Legal Update

ROPER, P.A.

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CIVIL PROCEDURE- SETTLEMENT-MEDIATION

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We have all been there. Your mediation started at 9.00 a.m. It is now 6.30 p.m. and you have finally reached agreement on that last remaining term of the settlement. You are tired, hungry (perhaps thirsty?) and ready to get out of Dodge. Someone suggests, "Let's just have the lawyers exchange an email confirming the terms of the settlement, so that we can all get out of here." Understand that you do so at the peril of not having an enforceable settlement agreement.

In *Parkland Condominium Association, Inc. v. Henderson*, --- So.3d ----, 2022 WL 16954010 (Fla. 2nd DCA, November 16, 2022) the court found that based upon Florida Rule of Civil Procedure 1.730(b) a settlement reached at mediation is not enforceable, unless it is reduced to writing and *signed by all parties and their counsel* (emphasis added). The court reached this decision even though, in *Parkland*, after the mediation, counsel for the parties had exchanged drafts of the proposed settlement agreement and emails expressing their client's agreement with the essential terms.

The court noted that if the purported settlement agreement had not been reached in the context of court-ordered mediation, it would have likely concluded that the agreement was binding and enforceable because both parties' attorneys appeared to have agreed on the essential terms and had indicated that their clients were on board with settlement. However, because of the specific language of Florida Rule of Civil Procedure 1.730(b), governing mediation, since there was no written agreement, signed by the parties and their counsel, the agreement was not enforceable.

So, if you want to be sure that you have an enforceable settlement agreement resulting from a mediation, makes sure that you:

1. Reduce the essential terms of the settlement to writing.
2. Have that written agreement signed by *all* parties.
3. Have the written agreement signed by counsel for *all* parties.

By: Michael J. Roper

THE POWER OF THE PUBLIC RECORDS POLICY

In a recent decision of Florida's Third District Court of Appeals (3rd DCA), that portion of the Public Records Act, which allows a governmental entity to charge a special service fee for the production of public records, was put to the test.

Florida Statutes, Section 119.07 (4)(d) provides that, if the **nature or volume of public records requested** to be inspected or copied pursuant to this subsection is such as to **require extensive use of information technology resources or extensive clerical or supervisory assistance** by personnel of the agency involved, or both, **the agency may charge**, in addition to the actual cost of duplication, **a special service charge**, which shall be reasonable and shall be **based on the cost incurred** for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both. (emphasis added)

Relying on this "extensive use" portion of the statute, Miami Dade College attempted to secure a fee award from the records requestor in an amount over $200,000.00, related to production of public records that were sought, even though the College had failed to provide the requestor with an estimate of the extensive cost involved in violation of its own policy. *Miami Dade College v. Nader+Museu I, LLLP*, ---- So. 3d ----, WL 3903465 (Fla. 3rd DCA 2022). The College initially failed to produce the records requested and after the lawsuit had been filed and the subject public records produced as part of the lawsuit, the College sought an award of costs related to the production of the records pursuant to the extensive fee portion of Florida Statutes, Section 119.07(4)(d).

The trial court denied the motion for the extensive fees to be paid relying on the Second District Court of Appeals decision in *Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2nd DCA 2008), wherein the court there held that the County may collect an advance deposit of the special service charge permitted by the statute, provided the fee is reasonable and based on the costs actually incurred.

Miami Dade College had a policy that allowed for the extensive fee to be charged; however, the policy also required that an estimate be given to the requestor prior to the production of the records. At no time, did the College provide the requestor with an estimate of the cost to produce the records prior to producing the same. Therefore, the trial court reasoned that the College could not after the fact, charge an extensive use fee, without having first provided an estimate of the cost.

What should such a policy include – you might ask? The following is a great starting point which can certainly be developed over time based on the types of requests the entity receives:

1. Place a requestor on notice as to when the Florida Statutes, Section 119.07(4)(d) fee for extensive use of government resources will be triggered. Some entities will tie the trigger point to a period of time. For example, if it is estimated that

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the records request will take longer than 30 minutes to compile, redact, copy or otherwise reproduce, the special fee would be applicable.

2. The policy should also provide that the government entity will provide an estimate the cost to the requestor which is based on the hourly rate of the lowest paid employee capable of producing the records, including the review for redactions. It should be made clear that the estimate is just that and the actual cost could be higher or lower.

3. Once the estimate is provided, a deposit can be required before the research is started. If the deposit collected turns out to be greater than the actual cost of producing the records, a refund can be provided.

4. The remainder of the actual cost should be paid prior to the records being provided.

For purposes of avoiding claims of inconsistent application, is imperative that a governmental entity adopt a policy related to when it will charge for extensive use of government resources to produce a public records request. The only thing that will get the entity into trouble by adopting such a policy is not following the policy after it has been adopted.

In the *Miami Dade College* case, the 3rd DCA upheld the trial court's decision because the College never provided an estimate for the cost of production prior to producing the records to the requestor. The Court reasoned that the College's failure to provide an estimate of the anticipated costs violated its own policy as well as the statute. *Miami Dade* at *4.

