PRACTICE & PROCEDURE

Practice & Procedure: Civil Contempt

***J-II Investments, Inc. v. Leon Co.*,**
21 So. 3d 86 (Fla. 1st Dist. App. 2009)

Civil contempt fines differ from criminal sanctions by providing the contemnor opportunity to purge his or her contempt through compliance, thereby reducing the amount imposed or avoiding the fine entirely. The reduction of a per diem fine to a lower flat amount does not convert a civil contempt proceeding to a criminal contempt proceeding.

FACTS AND PROCEDURAL HISTORY

In the most recent installment of extended litigation relating to J-II Investments, Inc.'s (J-II) unpermitted development of land within Leon County, J-II appealed a trial court order to pay a fine for failure to purge its civil contempt. In May 2006, the trial court issued an order finding J-II in contempt, ordering the entity to purge itself of the contempt by submitting an application for a Standard Form Environmental Management Permit (EMP application), and explaining that failure to purge its contempt would result in a per diem fine that would accrue until the contempt was satisfactorily purged.

J-II submitted an incomplete EMP application, and the County notified the entity of the application's deficiencies, but J-II took no action for a year. The County moved to enforce the contempt order in May 2007. The trial court found that J-II made no good faith effort to purge its contempt order and fined the entity $2,335,000, in compliance with the per diem fines set out in the original order of contempt. On rehearing, the trial court considered J-II's ability to pay and compared the amount of the fine with the amount of harm the entity caused. Ultimately, the trial court determined that J-II could afford to pay the cost of remediation, and in October 2008, it reduced the amount due to $314,068.

J-II appealed, arguing that the trial court erred by imposing a flat fine and eliminating J-II's opportunity to purge its contempt. By doing so, the entity argued, the trial court converted J-

II's civil contempt into criminal contempt thus depriving J-II of the due process protections to which it was entitled. In a per curiam opinion, the First District Court of Appeal affirmed.

ANALYSIS

The First District began by acknowledging the different protections that accompany criminal and civil contempt proceedings. Criminal contempt proceedings are governed by Florida Rule of Criminal Procedure 3.840 and incorporate all due process protections that a criminal trial would carry. Civil contempt proceedings, conversely, do not require the same degree of protection. One critical distinction separates monetary sanctions levied by the two proceedings—in civil contempt sanctions, the contemnor is provided an opportunity to purge itself of the contempt, thereby reducing the fine amount or avoiding the fine in total. Without the purging mechanism, a flat and unconditional fine can be considered a criminal sanction.

J-II argued that because the trial court imposed a flat fine on rehearing, it changed its civil contempt hearing into a criminal proceeding without guaranteeing the procedural and constitutional protections that were due. The First District rejected that argument. J-II was given a civil contempt proceeding in 2007 after the County moved to enforce the May 2006 contempt order. At that time, the trial court imposed an original contempt fine of $2,335,000; the trial court reduced this original fine in October 2008 to $314,068. Both fines were imposed because of J-II's failure to purge its contempt, but the First District held that "[s]ince Appellants were given the opportunity to avoid the fine, the matter remained a civil contempt proceeding," and, therefore, J-II received all protections to which it was entitled. *J-II Investments, Inc.*, 21 So. 3d at 90.

SIGNIFICANCE

J-II Investments articulates the differences between civil and criminal contempt, foremost among them the opportunity of the contemnor to purge his or her contempt through compliance. *J-II Investments* also reaffirms a trial court's power to enforce contempt when a party has ignored a court order.

RESEARCH REFERENCE

- 11 Fla. Jur. 2d *Contempt* § 3 (2008 & Supp. 2009).

Jennifer Morris McPheeters

Practice & Procedure: Declaratory Judgments

***N & D Holding, Inc. v. Town of Davie*,**
17 So. 3d 819 (Fla. 4th Dist. App. 2009)

In order to survive a defendant's motion to dismiss for failure to state a cause of action in a declaration of rights action, the plaintiff is not required in its complaint to show that it will succeed in obtaining a declaration of rights in accordance with its theory and contention. Rather, the plaintiff is required to show only that it is entitled to a declaration of rights.

