IN THE SUPREME COURT
STATE OF FLORIDA

Case No: SC05-1778

Lower Tribunal Case No.:
5D04-2617

JOHN VOSILLA, EMILIO CIRELLI,
KELLY SCOFIELD and STEVE SEMMELMAN,

Appellants,

vs.

JULIO ROSADO, NANNETTE ROSADO, et al,

Appellees.

ANSWER BRIEF OF APPELLEES ON CERTIFICATION OF CONFLICT BY THE FIFTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND THE FACTS

In an *en banc* unanimous decision, the Fifth District Court of Appeal reversed a judgment entered by the Eighteen Judicial Circuit quieting title to real property. John Vosilla, Emilio Cirelli, Kelly Scofield, and Steve Semmelman (collectively referred to as Vosilla) obtained title to the property by quit claim deed from Edward Terry. Terry bought the property at a tax deed sale after the Rosados failed to pay their 1997 property taxes. The Rosados challenged the Vosilla's claim based on improper and insufficient notice. They argued that they failed to receive notice of the tax sale, and that Florida Statute section 197.502(4) was unconstitutional as applied to the facts of their case. [1]

The Fifth District Court of Appeal agreed with the Rosados' argument that depriving them of their property under the particular facts of this case violated federal due process notice requirements. The Appellate court concluded that because the Rosados "had previously notified the tax collector and the clerk of their new address, the clerk's notice of tax deed sale to their old address was not 'reasonably calculated under all the circumstances' to apprise them of the tax deed sale and therefore violated their federal constitutional due process rights." (A2.) It confirmed the trial court's findings and reiterated those findings as part of its

[1] The Fifth District Court of Appeal decided the issue en banc because its resolution resulted in receding from the prior precedent of *Eurofund Forty-Six, Ltd. v. Terry*, 755 So. 2d 835 (Fla. 5th DCA 2000). A.1 fn 1, 6, 7,14,15).

decision. (A.2,3) These findings included: **1**.) The Rosados sent two letters, one to the tax collector and one to the clerk of court, "Attn: Property Tax Dept.", notifying them of their new address and requesting that they correct their address on the tax records. (R.176, A.2,10, R.74-76) **2**.) "Despite the Rosados' change of address, the tax collector had not updated the Rosados' address in the assessment rolls and the clerk of court had not updated the address in the clerk's records." (R.176, A.3) **3**.) "Since the tax collector did not update the Rosados' address in the assessment roll, the notice of the application for a tax deed was mailed certified mail, return receipt requested to the Rosados' old address." (R.176, A.3) **4**.) "The return receipt was signed by a Regina Carmona," not by the Rosados. (R.176, A.3) **5**.) "The Rosados did not receive notice of the application for tax deed nor of the date of the proposed sale." (R.176, A.2,3) **6**.) The Rosados' failure to receive notice was "completely the fault of the taxing agencies." (R.178, A.10).[2]

[2] A comedy of errors committed by others prevented the Rosados from receiving notice of the sale. The Rosados sent their first change of address to the tax collector on September 25, 1998 (R. 74), and their second to the clerk, attention tax department, on February 21, 2000. (R.75,76) The tax collector and the clerk failed to change the Rosados' address on the tax rolls. The clerk did not send notice of the tax sale to the mortgage company, so the mortgage company was not given the opportunity to pay the taxes or to notify the Rosados of the pending sale. When the Rosados purchased the property in 1996, they received a mortgage from the Ford Consumer Finance Company. The mortgage company's address was listed on the top left hand corner of the mortgage. (T. 40, lines 7-24). In July 1997, the Rosados refinanced their mortgage with Ford. They thought at that time that the taxes for 1997 had been paid as part of the refinancing (T.122, Lines 6-15). The 1997 mortgage with Ford contained the identical address as the 1996 mortgage, but

Other salient facts are that the certified letter to the clerk of court was signed for when it was received. The sheriff notified the clerk that the Rosados did not reside at the property address. (T.60 lines 11-14). The clerk received a phone call before the sale regarding the irregularity in the notification, but proceeded with the sale (T.104).

The homestead argument was raised by Vosilla on appeal below, was reviewed by the Fifth District Court of Appeal, and was not addressed in its opinion because there were no findings of fact to support it. (R.175, 176.)

The Fifth District Court of Appeal certified conflict with *Alwani v. Slocum*, 540 So. 2d 908 (Fla. 2nd DCA, 1989, and Appellants filed a notice to invoke the discretionary jurisdiction of this Court.

