IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC09-2075

DELTA PROPERTY MANAGEMENT, INC.,

Petitioner,

vs.

PROFILE INVESTMENTS, INC.,

Respondent.
_____/

DCA CASE NO. 1D08-515

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I

THE CASE

This matter began ten years ago and in that time has been the subject of five appeals, including a prior visit to this Court in 2004. Delta Property Mgmt., Inc. v. Profile Investments, Inc., 875 So. 2d 443 (Fla. 2004) ("Delta II"), *quashing*, 830 So. 2d 867 (Fla. 1st DCA 2002).[1] At issue were notices of a tax sale, which had been sent to petitioner, Delta Property Management, Inc., as titleholder at an outdated address and to the mortgagee, AT&T Commercial Finance Corporation, in care of the wrong company. (R5:821-22)

After the mandate was issued by this Court in 2004, two significant due process cases involving analogous facts were rendered by higher courts, namely Jones v. Flowers, 547 U.S. 220 (2006) and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006). Review is now sought regarding the First District's determination in Profile Investments, Inc. v. Delta Property Management, Inc., 19 So. 3d 1013 (Fla. 1st DCA 2009) ("Delta IV"), that neither Jones nor Vosilla are applicable. Those cases clarify what due process requires when a notice of tax sale is returned to the

[1] The sequence of appeals is described in chronological order under the Statement of Facts and following as "Delta I," "Delta II,' and so forth.

clerk as undelivered -- which is the precise situation in this case (R5:821). In Jones, the Court said:

> We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so. 547 U.S. at 225.

Relying on Jones, this Court in Vosilla added that where notices are returned, the additional steps to be taken by the clerk are defined by the circumstances of the particular case:

> Such circumstances include unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances. ....
>
> [D]ue process required that the clerk of court take additional reasonable steps to notify the [property owners] of the tax deed sale prior to selling their property, *such as checking to determine whether a change of address had been submitted*. 944 So. 2d at 299-301 (emphasis added).

Based on Delta II, Jones, Vosilla and the undisputed facts of record, the trial court invalidated Profile's tax deed and entered final judgment in favor of Delta. (R5:818-27) On appeal, the First District admonished the trial court for having relied on the intervening decisions in Jones and Vosilla and reversed for entry of final judgment in favor of Profile. Relying on the judicially created doctrine of

"law of the case," the First District reasoned that the mandate announced in this Court's 2004 decision limited the scope of the trial court's inquiry on remand to a single fact issue -- whether Delta's current address appeared on the most recent tax assessment roll. See Delta IV, 19 So. 3d at 1017.

II

STATEMENT OF THE FACTS

A. Delta Loses Property Through Tax Sale

Delta inadvertently failed to pay its Duval County ad valorem taxes in 1997, resulting in a tax certificate being issued and purchased by Profile in April of 1998. (R5:820) In April of 2000, after Delta failed to redeem the tax certificate with the two-year statutory period provided by statute, Profile applied for a tax deed in accordance with § 197.502(1). (R5:821) That section provides in relevant part:

> The holder of any tax certificate, other than the county, at any time after 2 years have elapsed since April 1 of the year of issuance of the tax certificate and before the expiration of 7 years from the date of issuance, may file the certificate and an application for a tax deed with the tax collector of the county where the lands described in the certificate are located. …

Delta II, 875 So. 2d at 444. After such an application is filed, the clerk of the circuit court is then required to provide notice as set forth in Florida Statutes § 197.522(1) at least 20 days before a tax sale is held. That statute directs the clerk

to notify by certified mail all parties listed in the tax collector's statement in accordance with § 197.502(4). That section, in turn, directs that the tax collector *shall* include in that statement the names and addresses of any legal titleholders and mortgagees of record.

The chronology of events which led up to the tax sale in this case are set forth in this Court's opinion in Delta II and are basically as follows. In December of 1999 -- five months before Profile applied for tax deed and nine months before the tax sale was actually held -- Delta provided the tax collector with a change of address. (R3:527-30; R5:821); Delta II, 875 So. 2d at 444 n.4. For unexplained reasons, however, this new address was not timely posted for many months, resulting in Delta's new address being omitted from the statement which the tax collector sent to the clerk on May 30, 2000. That statement listed Delta as a party entitled to notice, but specified Delta's outdated address as it had appeared on the 1999 tax assessment roll. Id. at 444. The clerk then sat on that information for three more months before preparing a notice of tax sale, which it mailed to Delta on September 7, 2000. Id. So even though Delta had given the tax collector its change of address some nine months earlier, the clerk still ended up mailing the notice to Delta to an outdated address. Compounding the problem, the clerk sent notice to the mortgagee in care of a different company altogether. (R5:821-22)

Both notices were returned to the clerk as undelivered, and the clerk did nothing further. (R5:821-22); Delta II, 875 So. 2d at 444. Thus, neither Delta nor the mortgagee knew of the tax sale -- a circumstance which is highlighted by the very fact that Delta continued to pay the taxes on this property for the three *following* years, 1998 through 2000.[2] (R1:104-05)

B. This Lawsuit

Respondent, Profile Investments, Inc., the successful bidder at the tax sale, later sued to quiet title, and Delta counterclaimed asserting that it was still the titleholder because the clerk had failed to provide proper notice of the tax sale.[3] Delta II, 875 So. 2d at 445.

