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IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. **3D21-_____**
LT CASE NO. **19-167 AP**

CITY OF MIAMI,

Petitioner,

vs.

MIAMI-DADE COUNTY,

Respondent.

CITY OF MIAMI'S PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This case arises from a Petition for Writ of Certiorari by Miami-Dade County seeking to quash a Mayoral veto and reinstate the decision of the Miami City Commission regarding the County's application for a Certificate of Appropriateness to develop the Coconut Grove Playhouse.

On remand from this Court for a consideration of the case on the merits, the Appellate Division of the Circuit Court found that the Veto was supported by competent substantial evidence and complied with the essential requirements of the law. Notwithstanding its approval of the substance of the veto, the Circuit Court found a violation of due process. In quashing the veto, the Circuit Court effectively reinstated the decision of the Miami City Commission.

This Circuit Court based the due process violation on proffered ex parte communications involving the Mayor during the veto period. The ex parte communications were not part of the record before the City Commission. There was no formal hearing at which to disclose the communications. There was no opportunity for the Mayor to rebut any presumption of prejudice.

The City has argued throughout these appellate proceedings that pursuant to the holding of this Court in Jennings v. Miami-Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991), a party challenging ex parte communications must file an original action in circuit court. An original action is the exclusive remedy. Such communications cannot be challenged on appeal. An evidentiary proceeding is required.

Nonetheless, the Circuit Court disagreed and quashed the Mayoral Veto. The Circuit Court relied exclusively on a finding that there was a presumption of prejudice based on five unsolicited emails to the Mayor and non-substantive replies to the emails from the Mayor – without affording any opportunity to rebut any presumption of prejudice. The County's argument for this result relied on precedent exclusively from the Circuit Court to establish the Circuit Court's appellate jurisdiction to review such a violation de novo. Jennings stands to the contrary.

As explained in detail herein, the decision of the Circuit Court applied the incorrect law and deprived the Mayor of due process. This error warrants second-tier certiorari relief because the error results in a miscarriage of justice. A violation of Jennings cannot be

determined absent an evidentiary hearing via a separate lawsuit or a hearing whereby the Mayor has the opportunity to rebut any assertion of prejudice. Absent an evidentiary hearing, the bare unsolicited emails relied upon by the Court do not conclusively establish that the communications were prejudicial. Finally, in order for elected officials to comply in the future, the Circuit Court's determination of a Jennings violation without the requisite evidentiary proceeding requires clarification of exactly what circumstances result in a Jennings violation mandating reversal without explanation from the elected official.

BACKGROUND[1]

This case arises from an administrative process initiated by Miami-Dade County ("the County") for the purpose of redeveloping the Coconut Grove Playhouse ("the Playhouse"). Because the Playhouse is designated as Historic by the City of Miami Historic and Environmental Preservation Board ("HEPB"), the County is required

[1] As demonstrated by the numerous appeals in this matter, the process has been somewhat extensive. The City has included the County's appendix filed below to ensure that this Court has a complete record. For purposes of this Petition, which includes one narrow issue, the City includes only a summation of the relevant proceedings in its Petition.

to obtain a Certificate of Appropriateness from HEPB. City Code § 23-6.2; App. 1373-1382.

Initially, the County applied for a preliminary Certificate of Appropriateness which the HEPB granted with conditions. App. 541-542. Several intervenors appealed to the City Commission. App. 544-546. The City Commission granted the appeal in part, and the County appealed to the Circuit Court. App. 550-552; 558-565. On appeal, the Circuit Court vacated the Commission's decision, finding that the intervenors lacked standing to appeal to the Commission. App. 558-565.

Thereafter, the County applied for a final Certificate of Appropriateness. App. 861-870. HEPB denied the Certificate of Appropriateness, and this time the County appealed to the City Commission. App. 509; 942-947. The City Commission granted the County's appeal which would have resulted in the County obtaining the Certificate of Appropriateness to proceed with its development plan for the Playhouse. App. 1210-1212.