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the address was crossed out and was replaced with the address of the title company handling the refinancing. (T.41, lines 16-25), T.42 lines 1-15). In the statement of persons to be served with notice, the tax collector listed Ford with no address. (T.70, line 25, T. 71, lines 1,2, T.72, lines 1-7). The clerk did not send any notice to Ford despite the fact that its address was clearly visible on both mortgages. (T.40, lines 16-24, T.41, lines 20-25, T.42, lines 15-17). The Rosados therefore also never received any notice of the sale from the mortgage company. (T.51, lines 8-11)

At the sale, the property sold for $27,611 (T.61, lines 8-11, T.75, lines 9-11). After paying off the amount owed of $3,075.44 (T.61, lines 14,15), there was an overage of over $24,000 (T.61, lines 12-18). The attorney for Ford notified the clerk that Ford had not received proper notice, and requested that the clerk pay the entire overage amount to Ford. (R.149, 150). The Rosados also made a claim to these funds, and notified the clerk that the matter was in litigation . (R.151). The clerk did not interplead the funds, but rather disbursed the entire overage amount to the attorney for Ford. (R.155).

SUMMARY OF ARGUMENT

Since the Rosados had previously notified the tax collector and the clerk of their new address, the clerk's notice of tax deed sale to their old address violated their federal due process rights. Both the tax collector and the clerk of court were proper agencies to receive the change of address requests. In *Delta Property Management v. Profile Investments, Inc.*, 875 So. 2d 443 (Fla. 2004) the property owner notified the **tax collector** of its change of address. *Id*. at 444, and this Court rightfully assumed that the address change sent to the tax collector could be reflected in the latest assessment rolls. In addition, Florida Administrative Code 12 D-13.006 provides that both the tax collector and the clerk of court shall notify the property appraiser of any errors on the tax rolls. Therefore, both the clerk and the tax collector should have notified the property appraiser of the Rosados' correct address.

The facts and reasoning in *Delta* support the Fifth District Court of Appeal's decision. The facts in *Delta*, while not identical, are remarkably similar to the underlying facts in *Rosado.* Both the Rosados and Delta lost their property in a tax sale because notice was given to them at an old address. Under *Delta*, if the tax roll is updated after the clerk receives a statement from the tax collector, but before mailing the notice to the owner, then the clerk must look at the new assessment roll to see if the owner's address has changed. The clerk in *Rosado* failed to obtain an

updated assessment roll from the tax collector as required by *Delta* (R. 87,105). Therefore, the tax deed to Vosilla is not valid. Based on *Delta*, the Fifth District Court of Appeal's decision should be affirmed.

Depriving the Rosados of their property under the facts of this case would constitute an unconstitutional taking without due process in violation of *Mullane v Central Hanover Bank and Trust Co*, 339 U.S. 306, 70 S. Ct. 653, 94 L.Ed. 865 (1950) and *Mennonite Board of Missions v. Adams* 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). The legislator's authority to determine notice requirements is subject to the federal due process requirement that notice be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Dawson v. Saada* 608 So. 2d 806, 808 (1992), quoting *Mullane v. Central Hanover Bank and Trust Co*, 339 U.S. 306, 314, (1950) Under *Dawson* and *Mennonite* " knowledge of delinquency and the payment of taxes is not equivalent to notice that a tax sale is pending." *Dawson*, at 810.

Alwani v. Slocum 540 So. 2d 908 (Fla. 2nd DCA, 1989) was decided prior to *Dawson* and was based on the assumption that knowledge of non payment of property taxes is equivalent to knowledge of a tax sale. *Dawson* rejected that assumption and also rejected *Alwani's* reasoning that lack of notice was no defense

to a tax sale. Under *Dawson*, tax deed sales must meet federal due process notice requirements. The sale of the Rosados' property did not meet these requirements.

ARGUMENT

A. Under the Facts of this Case, Notice Was Not Reasonably Calculated Under All the Circumstances to Apprise the Rosados of the Pendency of a Tax Deed Sale. Therefore, Notice Provided to the Rosados Did Not Meet the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America

The United States Supreme Court has set forth the minimum notice required by the Fourteenth Amendment of the Constitution of the United States to affect an interest in property. It has done so in two main cases: *Mullane v. Central Hoover Bank & Trust Co.*, 339 U.S. 306; 70 S. Ct. 652; 94 L. Ed. 86 (1950) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983). *Mullane* rejected the traditional justification for distinguishing notice requirements for actions *in rem* and *in personam*. *Mennonite* summarized the trend which began with *Mullane* and concluded "our cases have required the state to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required on *in personam* actions". *Mennonite* at 462 U.S. 796. It went on to state:

> [N]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. *Id*. at 800. (emphasis added)

In *Mennonite*, the mortgagee was not given notice of a tax sale. The mortgage on file did not contain a street address for the mortgagee. It only contained the name of the mortgagee and its county and state. The court

nevertheless concluded "we assume that the mortgagee's address could have been ascertained by reasonably diligent efforts", *Id*. at 798, fn 4. It required that notice be "mailed to the mortgagee's last known available address, or by personal service" *Id*. at 798, even though no address was listed by the tax collector or in the mortgage.