The question initially presented to the trial court was whether the clerk had properly complied with the notice requirements of § 197.522(1) by relying exclusively upon the tax collector's statement in preparing the notice. The trial court granted Profile's motion, concluding that the clerk had no duty to look

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[2] Since tax bills do not show past due balances, the bills for the later years did not alert Delta to the fact that it had missed its 1997 payment.

[3] The record shows that despite *lis pendens* notice, Profile somehow encumbered the property with two mortgages while this case was on appeal the first time, enabling Profile to pocket in excess of $1.1 million of the property's equity. Neither trial nor appellate counsel appears to have had anything to do with Profile's actions in this respect.

beyond the statement to determine whether the names and addresses of the parties were correctly listed on the tax collector's statement. Delta appealed, and the First District affirmed by a two-to-one vote. The majority opinion did not say one word about due process, yet that was the underpinning of Judge Ervin's dissent. Delta Property Management, Inc. v. Profile Investments, Inc., 830 So. 2d 867 (Fla. 1st DCA 2002) ("Delta I"). Review was then sought in this Court, which found Judge Ervin's dissent persuasive and reversed. Delta II, 875 So. 2d at 443. In its opinion this Court said:

> The issue in this case is whether under chapter 197 of the Florida Statutes, the clerk of the circuit court must verify the legal titleholder's address prior to mailing the notice of the tax deed sale to that titleholder if the tax assessment roll has been *or should have been* updated after the tax collector provided the clerk with the tax collector's statement.
> ...
> *We hold that the clerk is so required*. Id. at 445 (emphasis added).

Concluding that the clerk had failed to obtain updated information about Delta from the tax collector, the case was remanded for further proceedings. Delta II, 875 So. 2d 447-48. Once back in the trial court, Delta moved to implement the mandate of this Court, requesting an order quieting title in its favor based on the undisputed facts of record. (R1:166-83; R1:134-44) The trial court agreed with

Delta on the basis that Profile had failed in its evidentiary burden, pointing out that:

> [Profile] omitted presenting any evidence rebutting the evidence of [Delta's] notice of a change of address, and omitted presenting any evidence rebutting that the address provided on the 2000 tax roll reflected [Delta's] changed address. (R2:305)

Relying on this express finding and quoting the holding in Delta II, the trial court ruled for Delta and granted final summary judgment in its favor. (R2:308-09)

Profile then appealed. Once more, the First District ruled in favor of Profile. It determined that the question of whether or not the new address was available to the clerk presented a fact issue. The summary judgment was reversed, and the case was remanded again. Profile Investments, Inc. v. Delta Property Management, Inc., 913 So. 2d 661 (Fla. 1st DCA 2005) ("Delta III").

C. The Decision Under Review

On remand, further discovery was pursued, and Delta again moved for summary judgment. (R3:520-59) It showed that its new address was given to the tax collector in December of 1999 -- nine months before the sale -- and that the new address was clearly available to Duval County at the time of sale. (R3:520, 527-30) Indeed, the tax collector and the clerk worked under a common roof for Duval County. Delta also pointed to undisputed evidence that the clerk took no

additional steps once the notices of tax sale to Delta and the mortgagee were returned undelivered.[4]

During the proceedings on remand Jones and Vosilla were decided, so Delta brought these cases to the trial court's attention. Delta explained that in Jones, the United States Supreme Court said that when mailed notice of a tax sale is returned undelivered or unclaimed "the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." 547 U.S. at 225. Delta further explained that this Court in Vosilla relied on Jones and concluded that where notices are returned, the additional steps to be taken by the clerk are defined by the circumstances of the particular case. Reasoning that Jones and Vosilla were dispositive, Judge Karen Cole ruled that since the clerk did nothing with the returned notices and that it was the County's policy to do nothing, Delta's due process rights had been violated. She therefore set aside the tax deed. (R5:824-25)

That decision was appealed, and for the *third* time the First District ruled in Profile's favor. Delta IV, 19 So. 3d at 1013. It reasoned that despite the holdings in Jones and Vosilla, this Court's remand in 2004 established absolute limits on what the trial court could consider regarding due process -- namely, whether or not

[4] The specific evidence confirming this point is discussed in detail at the beginning of the argument section below.

Delta's new address appeared on the most recent tax assessment roll prior to the sale. According to the First District, no further inquiry or analysis was allowed. In so ruling, the First District skirted the topic of due process, choosing instead to resolve the matter based on what it considered to be a proper application of the doctrine of the law of the case. Delta then sought this Court's discretionary review based on the decision's express and direct conflict with Vosilla and with cases interpreting the law of the case doctrine -- as well as the decision's effect on a class of constitutional officers. The latter point was the basis for this Court's jurisdiction the last time around. Delta II, 875 So. 2d at 445.

SUMMARY OF ARGUMENT

In this case, Delta forfeited a piece of commercial real property valued at over $1 million because it inadvertently failed to pay its 1997 property taxes. As evidence of Delta's inadvertence, the taxes for years both before *and* after were timely paid. The dispute in this case arose because the notice of tax sale was sent to Delta, as owner, at an outdated address and to the mortgagee in care of the wrong company. The notices were returned to the clerk as "undeliverable." It is undisputed that no further attempts were made to notify either party. Despite the manifest injustice which resulted, in multiple instances the First District has rubber-stamped the clerk's inaction.

