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IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

MICHAEL and KATHERINE HENRY,
Respondents/Appellants,

CIRCUIT CASE NO: 2023-30711 CICI

vs

CITY OF ORMOND BEACH, FLORIDA
Petitioner/Appellee.

Lower Court CASE NOS: 22-112237
22-112246
22-112247

HENRYS' RESPONSE TO ORMOND BEACH'S MOTION TO STRIKE

COME NOW APPELLANTS MICHAEL HENRY and KATHERINE HENRY [hereinafter, "Henrys"], appearing on their own behalf, and file this Response to Ormond Beach's [hereinafter, "OB"] Motion, and in support thereof state:

1. As much as the Henrys would prefer to just rely on their prior pleadings, "objection of failure to state a legal defense in an answer" must be asserted within 20 days after service" or the objections are deemed waived under FRCP 1.140(b) and (h), thus the Henrys make their objections herein. As described below, OB has failed to state a legal defense to the Henrys' Emergency Motion, thus necessitating the granting of the Henry's request for relief.

JURISDICTION

2. OB claims this court does not have the jurisdiction to grant the Henrys' requested relief. But that claim is based on OB's continued cherry-picking of laws and court rules, and unsubstantiated *ipse dixit*.
3. While the Henrys' uncontested original paragraph 7 explains the jurisdiction of this court over the requested relief, the Florida Supreme Court has "expressly recognized that circuit courts have the power, in all circumstances, to consider constitutional issues."[1] OB's continued actions constitute an unreasonable seizure under the 4th Amendment, an unlawful per se taking under the 5th Amendment, excessive fines under the 8th

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[1] *Key Haven Associated Enterprises v Board of Trustees,* 427 So.2d 153 (Fla. 1982), *citing Gulf Pines Memorial Park v Oakland Memorial Park,* 361 So.2d 695 (Fla. 1978).

Amendment, and an equal protection violation under the 14th Amendment. It is uncontested that the magistrate's orders are legally void because they were issued without subject matter jurisdiction, and were issued in a manner denying the Henrys of due process of law, both of which are required by the Constitution. In other words, this entire case is about the multitude of constitutional violations by OB, a subject over which the circuit court clearly has jurisdiction.

FATAL PROCEDURAL DEFECTS

4. OB has continued its course of doing the least amount of work to inflict the most amount of damage. Even with OB's response filed 4/20/23, OB continues to ignore many procedural and substantive rules, laws, etc. Just to be clear, OB still claims it is entitled to literally enter onto the Henrys' homestead, remove & dispose of the Henry's property, charge the Henrys for said disposal, and use such charges to create a lien against the Henrys' real and personal property. All of this, and counsel for OB has only managed to compile 4 sheets of paper TOTAL to address these issues. *No* eminent domain claim brought, *no* written response to the Henrys' 11/8/22 Notice as required under FS 70.45, *no* written answer to Henrys' February 2023 pre-hearing pleadings or motion for dismissal, *no* response to Henrys' Motion for Relief from Orders and for Stay Pending Appeal to the magistrate, and now a procedurally deficient "response" and "motion" failing to address *any* substance of the matters involved.
5. On 4/6/23, OB was ordered to respond to the Henrys' Emergency Motion by 4/20/23. As such, "[e]very defense in law or fact to a claim for relief in a pleading must be asserted in the responsive pleading," except the 7 which may be raised by motion. FRCP 1.140(b). Indeed, "*any ground not stated must be deemed to be waived* except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time." *Ibid.* Further, FRCP 1.420(b) allows for any party to move for dismissal of "any claim against that party for failure of an adverse party to comply with these rules," thus the Henrys seek dismissal of all of OB's claims before this court, including the underlying claims relating to the Henrys' fence, pavers and 2 shipping containers.