The tax collector and the clerk in *Rosado* knew or should have known that the property address was not the Rosados' "last known address" since the Rosados previously notified them of their correct address.

The United States Supreme Court has balanced the interests of the state in collecting taxes against those who possess substantial property interests. It has concluded that the state must use reasonably diligent efforts to ascertain a correct address to meet constitutional notice requirements. [3] In a case like this, where the owner has not received actual notice, the state has reason to believe that the owner did not receive actual notice and the County fails to provide notice at the address provided by the owner for notification purposes, the tax sale and deed should be invalidated for lack of due process. [4]

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[3] The County's failure to accurately record changes of address provided to it by the property owner does not constitute "reasonably diligent efforts" to give notice to the property owner.

[4] The Rosados were also almost deprived of the opportunity to defend against the quiet title action. Vosilla obtained a default against them without service of process. An order was issued to the clerk to issue a writ of assistance (R.20). Only after counsel became involved was that order withdrawn. (R. 21-22).

Under *Dawson v. Saada*, 608 So. 2d 806, 807 (Fla. 1992) and *Mullane*, before depriving an owner of their property, notice of a tax sale must be "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Dawson*, *supra* at 808; *Mullane*, *supra* at 314, (emphasis added). This court in *Dawson* found that excluding insufficient notice as grounds for challenging the validity of tax deeds would render Florida Statute 197.404 unconstitutional. Insufficient notice would permit the sale of property without notice to the affected owners in contravention of the "elementary and fundamental requirements of due process" as required by *Mullane* 339 U.S. at 314, 70 S. Ct. at 657. Under the reasoning in *Dawson*, when notice to the landowner is not reasonably calculated under all of the circumstances to apprise him of the pendency of a tax deed sale, then due process requirements are not met.

The Rosados provided both the tax collector and the clerk of court, "Attn: Property Tax Dept.", with an address for official notification of tax information

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Furthermore, the Rosados were deprived of the opportunity to have the county determine their entitlement to the overbid of more than $24,000 which was distributed by the county to the mortgage company during the pendency of this action, without court order, after the Rosados put the county on notice of their claim to these funds. (R. 151, 155).

and neither corrected the address on the tax rolls. (R. 74-76)[5] The return receipt received by the clerk clearly showed that the Rosados did not sign for the notice of sale sent to the property address. Furthermore, the sheriff notified the clerk that the property owner did not reside at the property address. (R.117). On December 18, 2001, the morning of the sale, someone called the clerk about this property. Notes were put in the Rosados' file about the conversation, which show that this person spoke only Spanish. This person was told to speak English because no one in the clerk's office spoke Spanish. (T.81, lines 6-10, T.105, lines 13-17). The call was made to the clerk before the sale took place. (T.104, lines 17-24). The clerk, therefore, knew that there was an issue regarding the sale of this property. (T. 103-105) The clerk knew that the Rosados had not received notice, and yet did not stop or postpone the sale.

This is precisely the kind of situation the Fifth District Court of Appeal was concerned about in *Kidder v. Cirelli*, 821 So. 2d 1106 (5th DCA, 2002). The Fifth District followed the reasoning in *Kidder* to arrive at its decision in *Rosado v. Vosilla*, 909 So. 2d 505, (Fla. 5th, 2005). The dissent in *Kidder* was concerned with due process when prior to the sale, the clerk "knows that the owner has not been given notice." *Kidder* at 1108. In his special concurring opinion, Judge Cobb

[5] The person who signed for the receipt of the letter to the clerk, worked for the clerk, but not in the tax department. (T. 76, lines 5-16). The procedure was to forward such correspondence to the correct department if it was received by someone in a different department. (T. 77, lines 11-22, T.78, lines 9-12).

distinguished the facts in *Kidder* from *Mullane*, stating " [i]n the instant case, unlike *Mullane*, the failure of the tax rolls to reflect Kidder's correct mailing address is his fault and not that of the county. This is because it was Kidder who furnished the incorrect address to the taxing agencies…" *Kidder* at 1108. (emphasis added). The trial court in *Rosado* found that the Rosados' failure to receive notice was "completely the fault of the taxing agencies." (R. 176). Judge Griffin's opinion in *Kidder* was based on the fact that an owner bears some responsibility for his correct address being on the tax roll. *Kidder* at 1107. Since Kidder did not provide the authorities with his current address, he could not complain about not receiving notice. The Rosados, however, took reasonable steps to advise the taxing authorities of their new address.[6]

Florida Statute 197.502 (4)(a) provides that when the legal titleholder of record is the same as the person to whom the property was assessed on the tax roll for the year in which the property was last assessed, then the notice may only be