In a prior visit to this Court, a unanimous panel ruled that "the clerk of the circuit court must verify the legal titleholder's address prior to mailing the notice of the tax deed sale to that titleholder if the tax assessment roll has been *or should have been updated* after the tax collector provided the clerk with the tax collector's statement." Delta II, 875 So. 2d at 445. This Court quashed the First District's approval of the tax sale in 2004 based on due process concerns.

During the remand process, two intervening decisions were issued by the United States Supreme Court and by this Court, namely Jones v. Flowers, 547 U.S. 220 (2006) and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006). Jones and Vosilla both addressed what due process requires when notices of a tax sale are returned to the clerk marked "undelivered." Under such circumstances, the state *must* take additional steps if practicable to locate the owner. The trial court applied those decisions and set aside the tax deed because it was undisputed that the clerk took *no* further steps once the notices were returned undelivered. The First District, however, failed to recognize the binding effect of the intervening decisions.

To justify its holding, the First District narrowly construed the directive of this Court in Delta II and determined that the trial court was permitted on remand to deal with only one fact issue -- whether Delta's new address was available to the clerk on the latest tax collector's assessment roll at the time notice was sent. To

justify its ruling, the First District reasoned that the doctrine of the law of the case significantly curtailed the breadth of permissible considerations regarding any fact issues. Accordingly, it refused to acknowledge the true message of Delta II and the impact of Jones and Vosilla regarding what a clerk must do in order to satisfy due process when a notice is returned undelivered.

Regarding the law of the case, it is doubtful that the doctrine would apply at all under the circumstances presented here. The doctrine is said to be an amorphous, judicially created concept primarily designed to curtail multiple appeals on the same issue of law. In this case, however, the "hornbook" principle that "when the reason for the rule does not apply, then the rule does not apply" is a fitting maxim. First of all, the doctrine applies only to final determinations, not to reversals of summary judgments for further fact development, as is the case here. Second, in this case, as in any case, due process considerations attendant to a forfeiture trump application of the doctrine. But even if the doctrine were to have some relevance, the case falls squarely within one or both of its recognized exceptions, namely that applying the doctrine would create a "manifest injustice" and that relevant "intervening decisions" of higher courts have been issued. By justifying its narrow interpretation of Delta II on the basis of the doctrine of the law of the case, the First District erred. Delta therefore requests that this Court

quash the First District's opinion and remand the case with instructions to reinstate the final judgment in favor of Delta.

ARGUMENT

Standard of Review

This proceeding addresses legal issues which were resolved by the First District in an appeal from a final summary judgment. Accordingly, the issues raised herein are reviewed *de novo*.

Introduction

Before turning to the specific legal issues, it is important to understand the full context in which the trial court entered its final ruling in favor of Delta. When the case landed back in the trial court on remand from this Court's decision in Delta II, the parties engaged in discovery and eventually filed cross-motions for summary judgment. In support of its motion, Delta highlighted the full meaning of Delta II and the intervening holdings in Jones v. Flowers, 547 U.S. 220 (2006) and Vosilla v. Rosado, 944 So. 2d 289 (Fla. 2006), as setting the standards for due process compliance when undelivered notices are returned to the clerk. It presented evidence that upon receiving the returned notices of tax sale, the clerk did nothing *and that it was the policy of that office to do nothing with returned undelivered tax sale notices*. (R4:687-88) The clerk's office tax department court

operations supervisor for Duval County at the time of the tax deed sale, Mildred Wootson, so testified:

> Q: [By Counsel for Delta]: In connection with that [undelivered] letter, was anything done after that was received by the tax department?
>
> A: [By the supervisor]: No.
>
> Q: And that was consistent with your policies and procedures at that time?
>
> A: Yes.

(R4:700; R5:821)[5]

Profile made several arguments in response to Delta's position that the clerk did not comply with due process safeguards, but filed no evidence in rebuttal. Nor did Profile request leave of court under Fla. R. Civ. P. 1.510(f) in order to take additional discovery to refute anything Delta presented to the trial court. Based upon an undisputed record and the due process analysis in Delta II, Jones and Vosilla, the trial court granted Delta's motion. Judge Cole found that the clerk

[5] Wootson further admitted that the returned envelope containing the notice of tax sale incorrectly sent to Delta at its outdated address and with the markings "return to sender" and "attempt not known" is still in the clerk's official files. (R4:699-701) Likewise, the original undelivered notice to the mortgagee, incorrectly addressed to "Commercial Finance Corporation," was also in the file and marked "attempted not known." (R4:702)

could have taken additional steps to locate Delta, but inappropriately elected to do nothing. Her order reads in part:

> In the present case, such additional steps were possible and practicable, but not taken. The additional steps could have included checking for the hard-copy change of address form submitted by Delta; reviewing the preliminary or final 2000 tax assessment roll; checking the current address(es) shown for Delta on the online records of the State of Florida, Secretary of State, Division of Corporations, and checking the Clerk's own records to see if Delta was involved in other litigation in which it had provided a current address. (R5:824-25)

On appeal, the First District determined that the trial court could not go beyond one question: whether petitioner's current address appeared on the most recent tax assessment roll. Delta IV, 19 So. 3d at 1017. Beyond that narrow point, no further due process analysis was permitted. Because the trial court expanded its analysis to include Jones and Vosilla, the First District deemed that to be reversible error and remanded the case with instructions to grant Profile's motion for summary judgment and to reinstate the tax deed. 19 So. 3d at 1019.