The moral of the story…it is important to have a special service fee policy related to the production of public records requests; however, more importantly the policy MUST be followed.

By: Sherry G. Sutphen

FIFTH DISTRICT COURT OF APPEAL REJECTS ORANGE COUNTY RENT CONTROL ORDINANCE

In 1977, the Legislature passed a law limiting the ability of local governments to pass any measure imposing "controls on rents." *See* § 125.0103(2), Fla. Stat. The law sets a high bar. First, the local government must find and determine "such controls are necessary and proper to eliminate an existing housing emergency which is so grave as to constitute a serious menace to the general public." Second, any such measure may not be imposed for longer than a year. Third, certain types of properties, like second homes, are completely exempted from rent controls. The law also requires a regimented process before a local government can pass a rent control ordinance. The governing body must adopt the ordinance after notice and public hearing. In the resulting ordinance, the government must recite "its findings establishing the existence in fact of a housing emergency so grave as to constitute a serious menace to the general public and that such controls are necessary and proper to eliminate such grave housing emergency." The local government's voters must approve the measure. Finally, if the ordinance is challenged in court, the local government bears the burden of upholding its validity.

Earlier this year, the Orange County Board of County Commissioners considered whether to enact rent control measures, supposedly intended to address the lack of affordable housing in the County. The County hired a consultant to evaluate local housing costs and the possible effectiveness of rent control. The consultant presented its findings at a public meeting. It concluded the County faced several pressing housing-related challenges, noted rents were "spiking," and the County's poorest citizens were bearing the disproportionate burden of the increasing costs. Notably, the consultant did not find a "housing emergency" existed. The consultant concluded the issues that were driving rising housing cost were "deeply structural and the product of regional and national market influences, likely be on the control of local regulation," stemming mostly from "inadequate housing production over years which a temporary rent ceiling would do little to correct." The consultant opined if the County passed such a measure, it "may impede the objective of speeding overall housing deliveries as well as create a number of unintended consequences," rather than fulfilling the goal of eliminating a housing crisis.

The Board held several meetings to discuss the issue, and ultimately passed a rent control ordinance, which was to be voted upon by Orange County voters during the November 2022 election. Despite the consultant's findings, the ordinance listed findings supporting its contention that a housing emergency existed in the County "so grave as to constitute a serious menace to the general public and that such controls are necessary and proper to eliminate such grave housing emergency." The ordinance also provided for a referendum question to be stated on the November 2022 ballot, which inquired as follows:

> Shall the Orange County Rent Stabilization Ordinance, which limits rent increases for certain residential rental units in multifamily structures to the average annual increase in the Consumer Price Index, and requires the County

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> create a process for landlords to request an exception to the limitation on the rent increase based on an opportunity to receive a fair and reasonable return on investment, be approved for a period of one year?

After the ordinance was passed, the Florida Association of Realtors sued Orange County, seeking a declaration that the ordinance was unconstitutional (i.e., violates the Florida Constitution), and that the ballot summary was invalid. The case quickly made its way to the Fifth District Court of Appeal, which issued its ruling 12 days before the general election. *Fla. Ass'n of Realtors v. Orange Cnty.*, Fla., No. 5D22-2277, 2022 WL 15234476 (Fla. 5th DCA Oct. 27, 2022), *reh'g denied* (Fla. 5th DCA Nov. 2, 2022). The Court of Appeal ultimately determined the Association was entitled to an injunction against the ordinance. The Court of Appeal found the ordinance did not satisfy high standard set by section 125.0103, Fla. Stat. As the Court explained, the statute required the County to prove the "existence in fact" of its adopted legislative findings establishing: 1) a "housing emergency"; 2) that is "so grave as to constitute a serious menace to the general public"; and 3) that the proposed rent control measures are both "necessary" and "proper" to "eliminate" the grave housing emergency. Upon review of each of these requirements, the Court found the ordinance failed to satisfy the statute. As such, the Court found the ordinance violated section 125.0103, and was therefore unconstitutional.

The Court of Appeal found the lower court erred in deny the Association's request for an injunction. In terms of a remedy, the Court was circumspect, and declined to dictate how the Orange County Supervisor of Elections should effectuate the relief imposed by the temporary injunction vis-à-vis the November 2022 election, but "anticipate[d] at a minimum . . . the results of the ballot initiative will not be certified." Therefore, the referendum question remained on the ballot, but the Supervisor of Elections could not certify the result.

By: Dale A. Scott

THE CHANGING LANDSCAPE FOR ELECTRONIC EVIDENCE

The implications of electronic evidence, such as videos, photographs, and social media content, cannot be understated. A picture (or video) is worth a thousand words. It can disprove a plaintiff's claims of how the accident happened. It is also useful as a means to show a pre-existing injury or attack claims of injury, pain and suffering, and damages. This evidence can be used at mediation to bolster defenses or at trial. As technology advances, the potential sources are constantly growing. Rather than just medical records and surveillance, a plaintiff's injuries can be assessed through their social media profiles. Rather than just looking to a single camera for post-accident photographs, the likelihood of the before, during, and after of an accident being recorded by video is much greater. So is the potential for the incident to be recorded across multiple devices, such as surveillance cameras, cell phones, and traditional cameras. Once captured, evidence can also be shared—and often is—through text,

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email, and social media too. As the landscape changes, the investigation process must also adapt. The defense must now look outside of the traditional box to a wider range of places for relevant evidence.