[6] It is significant that the Rosados sent two notices of change of address, and that neither resulted in a change of address or in a response from the county to the Rosados. This means that the taxing authorities erred not just once, but twice, on two separate occasions, several years apart. How many times must the county fail to comply with the taxpayer's instructions before its procedure of notification under the statute becomes constitutionally flawed? The Rosados contend that once is enough. Otherwise, there is no incentive for the taxing authorities to be responsible to its taxpayers, and notice under the statute could not possibly be reasonably calculated to actually advise the taxpayer of a pending sale. Responsible government and due process demand that citizens not be deprived of their property rights without notice to them at the address they have provided for such notification.

mailed to the address of the titleholder as it appears in the latest assessment roll. Florida Statute 197.522(3) provides "nothing in this chapter shall be construed to prevent the tax collector or any other public official in his or her discretion from giving additional notice in any form concerning tax certificates and tax sales beyond the minimum requirements of this chapter." If, under Section 197.502 (4)(a), the clerk can send notice of a tax sale only to the address that should have been put on the records pursuant to the property owner's request, then a property owner will never receive notice when the tax collector fails to change the property owner's address.

To be reasonably calculated to give the property owner notice, the county must either accurately record the change of address, or if they fail to do so, then the tax collector or the clerk should use its discretion under section 197.522 (3) to provide additional notice, especially where, as here, it is evident that the property owner has not received actual notice. Thus, any conflict between Florida Statute 197. 522 (3) and 197.502 (4)(a) must be resolved in favor of the former to ensure notice when the tax collector fails to record a property owner's change in address. As this court stated in *Delta* " while the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk." *Delta* at 448. The facts in *Rosado* are precisely

those kinds of circumstances which should warrant some additional action by the clerk. [7]

B. Under the Facts and Reasoning of *Delta* this Court Should Affirm the Fifth District Court of Appeal's Decision.

Delta Property Management, Inc. v Profile Investment, Inc., 875 So. 2d 443 (Fla. 2004) was decided just prior to the trial court's decision in *Rosado.* In that case, Delta, like the Rosados failed to pay 1997 property taxes. *Delta* established that the clerk must mail notice to an owner to the address listed on the latest tax roll. If the tax roll is updated after the clerk receives a statement from the tax collector, but before mailing the notice to the owner, then the clerk must look at the new assessment roll to see if the owner's address has changed. This is because Florida Statute 197.502 (4) provides that notice may only be mailed to the address of the title holder as it appears on the latest assessment roll. Mailing notice to the owner at an address listed on an earlier tax roll does not satisfy the statutory

[7] Had the tax collector changed the Rosados' address in 1998 when they first requested the change, the clerk could only have mailed notice of the tax sale to the Rosados at their correct address and the Rosados would then have received notice and would have paid the outstanding taxes. (T.135, lines 12-18). If the statute requires that notice be given in accordance with the tax roll prepared by the taxing authorities, then common sense requires that the taxing authorities be required to properly record the address provided by the property owner. Because the tax collector failed to change the address, the notice requirement intended by the statute was thwarted.

requirement, thereby depriving the property owner of due process of law. *Delta* at 447.

In both *Delta* and *Rosado,* notice was mailed to the address shown on the 1999 tax rolls when the 2000 tax rolls were or should have been available. *Delta* at 447. The clerks in both *Delta* and *Rosado* waited months before mailing notice of the sale. In the meantime, the new tax roll was or should have been prepared pursuant to Fla. Stat. 193.023 (1), mandating that the tax rolls be updated " no later than July 1st of each year."

In *Delta*, the clerk received the tax collector's statement in May of 2000 and did not send notice to the property owner until September 7, 2000. *Id*. at 44. The clerk in *Rosado* received the tax collector's statement in June of 2000 (R. 83), did not send notice of the sale until November of 2000 (R. 116), and used the information entered in the 1999 tax roll. (R. 87,105) Thus, in both *Delta* and *Rosado,* the clerk did not check the 2000 tax rolls for any change in address before tax sale notices were issued. As in *Delta*, in *Rosado,* when the clerk mailed the notice, "the latest assessment roll was, presumptively the 2000 roll, not the 1999 roll." *Delta at.* at 447. Because the most recent notice of a change of address was sent by the Rosados in February of 2000, prior to the preparation of the 2000 assessment rolls, had the clerk asked the tax collector to check the most recent rolls, the Rosados' correct address presumably would have been noted.

There was no evidence presented in *Delta* that the assessment rolls actually contained the property owner's current address. Rather this Court's decision was based on the fact that the clerk did not check the latest assessment roll before sending out the notices. Likewise, the Seminole County clerk in *Rosado* failed to check the latest assessment roll. Since a new Seminole County tax roll was or should have been completed between the time the clerk received the statement from the tax collector and the time she mailed the notices of the tax deed sale, under *Delta*, she was obligated to obtain updated information from the tax collector. Had she done so, the Rosados' new address might have been changed on the new assessment roll pursuant to their request of February of 2000.