Delta essentially makes two arguments here. The First District erred when it failed to follow the due process analysis in Delta II and the expanded analysis in Jones and Vosilla. In addition, it improperly applied the doctrine of the "law of the case" to justify its resolution of the matter. Each point is separately discussed. But as a guiding theme, Delta contends that Delta II, Jones and Vosilla, unequivocally,

plainly and forthrightly state that there are times when a clerk must do more than *nothing* when notifying a titleholder that its property is about to be forfeited, and that duty is not excused by treating "law of the case" as a hard and fast rule of law. The analysis begins with an examination and review of Delta II, Jones and Vosilla.[6]

I

THE FIRST DISTRICT ERRED WHEN IT FAILED TO APPLY THE DUE PROCESS ANALYSIS UNDER DELTA II, JONES AND VOSILLA

In all three cases -- Delta II, Jones and Vosilla -- the least common denominator is the due process message of Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950):

> When notice is a person's due ... [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Id. at 315; see also Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (addressing constitutional obligation of government to notify *all* interested parties of the pendency of a tax sale).

[6] For some odd reason, the First District supports its analysis by noting that "it appears" that the trial judge mounted a facial constitutional attack on Florida Statutes § 197.522. 19 So. 3d at 1018. That is not true. If anything, Delta's contention and the trial court's analysis were merely in the context of an "as applied" challenge focusing on what the clerk must do to comply with due process when following the statute's requirements.

In Delta II, this Court unanimously held that the First District had erred when it determined that the clerk's returned notice to Delta was sufficient. Even Judge Ervin's dissent -- which this Court found to be persuasive -- suggested that it would not create an undue burden to require the clerk to take additional steps once the clerk became aware that Delta's information may no longer be current. Delta II, 875 So. 2d at 446, *quoting*, Delta I, 830 So. 2d at 873 (Ervin, J., dissenting).

In other words the due process reasoning of Jones and Vosilla were actually in play in Judge Ervin's mind and in the mind of this Court in Delta II well before those decisions were rendered. This Court also referred to the Fourth District's decision in Baron v. Rhett, 847 So. 2d 1032, 1035 (Fla. 4th DCA 2003) -- which preceded Jones and Vosilla -- noting that when Florida citizens are in danger of losing their property at a tax sale, circumstances may arise which trigger the need for the clerk to take additional action beyond simply using the tax collector's statement when preparing notices. Id. This is the very message delivered later in Jones and Vosilla.

In Jones the United States Supreme Court said that the taking and selling of one's property is the exercise of "extraordinary power," and therefore "[i]t is not too much to insist that the state do a bit more to attempt to let [the owner] know about it when the notice letter addressed to him is returned unclaimed." 547 U.S. at

239. The property owner in Jones had moved but had not notified the taxing authorities of his change of address. When the state sent notice of the tax sale by certified mail, the letter was returned as undeliverable. Despite this fact, the state proceeded with the tax sale. Id. at 223-24. The Supreme Court held that once the letter was returned as undeliverable, the state had a duty to take additional measures to notify the property owner. The state's failure to do so resulted in a denial of due process. Id. at 225.

In its analysis the Court determined that "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." The Court reasoned that "despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman," when the notice provider became aware that the normal procedures were ineffective, that triggered an obligation "to take additional steps to effect notice." Id. at 229. Informatively, the Court said:

> We do not think that a person who actually desired to inform a real property owner of an impending tax sale ... would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the

> Commissioner's office to prepare a new stack of letters and send them again ....

Id. at 229. The Court went on to say that when "important and irreversible" property forfeiture concerns are at stake, taking further reasonable steps if any were available is the least that can be expected. Put another way, doing nothing -- or as in this case having a *policy* of doing nothing -- when notices are returned undelivered is *not* reasonable.

> [W]hen a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so .... This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach [the property owner], it had good reason to suspect when the notice was returned that [the property owner] was "no better off than if the notice had never been sent." Deciding to take no further action is not what someone "desirous of actually informing" [the property owner] would do; such a person would take further reasonable steps if any were available. Id. at 230 (emphasis added; citation omitted).

Following Jones, this Court in Vosilla noted that:

> The fundamental right to have a meaningful [due process] opportunity to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 944 So. 2d at 294.

Vosilla goes on to say that due process requirements are not to be viewed too narrowly. 944 So. 2d at 297. This unanimous Court determined that even though Florida law imposes an affirmative duty on all property owners to know of and to pay their current and delinquent taxes, "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." Id. at 297-98. Referring to its 2004 ruling in this case, this Court said that the clerk must look to the latest assessment roll to determine if the property owner has filed a change of address. But recognizing that Jones adds a new dimension to the notice analysis, this Court added that circumstances may warrant *additional* steps to be taken. 944 So. 2d at 298.

