts. But, when no express, written contract exists, even if the conduct between the parties suggests an agreement, it is merely an implied contract, and sovereign immunity protections remain in force.

The Third District Court of Appeal recently had occasion to apply these principles to a scenario involving the City of Opa-Locka, and a former city employee who sued the city for wrongful termination. *Abia v. City of Opa-Locka*, No. 3D23-1228, 2024 WL 1183545 (Fla. 3d DCA Mar. 20, 2024). From the Third District's rather short written opinion, it appears after the wrongful termination case had been pending for some time, the city and the former employee agreed to a settlement which involved full reinstatement of employment. The Third District's opinion is silent as to whether that agreement was reduced to writing, but it appears it was not. The city subsequently did not honor the (oral, implied) agreement to reinstate the employee, and the employee sued the city for breach of contract (or asserted an amended complaint of some kind which included a breach claim).

The city moved for summary judgment based on the established principle that sovereign immunity bars suits against governmental entities based on implied or oral (i.e., non-written) contracts. The circuit court granted summary judgment for the city, with the Third District observing "[t]he trial court correctly notes that, based on sovereign immunity principles, Abia can't enforce implied rights or obligations absent from the contract." However, the Third District held the claim was not barred by sovereign immunity, based upon the principle of estoppel. Estoppel may, generally, be applied where there is: a representation as to a material fact by the defendant that is contrary to a later-asserted position; reliance on that representation by the plaintiff; and a detrimental change in position by the plaintiff, caused by the representation and reliance thereon. One seeking to invoke estoppel against the government first must establish the above elements, and demonstrate the existence of affirmative conduct which goes beyond mere negligence, show the conduct will cause serious injustice, and show the application of estoppel will not unduly harm the public interest. And, equitable estoppel will apply against the government only in rare instances and under exceptional circumstances.

In finding the employee's claim was not barred, the Third District held the city "cannot take the benefit of the settlement agreement—the dismissal of a lawsuit—and then later argue that the same agreement is unenforceable." In relying upon estoppel, the Third District cited to an earlier case from the First District Court of Appeal, which did not involve an

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Fiscally constrained Counties do not have to comply with certain of the above standards if the governing body finds compliance would result in a financial hardship.

5. Undergo inspections by the Department of Children and Families

While the intent behind the new legislation may have been correction of complacency related to the homelessness problem, creating a new cause of action which carries a prevailing attorney's fee and cost award will quite possibly have unintended consequences for local governments as the statute gains popularity among the Plaintiffs' bar.

If you have any questions regarding any of this new requirement, you should contact your general counsel or feel free to contact our office directly.

By: Sherry G. Sutphen

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entity, nor involve sovereign immunity issues. *See Pipeline Contractors, Inc. v. Keystone Airpark Auth*., 276 So. 3d 436 (Fla. 1st DCA 2019). And, the Third District disregarded—or at least did not consider nor discuss—prior precedent which generally holds sovereign immunity, indeed, bars estoppel claims.

The Third District's *Abia* opinion is noteworthy, and questionable, first, as it relied on a prior case which is clearly distinguishable, which applied estoppel to a contract dispute between private parties and did not involve sovereign immunity. The opinion is also questionable as it offers no consideration and analysis in any depth as to the interplay between sovereign immunity and estoppel, nor the estoppel issue separate and apart from sovereign immunity. That is, the Third District did not consider whether, putting aside sovereign immunity, the employee in *Abia* could satisfy the estoppel elements and precepts which apply to claims against governmental entities. Based on these failings, and as it appears the Third District's *Abia* opinion conflicts with prior Court of Appeal opinions involving the extent to which sovereign immunity bars implied and oral contract claims and estoppel claims, it appears the city would have been justified in seeking further review from the Florida Supreme Court. However, it appears the city did not seek further review. As such, the Third District's *Abia* opinion stands—at least for now.

By: Dale A. Scott

VIDEO SURVEILLANCE AND CONSTRUCTIVE NOTICE OF TRANSITORY SUBSTANCES

Transitory substances are a common problem faced by many businesses. A transitory substance is "any liquid or solid substance, item, or object located where it does not belong." *Blacks Law Dictionary 660* (7th ed. 1999). In 2010, the Florida Legislature enacted a new law effectively shifting the burden of proof to the plaintiff when a transitory substance is the cause of a slip and fall resulting in injury. Fla. Stat. § 768.0755 states:

> (1) If a person slips and falls on a transitory foreign substance in a business establishment, ***the injured person must prove that the business establishment had actual or constructive knowledge*** of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that
>
> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> (b) The condition occurred with regularity and was therefore foreseeable.