Under *Delta*, the Seminole County clerk should have been required to use her discretion to give additional notice, to ask for updated information from the tax collector or to take additional actions to ensure that notice was reasonably calculated under all of the circumstances to apprise the Rosados of a pending tax sale. Since she failed to do so, the tax deed is void under *Delta*.

Even if *Delta Property Management, Inc* is factually distinguishable from the instant case, this Court acknowledged in *Delta* that there may be circumstances where the statutory notice requirements are no longer reasonably calculated to provide actual notice. *Id*. at 448. The Rosados' failure to receive notice was "completely the fault of the taxing agencies." (R. 178). The clerk knew that the

Rosados did not receive notice since the return receipt was not signed by them and the sheriff's return of service indicated that "subject no longer resides at the property address." (R. 117, T. 60 lines 5-14, A 10, 11). Almost 5 months passed between the time the clerk received the information and the time she attempted to notify the property owners of the pending tax deed sale. In the meantime, a new tax roll should have been created. The clerk in *Rosado* failed to request a supplemental statement from the tax collector despite being aware that the information contained in this statement was no longer current and was not accurate. (R. 117,118)

Thus, given all the circumstances, notice to the Rosados could not have been reasonably calculated to apprise them of the pending tax sale. "The importance of notice when a person may be deprived of an interest in real property cannot be overemphasized." *Delta* at 447. The process followed by the Seminole County clerk was "mere gesture." It was not designed to actually inform the Rosados of a sale of their property. Under *Mullane*, "When notice is a person's due, process which is mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane,* 339 U.S. 306, 315, 70 S.Ct. 652 (U.S. 1950). When they are not, then due process requirements are not met. The Rosados were deprived of

their property without due process, and this court should affirm the Fifth District Court's decision.

C. The Fact that the Rosados Notified the Tax Collector and the Clerk of Court of Their Change in Address, Instead of the Property Appraiser, Does Not Obviate the Tax Collector's or the Clerk's Responsibility to Comply With the Property Owner's Request.

The tax collector, tax appraiser and the clerk have a working relationship regarding taxes and tax deed sales. The property appraiser prepares the assessment roll. Fla. Stat. 193.114(1)(a). The tax collector sends out the tax bills, and forwards information to the clerk regarding tax deed sales. Fla. Stat. 197.502(4). Based on the information supplied by the tax collector, the clerk of court sends out notices of tax deed sales. Fla. Stat. 197.522(1)(a). Therefore, all three need accurate addresses of property owners to perform their responsibilities, so presumably, they would share this information. Also it is reasonable, therefore, for a taxpayer to assume that these are the proper agencies to notify of address changes.

In the instant case, the Rosados did not just assume; they acted reasonably and sought out the correct department to notify. In 2000, Mrs. Rosado called the clerk of the court and asked where she should send her change of address. The clerk's office gave her the address, and told her to send it to the clerk of court, attention property tax department. (T. 53, lines 7-9, 54 lines 12-18). She sent the

first notice of change of address to the tax collector because that was the address on the Rosados' previous tax records. (T. 54 lines 14-23).

Why should a citizen think to write to the tax assessor's office to change their address for notice of tax issues when the tax bill comes from the tax collector? Only a person who works with the county would know the specific rolls of the taxing authorities. If the tax collector sends a statement of persons to be notified of the tax deed sale along with addresses for those persons, then pursuant to Fla. Stat. 197.522(3), he should use the current address provided to him by the property owner for that purpose. If the clerk of has notice of an updated address for a property owner, then, also pursuant to Fla. Stat. 197.522(3), the clerk should use that address, especially where the clerk is aware that the property owner no longer resides at the property. The Rosados relied on information supplied by the county to determine where to send their address change. It would be reasonable to assume that the county knows better than taxpayers how to effectuate such changes, and that when the taxing authorities have a new address, they would use that address to give additional notice to the taxpayer. Doing so would reconcile the conflict between Fla. Stat. 197.502(4) and 197.522(3).