Vosilla says that in determining whether the notice given by the clerk in a tax deed sale was reasonably calculated under all the circumstance to apprise the titleholder of the sale, the due process reasoning set forth in Delta II is to be followed. Calling on the reasoning in Delta II and Jones, this Court said:

> *Due process requires that the clerk look beyond the tax collector's statement when there is reason to believe that the statement no longer reflects those who are entitled to notice, ... or as in this case ... the statement no longer reflects the titleholder's correct address.*
>
> In Jones, the United States Supreme Court held that when notice of a tax deed sale is mailed to the titleholder via certified mail and returned unclaimed, due process requires that the government take additional reasonable

> steps, if it is practicable to do so, to provide notice to the titleholder before selling his or her property…. Following precedent recognizing the flexible nature of due process, the Supreme Court emphasized that
>
> > "[w]e do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. …."

Vosilla, 944 So. 2d at 299 (emphasis added; citation omitted).

With these principles in mind, the focus of the trial court's inquiry on remand in this case was to determine whether the clerk made or could have made any additional effort to notify the titleholder and the mortgagee of the impending forfeiture sale. On undisputed facts (R5:820-23), the trial court determined that additional reasonable steps "were possible and practicable, but not taken" and that the clerk had not satisfied due process. (R5:824-25) As the trial court explained:

> In the case at bar, it is the opinion of the Court that, even had Delta failed to provide change of address notification, the return of the undelivered notice of tax deed sale to the Clerk's Office, reflecting that the attempted notice had been ineffective, would have required the Clerk's Office to take additional reasonable steps to notify Delta of the tax deed sale before selling its property. While this would place an additional burden on the Clerk's Office, it is a reasonable and necessary one when "measured against the backdrop of such a significant and irreversible prospect as the loss of [real property]." [Vosilla] at concluding page. (R5:824)

This ruling is fully consistently with the letter and spirit of Delta II, Jones and Vosilla. Surely, the additional burden on the clerk and tax collector would have been slight here since it would have only involved exploring *their own records*.[7] Or better yet, the tax collector could have posted Delta's change of address in a timely manner. The Fifth District's decision in Patricia Weingarten Associates v. Jocalbro, Inc., 974 So. 2d 559 (Fla. 5th DCA 2008), says that a search of the tax collector's own records is both reasonable and practicable. Again it should be noted that the tax collector and the clerk were part of the same governmental entity -- Duval County. In Patricia Weingarten, after learning that the certified mail notice to the property owner had been returned, the clerk did nothing more than publish notice of the tax sale. Id. at 564. Accordingly, the court reversed and remanded for judgment in favor of the property owner. Id. at 564-65; see Singleton v. Eli B. Investment Corp., 968 So. 2d 702, 705-06 (Fla. 4th DCA

[7] As noted, Delta had provided its change of address to the tax collector some nine months earlier. Moreover, CIT's mortgage could have been detected by the push of a button on a file search of the County's own records. (R3:464) These are, in fact, the very records searched by the tax collector to prepare the list of parties to be notified of the tax sale under § 197.502(4). CIT's correct name and address were also reflected in the State of Florida, Department of State, Division of Corporations database. (R3:464) The tax collector, however, incorrectly identified the mortgagee as "Commercial Finance Corporation" -- not "AT&T Commercial Finance Corporation" -- when it provided the list of parties to whom notice must be sent.

2007); accord Sidun v. Wayne County Treasurer, 751 N.W. 2d 453, 461-62 (Mich. 2008) (citing Jones it is reasonable to expect the government to consult its own records after its first attempt at notice fails).

Despite these decisions, the First District's opinion under review determined that they had no bearing on the actions of the Duval County clerk in this case. Instead, the court determined that this Court's mandate in Delta II significantly limited the trial court's inquiry. The First District said:

> We find dispositive here the trial court's failure to rule within the narrow scope of the determination required by the Florida Supreme Court in Delta [II]. ... The sole question within the scope of previous remands was whether the 2000 assessment roll was available to the clerk of the court when it mailed the notices of sale and, if so, whether Delta's alleged "new address" was contained therein. 19 So. 3d at 1017.

The First District went on to say that "[i]t matters not that the decisions in Jones and Vosilla had not been rendered before either of the previous appeals to this court, or the review in the Florida Supreme Court." The court continued by saying that Delta was not in a position to take advantage of those holdings as it could have raised the issue of the clerk's failure to do anything with the returned notice at earlier stages of the proceedings. The point made by the First District is that since the facts of the case remained the same, the law of the case doctrine would limit further analysis in the trial court to the express wording of the remand

direction in Delta II. Thus, according to the First District, Jones and Vosilla should have been disregarded. Such a conclusion is neither reasonable nor just. Jones and Vosilla -- and indeed Delta II as well -- address what due process *requires* under a fact pattern such as this one. To suggest that Judge Cole should have ignored this precedent is cynical, at best.

While the "law of the case" doctrine is addressed at length below in Section II, it is enough to say at this point that the doctrine has been misinterpreted and misapplied by the First District in order to rule in favor of Profile for the third time. Here, the clerk did even less than the clerk in Patricia Weingarten after learning of the returned notices. The clerk's office in this case did nothing! And as a matter of policy it had the intention to do nothing! Nevertheless, the First District saw a way to avoid the impact of the intervening decisions by way of the law of the case doctrine. As explained below, either the doctrine has no application at all here, or this case falls within one or more of the doctrine's exceptions.[8]

[8] See also South Investment Properties, Inc. v. Icon Investments, LLC, 988 So. 2d 1114, 1118-19 (Fla. 5th DCA 2008) (upheld tax deed where property owner did not provide clerk with change of address but, citing Vosilla, distinguished those cases where owner does provide such notice); Deutsch v. Global Financial Services, LLC, 976 So. 2d 680, 683-85 (Fla. 2d DCA 2008) (Andrews, J., concurring) (citing Jones and Vosilla, due process violated where clerk does nothing after owner provides notice of change of address).