FACTS AND PROCEDURAL HISTORY

N & D Holding, Inc. (N & D) owned a parcel of property (Property) located in the City of Hacienda Village (City). In 1984, the City was dissolved pursuant to Public Law, Chapter 84-420, Section 2. Section 2 transferred all assets and obligations of the former City to the Town of Davie (Town). Additionally, Section 2 provided that "[a]ll zoning within that portion of the Town . . . that was formerly the City . . . is preserved as it existed immediately prior to the effective date of this act." Immediately prior to the effective date of Section 2, Holding's Property was located in M-3 and M-4 Zoning Districts.

In 2008, pursuant to Ordinances 2008-3 and 2008-4 (Ordinances), the Town rezoned the Property from M-3 and M-4 Zoning Districts to a Regional Activity Center (RAC) Zoning District. The M-3 and M-4 Zoning Districts were not similar or substantially comparable to a RAC Zoning District. N & D filed suit against the Town to obtain a declaration of rights based on its allegation that the Ordinances violated Section 2. The Town filed a motion to dismiss, arguing that Holding failed to state a cause of action. The trial court dismissed the claim finding that no case or controversy existed.

N & D appealed to the Fourth District Court of Appeal and made two arguments. First, N & D argued that it had presented a

case or controversy and, therefore, its complaint was sufficient. Second, N & D argued that the trial court considered off-the-record representations in deciding the Town's motion to dismiss. But N & D did not include a transcript of the hearing on the motion to dismiss in the record on appeal.

ANALYSIS

The Fourth District upheld the trial court's dismissal of N & D's claim. Judge Warner wrote a dissenting opinion.

The Fourth District initially addressed the sufficiency of N & D's complaint, concluding that N & D failed to present a case or controversy. "The test of . . . sufficiency . . . is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with [its] theory and contention, but whether [it] is entitled to a declaration of rights at all." *N & D Holding, Inc.*, 17 So. 3d at 820–821.

Under the standard set forth in *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952), a plaintiff is entitled to a declaration of rights if five elements are met: (1) there is an bona fide need for the declaration; (2) the declaration deals with a present state of facts or present controversy as to a state of facts; (3) some right of the complaining party is dependent upon the facts or the law applicable to the facts; (4) there is some person or persons who have or reasonably may have present adverse interests in the subject matter, either in fact or law; and (5) "the relief sought is not merely the giving of legal advice by the court or the answer to questions propounded from curiosity." *N & D Holding, Inc.*, 17 So. 3d at 821.

Without further discussion regarding the sufficiency of the complaint, the Fourth District found that Holding failed to satisfy the *May* standard.

The Fourth District next addressed and ultimately rejected N & D's argument that the trial court considered off-the-record representations in rendering its decision. The appellant has the burden of showing "where in the record the alleged error can be substantiated." *Id.* at 821. Because N & D failed to include a transcript of the hearing on the motion to dismiss in the record on appeal, N & D could not show where the error occurred. Therefore, N & D failed to satisfy its burden, and the trial court did not improperly dismiss N & D's claim.

In dissent, Judge Warner concluded that there was a case or controversy between N & D and the Town. Judge Warner agreed that the proper test was the *May* standard. N & D alleged that it was entitled to the M-3 and M-4 Zoning Districts as a result of Section 2, and the Town changed the M-3 and M-4 Zoning Districts to an RAC Zoning District in accordance with the Ordinances. Judge Warner noted that the Ordinances contained an exception for uses of land that were already established in accordance with the zoning districts of the City prior to the Town passing the Ordinances. Under the exception, if N & D had already established a use of the property that complied with the M-3 and M-4 Zoning Districts but conflicted with the RAC Zoning District, the RAC Zoning District requirements would not take effect until the year 2038. Therefore, Judge Warner reasoned there was a present controversy as to whether or not N & D had already established use of the property to qualify for the exception.

