IN THE SUPREME COURT
STATE OF FLORIDA

DELTA PROPERTY MANAGEMENT, INC.

Petitioner,

Case No. SC09-2075

vs.

1st DCA Case No. 1D08-515

PROFILE INVESTMENTS, INC.,

Respondent.

RESPONDENT'S AMENDED BRIEF ON JURISDICTION

William S. Graessle
Florida Bar No. 498858
William S. Graessle, P.A.
219 Newnan Street, 4th Floor
Jacksonville, Florida 32202
(904) 353-6333
(904) 353-2080 facsimile

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DESIGNATION OF THE PARTIES AND CITATIONS

References herein to the Petitioner Delta Property Management, Inc. will be "Delta."

References herein to the Respondent Profile Investments, Inc. will be "Profile."

References to the decision of the First District below, appended to the Petitioner's Brief on Jurisdiction, will be (Op. ___), followed by the appropriate page number.

All emphasis used herein are those of the scrivener unless indicated otherwise.

STATEMENT OF THE CASE AND FACTS

The only facts relevant for a conflict analysis are those appearing within the four corners of the decisions allegedly in conflict. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

The decision of the First District for which review is sought centers on Delta's abandonment of the theory it had advocated since the onset of the litigation nine years ago. After two prior appeals in the First District and one decision on the merits by this Court, Delta attempted to proceed on an entirely new theory after realizing its prior theory had no factual or legal basis. *Sub judice*, the First District unanimously held that this violated the law of the case doctrine, citing this Court's decision in Fla. Dept. of Transp. V. Juliano, 801 So. 2d 101 (Fla. 2001), and its own decision in Parker Family Trust I v. City of Jacksonville, 804 so. 2d 493 (Fla. 1st DCA 2001).

The First District extensively addressed this Court's decision in this case, Delta Property Management, Inc. v. Profile Investments, Inc., 875 So. 2d 443 (Fla. 2004). Delta failed to pay its taxes, Profile purchased the property at a tax sale, and sued to quiet title. Delta counterclaimed, alleging that the clerk failed to comply with the statute and had not provided proper notice of the sale, as Delta had allegedly provided the tax collector with a "new" address to which notice should have been sent and if the clerk had used the "latest assessment roll," Delta's

new address would have been thereon and it would have received notice. Summary judgment was entered for Profile, with the trial court "concluding that the clerk was not required to look beyond the statement to determine if the names and addresses of the parties were correctly listed on the tax collector's statement." (Op. at 2-3). At no time did Delta ever challenge the statute's constitutionality, either facially or as applied, instead arguing only that it had been denied due process because the clerk failed to follow the statutory requirements as to where notice was to be sent.

The First District affirmed, 830 So. 2d 867 (Fla. 1st DCA 2002), and this Court reversed, holding that the provisions of §197.522(4)(a), Florida Statutes, require notice be given at "the address of the legal title holder as it appears on the latest assessment roll." This Court's holding in this summary judgment case (with no record on the dispositive issue), was that "the Clerk erred by mailing the notice to Delta at the address listed in the tax collector's statement (i.e., the 1999 address) without determining if the 2000 tax assessment roll was available." (Op. at 4, quoting 875 So. 2d at 447). As the First District recognized, this Court's remand was to determine if Delta's alleged new address, to which it claimed notice of the tax sale should have been mailed, was "reasonably ascertainable" from the "latest tax assessment roll." (Id., quoting 875 So. 2d at 448).

Profile then moved for summary judgment on this issue, proving the 2000 assessment roll was not available to the clerk until long after the notices of sale were mailed and the sale held (Op. at 4-5). In violation of this Court's decision, the trial court quieted title in Delta and on appeal by Profile, the First District reversed, holding, "there is a factual dispute over whether Delta's new address was reasonably ascertainable from the latest tax assessment roll available at the time the clerk mailed the notice of the tax deed sale." (Op. at 5, quoting Profile Inv., Inc. v. Delta Property Mgmt., Inc., 913 So. 2d 661, 662 (Fla. 1st DCA 2005), *review denied*, 929 So.2d 1052 (Fla. 2006)). As the First District stated, "through protracted litigation, then, including two summary judgments, two appeals to this court, and review by the Florida Supreme Court, this case moved inexorably toward resolution on the question of whether an updated tax roll would have been available to the clerk and, if so, whether such roll would have allowed the clerk to provide better notice to Delta." (Op. at 5).