II

THE FIRST DISTRICT ERRED WHEN IT APPLIED THE DOCTRINE OF THE LAW OF THE CASE AS A BASIS FOR DISREGARDING THE DUE PROCESS ANALYSIS IN DELTA II, JONES AND VOSILLA

When an appellate court has decided a question of law, the decision of the court is said to become the law of the case. Once a decision has been rendered and settled as the law of the case, as a general rule, it cannot be relitigated. In Arizona v. California, 460 U.S. 605 (1983), however, the United States Supreme Court noted that unlike the requirements of *res judicata*, the doctrine of the law of the case is an "amorphous concept."

> As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Law of the case directs a court's discretion, it does not limit the tribunal's power.* Id. at 619. (Emphasis added)

While the law of the case may be an amorphous concept, due process is not. To begin the analysis, it is important to recognize just how far afield the First District has gone with its application of the doctrine. If the First District's decision on how it defines and applies the doctrine were left to stand as precedent, its ruling could empower courts in the future to apply the doctrine well beyond its intended purpose.

Placing the entire doctrine in perspective, what the First District has overlooked is that this doctrine has established limits and exceptions. One major qualification on the application of the doctrine, for example, is that it is limited to rulings on questions of law. In Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101 (Fla. 2001), this Court said:

> As to the scope of the law of the case doctrine, this Court in U.S. Concrete [Pipe Co. v. Bould, 437 So. 2d 1061, 1063 (Fla. 1983)], explained that *the doctrine is "limited to rulings on questions of law actually presented and considered on a former appeal*."... By reaffirming the principle articulated in earlier decisions that the law of the case doctrine is limited to questions of law actually presented and considered on a former appeal, U.S. Concrete was consistent with prior cases from this Court. 801 So. 2d at 106 (emphasis added; citations omitted).

For this reason, mere reversals of summary judgment for further fact development are typically not subject to the law of the case doctrine. See Ameriseal of North East Florida, Inc. v. Leiffer, 738 So. 2d 993, 995 (Fla. 5th DCA 1999) (reversal of summary judgment on ground that material questions of fact remained did not create law of the case).

But more importantly, when the legal principles that were "actually presented and considered" in Delta II are examined, it is apparent that this Court laid out the precise due process framework that the trial court implemented on remand. From the outset of the Delta II opinion, this Court emphasized that the

"importance of notice when a person may be deprived of an interest in real property cannot be overemphasized." Delta II, 875 So. 2d at 445. This Court's statement is followed by a reference to a significant passage in Mullane v. Central Hanover Bank & Trust Co. 339 U.S 306 (1950), underscoring the requirement that notice must be defined under all the circumstances.

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it. Delta II, 875 So. 2d at 447 (citations omitted; emphasis added)

This was accompanied by a quote from Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983):

> Years later, the Supreme Court further elaborated on this due process requirement when it said, "Notice 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 interest of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." Delta II, 875 So. 2d at 447.

After setting the stage with those cases from the United States Supreme Court, this Court went on to cite its earlier decision in Dawson v. Saada, 608 So. 2d 806 (Fla. 1992), for the proposition that the due process requirements announced in Mullane and Mennonite are applicable to situations in which Florida citizens face the loss of their property at a tax sale. Delta II, 875 So. 2d at 447-48.

Notably this Court observed that "[w]hile the clerk should use the tax collector's statement when preparing the tax sale notices, circumstances may warrant some additional action by the clerk." Id. at 448. Then, quoting from Baron, 847 So. 2d at 1035, this Court said:

> [T]here could come a point in time when the tax collector's statement no longer represents those who are entitled to notice. That is precisely what happened here. The clerk waited approximately five months before noticing and setting the tax deed sale; during the time lapse, the name on the tax assessment roll changed. Delta II, 875 So. 2d at 448.

This Court then turned to the facts of this case. It expressly recognized that the clerk in this case waited more than three months before noticing and setting the tax deed sale, and by that time -- indeed long before that time -- Delta's address had changed. Delta II, 875 So. 2d at 448.

This Court's due process roadmap was thereby established, and the reasoning was to be followed. In effect, this roadmap is Delta II's law of the case. On remand the trial court in two subsequent instances implemented it right down the line. (R2:302-09; R5:818-27) As such, even without the benefit of Jones or Vosilla, the trial court was well within its right to rule as it did -- twice. As discussed below, there are many further flaws in the First District's reliance on the law of the case doctrine.

A. **The Issue of Finality**.

It is well-settled that the law of the case doctrine applies only to matters litigated to finality -- not to matters that remain unresolved due to an erroneous ruling below. See Wells Fargo Armored Svcs. Corp. v. Sunshine Security & Detective Agency, Inc., 575 So. 2d 179, 180 (Fla. 1991); see also Ameriseal, 738 So. 2d at 995 (reversal of summary judgment did not create law of the case); Metro. Dade County v. Martino, 710 So. 2d 20 (Fla. 3d DCA 1998) (law of the case is inapplicable if there is even an arguable change in the facts developed on remand). In an odd twist the First District itself made the same point in Parker Family Trust v. City of Jacksonville, 804 So. 2d 493, 498 (Fla. 1st DCA 2001).