SIGNIFICANCE

N & D Holding, Inc. clarifies that in order to survive a motion to dismiss, a plaintiff seeking a declaratory judgment must show that it is entitled to a declaration of rights. Although this rule does not require that the plaintiff show that it will succeed in obtaining a declaration of rights in accordance with its theory and contention, this rule does require that the plaintiff show a present controversy.

RESEARCH REFERENCES

- 40 Fla. Jur. 2d *Pleadings* § 65 (Westlaw database updated Feb. 2010).
- Eugene McQuillin, *The Law of Municipal Corporations* vol. 8A, § 25.289 (3 ed., 2003).

Charles E. Simpson

Practice & Procedure: Home Venue Privilege

***Department of Transportation v. City of Miami*,**
20 So. 3d 908 (Fla. 3d Dist. App. 2009)

The sword-wielder doctrine supersedes the State's home venue privilege only when the State is the prime mover, or sword-wielder, causing an unlawful invasion of a plaintiff's constitutional right.

FACTS AND PROCEDURAL HISTORY

This case for injunctive relief concerns a group of individuals occupying makeshift dwellings under the Julia Tuttle Causeway Bridge in Miami. The City of Miami (City) filed an action against multiple state agencies (referred to collectively as "State"), including the State of Florida Department of Transportation (DOT), for alleged violations of the Florida Constitution and City of Miami Code (Miami Code) and for failure to abate an alleged public health nuisance. The City's claim that the State violated the Miami Code rested on the fact that the bridge is within 2,500 feet of a city park and some of the residents under the bridge were sexual predators and offenders. The constitutional claim alleged that it is the policy of the state to preserve natural resources and protect scenic beauty. The nuisance action rested on the City's claim that the State created, allowed, or facilitated the group of individuals to take up a permanent residence under the bridge with no electricity or facilities. ,

The City filed its complaint in the Circuit Court for Miami-Dade County. Using its home venue privilege, the State moved to change venue to Leon County, the location of DOT headquarters. The City contended that venue was proper in Miami because of the "sword-wielder" exception to the home venue privilege. The circuit court denied the motion for a change of venue. The State appealed.

ANALYSIS

The State argued that the circuit court erred when it denied the motion because the home venue privilege provides that the proper venue for a suit against the State or one of its agencies is

the county of its principal headquarters, barring the presence of an exception or waiver.

The Third District Court of Appeal first looked to the background of the sword-wielder exception. The exception has a number of restrictions. It applies only where the official action was being performed, is being performed, or is threatened within the county. The exception is also limited by its primary purpose, which is to obtain protection from an unlawful invasion of constitutional rights within the county. Additionally, if the plaintiff is the prime mover against a dormant state or agency the exception does not apply.

The court found that the sword-wielder exception did not apply to this case for several reasons. First, the Florida Constitution did not vest the City with any constitutional right, so there could be no claim that the State was invading such a right. Second, there was no indication the State was enforcing a rule that would later create a constitutional violation. Finally, the court found the exception could not apply because "the DOT is a passive defendant in the City's action for injunctive relief and abatement of a nuisance." *Fla. Dept. of Transp.*, 20 So. 3d at 911.

The Court concluded that the trial court had reversibly erred when it denied the motion to transfer because the sword-wielder exception did not overcome the home venue privilege of the State.

SIGNIFICANCE

Department of Transportation combines the exceptions stated from multiple cases into one cohesive test. The sword-wielder exception is narrow, covering only cases that impact constitutional rights and are the result of assertive, not merely passive, action by the State or one if its agencies.

RESEARCH REFERENCE

- 57 Am. Jur. 2d *Municipal, etc., Tort Liability* § 609 (2009).