6. OB seems to think the Florida Rules of Civil Procedure [FRCP] and Florida Rules of General Practice and Judicial Administration [FRGP] do not apply in this case. However, the FRCP “apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the Florida Probate Rules, the Florida Family Law Rules of Procedure, or the Small Claims Rules apply.” FRCP 1.010. Likewise, FRGP “shall apply to administrative matters in all courts,” and shall even “supersede all conflicting rules and statutes.” FRGP 2.110.
7. As such, OB is required to follow the FRCP and the FRGP in addition to the Florida Rules of Appellate Procedure [FRAP]. Thus, per FRCP 1.110(f), all of OB’s “averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all subsequent pleadings.” OB failed to do this, making it unnecessarily harder for the Henrys and the court to understand OB’s pleadings, and to take appropriate responsive action.
8. On 4/6/23, OB was ordered to respond to the Henrys’ Emergency Motion by 4/20/23. In that response, OB was required under FRCP 1.110(c) to “state in short and plain terms the pleader’s defenses to each claim asserted and shall admit or deny the averments on which the” Henrys rely. Furthermore, “[d]enial shall fairly meet the substance of the averments denied.” FRCP 1.110(c). OB did not provide a defense for any of Henrys’ claims, nor did OB admit nor deny any of the Henrys’ averments, let alone provide denials that fairly meet the substance of the averments denied.
9. More pointedly, is the court rule on the “Effect of Failure to Deny.” With OB being ordered by the court to respond to the Henrys’ Emergency Motion, FRCP 1.110(e) requires that “[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading.” Therefore, ALL averments by the Henrys in their Emergency Motion, having not been denied, are now deemed to be admitted. This means that OB

has waived their opportunity to the facts or the law presented by the Henrys, and the Henrys' entire requested relief must be granted as a matter of law.

BOND

10. OB accurately states FRAP 9.310(a), which indicates that a "stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both." However, OB assumes a bond is automatic, ignoring the permissive "*may* be conditioned" language. Indeed, if a bond is to be posted, it would need to comport with the basic notions of justice. However, OB offers not one single reason why the Henrys should be required to post a bond.

11. To determine whether a bond is appropriate, we must look to the reason why a bond would be posted. This question is not directly answered in the court rules, but Florida Surety Bonds, a company providing civil court bonds, explains on their website floridasuretybonds.com that civil court bonds are provided to protect parties from harm that could result from a court ruling. This case deals with the Henrys' pavers, privacy fence and 2 shipping containers. The stay pending appeal allows the Henrys to keep their property intact while the legalities are sorted out. Without the stay, OB clearly stated they think they have authority to enter onto the Henrys' homestead, and remove and destroy their privacy fence, pavers and shipping containers. Given their request to the magistrate to provide full immunity for the damages such actions will cause, even to other portions of the Henrys' property, OB acknowledges the irreparable harm to the Henrys that would happen if the stay was not in place.

12. However, there is no harm to OB in the stay being entered. Even if the court were to conclude that the Henrys' legal challenges had no merit, OB would suffer no harm in waiting to take and destroy the Henrys' property. Even if OB were to stretch and claim the Henrys' privacy fence, pavers and 2 shipping containers resulted in some sort of aesthetic harm to OB, such a claim would be laughable given the 810 similar LDC "violations" within just a quarter-mile radius of the Henrys' home (as clearly identified in pictures and a color-coded spreadsheet, given to OB on 11/8/22 and the magistrate in

February 2023). Even the City Attorney's office fails to follow the same paver/parking and accessory structure LDC provisions OB claims the Henrys are violating. (As detailed in prior pleadings, and formally reported to the OB Neighborhood Improvement Division.)

13. ALL averments by the Henrys in their Emergency Motion, having not been denied, are deemed to be admitted by OB. That includes the averment that "The underlying orders not only lack subject matter jurisdiction, but also *completely* deprive the Henrys of due process of law. While the laws broken by the Magistrate and Ormond Beach are many in number, the issue is actually quite simple - Ormond Beach is expressly prohibited by the US and Florida Constitutions, and state law, from **literally taking and destroying portions of the Henrys' homestead!"** The Henrys already had to pay thousands of dollars in court filing fees and transcript costs. Under what notions of fairness and justice would the Henrys have to pay additional sums to ensure OB could utilize orders completely lacking subject matter jurisdiction and that completely deprived the Henrys of due process of law in the first place?
14. Additionally, OB seeks a bond of $13,670.68 (in addition to clerk and other court costs), but fails to explain how it arrives at such a calculation. Likewise, OB seeks "damages for delay" and "interest" as part of the bond, but fails to identify what those damages would be, nor the statutory authority for such damages or interest.
15. Even a look at Form 1.961 Various Bond Conditions gives some insight here. There, bond is anticipated in cases of attachment, garnishment, distress, replevin, or to ensure a plaintiff pays all necessary court costs. This is not a case of attachment, garnishment, distress, or replevin, and the Henrys have paid all court costs to-date in full. In fact, OB is essentially seeking "enforcement of a final judgment" without having gone through the proper processes to obtain such a judgment. FRCP 1.570(b) describes the required procedures OB must use to enforce an order regarding the Henry's privacy fence, shipping containers and pavers, yet OB has followed none of those required steps, and thus comes to the court with unclean hands in asking the court to impose a bond upon the Henrys to simply keep the status quo while the appeal is pending.

