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

MICHAEL and KATHERINE HENRY,
Appellants/Respondents,

CIRCUIT CASE NO: 2023-30711 CICI

vs

Lower Court CASE NOS: 22-112237
CITY OF ORMOND BEACH, FLORIDA 22-112246
Appellees/Petitioners. 22-112247

Henrys' Motion for Appellate Costs

Respondents, MICHAEL AND KATHERINE HENRY, submit this motion for appellate costs, and in support hereof, state the following:

Henrys appealed the 3 magistrate orders issued in March 2023. The circuit court reversed those magistrate orders in part, in an order signed 3/4/24 and rendered 3/7/24. This motion for appellate costs must be filed within 45 days from rendition of that order on appeal, which would be 4/22/24 (as 4/21/24 is a Sunday). This motion was filed several days before that deadline, on 4/17/24. Exhibit 1.

Henrys have been indefinitely denied a ruling on this motion, as filed in the Magistrate tribunal. Despite receiving this filing, the city clerk (as the magistrate tribunal clerk), the Magistrate, and opposing counsel each *refused* to acknowledge Henrys' Motion, or respond in any way.[1] At the 5/20/24 Magistrate Hearing, the Magistrate refused to rule on Henrys' Motion, saying Henrys must obtain a hearing date from OB. Tr 47, 54, 55. However, OB unequivocally stated they will *not* provide Henrys with a hearing date on

[1] While it's hard to prove that something *doesn't* exist, Henrys testified about the lack of response during the 5/20/24 Magistrate Hearing (Tr 47), and OB never disagreed. Furthermore, although Rule 9.300(a) allowed OB 15 days to file a response to Henrys' Motion for Costs, OB *never* filed a response.

their motion. Tr 55. OB claimed Henrys improperly filed the motion for costs in the Magistrate tribunal, citing no legal support whatsoever, asserting the motion can only be filed in the circuit court. Tr 48. However, Rule 9.400(a) clearly states that "costs will be taxed by *the lower tribunal* on a motion served no later than 45 days after rendition of the court's order."

"Under Florida Rule of Appellate Procedure 9.400(a), the prevailing party in [an appeal] is **automatically entitled to taxation of certain enumerated costs** unless otherwise directed by the respective courts of appeal."[2] Therefore, the "trial court has the duty to assess appellate costs."[3]

The court rule and case precedent mandate that "the specified costs . . . are taxable in favor of the prevailing party 'unless the court orders otherwise.'"[4] The circuit court did *not* order otherwise in the final order on appeal, thus Henrys are entitled to an award of costs.

OB also implied that Henrys are not considered the "prevailing party" for purposes of this rule unless they succeeded on *every* issue raised on appeal. However, "[t]he 'prevailing party' under rule 9.400(a) is the party who prevailed in the appellate proceeding that was the subject of the motion to tax costs, and not necessarily the party who ultimately prevails after the completion of all of the litigation."[5] So, though Henrys did not prevail in every issue raised on appeal, they are still considered the prevailing party.

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[2] *Di Teodoro v Lazy Dolphin Development*, 432 So.2d 625, 626 (Fla. 3rd DCA: 1983), citing *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980).
[3] *Tomorrow's Choice v Bassing*, 364 So.2d 530, 532 (Fla. 3rd DCA: 1978), internal citations omitted.
[4] *American Medical International v Scheller,* 484 So.2d 593, 594 (Fla. 4th DCA: 1985).
[5] *Stringer v Katzell,* 695 So.2d 369, 369 (Fla. 4th DCA: 1997), internal citations omitted.

Relatedly, the US Supreme Court held in *Hensley* that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the [appeal]. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee."[6]

Naturally, the Florida Supreme Court agreed with the holding of the US Supreme Court in *Hensley* (and the *Nadeau* holding quoted therein) that "'[appellants] may be considered 'prevailing parties' for [costs and] fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing [the appeal].'"[7]

Indeed, in discussing "prevailing parties," the court in *Nadeau* stated "[t]he legislative history strongly suggests that a plaintiff who is partially successful in achieving the relief sought may still receive an award. . . . [T]he Senate Report states, 'Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.' . . . [Courts have] awarded fees to plaintiffs despite the fact that they had prevailed on only one of 15 issues. Given the legislative history and case law cited above, we conclude that [litigants] may be considered 'prevailing parties' for [costs and] fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing [the appeal]."[8]

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[6] *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983), internal citations omitted. *See also, Peter Marich & Associates v Powell,* 365 So.2d 754, 756 (Fla. 2nd DCA: 1978), internal citations to the 2nd DCA, 3rd DCA, and 4th DCA omitted. ("This is true despite the fact that the judgment is for less than initially sought in the complaint.")

