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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
SIXTH DISTRICT

RICHARD LEE MASSEY,	)	
Appellant,	)	
	)	
v.	)	**Case No. 6D23-2152**
	)	
CITY OF PUNTA GORDA,	)	
Appellee.	)	
	)	

MOTIONS FOR
REHEARING, CERTIFICATION, AND WRITTEN OPINION

COMES NOW the Appellant, Richard Lee Massey, by and through the undersigned counsel, and moves pursuant to Fla. R. App. Pro. 9.330 for rehearing, certification, and written opinion following this Court's two orders issued on February 13, 2024, affirming *per curiam* the decision of the lower tribunal and denying Appellant's Motion for Attorneys' Fees, which thereby "adjudicate[d], resolve[d], or otherwise dispose[d] of [this] appeal . . . [and] motion for appellate attorneys' fees" as required by Fla. R. App. Pro. 9.330(e).

Appellant presented three issues in this appeal: (1) whether attorneys' fees and costs must be awarded to Appellant pursuant to Fla. Stat. § 57.112, (2) whether attorneys' fees and costs must be awarded to Appellant pursuant to Fla. Stat. § 768.295, and (3) whether costs should be

awarded to Appellant pursuant to Fla. R. App. Pro. 9.400(a). All three of those issues should be addressed in a written opinion to provide guidance and a legitimate basis for supreme court review, and all three should be certified as being of great public importance. And because Appellant's Motion for Attorneys' Fees directly relates to this Court's decisions on the first two issues regarding Fla. Stat. §§ 57.112 and 768.295, a ruling on that Motion should also be addressed in a written opinion and certified as being of great public importance.

Additionally, the Court's ruling as to the third issue regarding costs under Rule 9.400(a) should be reheard for apparently overlooking points of law and fact, and also certified for being expressly and directly in conflict with the Fourth District Court of Appeal's decision in Hollywood Firemen's Pension Fund v. Terlizzese, 538 So.2d 934 (Fla. 4th DCA 1989).

Grounds for Certification of All Three Issues as being of Great Public Importance

Each of the three issues presented meets the criteria of Rule 9.330(a)(2)(C) for certification as being of great public importance because each issue affects the ability of people to defend their constitutional rights by pursuing appeals in the circuit court from local board hearings which violate those constitutional rights, as clearly happened in

this case (R. at 437-50). To enable people to protect their constitutional rights, the Florida Legislature has set forth two statutes—Fla. Stat. §§ 57.112 and 768.295—to help remove the financial obstacles and burdens of court costs and attorneys' fees so that people who have had their rights violated will be able to bring forth their cases and defenses to correct those wrongs.

The Legislature's intent is made explicitly clear in Fla. Stat. § 768.295(1), which begins by explaining that

> [i]t is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues . . . as protected by the First Amendment to the United States Constitution and s. 5, Art. 1 of the State Constitution. It is the public policy of this state that a person or governmental entity not engage in SLAPP suits [(i.e., Strategic Lawsuits Against Public Participation)] because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues.

Further protecting the right in Florida to exercise the rights of free speech is Article 1, Section 4 of the Florida Constitution, which states that "[n]o law shall be passed to restrain or abridge the liberty of speech." Fla. Stat. § 57.112 seeks to deter local governments from violating that and other state constitutional provisions which preempt local governments from passing certain types of laws, like the City's Ordinance here.

The Florida Supreme Court has stated that "[w]here possible, courts must give effect to *all* statutory provisions," and if there is any ambiguity in a statute, then courts should inquire into the Legislature's intent, which is the "ultimate goal of *all* statutory analysis." State v. Peraza, 259 So.3d 728, 732-33 (Fla. 2018). Thus, the proper interpretation and understanding as to the application of these statutes is of great public importance as it impacts people's ability to defend their fundamental constitutional rights.

It is unjust and against public policy as well as legislative intent that someone like Appellant, who was found to have had his constitutional rights to free speech violated by the City, would have to pay over $800 in costs alone for filing fees and transcripts just to be heard and vindicated on appeal from the City's Code Enforcement Board hearing so as not to pay the $500 fine imposed on him by the City, without the City having to pay a penny or bear any responsibility at all for those costs or the attorneys' fees incurred to defend his case on account of the City's unjust and unconstitutional actions. Such an outcome emboldens government entities to violate the constitutional rights of the people since the government, like the City here, will suffer no consequence for its wrongful and unconstitutional actions.