For example, courts have recently addressed the admissibility of footage recorded by doorbell cameras which are now widely used both residentially and commercially. For example, *Aspen American Insurance Company v. Tasal, LLC*, 2021 WL 1053177, at *1 (M.D.Fla., 2021) involved an insurance claim for damage to an allegedly stolen boat and the court's ruling on missing doorbell and home surveillance footage which one party asserted would have shown what really happened to the boat. In *Hormilla v. Miami-Dade Cnty.,* 2022 WL 2800966, at *3 (Fla.Cir.Ct. 2022), the court addressed the admissibility of a Ring doorbell video in a code enforcement action involving an allegedly dangerous dog where the video captured the incident and purported to show the victim instigated the attack. Vehicle dash cameras previously only used by law enforcement are now commonly used by drivers and could determine liability. With the popularity of home doorbell cameras and mobile video, it is now possible to find out what really happened and set the "he said, she said" battle aside.

Social media evidence has also proven useful. Courts have ruled that there is no right of privacy to the information posted to a social media account, even if the user selects the highest privacy settings. As a result, social media content is often sought in personal injury cases to evaluate the claimant's quality of life, both before and after the accident. Pictures and videos of the claimant after an accident depicting them traveling and doing those activities they testified they could not, are highly relevant to the issue of damages. And, have proved very effective as a negotiating tool for mediation or building a case for fraud upon the court. Additionally, many social media platforms also allow a user to record a live video that is broadcast on the platform and saved to the user's account. In *Lamb v. State*, 246 So. 3d 400, 409–410 (Fla. 4th DCA 2018), the court admitted a Facebook live video of the defendants driving the vehicle they were charged with stealing. A plaintiff might also record themselves in a live video during the subject incident or that captures them dancing, playing a sport, or other activities that would refute claims of ongoing pain and suffering.

Electronic evidence can make or break a case, but is only useful if it is saved. After an incident occurs, consider every potential source of evidence, related not just the incident itself, but the time periods leading up to the incident and after. Obtain copies of all available information as soon as possible and determine what other sources of information exist, such as doorbell cameras, video surveillance and social media accounts. If photographs were taken, save all of the photographs in electronic format and in color. If video is available, save the entire video in its original format for the entire day, not just the incident alone. If copies of any items cannot be obtained, make note of the existence of the evidence so a request for preservation can be made or it can be pursued later. This information continuously proves its value in litigation on issues of both liability and damages.

By Jennifer C. Barron

FIRM SUCCESS

Summary Judgment Awarded for Citrus County in Lift Station Dispute

Firm attorney Dale Scott recently obtained a summary judgment on behalf of Citrus County in a dispute involving a new lift station built to service The Islands Condominiums near Crystal River. The County, as part of a County-wide project funded through state grants, replaced a deteriorating "package" sewage treatment plant which had served The Islands since the early 1970s, with a new lift station and transmission line which connect The Islands to the County's wastewater collection and treatment system. This was accomplished at no cost to the residents of The Islands, and with the permission of the condominium association which governs The Islands. In 2019, a company which owns several units at The Islands sued the County and the association, claiming they did not have the legal authority to demolish the old "package" plant, install a new lift station, and "force" the residents of The Islands to connect to the County's system. After three years of litigation, the parties filed summary judgment motions. The circuit court granted summary judgment for the County and the association, finding they had the requisite legal authority, under Florida law and the association's governing documents, to undertake the project and connect the residents to the County's system. The plaintiff in the case has threatened to appeal the court's ruling, but has yet to file a notice of appeal. The case was pending before the Circuit Court in and for Citrus County under case no. 2019-CA-000938-A.

FIRM ANNOUNCEMENT

Christopher R. Fay
Florida Supreme Court Certified Circuit Court Mediator

It's my pleasure to announce that mediation has become part of my practice. For the last 30 years I've been practicing law in Florida. Since 2020 I have been a Florida Supreme Court Certified Court Mediator. The reputation I have built in the legal community for professionalism, with a detailed and straightforward approach, carries over to my role as mediator. While I have tried a substantial number of cases, my active involvement in negotiating settlement through mediation has resolved many times more cases. It is a process I believe in and one I am delighted to serve in as your mediator.

My experience is generally in the areas of personal injury and wrongful death, as well as first and third-party insurance disputes, including property damage. I am well experienced in governmental matters involving sovereign immune entities and the legislative claim bill process, as well multiple other areas of civil litigation.

Please contact me about scheduling your mediation or link to my calendar at: https://www.roperpa.com/team/christopher-fay/ I looked forward to working with you.

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