The Mayor of the City of Miami exercised his authority under the City Charter to veto the decision of the City Commission. App.

1214-1215. When the item was placed before the Commission, the Commission did not override the Veto. App. 1276.

The County challenged the Veto by filing a petition for writ of certiorari in the Circuit Court. App. 1. The City filed a motion to dismiss, which the circuit court carried with the case. App. 1358-1371; 1423-1424. The basis for the City's motion to dismiss was that the Veto was not quasi-judicial and therefore the circuit court lacked appellate jurisdiction. App. 1358-1371. After briefing and oral argument, the circuit court agreed with the City's position and dismissed the case. App. 1410-1424.

On appeal, this Court reversed. See Miami-Dade County v. City of Miami, 315 So. 3d 115 (Fla. 3d DCA 2020). This Court stated: "We conclude that the Mayor's veto is inextricably intertwined with the quasi-judicial proceedings, as his action was in response to a quasi-judicial proceeding. This, it was reviewable by the circuit court's appellate division, and the circuit court had jurisdiction to address the merits of the County's petition." Id. at 122-23. This Court quashed the opinion of the circuit court and remanded for reinstatement of the County's petition for writ of certiorari.

On remand, the circuit court rendered an opinion holding that the Mayor's veto was supported by competent substantial evidence and complied with the essential requirements of the law. App. 1525-1547. However, the Circuit Court found a violation of due process and quashed the Veto. The due process violation was founded on the County's assertion that the Mayor had engaged in ex parte communications during the veto period. Id. Without requiring any evidentiary hearing, the Circuit Court decided that the proffered ex parte communications – alone and without any opportunity for the Mayor to rebut the allegations – resulted in a presumption of prejudice which entitled the County to relief. Id.

The City filed a timely and authorized motion for rehearing and clarification. App. 1548-1560. The County filed a response, and the circuit court denied the City's motion. App. 1600-1603.

This petition for second-tier certiorari review follows.

STANDARD OF REVIEW

Upon second-tier review, the district court of appeal determines "whether the decision of the circuit court . . . is a departure from the essential requirements of the law resulting in a miscarriage of justice." Nader v. Fla. Dep't of Motor Vehicles, 87 So. 3d 712, 725

(Fla. 2012). The circuit court's decision is said to depart from the essential requirements of the law where the circuit court fails to afford procedural due process or fails to apply the correct law. Id. at 722-23 (quoting Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530-31 (Fla. 1995)). The failure to follow binding applicable district court of appeal precedent constitutes a failure to apply the correct law. See Id. at 723 (clearly established law can derive from a variety of legal sources including recent controlling case law); Rodriguez v. Palm Beach Cnty. Div. of Animal Care & Control, 56 So. 3d 45 (Fla. 4th DCA 2011); see also State, Dep't of Hwy. Safety & Motor Vehicles, 204 So. 3d 169 (Fla. 1st DCA 2016); Dep't of Hwy. Safety & Motor Vehicles v. Chakrin, 304 So. 3d 822 (Fla. 2d DCA 2020). The "miscarriage of justice" standard involves "a degree of flexibility and discretion" that cannot be reduced to a catalog of factors for courts to consider in every case. Heggs, 658 So. 2d at 530-31; see also Custer Medical Center v. United Auto. Ins. Co., 62 So. 3d 1086, 1092-93 (Fla. 2010). The decision to grant or withhold relief by way of second-tier certiorari largely depends on the court's "assessment of the gravity of the error and the adequacy of other relief." Id. at 1092 (quoting Heggs, 658 So. 2d at 531 n.14).

ARGUMENT

I. THE CIRCUIT COURT APPLIED THE INCORRECT LAW IN FINDING A VIOLATION OF JENNINGS V. MIAMI-DADE COUNTY WITHOUT REQUIRING AN EVIDENTIARY PROCEEDING AFFORDING THE MAYOR THE OPPORTUNITY TO PRESENT EVIDENCE TO REBUT ANY PRESUMPTION OF PREJUDICE.