JOINDER

16. OB uses *ipse dixit* in claiming the "Florida Rules of Civil Procedure . . . are inapplicable to Appellants' appeal." However, as discussed above, FRCP 1.010 and FRGP 2.110 clearly articulate that the rules of Civil Procedure and General Practice are applicable in this case. Indeed, per FRCP 2.130, the Florida Rules of Appellate Procedure have "priority," not "exclusivity," in circuit court appellate proceedings.
17. OB argues the Henrys cannot join their counterclaims. However, the rules require otherwise. FRCP 1.110(a) specifically allows for "an original claim, counterclaim, crossclaim, or third-party claim," and that "[r]elief in the alternative or of several different types may be demanded." Also, 1.110(g) states that a "pleader may set up in the same action as many claims or causes of action or defenses in the same right as the pleader has," and that a "party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both." Indeed, "[a]ll pleadings shall be construed so as to do substantial justice." *Ibid.*
18. But aside from the permissive language, the rules call for the Henrys' claims to be filed as "compulsory counterclaims." FRCP 1.170(a) requires a party to "state as a claim any claim which at the time of serving the pleading the pleader has against any opposing party, provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction." At the time the Henrys' brief on appeal is due, they will include the full scope and explanation of all claims and defenses involved, including those identified in the Notice of Joinder, as such claims arise out of the same transaction or occurrence as the underlying appeal.
19. The Henrys would have already filed the appellate brief and joined complaints, but they have been waiting for *any* form of written response from OB in order to best narrow down the issues to litigate. Despite FS 70.45 and general notions of justice and due process requiring otherwise, OB *entirely failed to respond* to the Henrys' 11/8/22 Notice of Proposed Action and Notice to Cease & Desist, February 2023 pre-hearing pleadings

or motion for dismissal, 3/24/23 Motion for Relief and Motion for Stay, with OB's 4/20/23 Response still failing to address *any* substantive issues raised in the Henrys' 4/3/23 Emergency Motion.

20. OB also argues that the Henrys cannot join in necessary parties for full adjudication of the compulsory counterclaims. Black's Law Dictionary, Eighth Edition, p 404, defines a "cross-complaint" as not only a "claim asserted by a defendant against another party to the action," but also a "claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action." FRCP 1.210(a) specifically allows "[a]ny person may at any time be made a party if that person's presence is necessary or proper to a complete determination of the cause." Moreover, FRCP 1.170(h) requires that "[w]hen the presence of parties other than those to the original action is required to grant complete relief in the determination of a counterclaim or crossclaim, they must be named in the counterclaim or crossclaim." This joinder of parties is required unless jurisdiction cannot be obtained over those parties or their joinder would deprive the court of jurisdiction, neither of which is at issue here.
21. Additionally, FRCP 1.180(a) allows the Henrys to join in new parties to the action and to "assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim." In fact, the Court Commentary to FRCP 1.180 states that "[s]ubdivision (a) is amended to permit the defendant to have the same right to assert claims arising out of the transaction or occurrence that all of the other parties to the action have."
22. OB then claims that in this court exercising its *appellate* capacity, it lacks jurisdiction to join Henrys' counterclaims stemming from the court's *original* jurisdiction. However, "rule 9.100 is not designed for use in trial court. The times for proceeding, the methods of proceeding, and the general nature of the procedure is appellate and presumes that the proceeding is basically an appellate proceeding. When the extraordinary remedies are sought in the trial court, these items do not usually exist and thus the rule is difficult to apply." FRCP 1.630 Court Commentary. Even non-extraordinary remedies claims can

coincide with the court's appellate jurisdiction now, as "the uniform procedure concept of rule 9.100 has been retained with changes making the procedure fit trial court procedure." *Ibid.*