Unfortunately, some cases have interpreted that the mere mention of the substance being aged, walked through previously, or dirty in any way as support of constructive notice. Consequently, defendants are left with the difficult task of showing when the substance appeared and if it should have been found by the business. A recent case has shed some light on how this can be proven.

In *Leftwich v. Wal-Mart Stores East, LP,* 2024 WL 716972 (Fla. 5th DCA 2024) the Fifth District Court of Appeals upheld summary judgment where the plaintiff failed to show constructive knowledge of the transitory substance. The incident was captured on the store's video surveillance system but the "clear" substance was not visible on the video. The video showed that in the 9 minutes before the incident involving the plaintiff, a Walmart employee walked near the area and about 10 customers walked through the area without incident. The employee in the area nine minutes before the incident testified that he looks for liquids and would have noticed it if it was present, so it had to have been present less than 9 minutes.

The Fifth District explained that the "clear" liquid was on the floor with what looked like wheel marks and footprints running through it. The only testimony about how long the liquid had been on the floor came from the employee who testified that it was on the floor for less than 10 minutes, as it was not on the floor when he was in the area. "Had this been the sum of the evidence in the record, a jury question may have existed. . . However, that was not the case here." The video showed a multitude of customers standing, walking, and pushing carts through the exact spot where the liquid was found in the 9 minutes between when the employee walked by and when the incident occurred. In that time, any of the customers could

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have dropped, slipped, or dripped the liquid on to the floor, potentially within just seconds of the plaintiff encountering the liquid. Consequently, the combination of employee testimony and video did not support a permissible inference that the condition existed for a sufficient length of time to establish constructive notice.

The mere presence of a substance on the floor is not enough to establish constructive notice. The record must contain additional facts in support of liability, known as "plus" facts, from which a jury could infer the condition existed for a length of time to establish constructive notice. *Encarnacion v. Lifemark Hosps. of Fla.*, 211 So. 3d 275 (Fla. 3d DCA 2017). Generally, the presence of dirt, wheel marks and footprints in a substance are often sufficient "plus" facts for a plaintiff to survive summary judgment. However, in this case, the video provided a reasonable explanation for the presence of the wheel marks and footprints in the substance, which were created by an identified group of customers passing through in the 9 minutes prior to the incident.

This case illustrates the hurdle for defendants in disproving constructive knowledge in a transitory substance case. This case had an employee in the area 9 minutes before the fall who testified that nothing was present but that alone, would have been insufficient to counter the inference created by the marks in the substance. The store's video footage proved quite consequential to explaining the presence of the marks and thus, the outcome of summary judgment.

This case highlights the importance of reviewing and preserving video evidence when a premises is equipped with surveillance, regardless of the type of incident involved. It is important to preserve the video footage at the earliest possible opportunity. If possible, retain <u>*all*</u> video for the date of incident; not only the subject incident, but of the plaintiff at every point on the premises, all video of the location where the incident occurred, before and after the incident, and video of any employees last in the area. As a matter of course, check lists or inspection sheets of routine inspections should be preserved, along with photographs of the condition of the area/substance, and witness statements from employees and bystanders, which will give the best possible outcome for summary judgment.

By: Jennifer C. Barron

FIRM SUCCESS

Summary Judgment for Officer in Excessive Force Case

Ramon Vazquez recently obtained summary judgment on behalf of Town of Jupiter police officer who responded to a 911 call from the plaintiff's adult son who reported that she had tried to run him over with her vehicle, as she drove away, and that she was suicidal. The officer's interaction with the caller, the plaintiff, and others was captured on video by his bodycam. The officer was also told by a neighbor that the plaintiff almost hit her [with her vehicle] and that the plaintiff would fight him. As the plaintiff came back to the scene, she hit the officer's squad car with her RV, told him that she was "just nuts" and that she was going to a mental unit. The officer asked her several times to calm down. As he spoke with her, she tried to get into the house and the officer, in a matter of a few seconds, stopped this potentially suicidal person from doing so, by taking her down and handcuffing her.

Paramedics were summoned to the scene, she was transported to the hospital and medically cleared. Subsequently she was taken to jail and Baker acted. Plaintiff filed a lawsuit against the officer where she alleged three counts against him: battery, false arrest and deprivation of her constitutional rights. The first two counts were dismissed at an earlier stage and the constitutional claims were dismissed via summary judgment where the court agreed that the use of force was *de minimis* and even if the use of force was unnecessary, the officer would still be entitled to qualified immunity as a matter of law.