Because this Court in Delta II reversed a summary judgment for further factual development, the threshold "litigated to finality" requirement is necessarily missing. Ameriseal, 738 So. 2d at 995. Moreover, by simply remanding "for further proceedings consistent with this opinion," Delta II, 875 So. 2d at 448, this Court did not limit the parameters of the evidentiary hearing to be held on remand. Cf. McWilliams v. State, 620 So. 2d 222, 225 n.2 (Fla. 1st DCA 1993). But what this Court did require was for all further proceedings in this case to be guided by its due process roadmap noted above. And that is precisely what the trial court did on two distinct occasions. (R2:302-09; R5:818-27)

B. **Exceptions to the Doctrine**.

In practice, the "amorphous" law of the case doctrine, as the United States Supreme Court tagged it, is not enforced with the rigor of the rules of *res judicata* and collateral estoppel. But even if the doctrine were to have some purpose in or relevance to this matter, either of the two interrelated exceptions would preclude its application here. Each exception is separately discussed.

1. ***Manifest Injustice*.**

The law of the case doctrine does not apply when a manifest injustice is created. In State v. Owen, 696 So. 2d 715 (Fla. 1997), for example, this Court stated that the doctrine is "not an absolute mandate" and that where sole reliance on a prior decision "would result in manifest injustice," the doctrine yields to the concept of fairness. Id. at 720.

To the same effect is Strazzulla v. Hendrick, 177 So. 2d 1 (Fla. 1965), in which this Court observed that the law of the case should not be applied "where 'manifest injustice' will result from a strict and rigid adherence to the rule." Id. at 4; see also State v. McBride, 848 So. 2d 287, 291 (Fla. 2003); Dougherty v. City of Miami, 23 So. 3d 156, 158 (Fla. 3d DCA 2009). In Lago v. State, 975 So. 2d 613 (Fla. 3d DCA 2008), the court added that "[w]here ... a manifest injustice has

occurred *it is the responsibility of the court to correct that injustice*, if it can." Id. at 614 (emphasis added).

Strazzulla is actually cited within an internal quote in the decision below, but the reference actually makes Delta's point, rather than supporting the First District's conclusion. As that court acknowledges, the doctrine is "a *self-imposed* restraint" by the courts. Delta IV, 19 So. 3d at 1017 (emphasis added). By definition, cases involving forfeitures of real property fall within a well-defined category of "manifest injustice." Hackneyed as the expression may be, the law abhors a forfeiture. This is particularly obvious in a case like this where the facts involve a tax collector's failure to update records in a timely manner and a clerk's policy to do nothing with returned notices. For the First District to look at these facts and then to ignore Jones and Vosilla is not only manifestly unjust to Delta,[9] but truly outrageous. Delta has now spent ten years in litigation over its basic due process rights which this Court pointedly recognized in Delta II, which the trial court recognized on remand, and which Judge Ervin recognized in his dissent. The only court which has never seen this situation as implicating due process at all is

[9] By contrast, regardless of how this case turns out, there will no injustice to Profile. Under § 197.602, if Profile's tax deed is ultimately invalidated, Profile will be reimbursed the entire purchase price plus twelve percent interest, together with costs and fees.

the First District -- and it has dug in its heels three times.[10] Again, Chief Justice Roberts opined in Jones:

> No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman. Jones, 547 U.S. at 229.

How could this passage, the underpinnings of Delta II and the reasoning in Vosilla not have penetrated the thought process of the First District?

2. *Intervening Decisions of Higher Courts*.

In Strazzulla, this Court also acknowledged the specific "intervening decisions" exception to the doctrine:

> Another clear example of a case in which an exception to the general rule should be made results from an intervening decision by a higher court contrary to the decision reached on the former appeal, the correction of the error making unnecessary an appeal to the higher court. 177 So. 2d at 4.

First things first -- the intervening decisions in Jones and Vosilla are not contrary to the decision reached on the former appeal. They merely expand the

[10] At *all three* oral arguments in the First District, Judge Kahn was the most vocal panel member and was vehement that there was no due process problem and that the clerk's office did nothing wrong. During oral argument in Delta IV, Judge Kahn insisted that Delta and the mortgagee were mounting a facial attack on the statutes when, as noted, that has never been the case. The *per curiam* opinion in Delta IV makes that same unfounded reference.

scope of the due process inquiry. But in an effort to explain that the First District arguably had yet another way out of its self-imposed "law of the case" trap, the intervening decision exception should be discussed. Thus, if the controlling legal precedent has been "changed" to require additional steps to locate a titleholder, and new facts are developed consistent with the so-called "new" controlling precedent, then the doctrine does not prohibit a trial court from following the new decisions. Juliano, 801 So. 2d at 101. Simplifying the matter, this exception is consistent with the rule that a trial court is required to apply the law as it exists at the time of the decision. Dep't of Agric. & Consumer Services v. Schick, 580 So. 2d 648 (Fla. 1st DCA 1991). Lowe v. Price, 437 So. 2d 142, 144 (Fla. 1983); Hendeles v. Sanford Auto Auction, Inc., 364 So. 2d 467, 468 (Fla. 1978).