After discovery, Profile again moved for summary judgment as the undisputed facts showed there is no "updated assessment roll" prepared by the property appraiser's office on July 1 that would have been available to the tax collector or the clerk. July 1 starts the process of updating the assessment roll, and culminates in certification of the final tax roll; this occurred here more than two months after the notices of sale were served by the clerk and over one month after

the sale (Op. at 5-6). Profile also proved that even if the tax collector or clerk could have accessed the property appraiser's ongoing updating process, Delta's 'new' address was not contained in the property appraiser's records and, thus, "was not available to the tax collector or to the clerk when the notices of sale were mailed." (Id. at 6).

Upon realizing that there was no factual basis for its theory that the clerk had failed to follow the statute and should have utilized Delta's alleged "new" address, Delta abandoned its theory and argued that Jones v. Flowers 547 U.S. 220 (2006), and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006), justified the trial court's holding that this Court's prior decision was "moot." (Op. at 6).

The First District here held that the sole legal issue presented was that identified in this Court's decision. Profile proved there was no updated assessment roll at the time the notices were mailed, as the "latest assessment roll… was, in fact, the roll certified in October 1999." (Id. at 7). Relying on this Court's decision in Fla. Dept. of Transp. v. Juliano, 801 So. 2d 101, 102 (Fla. 2001), and its decision in Parker Family Trust I v. City of Jacksonville, 804 So. 2d 493 (Fla. 1st DCA 2001), the First District held that the law of the case doctrine requires that when successive appeals are taken in the same case, "a trial court is bound to follow prior rulings of the appellate court as long as the facts on which such decision are based continue to be the facts of the case," which was conceded by

Delta (Op. at 7-8). Delta's new theory that some other action on the part of the clerk was required, could have been raised at the beginning of this case but was not and the law of the case doctrine now prevented Delta from asserting this new theory. (Op. at 8).

To eliminate any question as to the viability of Delta's new claim, the First District recognized that Jones addressed the facial constitutionality of the Arkansas statute which, unlike Florida, required solely notice by certified mail (547 U.S. at 226). The U.S. Supreme Court specifically noted that many states, including Florida, require more, thereby satisfying due process (id. at 228, n.2). The First District noted that unlike the owner in Jones, Delta never claimed Florida's statutory procedure was unconstitutional, arguing only and successfully, that the clerk must utilize the most recent tax roll when preparing notices (Op. at 9).

The First District also addressed the inapplicability of Vosilla wherein the property owner had, in fact, provided the tax authorities with "an updated and correct mailing address, receipt of which was acknowledged by the clerk of the court. See Vosilla 944 So. 2d at 291." Vosilla noted that §197.522 is facially constitutional, but found an "as applied" due process depravation where the clerk has actual notice of a change of address but still sent the notice to a prior address (id. at 293, n. 2). Noting that Delta had never challenged the statutory procedure, the First District held that the trial court misapplied Vosilla by implicitly finding

that §197.522 was facially unconstitutional, an issue not addressed in Vosilla and never raised by Delta (Op. at 10-11). Because the dispositive question proved Profile's position, the First District reversed with directions that judgment be entered in favor of Profile.

SUMMARY OF THE ARGUMENT

The First District's decision here is based on the law of the case doctrine, which it held prevented Delta, after several appeals and a specific decision from this Court as to the dispositive legal issue, from changing theories when it discovered its theory had no factual basis. The First District's decision is in complete accord with this Court's decision in Fla. Dept. of Transp. V. Juliano, 801 So. 2d 101, 102 (Fla. 2001), on which it explicitly relied, along with its own decision in Parker Family Trust I v. City of Jacksonville, 804 So. 2d 493 (Fla. 1st DCA 2001).

There is no conflict with Juliano or with Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006). Vosilla does not involve the law of the case doctrine and is also factually inapposite. In Vosilla the property owner, in fact, provided a current address to the clerk who nonetheless mailed notice of a tax sale to a prior address. Here, Profile proved that there was no updated assessment roll and that even if the clerk had access to the preliminary roll, Delta's alleged "new" address was not

contained therein. Vosilla's progeny likewise are factually inapposite and similarly do not involve any law of the case issue.

The First District's decision does not affect a class of constitutional officers. Instead, it rules only that a litigant may not change its theory after an appellate decision has determined the applicable law so long as the facts have not changed, which is the case here. As there is no conflict between the First District's decision and any decision from this Court or another district court, express and direct or otherwise, this Court should deny review.

ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH VOSILLA V. ROSADO, 944 SO. 2D 289 (FLA. 2006) OR WITH ANY OTHER DECISION AND DOES NOT AFFECT A CLASS OF CONSTITUTIONAL OR STATE OFFICERS

D. THERE IS NO CONFLICT WITH VOSILLA OR ANY OTHER DECISION

The First District below specifically noted that this Court's prior decision addressed the only argument ever made by Delta, and identified the dispositive question to be determined on remand: Delta's claim that it had submitted a change of address to the tax collector and that if the clerk had only utilized the most recent tax roll, Delta would have received notice of the tax sale. This Court specifically held that the clerk was required to utilize the most recent assessment roll and erred by mailing notice to Delta's 1999 address "without determining if the 2000 tax

assessment roll was available," (Op. at 4), and remanded the case for resolution of this issue. The First District court below recognized that Profile proved that at the time notices were prepared, there was no year 2000 assessment roll available to the clerk and even if the clerk could have accessed the interim roll, Delta's alleged "new" address was not contained therein.

Vosilla was not decided on law of the case grounds, and involves materially different facts. Here the evidence proved that Delta did not provide the clerk with a "new" address at any time prior to the sale; In Vosilla, the taxing authorities had in fact information provided to them on several occasions that notice was being sent to an incorrect address. Under those circumstances, the owner's due process rights were violated when notice was mailed to an old address. 944 So. 2d at 300. There is manifestly no conflict: the First District here decided the case on law of the case principles, not an issue in Vosilla, and recognized the evidence proved no "new" address was ever submitted by Delta prior to the notices being mailed. Delta's claim of conflict with Patricia Weingarten Associates, Inc. v. Jocalbro, Inc. 974 So. 2d 559 (Fla. 5th DCA 2008), is likewise misplaced as like Vosilla, it is factually inapposite. There, the owner of numerous parcels provided the clerk with a change of address; tax bills for some properties were sent to the current address but others to an old address. The district court held that the tax collector having the correct address but not utilizing it for notice violated due process. There is also

no conflict with Singleton v. Eli B. Investment Corp., 968 So. 2d 702 (Fla. 4th DCA 2007), which involved a factual dispute over the taxing authority's use of an incorrect address; the case was remanded for evidentiary proceedings (id. at 705-706). Again, the First District *sub judice* found there was uncontradicted evidence on the controlling issue: the clerk could not have accessed the year 2000 assessment roll prior to notice being sent; even if it had been able to access the interim 2000 assessment roll, Delta's alleged "new" address was not there. According, there is no conflict with Vosilla or any of its progeny.

E. THERE IS NO CONFLICT CONCERNING THE LAW OF THE CASE DOCTRINE

Delta claims that the First District misapplied the law of the case doctrine, which is not used when there is an intervening decision by a higher court or where manifest injustice will result, citing State v. Owen, 696 So. 2d 715 (Fla. 1997), and Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965), both of which are cited by the district court below (Op. at 7).

The First District's decision here is in complete accord with those decisions. Unlike Owen, there is no "intervening" decision of a higher court which applies. Jones addressed the facial validity of the Arkansas statute which, unlike Florida, required only notice by certified mail, and specifically recognized that Florida's statute contains such an additional component which comports with due process. Vosilla is factually inapposite, as there the property owner had provided a current

address which was not used by the clerk, while here Delta did not provide anyone with a "new" address to which to send notice. According, neither Jones v. Flowers nor Vosilla are "intervening" decisions on the controlling issue. Accordingly, the First District's holding that the law of the case doctrine should have precluded Delta from changing its theory after this Court identified the controlling decision is in complete accord with Juliano, Owen, and Strazzulla, *supra*.

F. THIS CASE DOES NOT AFFECT A CLASS OF CONSTITUTIONAL OFFICERS

The First District here based its holding solely on the well-settled law that after an appellate court has ruled on the governing law in a case, a party may not change its theory so long as the facts have not changed. This manifestly has no impact whatsoever on the duties of the clerk or tax collector.

CONCLUSION

Jurisdiction does not exist as there is no conflict. The First District's decision below is in complete accord with the law of the case doctrine, this Court's prior decision in this case, with Vosilla v. Rosado, *supra*, and its progeny, and does not affect a class of constitutional officers. Accordingly, there is no jurisdiction and this Court should deny the petition for review.

William S. Graessle
Florida Bar No. 498858
219 Newnan Street, 4th Floor
Jacksonville, Florida 32202
(904) 353-6333
(904) 353-2080 (facsimile)
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by U.S. mail, postage prepaid, to John R. Hargrove, Esq., Hargrove, Pierson & Brown, P.A., 21 S.E. 5th Street, Suite 200, Boca Raton, FL 33432; and John R. Beranek, Ausley & McMullen, 227 S. Calhoun Street, P.O. Box 391, Tallahassee, FL 32302-0391, on this 1st day of February, 2010.

Attorney

CERTIFICATE OF TYPEFACE

I hereby certify that I have complied with Rule 9.210(a), Fla.R.App.P., and the font size of this brief is Times New Roman 14-point.

Attorney