This outcome also emboldens local governments to act with impunity to financially obstruct defendants from appealing board hearings to have their rights vindicated since that will in no way come back on the local government. In this case for example, Appellant paid $400 to file the notice of appeal to the circuit court. (R. at 9.) And although Appellant sought to keep costs low by offering to file an agreed stipulated statement in lieu of a transcript, as permitted by Fla. R. App. Pro. 9.200(a)(3), since the Board hearing was recorded on video and there would be no question or dispute as to the accuracy of the stipulated statement, the City insisted on having a transcript of the video recording. (R. at 10-11.) Appellant thus had to then pay $405 for preparation of that transcript. So, Appellant's costs to appeal the case to the circuit court and have his constitutional rights vindicated ended up being over $300 more than the $500 fine he received from the Code Enforcement Board. (R. at 8.)

But procedural due process requires defendants to have an opportunity to be heard on their constitutional claims and defenses. See Holiday Isle Resort & Marina Associates v. Monroe County, 582 So.2d 721, 721-22 (Fla. 3d DCA 1991). This is because "[p]rocedural due process requires . . . a real opportunity to be heard . . . in a meaningful manner." Massey v. Charlotte County, 842 So.2d 142, 146 (Fla. 2nd DCA 2003).

Appellant clearly did not get that opportunity at the Code Enforcement Board hearing, which claimed it could not even consider his constitutional defenses, and therefore Appellant had to appeal to be heard on his constitutional defenses, but he was required to pay significant financial costs in doing so and was denied recovering those costs and attorneys' fees even though the circuit court found the City's Ordinance to be unconstitutional and the charge to be without probable cause. (R. at 437-50.) No one who has been vindicated as having had their constitutional rights to freedom of speech violated should be required to bear the costs for being heard to correct that wrong.

Thus, although the City's Ordinance was found to be unconstitutional, the City still effectively succeeded in severely financially penalizing Appellant for exercising his constitutional rights in criticizing the government. This unjust outcome could create a chilling effect causing others to think it is not financially reasonable or possible to exercise and stand for their constitutional rights and be heard if it will cost them significantly to prevail, and so they might silence themselves to avoid the violation altogether since they would be effectively penalized anyway through the court costs they will owe.

To deny Appellant an award of attorneys' fees and costs would provide a roadmap for government entities, like the City here, to have a loophole from any responsibility after blatantly violating its citizens' constitutional rights simply by routing such enforcement actions with severe fines through a local code enforcement board to avoid due process and to avoid consequences under Fla. Stat. §§ 57.112 and 768.295 by claiming that a board hearing and subsequent appeal are not the types of proceedings which are subject to the broad scope of those two statutes, as the City argued and the lower court held in this case. The Legislature clearly did not intend for such an unjust outcome or loophole, nor do the statutes provide one. As the interpretation of the application of these statutes and Rule 9.400(a) in this context affects people's ability to reasonably defend themselves from unconstitutional violations, these three issues involve matters of great public importance which should be certified to the Florida Supreme Court.

Additionally, as described in the sections below, the first two issues involving Fla. Stat. §§ 57.112 and 768.295 are of great public importance because they are also issues of first impression for which guidance from the Florida Supreme Court is needed for similar future cases, and the third issue involving the award of costs under Rule 9.400 still needs guidance

from the Florida Supreme Court for similar future cases. Therefore, this motion for certification should be granted as to each of the three issues raised in this appeal.

Grounds for Written Opinion on First Two Issues regarding Fla. Stat. §§ 57.112 and 768.295

Each of the first two issues presented involving Fla. Stat. §§ 57.112 and 768.295, as well as the related motion for appellate attorneys' fees, meets the criteria of Rule 9.330(a)(2)(D)(i) and (iii)(b) and (d) because a written opinion would provide both a legitimate basis for supreme court review on issues of great public importance and guidance to the parties and lower tribunal on issues of first impression which are expected to recur in future cases. Additionally, the issue involving Fla. Stat. § 57.112 could provide another legitimate basis for supreme court review under Rule 9.030(a)(2)(A)(ii) as the opinion might need to expressly construe a provision of the state constitution in determining whether the City's Ordinance was preempted by Article 1, Section 4 of the Florida Constitution, because the lower court held that the Ordinance was not preempted (R. at 506-07).

As described above, the three issues raised in this appeal are each of great public importance involving the constitutional rights to freedom of

speech. The application of Fla. Stat. §§ 57.112 and 768.295 to this context are also issues of first impression on matters which are expected to recur and for which guidance is needed. Appellant is unaware of any Florida appellate decision addressing Fla. Stat. § 57.112, which is a relatively new statute that took effect in July 2019. Appellant is also unaware of any Florida appellate decision addressing the application of Fla. Stat. § 768.295 in a context similar to this case where an unconstitutional ordinance violation is brought before a locality's Code Enforcement Board and appealed to a circuit court.