The property owner in *Delta* sent its change of address to the tax collector's office, not to the property appraiser. *Delta* at 444, fn 4. This Court in *Delta* rightfully assumed that the change in address sent to the tax collector's office could

be reflected on the latest assessment rolls. Also, under *Kidder*, it is clear that the tax collector and the clerk are proper authorities to notify of an address change. *Kidder* states, "the only address provided to the tax collector for the owner of the property was that of the property itself" *Kidder* at 1107 (emphasis added), and "appellant makes no claim that he undertook to provide a proper address to the clerk." *Id.* at 1106, fn1, (emphasis added). The tax collector and the clerk are "taxing authorities" and are reasonable agencies to notify of address changes for tax purposes. (*See*, e.s. *Kidder* at 1107 "No claim is made that Appellant ever took any steps to provide a correct address to taxing authorities.") Also, Florida Administrative Code 12 D-13.006(3) requires both the tax collector and the clerk of court to notify the property appraiser's office of any errors. F.A.C. 12 D-13.006 (4) also allows the tax collector to correct errors on tax rolls.[8]

In addition, if the Rosados had sent their change of address request to the wrong agency, then that agency either should have forwarded it to the appropriate agency or notified the Rosados of their need to send their change of address request elsewhere. Neither the tax collector nor the clerk of court advised

[8] The *Alwani* court rejected this argument on the basis that "the payment of taxes should not be excused because of an omission or commission or any act on the part of any property appraiser [or] tax collector…" *Alwani*, 540 So. 2d 908, 910. Excusing the payment of taxes because of an error by the tax collector, tax appraiser or clerk of court, is not the same as losing your property because of such an error. The Rosados are not claiming that the errors by the tax collector and clerk excuse their payment of taxes. They are saying that such errors cannot be the basis for depriving them of their property.

the Rosados that they could not comply with the Rosados' request. As stated by the Fifth District Court of Appeal, "neither the statutes nor the administrative rules designate to which of these agencies a property owner must submit a change of address form in reference to notice of a tax deed sale." (A.15) When taxpayers such as the Rosados, make a reasonable effort to advise the taxing authorities of a change of address, those authorities have an obligation to either comply with the taxpayer's request or to explain why they cannot. [9] In this case they did neither, instead they totally ignored the Rosados' requests. As a result, the Rosados failed to receive their tax bills and notice of the tax deed sale.

This lack of responsiveness by the taxing authorities constitutes a breach of the social contract between government and its citizens. If taxpayers cannot depend on the taxing authorities to act upon or otherwise respond to their requests, then how can government justify taking their property for taxes which are supposed to be used to service its citizens?

From a policy standpoint, condoning the behavior of the Seminole County taxing authorities discourages responsible government. Investors, such as those who purchased the Rosado's property often work closely with the taxing

[9] It is not as though the Rosados notified the county of their change of address by writing to the Public Works Department, or other County Department which has nothing to do with the collection and payment of taxes. They notified the taxing authorities in a good faith effort to ensure that all tax information was sent to their correct address.

authorities to identify suitable properties.[10] If they can purchase property at a tax deed sale, they often can acquire property for much less that its fair market value. This was the case with the Rosado property. The Rosado's had approximately $70,000 in equity in their property before the sale. (T. 121, lines 4-7). Requiring the taxing authorities to comply with or respond to taxpayers' requests for address changes would help safeguard against possible abuses. This is especially the case where, as here, the clerk knows the taxpayer has not received notice of the sale.

D. The Conflict Between *Alwani* and *Rosado* Should be Resolved in Favor of the Fifth District Court of Appeal's *En Banc* Unanimous Decision in *Rosado.*

The Fifth District Court of Appeal in *Rosado v. Vosilla*, 909 So. 2d 505, (Fla. 5th, 2005) certified conflict with *Alwani v. Slocum*, 540 S.2d 908 (Fla. 2nd DCA 1989). The property owner in *Alwani* argued that they, like the Rosados, had also notified the tax collector and the clerk of their new address, but that the clerk did not send notice to that new address. *Alwani* found that the clerk had complied with the statutory notice requirements by sending notice to the property owner's address on the latest tax roll and reasoned that it would place an "intolerable burden" on the clerk to ascertain property owners' true addresses. This court has

[10] The *Eurofund*, *Kidder*, and *Rosado* cases all involved the same group of investors. This is evidenced by the following facts: first, the Appellee in *Kidder v. Cirelli*, Mr. Emilio Cirelli is one of the appellants in this case. Second, the deed to the Rosados' property was originally purchased at the tax deed sale by Mr. Edward Terry. Mr. Terry was the Appellee in *Eurofund.*

addressed that issue in *Delta* stating "while the clerk should use the tax collector statement while preparing the tax sale notices, circumstances may warrant some additional action by the clerk." *Delta* at 448. In addition, *Alwani* was decided prior to *Dawson*. In *Dawson*, this court held that knowledge that a property owner has not paid taxes is not equivalent to notice that a tax sale is pending and does not obviate the requirement of notice of the sale. *Dawson* at 810. To the extent that *Alwani* equates a notice of taxes due with notice of a pending tax sale, its holding has been overruled or at least questioned by this Court's decision in *Dawson*. In light of *Dawson* and *Delta Property Management,* the reasoning in *Alwani* is questionable. The *en banc* unanimous decision of the Fifth District Court of Appeal in *Rosado* eloquently recites the ways in which *Dawson* rejected the analytical underpinnings of *Alwani* and how the reasoning in *Alwani* has been rejected by this court in *Delta Property Management.*