Summary Judgment for Osceola County as to Challenge of "One-Cent" Sale Surtax Ordinance

Dale A. Scott recently obtained summary judgment for Osceola County against a citizen challenge to a one-cent infrastructure sales surtax adopted by the Osceola County Board of County Commissioner via County Ordinance 2022-72, and as subsequently approved by the Osceola County voters during the November 2022 election. In 1990, the Osceola County voters first approved a one-cent infrastructure sales surtax, which was set to expire in 2025. In anticipation of the expiration, in 2022 the Board sought to extend the surtax for another 21 years. Section 101.161, Fla. Stat., governs referenda elections and ballots. Subsection 1 of the statute, a ballot summary must be stated "in clear and unambiguous language on the ballot . . . ." § 101.161(1), Fla. Stat. Plaintiff Ruth Coberly argued the ballot summary in Ordinance 2022-72 was not clear, and was ambiguous, as it referred to a "one-cent" sales surtax, instead of a "one-percent" surtax. So, for example, as Coberly might argue, on a $20 purchase, Ordinance 2022-72's language should result in a mere 1-cent extra tax (i.e., $20 plus $0.01, or $20.01), but in effect and operation the extra tax would be 20 cents (i.e., $20 X 1.01 = $20.20). Coberly sought declaratory and injunctive relief, and the County moved for summary judgment. The County first, relying on the dictionary definition of "cent"—defined as "a monetary unit equal to 1/100 of a basic unit of

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value"—argued there is nothing misleading about describing the quantity of the surtax as a "one-cent surtax," which necessarily implies a 1-cent-per-dollar, i.e., 1-cent-per-100-cents, surtax. The County also relied on section 212.055, Fla. Stat., which specifically governs discretionary sales infrastructure surtaxes. Subsection 2 of the statute requires that certain language be used in such a referendum, namely language which requires voters to vote for or against the proposed "__-cent sales tax." § 212.055(2)(b), Fla. Stat. And, the County relied on applicable case law which, in related contexts, has considered, and approved, other referenda which used similar "cent" language to refer to a surtax, and presented several examples of other approved referenda, from other jurisdictions, which used the challenged "cent" language. The Circuit Court agreed with the County, and granted summary judgment in its favor. Coberly declined to appeal the ruling. The case was *Ruth Coberly v. Osceola County*, and was pending before the Circuit Court of the Seventh Judicial Circuit, in and for Osceola County, under case number 2022-CA-002581-OC.

Court Agrees with County that New Comparative Fault Standard and Tort Reform Provisions Apply in Case with Unique Timeline of Events

Attorney Chris Prusinowski recently convinced a judge presiding over a case in St. Johns County that the law applicable to the case should be that of the more favorable comparative fault standard in effect since the date the House Bill 837 became law on March 24, 2023, despite the fact that the lawsuit was filed on March 20, 2024.

The case at issue underwent a unique timeline of events. The Plaintiff filed a Complaint on March 20, 2023; however, the County was not a named Defendant at the time. Then on March 24, 2024, House Bill 837 was signed into law by the governor, which (among many other changes in the law) altered the applicable comparative fault standard for causes of action filed from that day forward. The current comparative fault standard, and other provisions of House Bill 837 are more favorable to Defendants than the previous provisions. Then on June 27, 2023, the Plaintiff submitted a statutory Notice of Claim to the County pursuant to Fla. Stat. §768.28. On July 18, 2023, the Plaintiff filed an Amended Complaint adding additional Defendants; yet the County was still not added as a party. Finally, on February 27, 2024, the County was added as a Defendant, and is the only Defendant remaining in the action.

When the County moved to Dismiss the Plaintiff's Second Amended Complaint due to pleading deficiencies, the County also sought a ruling by the trial court to determine which law applied to the case since the County was not added as a Defendant until after House Bill 837 became law on March 24, 2023, but the lawsuit commenced prior to March 24, 2023. At the hearing on the County's Motion to Dismiss, counsel for the Plaintiff argued that the old standard should apply based on the date the lawsuit was filed. Attorney Prusinowski argued that the law in Florida that allows amended pleadings to "relate back" to the date of the original pleading does not apply to newly added parties to a lawsuit, except under a specific factual scenario that did not exist in this matter. The Court ultimately agreed with Attorney Prusinowski and the County, and ordered that the Second Amended Complaint be Dismissed

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without prejudice; that the Relation Back Doctrine did not apply to the County in this case; and that the law in effect on the date the County was added as a party in the case shall be the applicable law.

The Court's ruling was a favorable one for the County on an issue that may not arise again due to the unique timeline of events in this matter.

Dismissal for Failure to Provide Discovery and Comply with Court Order

Ramon Vazquez recently obtained a dismissal due to the plaintiff's failure to prosecute his case, provide discovery and abide by a Court Order. The Court held that dismissal of an action with prejudice is a drastic punishment and should not be invoked except in those cases where the conduct of the party shows a deliberate and contumacious disregard of the court's authority. Therefore, the case was dismissed without prejudice and administratively closed. Plaintiff may file a new case the case as long as he does so within the applicable statute of limitations.

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