OB's UNDEFINED EXPECTATIONS

23. OB merely requests the court to strike the Henrys' Notice of Joinder of Claims and Parties, but does not explain to what end. In other words, is OB trying to prevent the Henrys from filing the extraordinary remedies and civil complaints all together, or just as part of this proceeding? Clearly, OB cannot prevent the Henrys from filing the extraordinary remedies and civil complaints entirely. On that point, FRCP 1.250(a) provides that even *if* there is a "misjoinder" of parties, that "is not a ground for dismissal of an action," rather if it is necessary, the "misjoined" party claims would simply be "severed and proceeded with separately." But the three individuals named in the Joinder of Parties are *not* "misjoined," as their participation is necessary to the full adjudication of the compulsory counterclaims relating to the actions taken on the Henrys' pavers, privacy fence and shipping containers.
24. More importantly, FRGP 2.110 requires there to be a "speedy and inexpensive determination of every proceeding," while FRCP 1.010 requires that court "rules shall be construed to secure the just, speedy, and inexpensive determination of every action." The "several nonparty employees of the City" are no strangers to the facts and procedural background of this case. To the contrary, Ann Margret Emery (Deputy City Attorney), Chris Mason (Neighborhood Improvement Division Manager), and Janet Bruce (Neighborhood Improvement Division Code Inspector) were the very individuals instigating the underlying action by OB. They were all served with the Henrys' initial 11/8/22 Notice of Proposed Action and Notice to Cease and Desist, which specifically forewarned them that failure to immediately cease and desist their unlawful actions "will result in legal action being taken against you in your official *and* individual capacities (as continuation of these actions constitutes actions done under the *color of law*, without actual authority)." Instead of taking corrective action, they all doubled down. They were

all present at the Special Magistrate 2/27/23 Hearing. And they all have stepped far outside the bounds of their lawful authority and broken countless laws, court rules and constitutional provisions in their actions relating to the Henrys' property.

25. So, unlike the lack of notice and opportunity to be heard provided to the Henrys, OB and the named individuals have had more than 6 months of notice of the Henrys claims. Considering all of the above, the only way to "secure the just, speedy, and inexpensive determination" of all the claims involved is to join the parties and claims as identified in the Notice of Joinder, and to provide the Henrys' requested relief from their Emergency Motions.

CONCLUSION AND PRAYER FOR RELIEF

26. Why force the Henrys to file separate cases, pay duplicative fees, and repeat the same procedures to address the same underlying problem? To create more hurdles for the Henrys to simply receive justice? To overburden the already clogged judicial system? Basic notions of fairness, justice and common sense simply do not allow for such gamesmanship.
27. Breaking up these claims creates undue burden on the courts and undue burden and hardship (financial, procedural, etc.) on the Henry family who simply want to enjoy and preserve their own property as our many laws and constitutional provisions protect.
28. "A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry."[2] OB's actions and the magistrate Orders violate the fundamental procedural safeguards of subject matter jurisdiction, due process of law, unreasonable seizures, unlawful per se takings, excessive fines and equal protection of the law. They violate protections provided by case precedent, court rules, OB's very own codes and ordinances, and statutes on eminent domain, municipal code enforcement, real property rights, land development regulation, destroying fences, unlawful entry, burglary in dwelling curtilage, trespassing, theft, and taking private property under color of law.

[2] *State of Florida v Sarmiento*, 397 So.2d 643 (Fla. 1981).

Following the magistrate Orders would force the Henrys into noncompliance for several other LDC requirements.

29. By the simple and plain reading of the court rules, all of these averments by the Henrys are now deemed as admitted by OB. Further, it is now uncontested that the Henrys will be irreparably harmed by such void Orders being enforced. Indeed, allowing such void Orders to stand would be the epitome of a miscarriage of justice. Moreover, cases must be handled to "secure the just, speedy, and inexpensive determination of every action." Thus, Henrys respectfully request this court to issue an order:
    a. Providing the Henrys complete relief from the 3 current Orders on the basis of being legally void. *A proposed Order was attached as prior Exhibit 8.*
    b. Requiring Ormond Beach to immediately comply with FS 70.45 and provide the Henrys with their written response to the Henrys' 11/8/22 Notice, *as identified in the proposed Order attached as prior Exhibit 8*, so the Henrys can timely include their FS 70.45 Claim (if still necessary) with their Brief on Appeal due 6/2/23.

Respectfully Submitted: April 27, 2023

/s/ Katherine & Michael Henry
Respondents, Pro Se

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to Abraham C McKinnon (lynn@mckinnonandmckinnonpa.com, amckinnon@mckinnonandmckinnonpa.com), Noah McKinnon (nmckinnon@mckinnonandmckinnonpa.com), Barbara Radcliff (Barbara.Radcliffe@ormondbeach.org), H. Pope Hamrick, Jr. (phamrickjr@cfl.rr.com), Ann Margret Emery (A.Emery@ormondbeach.org), Chris Mason (Chris.Mason@ormondbeach.org), Janet Bruce (Janet.Bruce@ormondbeach.org), via the electronic filing portal on April 27, 2023.

Respectfully Submitted: April 27, 2023

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