Justin P. Miller

Practice & Procedure: Scope of Review

***Miami-Dade County v. Valdes*,**
9 So. 3d 17 (Fla. 3d Dist. App. 2009)

In reviewing a local government's decision to deny a citizen's application for a zoning variance, the circuit court sitting in its appellate capacity should determine first whether the local board observed the essential requirements of law and second whether competent and substantial evidence supported the board's decision.

FACTS AND PROCEDURAL HISTORY

Respondent, Valdes, owned a single-family residence in Miami-Dade County, Florida. Valdes' property was located one lot south of Coral Way and zoned RU-1. Acting for Petitioner, Miami-Dade County (County), the Miami-Dade County Board of Country Commissioners (Board) granted variances, ranging from RU-2 to RU-5, to most of the owners of property fronting Coral Way. The variances allowed the owners to use their property for offices and other non-residential purposes. Valdes applied for a variance to use his property as an office. Valdes' application was denied by the Board. Valdes appealed to the circuit court, arguing that the Board had engaged in reverse spot zoning. Reverse spot zoning occurs when a property owner is prevented from using his property in a way that neighboring properties are used, thus creating a zoning island or peninsula. By virtue of its finding that Valdes' property was surrounded by a busy thoroughfare, commercial property, and a group home, the circuit court found that the Board had committed reverse spot zoning and quashed the Board's decision. The County sought second-tier certiorari review by the Third District Court of Appeals (Third District). The Third District denied certiorari. Judge Rothenberg dissented.

ANALYSIS

The Third District concluded that it was not improper for the circuit court to quash the Board's decision. The Third District disagreed with the dissent as to the applicable standard of review. Explicitly rejecting the competent-and-substantial standard of review, the Third District determined that "the [Board's decision]

is more appropriately considered [by the circuit court] as a matter of law, applying undisputed facts concerning the characteristics of the location in question and its surroundings to established legal principles." *Valdes*, 9 So. 3d at 18. Under this latter standard of review, and based on the circuit court's findings that Valdes' property was surrounded by a busy thoroughfare, commercial property, and a group home, the circuit court's conclusion was not a departure from the essential requirements of the law. Therefore, certiorari was denied.

Writing in dissent, Judge Rothenberg proffered the standard of review for a circuit court in reviewing an administrative action: "the circuit court must determine . . . whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent and substantial evidence." *Id.* at 20 (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982)).

For the following two reasons, Judge Rothenberg dissented. First, the circuit court failed to determine whether the Board's judgment was supported by competent and substantial evidence. In support of its judgment quashing the Board's decision, the circuit court considered evidence weighing contrary to the Board's decision. This was improper because the circuit court was limited to examining the evidence provided by and in favor of the Board. Irrespective of the amount of evidence weighing contrary to the Board's decision, so long as there is competent and substantial evidence in favor of the Board's decision, the Board's decision must be upheld. By considering and assessing evidence weighing contrary to the Board's decision, the circuit court effectively reweighed the evidence, resulting in both a usurpation of the fact-finding authority of the Board and a violation of the proper standard of review.

Second, the circuit court failed to abide by the essential requirements of the law. In justifying its judgment quashing the Board's decision, the circuit court found that the group home to the south of Valdes' property was "commercial in nature." The circuit court's classifying the group home as commercial in nature is in direct contravention to Florida Statutes, Section 419.001(2), which specifically defines the type of group home at issue as "non-commercial . . . for the purpose of local laws and ordinances."

SIGNIFICANCE

The Third District's decision in *Valdes* demonstrates that a circuit court is granted an enormous amount of power in reviewing and ultimately overturning an administrative decision by local government. As noted in the lengthy dissent, the circuit court in *Valdes* arguably substituted its own evaluation of the evidence for that of the local quasi-judicial board. For this reason, local government practitioners may wish to discount the precedential value of this decision in favor of the Florida Supreme Court's decision in *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982) and the long line of appellate cases in which the District Court of Appeal applied the standard of review articulated in that case.