In addition to these legal arguments, there are factual distinctions between *Alwani* and the instant case. First, the court in *Alwani*, found that the property owner "had received timely notices of the taxes due." *Alwani* at 909. There was no such finding in the instant case. In addition, the property owners in *Alwani* had faced tax sales before on other property they owned in the same county. The clerk sent the notice of sale to the same address used by the property owner in that prior correspondence. Since the properties involved in *Alwani* were vacant lots, and the

notices were sent to the property owners at an address other than the address of the subject property, the clerk had no reason to believe at the time of the sale that the property owners had not received notice. In *Rosado,* however, the notice was sent to the property and the sheriff notified the clerk that the Rosados no longer resided there. The clerk, therefore, had reason to believe that the Rosados had not received notice of the sale. [11]

Finally, from a practical standpoint, property owners who notify taxing authorities of a change in address want to be notified at that address of all issues concerning their property. If the county is desirous of collecting property taxes, then it would behoove taxing authorities to have procedures in place to accurately reflect changes in property owner's addresses. Such procedures would eliminate the need for many tax sales, and thereby reduce county expenses. It would also help protect and preserve the rights of property owners. As this Court stated in *Delta Property Management,* "the importance of notice when a person may be deprived of an interest in real property cannot be overemphasized." *Delta* at 447.

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[11] Other cases cited by the Appellant include: *Johnson v. Taggart*, 92 So.2d 606 (Fla. 1957), and *D.R.L., Inc. v. Murphy* 508 So.2d 413 (Fla. 5th DCA, 1987), both decided before *Mennonite* and *Dawson*. Appellant also cites *Brian v. Rheff*, 849 So.2d 1032 (4th DCA, 2003) which supports the Rosado's argument since there the clerk waited more than 3 months before noticing the tax deed sale. Other 5th District Court of Appeal cases related to this issue are: *Hutchinson Island Realty, Inc. v. Babcock Venture, Inc.*, 867 So.2d 528 (Fla. 5th DCA, 2004); *Bostwick v. Clukies*, 801 So.2d 961 (Fla. 5th DCA, 2001). Bostwick received actual notice of the sale and Hutchinson failed to notify the tax collector of his new address. Thus, both are distinguishable from the instant case.

The testimony is clear that had the Rosados known the taxes were unpaid they would have paid them. (T120 lines 12-18).

Taxes owed can be substantially less than an owner's equity, as they were in the case of the Rosados. Providing proper notice to taxpayers who advise the taxing authorities of a change in address will not "thwart" collection efforts, it will improve them. It would not place an "unbearable burden" on the taxing authorities to accurately reflect changes in property owners' addresses. To the contrary, it would relieve them of the burden of going through unnecessary tax deed sales.

E. The Rosados Are Not Responsible For The Taxing Authorities' Failure To Change Their Address. The Homestead Argument Is A Red Herring.

First, Vosilla did not present any evidence that the tax collector would have changed the Rosados address had the notice the Rosados sent included a notification of non-homestead status. Why would the tax collector record the requested change only if it were accompanied by a change to non-homestead? The Rosados made the request. Their address on the County's records should have been changed accordingly.

Second, the testimony is uncontroverted that the Rosados moved out of the subject property in December 1998. (T. 44, lines 5 - 7). Therefore, the property was still homestead in 1997 and 1998, the year in which the tax certificate was issued. Third, the evidence does not substantiate Appellants' argument that the

property was homestead subsequent to 1998. (T.116, lines 9 - 10). Also, Mrs. Rosado denied seeking a homestead exemption after she moved out of the property in 1998. (T.121, lines 22-25, T.122, line 1, T.123. lines 15-21). In light of all the other errors made by the county, is it not reasonable to assume it also erred in recording the property as homestead?

Furthermore, Florida Statute Section 196.031(1) allows for an owner to claim a homestead exemption if he has a legally or naturally dependent person living in the property, is a Florida resident and has no other homestead exemption. (See also, Rules and Regulations of the Dept. of Revenue, Rule 12D 7.007(4) and Attorney General Opinion 82-027). Mr. Rosado's elderly father who was living in the property was incapacitated and was being looked after by a live in care giver. (T. 46). Thus, if Mr. Rosado's father were a legal or naturally dependent person, then the Rosados would have qualified for a homestead exemption. Appellants presented absolutely no evidence that the Rosados did not qualify for this exemption. Thus, even if the Rosados had claimed the property as homestead after they moved, no evidence was provided that it would be improper to do so. Nor was any evidence presented that the tax collector or the clerk relied on any homestead status in sending the notice to that address.