In Schick, for example, the First District remanded the matter for additional findings regarding the imposition of attorney's fees and a multiplier in an eminent domain case. While the case was on remand, this Court decided Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), which limited the application of risk multipliers when determining attorney's fees in such cases. Given the intervening decision in Quanstrom, the court determined that the law of the case no longer applied. Schick, 580 So. 2d at 650. Laying the opinions side by side, it is difficult to square the First District's reasoning in Schick with its later

reasoning in Delta IV. In one case the First District seems to get it. In another case it does not.

Likewise in D'Aquisto v. Costco Wholesale Corp., 816 So. 2d 1231, 1232 (Fla. 5th DCA 2002), the Fifth District held that the Florida Supreme Court's decision in Owens v. Publix Supermarkets, Inc., 802 So. 2d 315 (Fla. 2001), which was issued after summary judgment had been entered, had to be applied on appeal. As the court stated:

> Any decision of the Florida Supreme Court "announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given retrospective application by the courts of this state in every case ... not yet final."

D'Aquisto, 816 So. 2d at 1232 (citation omitted). Like Schick and D'Aquisto, this case was not final at the time of the summary judgment decision on review. With Jones and Vosilla intervening in time, the trial court was bound to follow those decisions.

To distinguish Jones and Vosilla and justify its conclusion that they should not apply, the First District says that Delta never complained about the adequacy of Florida's statutory procedure, while in Jones the petitioner, from Arkansas, complained about that state's statutory protocols. The comments are true but

misleading. Delta has never facially challenged the statutes.[11] Nor does it do so now. Furthermore, Jones does not limit the holding just to Arkansas. This is implicit in three respects. First, the decision never says any such thing. Second, the Supreme Court may by its rulings resolve individual injustices, but the purpose behind that Court rendering decisions on constitutional principles is to explain in the broader context what the law requires. Otherwise, Mullane would be confined to New York, and Mennonite would be confined to Indiana. Such a conclusion would be illogical. And third, this Court in Vosilla was explicit that Jones applies to Florida cases.

More to the point of what occurred here on remand, as in Juliano and Martino an additional fact was revealed in discovery and presented to the court. Specifically, it related to the clerk's standing policy to do nothing with notices of tax sale that were returned undelivered. Again, it is worth repeating:

> No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman. 547 U.S. at 229.

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[11] As earlier referenced, the First District says that the trial court "appears" to have facially challenged the constitutionality of § 197.522. That is simply not the case. All advocacy and judicial analysis in the trial court was grounded in an "as applied" context.

But in the view of the First District, Delta and the mortgagee are entitled to a little less due process than others post-Jones and Vosilla because operative facts were, in its view, developed too late. The thought is inconsistent with many things, including that court's own remand for fact development in Delta III. Apparently the First District was bent on ruling in favor of Profile one way or the other after its reversal in Delta I, and in Delta IV it figured out a way -- so it thought -- on having the last word. But to buy into the First District's reasoning that the intervening decisions in Jones and Vosilla cannot be applied here would presumably be the equivalent of saying that this Court in Vosilla -- which also involved a 2000 tax sale -- should not have relied on the intervening decision in Jones!

The law of the case doctrine may be recognized as one advancing judicial stability. But the concept of judicial stability is poorly served by characterizing the failure of the tax collector to post a change of address in a timely manner and the clerk's policy to do nothing with a returned notice as a "new theory." To avoid the loss of property, neither Delta nor the mortgagee should have been placed in the position of depending upon whether or not the tax collector's office was open for business on the date the address change was submitted, whether that office reads its mail in a timely manner or whether the clerk follows a mindless policy to do nothing with returned notices. To translate the holding of the First District into a

truly workable rule would no doubt elevate the law of the case doctrine beyond what it was ever intended to be at the expense of compromising due process.

CONCLUSION

Tax sales are not meant to be statutory traps for the unwary. In this case the County through its own shortcomings failed to notify both the owner and the mortgagee that property was about to be forfeited. What could be more unjust than a government which dilly-dallies in updating its own records, endorses a policy to make no effort to redeliver returned notices, and then permits property to be taken as a consequence? Chapter 197 does not simply provide for a courtesy gesture of politeness such as a handshake. If the purpose of notice is to warn, then the County should have taken appropriate steps with the returned notices and warned Delta and the mortgagee. This Court should not countenance the actions of the tax collector and the clerk in the name of upholding what the First District considered to be the law of the case. Delta therefore requests that this Court quash the decision of the First District and to remand the case with instructions to reinstate the final judgment in favor of Delta.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 17th day of May, 2010, to Robert M. Quinn, Esq., Carlton Fields, P.O. Box 3239, Tampa, FL 33601; Edward P. Jackson, Esq., 255 North Liberty Street, 1st Floor, Jacksonville, FL 32202; Robert E. Biasotti, Esq., Carlton Fields, P.A., Post Office Box 2861, St. Petersburg, FL 33731, and William S. Graessle, Esq., 219 Newnan Street, 4th Floor, Jacksonville, FL 32202.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned certifies that the font of this brief is Times New Roman 14.

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