The lower court's Order Denying Motion for Attorney's Fees and Costs calls into question the explicitly broad scope of the types of proceedings to which these two statutes apply and what constitutes preemption under Fla. Stat. § 57.112 and being "without merit" under Fla. Stat. § 768.295. (R. at 506-07.) Therefore, this Court's affirmance of the lower court's decision without any written opinion raises significant questions about the circumstances in which a party can recover attorneys' fees and costs under Fla. Stat. §§ 57.112 and 768.295. Guidance is greatly needed so that attorneys can evaluate the risk of representing a potential indigent client in a city's board proceeding and in any appeal therefrom when the client's constitutional rights have been violated. Guidance is also

needed so that defendants in city board proceedings can themselves evaluate if it is worth hiring an attorney for the board hearing and/or the appeal depending on whether there is any chance they can recover those attorneys' fees and costs under these statutes. Failure to give this guidance will lead to attorneys and clients declining to protect their constitutional rights and assert constitutional defenses, thereby giving localities impunity to violate the U.S. and Florida Constitutions without fear of any consequence. This would circumvent and frustrate the purposes of Fla. Stat. §§ 57.112 and 768.295. As localities across the state will continue to pass ordinances and route proceedings through code enforcement boards to obtain fines without having to provide due process, this issue is reasonably expected to recur, and future litigants and lower tribunals should not have to guess about the scope and application of these statutes to such cases when those issues are now squarely before this Court and can be addressed in a written opinion from this appeal.

Grounds for Rehearing, Written Opinion, and Additional Grounds for Certification due to a Conflict on the Third Issue regarding Costs

While not an issue of first impression, the third issue as to costs under Rule 9.400(a) is still in need of much guidance for the same reasons described above in the context of this case where an ordinance violation is

brought before a locality's code enforcement board and appealed to a circuit court. It therefore meets the criteria of Rule 9.330(a)(2)(D)(i) and (iii)(b) for a written opinion which would provide both a legitimate basis for supreme court review on an issue of great public importance and guidance to the parties and lower tribunal on issues which are expected to recur in future cases whenever there is an appeal from a city board hearing to a circuit court.

Additionally, this issue as to costs under Rule 9.400(a) should be reheard pursuant to Rule 9.330(a)(2)(A) because this Court seems to have overlooked points of law and fact, including that this Court's decision (whether based on the lower court's reasoning or on this Court's own reasoning leading to the same result) is expressly and directly in conflict with the Fourth District Court of Appeal's decision in Hollywood Firemen's Pension Fund v. Terlizzese, 538 So.2d 934 (Fla. 4th DCA 1989), which provides additional grounds for certification under Rule 9.330(a)(2)(C).

In Terlizzese, "[t]he *Pension Fund Board* of the Hollywood Firemen's Pension Fund denied the application of respondent, James Terlizzese, for a service-incurred disability retirement pension. *The circuit court, sitting in its appellate capacity*, granted Terlizzese's Petition for Writ of Certiorari and concluded: 'IT IS ORDERED AND ADJUDGED that Petitioner, JAMES

TERLIZZESE'S Petition for Writ of Certiorari . . . is hereby granted and the Board's decision of August 22, 1986 is quashed . . . .'" Id. at 934 (emphasis added). Since Terlizzese prevailed at the circuit court on appeal from the Hollywood Pension Fund Board's decision, he was awarded costs by the circuit court. Part of the issue before the Fourth District Court of Appeal was that "order taxing costs *which was entered by the trial court*"—NOT by the city's Pension Fund Board—pursuant to Rule 9.400(a). Id. at 935 (emphasis added). Although the circuit court entered the order taxing costs after a petition for writ of certiorari was filed in the District Court of Appeal, the Fourth District stated clearly that "[t]he question of whether *the circuit court* had jurisdiction to enter an order taxing costs is answered in the affirmative." Id. (emphasis added).

While the circuit court's jurisdiction to enter an order taxing costs dealt with the court retaining jurisdiction on that matter even after a petition for writ of certiorari had been filed, it also necessarily means that the circuit court had the jurisdiction to enter an order taxing costs in the first place, even when "sitting in its appellate capacity" reviewing an administrative board hearing. This is so even though Rule 9.400(a) stated well before the time of the Pension Fund Board's decision in 1986, as it does now, that costs be taxed by "the lower tribunal" on a motion served within a certain

time period. Fla. R. App. Pro. 9.400, Committee Notes on the 1977 Amendment ("Subdivision (a) . . . provides that the prevailing party must move for costs in the lower tribunal within 30 days after issuance of the mandate.").