In this case, the Circuit Court deprived the Mayor of due process and applied the incorrect law by quashing the Mayoral veto based upon alleged ex parte communications consisting of unsolicited emails to the Mayor and non-substantive email replies from the Mayor. The solitary applicable precedent from this Court – Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991) – does not permit an appellate court to invalidate an administrative decision without an evidentiary proceeding to determine prejudice.

In Jennings, a property owner applied for a variance to allow him to conduct an oil change business on his property adjacent to the property of Jennings. The zoning appeals board granted his request. The Dade County Commission voted to uphold the board's decision. Thereafter, Jennings sought declaratory and injunctive relief in circuit court where he alleged that a lobbyist communicated with some or all the Dade County Commissioners before the vote of

the Commission. The trial court dismissed the portion of Jennings' complaint alleging ex parte communications by the lobbyist and granted leave to amend as to Dade County and transferred the matter to the appellate division of the circuit court. Jennings sought review from this Court.

In accepting jurisdiction over the appeal in Jennings, this Court stated:

> The trial court's order dismissed Jennings' equitable claim of non-record ex parte communications while it simultaneously reserved jurisdiction for Jennings to amend his complaint so as to seek common law certiorari review pursuant to Dade County v. Marca, S.A., 326 So. 2d 183 (Fla. 1976). Under Marca, Jennings would be entitled solely to a review of the record as it now exists. However, since the content of ex parte contacts is not part of the existing record, such review would prohibit the ascertainment of the contacts' impact on the commission's determination.

Id. at 1340 (emphasis added).

The Jennings Court held that the remedy for an allegation of a prejudicial ex parte communication in a quasi-judicial proceeding was the following:

> [W]e hold that the allegation of a prejudicial ex parte communication in a quasi-judicial proceeding before the

> Dade County Commission will enable a party to maintain an original equitable cause of action to establish its claim.
>
> . . . [W]e direct that upon remand Jennings shall be afforded an opportunity to amend his complaint. Upon such an amendment, Jennings shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred. Upon such proof, prejudice shall be presumed. The burden will then shift to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to determine the claim in light of all the evidence in the case.

Id. at 1341-1342 (emphasis added).

Under Jennings, the exclusive remedy is pursuit of a civil action and an evidentiary hearing to ascertain the impact of the communications on the administrative determination.[2]

[2] Scott v. Polk County, 793 So. 2d 85 (Fla. 2d DCA 2001), provides an example of the proper way to challenge an administrative decision based on an ex parte communication. See id. at 86 ("The instant judicial action involves a § 1983 due process claim, which, in the context of a zoning case, may be viewed as an action independent and distinct from the judicial review process relating to the approval or denial of a zoning request. See Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991) (holding that an original judicial action for declaratory and injunctive relief regarding due process violations in a quasi-judicial zoning proceeding before a county board can be maintained apart from the judicial review process of the board's actual zoning decision).").

In the present matter, the Circuit Court conducted its own de novo evaluation of the proffered facts and made its determination without the requisite evidentiary proceeding which would enable the Mayor to rebut any presumption of prejudice. This is directly contrary to Jennings. Jennings unequivocally requires an evidentiary proceeding to enable rebuttal and the ultimate determination of prejudice. See Id. at 1339 ("We hold that upon proof that a quasi-judicial officer received an ex parte contact, a presumption arises . . . that the contact was prejudicial. The aggrieved party will be entitled to a new and complete hearing before the commission unless the defendant proves that the communication was not, in fact, prejudicial.") (emphasis added).