The trial court made no findings of fact regarding the homestead status of the property or whether the Rosados were entitled to a homestead exemption in

1997 or any subsequent year. The homestead argument was raised by Vosilla on appeal to the Fifth DCA, but was not addressed in its opinion as there were no findings of fact to support it. (R. 175, 176).

F. The Rosados' Failure to Pay Taxes for Years Other Than 1997 Does Not Put Them on Notice of a Pending Tax Deed Sale.

Whether the Rosados paid taxes for the years subsequent to 1997 is not relevant to the issues before this Court. No evidence was presented that they failed to pay taxes prior to 1997, the year for which the tax certificate was issued on May 27, 1998, which resulted in the tax deed to Edward J. Terry. Nor was any evidence submitted that they actually received any notice concerning delinquent taxes for any years subsequent to 1997. If the Tax Collector failed to provide the clerk of court with the Rosados' correct mailing address for the notice of the December 18, 2000 sale, then it is reasonable to assume that the taxing authorities failed to correct the Rosados' address, and that the Rosados did not receive notice of any subsequent tax certificates.

The only tax certificate relevant in this case is the one issued in 1998. The Rosados should not be penalized for any subsequent tax certificates which might have been issued as a result of failing to receive other notices since those other certificates were not germane to these proceedings. No evidence was submitted

that any other tax certificates were ever issued on this property. Pursuant to *Dawson*, the mere fact that a property owner fails to pay taxes does not constitute notice of an application for a tax deed sale. Similarly, non-payment of taxes for years subsequent to the issuance of a tax certificate cannot constitute notice to the property owner of a pending tax deed sale.

G. The Rosados' Belief That the 1997 Taxes Were Paid Was Offered as an Explanation for Nonpayment, Not as Proof of Payment.

Appellants suggest that the Rosados should have presented a closing statement of their refinancing as evidence to show that a deduction was made for taxes at the time of the refinancing. Clearly, if the deduction was made, then the Rosados paid for the 1997 taxes through the refinancing. If this occurred, then it was error on the part of the closing agent in not forwarding those funds to the County, (or error by the County in not recording the 1997 taxes as being paid). The Rosados were unable to locate the closing statement for the refinancing. The Rosados were not arguing that the taxes were paid but rather that they mistakenly thought they were paid as part of the refinancing. This was offered merely as an explanation as to why the Rosados did not follow up with the County regarding their 1997 tax bill. (The May, 1998 certificate was issued for 1997 taxes).

H. The Rosados Proved that the Taxing Authorities Were Notified of Their Correct Address Despite the Appellants' Circular Argument to the Contrary.

The Rosados contend that the taxing authorities have an obligation to properly record changes of address provided to them. The fact that the county failed to do so should not be used against the Rosados to deprive them of their property. Appellants' argument is circular. They argue that because the clerk and the tax collector failed to properly record the Rosados' change of address, the Rosados cannot prove that they were notified of it. The testimony was uncontroverted that the Rosados sent the letter to the tax collector on September 25, 1998, and to the clerk on February 21, 2000. Also the testimony was that the individual who signed the receipt for the letter notifying the clerk of the change of address worked for the clerk of the court. (T.76, lines 14 - 16).

CONCLUSION

Alwani and *Rosado* are factually distinguishable. The property owner in *Alwani* received timely notice of taxes due. The Rosados did not. The clerk in *Alwani* had no reason to believe the property owner did not get notice of the sale. The clerk in *Rosado* had many reasons to believe the Rosados did not get notice.

However, any conflict between *Alwani* and *Rosado* should be resolved in favor of *Rosado.* The Fifth District Court of Appeal's opinion takes into consideration the federal due process requirements established in *Mullane* and *Mennonite* as applied by *Dawson* and *Delta* to tax deed sales in Florida. *Alwani* was decided before *Dawson* and *Delta*. It was based on the assumption that there was no defense under Florida Statutes for insufficient notice of a tax deed sale. Sufficient notice requires that taxing authorities be responsive when taxpayers submit address changes. Otherwise, the notification process is "mere gesture", and does not meet due process requirements. Responsible government is good business. It is not an intolerable burden; rather it enhances the ability to collect taxes and bolsters taxpayer's confidence in the process.

The Court should decline to exercise jurisdiction based on the factual distinctions between *Alwani* and *Rosado.* Alternatively, it should affirm the Fifth District Court of Appeal decision and find that the tax deed in this case is void because notice was not sufficient to meet due process requirements.

CERTIFCATE OF COMPLIANCE

I HEREBY CERTIFY that the attached Brief complies with typeface and length requires of Fla. R. App. P. 9.210(a)(2) and 9.210(a)(5).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Hand Delivery to STEPHEN P. SAPIENZA, ESQUIRE, 300 North State Street, Bunnell, FL 32110, on this 23rd day of November, 2005.

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