[7] *Moritz v Hoyt Enterprises*, 604 So. 2d 807, 809-810 (Fla. Supreme Court 1992), citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978)).

[8] *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir.1978).

While Henrys didn't prevail on the issue of fines, the circuit court nonetheless held "that the Orders of Violation which direct Appellee/COOB to enter the property to take the action necessary to bring the property into compliance departs from the essential requirements of the law. Those portions of the Orders of Violation are hereby stricken." Undoubtedly, stopping OB from illegally coming onto Henrys' property to destroy it is success on a significant issue in the Henrys' appeal.

Rule 9.400(a)(1) & (2) require Henrys to be awarded the costs they paid for court filing fees and transcript/court reporter services. Henrys paid the standard filing fee of $414 in 2023 ($103.50 on 3/25/23 and $310.50 on 4/3/23), and $1,759.80 in transcript/court reporter services, totaling $2,173.80 for their 2023 appeal to the circuit court. This total would have been the same whether Henrys only raised the one ultimately prevailing issue or all those raised on appeal, as the filing fee and transcripts were required either way.[9] However, as OB denied Henrys the opportunity to set a hearing on this motion at the lower tribunal level, and refused to even put that in a written response or acknowledgement to Henrys - only responding to Henrys repeated requests at the 5/20/24 Magistrate Hearing, Henrys were then forced to incur the additional expense of having the 5/20/24 transcript prepared to support the filing of this motion in the circuit court. That transcript cost an additional $593.75, bringing the total costs for the 2023 appeal and subsequent motion for appellate costs to $2,767.55.[10]

Therefore, since rule "9.400(a) clearly entitles the appellant to an immediate award of such costs without stay of execution thereon,"[11] the 5th DCA has held the lower tribunal

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[9] "Nor can it be said that the costs were 'unnecessarily incurred' under 'unusual circumstances.'" *Department of Labor v American Building Maintenance,* 449 So.2d 932, 933 (Fla. 1st DCA: 1984).

[10] The 2-page proof of court reporter fees paid is attached as Exhibit 2.

[11] *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980); *see also, Di Teodoro v Lazy Dolphin Development*, 432 So.2d 625, 626 (Fla. 3rd DCA: 1983).

would "err[] in not making the order a cost judgment subject to execution."[12] Therefore, the Magistrate erred in refusing to enter the order granting Henrys' motion for costs. Consequently, Henrys ask this court to issue "an immediate award of such costs" in the total amount of $2,767.55 as "a cost judgment subject to execution," for the appellate costs incurred for the 2023 appeal to circuit court.

Respectfully Submitted: /s/ Katherine Henry /s/ Michael Henry
June 24, 2024

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Certificate of Service

I certify that the foregoing document, along with the appendix of 2 exhibits and the 5/20/24 transcript, has been furnished to Abraham C McKinnon (lynn@mckinnonandmckinnonpa.com, amckinnon@mckinnonandmckinnonpa.com), Noah McKinnon (nmckinnon@mckinnonandmckinnonpa.com), *as attorneys of record for Ormond Beach in the appeal*; and Barbara Radcliff (Barbara.Radcliffe@ormondbeach.org), *as the clerk of the lower tribunal* via email on June 24, 2024.

Respectfully Submitted: /s/ Katherine Henry /s/ Michael Henry
June 24, 2024

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[12] *Swan v Wisdom,* 392 So.2d 987, 987 (Fla. 5th DCA: 1981), citing FRAP 9.400(a), and *Yost v Congress International Development*, 383 So.2d 732, 732 (Fla. 3rd DCA: 1980).