In this case, the Mayoral veto process – unlike the quasi-judicial process that preceded it – did not include a formal hearing. See Miami City Charter, § 4(g)(5) ("The mayor shall, within ten days of final adoption by the city commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the city commission . . . . The city commission may, at its next regularly scheduled or special meeting after the veto occurs, override that veto by a four-fifths vote of the city commissioners present,

notwithstanding any provisions to the contrary contained in the Charter and city code."). The County acknowledged in its merits briefs that the Mayor had no opportunity to disclose any ex parte communications before exercising the veto. App. 53; 1500; 1570.

This Court's application of Jennings on appeal is inconsistent with the conduct of appellate proceedings. Fundamental and well-settled principles of appellate practice provide that reviewing courts are prohibited from making factual findings or reviewing evidence not included in the record before the lower tribunal. See, e.g., Konoski v. Shekarkhar, 146 So. 3d 89, 90 (Fla. 3d DCA 2014) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court." (citation omitted)); Velazquez v. S. Fla. Fed. Credit Union, 89 So. 3d 952, 956 (Fla. 3d DCA 2012) ("Appellate review is limited to the record as made before the trial court at the time of the entry of a final judgment or orders complained of." (citation omitted)); Rosenberg v. Rosenberg, 511 So. 2d 593, 595 (Fla. 3d DCA 1987) ("It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court."); Farneth v. State, 945 So. 2d

614, 617 (Fla. 2d DCA 2006) ("A fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact."); Hillsborough Cnty. Bd. of Cnty. Comm'rs v. Public Employees Relations Comm'n, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it.").

Similarly, the Florida Rules of Appellate Procedure governing administrative appeals restrict review to materials that were before the lower tribunal. See Fla. R. App. P. 9.190(c)(1) ("As further described in this rule, the record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court."). The Circuit Court's holding – reviewing materials that were not part of the record

before the Miami City Commission – departed from these well-established principles of appellate review.[3]

The Circuit Court's invalidation of the Mayoral Veto without an evidentiary proceeding to enable rebuttal and the ultimate determination of prejudice was a failure to follow binding precedent that constituted application of the incorrect law. Furthermore, the imposition of a presumption in this case without an opportunity for rebuttal resulted in a deprivation of the Mayor's due process rights. The Circuit Court in this case imposed an irrebuttable presumption of prejudice.

The outcome in this case reached by the Circuit Court based upon the proffered ex parte communications demonstrates the importance of following the holding of Jennings and requiring an evidentiary proceeding. The Jennings opinion adopts the following

[3] The County relied on the decision in The Viscayans, et al. v. City of Miami, et al., 15 Fla. L. Weekly Supp. 657a (Fla. 11th Jud. Cir. App. Div. July 3, 2014). In The Viscayans, a panel of the appellate division reversed a decision of the City Commission with respect to a zoning matter, in part because it determined that ex parte communications by the mayor during the ten-day veto period constituted a denial of due process. The City submits that the holding in The Viscayans misapplied Jennings for the reasons addressed in this petition.

criteria to determine the prejudicial effect of an ex parte communication:

> [w]hether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefitted from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

Jennings, 589 So. 2d at 1341 (quoting Prof'l Air Traffic Controllers Org. v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982)) (emphasis added).

As quoted above, the Jennings opinion sets a high bar for the type of prejudice that would invalidate an administrative decision. The factors required for consideration cannot be determined by the Circuit Court on appeal without testimony and rebuttal by the Mayor. It begs the question then of how the asserted ex parte communications identified by the County – five unsolicited emails

and non-substantive email replies from the Mayor – could be deemed "prejudicial" under the high bar set by the Jennings case without an evidentiary proceeding. The answer is they cannot.

Finally, this Court should not allow the decision to stand without further guidance because the current decision creates confusion as to what facts constitute a presumption of prejudice, what facts dispel the presumption, and what ultimate facts demonstrate prejudice or lack of prejudice. Given that elected officials constantly receive communications from their constituents, the answers to these questions are crucial to guide elected officials in the future. The City submits that following the letter of Jennings and requiring an evidentiary proceeding would have obviated the need for the answers to these questions. But in the absence of a hearing which would have required proof, the Circuit Court's ruling in a vacuum begs the need for answers.