RESEARCH REFERENCES

- Eugene McQuillin, *The Law of Municipal Corporations* vol. 8A, § 25.302 (3d ed., 2003 & Supp. 2009).
- 2 Fla. Jur. 2d *Administrative Law* § 406 (2005 & Supp. 2009).

Charles Simpson

Practice & Procedure: Standing/Environment—Permitting

***Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Company*,**
18 So. 3d 1079 (Fla. 2d Dist. App. 2009)

An entity wishing to challenge an agency action must prove only that its substantial interests *may* be adversely impacted. Standing will not be lost if, after a hearing on the merits of the case, the Administrative Law Judge (ALJ) determines that no adverse impacts will actually occur. Furthermore, a determination that no adverse impacts will actually occur does not prevent the petitioner from having standing at the appellate level. Standing, once proven, will remain throughout the appellate process.

The Department of Environmental Protection (DEP) does not have to consider cumulative impacts analysis if the agency determines by competent, substantial evidence that a water resource permit applicant's mitigation plan will offset the project's adverse impacts in the same drainage basin as those impacts.

FACTS AND PROCEDURAL HISTORY

This case arose out of an administrative hearing in which the petitioners, the Peace River/Manasota Water Supply Authority (Authority), challenged the DEP's decision to issue a notice of intent to grant various permits. The permits would allow IMC Phosphates Company (IMC) to mine 4,197 acres of the Peace River tributary. The Authority has a water use permit (WUP) that grants the right to withdraw potable water from the Peace River to supply to the residents of four counties. The mining project would alter the flow of Horse Creek, a tributary that supplies roughly fifteen percent of the fresh water that the Authority withdraws. The Authority challenged the DEP's decision based on the DEP's failure to address the cumulative impacts of this and various other projects in the area.

Prior to the administrative hearing, IMC filed motions to exclude evidence of the cumulative impacts of the other projects and to challenge the petitioners' standing. IMC based its motion to exclude cumulative impacts analysis on Florida Statutes Section 373.414(8)(b) (2004), and the ALJ granted this motion. The ALJ did not consider the standing issue until hearing the merits of the case as they pertained to the effect of the order on the petitioner's interests. Although the ALJ found the Authority lacked standing because its interests were not substantially affected by the order, he also held the standing issue was moot because the Authority had already participated in the hearings. The DEP adopted the ALJ's recommendations in its final order, and the Authority appealed to the Second District Court of Appeal.

ANALYSIS

On appeal, the court first considered whether the Authority had standing to challenge the DEP's issuance of the permits. Examining this issue de novo, as one of statutory interpretation, the court found that the Authority did have standing even though the ALJ found the issue was moot. To have standing under the Florida Administrative Procedure Act (APA), the Authority must be a party whose substantial interests are affected by the agency action. Fla. Stat. Ann. § 120.569(1) (West 2008). Whether the Authority is a party whose substantial interests are affected depends on (1) whether it will suffer an "injury in fact which is of sufficient immediacy," and (2) whether the injury is "of a type or nature

which the proceeding is designed to protect." *Agrico Chem. Co. v. Dept. of Envtl. Reg.*, 406 So. 2d 478, 482 (Fla. 2d Dist. App. 1981).

As to the first prong, the court found that the Authority has a substantial interest in the health of the Peace River based on the fact that the Peace River is the Authority's sole source for supplying potable water to the residents of four counties, and changes to Horse Creek could injure the river's environmental integrity. The court then found that the Authority was a party because the interest it asserted—the integrity of the water supply—falls within the scope and purpose of the administrative proceedings (to ensure that the permitted activities would not adversely affect the water resources).

After finding the Authority did in fact have standing, the court explained why IMC's arguments and the conclusions of the ALJ and DEP failed. Although IMC argued that the Authority did not have standing because there would be no adverse impacts to the tributary and therefore the Authority's substantial interests would not be affected, the court rejected this argument, finding the Authority need only prove that its substantial interests *could* be affected. The court reasoned that to base standing on the outcome of the case would force parties to prevail on the merits to prove standing.

Next, the court addressed IMC's argument that the Authority did not have standing to prosecute the appeal. The APA accords judicial review to a "party who is adversely affected by final agency action." Fla. Stat. Ann. § 120.68(1) (2007). IMC argued the Authority was not adversely affected by the DEP's issuance of the permit. The court disagreed, concluding that the Authority did have standing to appeal because the Authority's WUP required the Authority to monitor the environmental integrity of the Peace River, and the Authority's ability to withdraw water depended on the continued health of the river. The permit the DEP issued allows IMC to alter the flow of Horse Creek, which could injure the Peace River. The court noted that "if those permits were improperly issued, the Authority will be adversely affected . . . ," and "the determination of whether those permits were properly issued necessarily includes appellate review." *Peace River/Manasota Regl. Water Supply Auth.*, 18 So. 3d at 1085–1086. The court also noted that "standing continues until the appellate process is tapped out." *Id.* at 1086.

The court then turned to the substantive issue of the appeal—whether the ALJ and DEP erred in refusing to consider evidence of the cumulative impacts of this and other mining projects in the Peace River basin. The Authority argued that Section 373.414(8)(a) requires cumulative impacts analysis, while IMC argued Section 373.414(8)(b) exempts this particular project. Section 373.414(8)(a) requires cumulative impacts analysis when determining whether to issue a permit for mining activities in wetlands. However, an applicant that proposes to offset any adverse impacts through mitigation within the same drainage basin as the adverse impacts will meet the cumulative impact requirement. There was no dispute that the proposed mitigation was in the same drainage basin as the adverse impacts. There is also no dispute that the ALJ and DEP found there would be no adverse impacts to Horse Creek post-mitigation. Recognizing this as a factual finding, the court reviewed the record to ensure it was supported by competent, substantial evidence.

Conflicting testimony was presented that pointed to a reduced stream flow in Horse Creek on one hand, and to the reduced stream flow's lack of disruption on the environmental integrity of the waters and wetlands on the other. After meticulous examination of the record, the court determined there was competent, substantial evidence to support either ruling. Because deference is given to the ALJ when reviewing credibility determinations, the court affirmed the DEP's adoption of the ALJ's ruling that since the "'function of the biological systems' would be fully restored," cumulative impacts analysis was unnecessary. *Peace River/Manasota Regl. Water Supply Auth.*, 18 So. 3d at 1088.

The court expressed some frustration, pointing out that even if the reduced stream flow to Horse Creek resulting from this particular project was not adverse, the reduced stream flow of several projects in the same basin could eventually have a significant impact. Regardless, the DEP is allowed to examine each project's impacts in isolation because of the plain language of the relevant statute. The court properly recognized this issue requires a legislative rather than judicial remedy and stated, "despite our misgivings, we cannot rewrite [S]ection 373.414(8) or overrule DEP's discretionary determinations to prevent this bit-by-bit accumulation of adverse impacts. That task must be left to the legislature." *Id.* at 1089.

SIGNIFICANCE

Peace River/Manasota Regional Water Supply Authority clarifies that an entity wishing to challenge a permit must show only that it *could* be affected by the agency's decision, not that it actually will be. Furthermore, even if the court finds the entity's substantial interests will not actually be affected by the agency action, such finding does not affect standing.

Peace River/Manasota Regional Water Supply Authority affirms that Section 373.414(8)(b) provides an exception to the cumulative impacts requirement of Section 373.414(8)(a). If the agency determines the mitigation plan outlined in the water resource permit proposes to offset adverse impacts in the same drainage basin as the projected impacts, the cumulative impacts requirement is deemed satisfied.

RESEARCH REFERENCES

- 2 Fla. Jur. 2d *Administrative Law* § 244 (2005 & Supp. 2009).
- 22 Fla. Jur. 2d *Environmental Rights and Remedies* § 28 (2005 & Supp. 2009).

Stephanie A. Broad