The following are examples of the intricate problems posed by a one-sided ruling without full and fair litigation of the issues. In this case, the Mayor received unsolicited emails and sent non-substantive responses. The City submits, as stated above, that this, without more evidence, does not constitute a violation under Jennings. Do said

unsolicited emails without a response by the elected official amount to a Jennings violation? If there was evidence that the elected official never met with or had any discussion with the constituents rebut a Jennings violation? Would meetings between the elected official's staff only or email responses by staff only result in a Jennings violation? Does it make a difference if the elected official or staff meets with constituents on both sides of an issue? All these examples point to the need for an evidentiary proceeding. All the examples demonstrate the problems and lack of clarity caused by making a Jennings finding with a one-sided record.

II. THE DECISION OF THE APPELLATE DIVISION DEPRIVED THE MAYOR OF DUE PROCESS AND APPLIED THE INCORRECT LAW RESULTING IN A MISCARRIAGE OF JUSTICE.

In addition to the circuit court's departure from the essential requirements of the law outlined above, this Court must also find a "miscarriage of justice" to grant second-tier certiorari relief. District courts of appeal have found a miscarriage of justice where the circuit court's decision fails entirely to apply a binding precedent. See State v. Jones, 283 So. 3d 1259, 1270 (Fla. 2d DCA 2019). This Court has also found a miscarriage of justice in this case where it concluded

the County was deprived of due process. See Miami-Dade County v. City of Miami, 315 So. 3d 115 (Fla. 3d DCA 2020).

Here, as explained above, the Circuit Court failed to apply this Court's opinion in Jennings. Furthermore, the Circuit Court denied the Mayor due process by imposed a irrebuttable presumption on him in this case and relieving the County of the ultimate burden of demonstrating prejudice. For these reasons alone, the departure from the essential requirements of the law result in a miscarriage of justice, particularly where the Circuit Court found that the veto was supported by competent substantial evidence and complied with the essential requirements of the law.

In addition, Florida courts have found a miscarriage of justice where the circuit court's decision is "pervasive or widespread in its application to numerous other proceedings." Dep't of Hwy. Safety & Motor Vehicles v. Alliston, 813 So. 2d 141, 145 (Fla. 2d DCA 2002); Jones, 283 So. 3d at 1269. Furthermore, an important factor to consider when determining whether the Circuit Court's error amounted to a miscarriage of justice is the adverse precedential effect the error might have on subsequent cases. See, e.g., GEICO Indem. Co. v. Gables Ins. Recovery, 159 So. 3d 151 (Fla. 3d DCA 2014);

State, Dep't of Hwy. Safety & Motor Vehicles v. Fernandez, 114 So. 3d 266 (Fla. 3d DCA 2013). In this case, the departure from the essential requirements of the law is pervasive and widespread resulting in adverse precedential effect in other cases. The County identified four other administrative cases before the appellate division of the circuit courts with the same holding. App. 52-53; 1497-1501; 1566-1570. The County argued before the Circuit Court that these four cases were precedent supporting its claim. Id. Here, the Circuit Court failed to apply the correct law and established and adhered to a principal of general application binding in subsequent cases. Thus, certiorari is warranted.

CONCLUSION

Jennings does not authorize an appellate court, without evidence or a complete record, to invalidate an administrative decision based on violation of due process. The vacuum created by proceeding in this fashion leaves many issues undetermined and unexplained. The holding in Jennings required evidence and a complete record to make the determination of prejudice. Based on the foregoing arguments and authorities, the City respectfully requests that this Court grant the

City's petition for writ of certiorari and quash the decision of the circuit court appellate division.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font and word count requirements of Florida Rules of Appellate Procedure 9.100(g) and 9.045(b).

By: */s/ John A. Greco*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the individual(s) on the below Service List by e-mail this 6th day of July, 2021.

By: */s/ John A. Greco*
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