In Terlizzese, there was no statutory basis in addition to Rule 9.400(a) which was required to recover costs for prevailing on an appeal in a circuit court from a board hearing, nor was there any procedural requirement that Terlizzese file or serve a motion with the Pension Fund Board as the "lower tribunal" to satisfy Rule 9.400(a). Therefore, whether this Court affirmed the lower court's decision to deny costs to the Appellant based on the lower court's sole reasoning that "there was no statutory basis" and the "Rules of Appellate Procedure do not create a substantive right to costs" (R. at 506-07), or whether this Court affirmed based on a different reason that a motion for costs should have been filed with the City's Code Enforcement Board, this Court's decision expressly and directly conflicts with the decision of the Fourth District in Terlizzese either way.

Without a written opinion, it is unclear upon what grounds this Court affirmed the lower court's ruling as to denying costs to the prevailing party. The *per curiam* affirmance indicates that this Court affirmed the lower court's ruling based on the same reasoning in the lower court's written

opinion denying costs on the sole basis that "there was no statutory basis" for awarding costs and the "Rules of Appellate Procedure do not create a substantive right to costs." (R. at 506-07.) However, at oral argument on February 6, 2024, at least two members of the panel indicated the lower court's reasoning was clearly incorrect,[1] and therefore this Court should issue a written opinion to provide proper guidance and clarification to the parties and lower tribunals for when similar issues recur in the future, rather than misleading the parties and lower tribunals by its general affirmance into mistakenly thinking that costs can only be recovered if there is an independent statutory basis.

In addition to conflicting with Terlizzese where the Fourth District did not require any statutory basis apart from Rule 9.400(a) for the circuit court to award costs to the prevailing party in an appeal from a city board hearing, the Second District Court of Appeal has stated that "[costs] are awarded only as provided by statute *or rule*." Lee County v. Galaxy Fireworks, Inc., 698 So.2d 1371, 1372 (Fla. 2nd DCA 1997) (emphasis

[1] "Oral Arguments 02/06/2024 Case # 23-2152, 23-2165, and 23-2544," FLORIDA SIXTH DISTRICT COURT OF APPEAL (Feb. 6, 2024) at 13:05 to 13:15, 31:07 to 35:05, and 37:15 to 38:20, https://www.youtube.com/watch?v=PKBQRg8hUtU.

added). Thus, unlike for an award of attorneys' fees, no statutory authority is needed for an award of costs to a prevailing party on appeal.

The Florida Rules of Appellate Procedure make this distinction between costs and attorneys' fees clear as well. Under Rule 9.400(b), "a motion for attorneys' fees shall state the grounds on which such recovery is sought," but in a separate subsection for costs under Rule 9.400(a), no motion or statement of grounds is required for recovery of certain costs, which is to be awarded as an automatic default to the prevailing party in the appeal. Similarly, for a judicial review of an administrative action, Rule 9.190(d)(1) states that a "motion for attorneys' fees . . . shall state the grounds on which recovery is sought, citing all pertinent statutes," while the Committee Notes to the 1996 Amendment explain that "[r]ecoupment of costs is still governed by rule 9.400," which clearly indicates that costs can be recovered in appeals from administrative actions solely on the grounds of Rule 9.400(a).

If this Court agrees with Appellant on this point, as was indicated at oral argument, then this should be clarified in a written opinion for lower tribunals and litigants in similar future cases. And if this Court still affirmed the lower court's ruling under a "right result, wrong reason" theory based on matters which were never previously raised or briefed, then this Court

appears to have overlooked points of law and fact in its reasoning, which would be grounds for rehearing and reconsideration.

At oral argument, the Court expressed concern that Rule 9.400(a) states that "[c]osts will be taxed by the lower tribunal on a motion served no later than 45 days after rendition of the court's order," and Rule 9.020(e) defines "lower tribunal" to include a board or body whose order is to be reviewed.[2] But there are good reasons as to why this argument and grounds for denying costs were never raised by the lower court or the City in this case, and thus the issue was never briefed or even factually addressed in the record.

Having to file a motion for costs with the Code Enforcement Board conflicts with the decision of the Fourth District in Terlizzese where the prevailing party did not file and did not need to file with the city's Pension Fund Board, which was the "lower tribunal" in that case, because "the circuit court had jurisdiction to enter an order taxing costs" even though it was sitting in its appellate capacity. Terlizzese, 538 So.2d at 934-35.

[2] "Oral Arguments 02/06/2024 Case # 23-2152, 23-2165, and 23-2544," FLORIDA SIXTH DISTRICT COURT OF APPEAL (Feb. 6, 2024) at 11:25 to 11:52, 13:15 to 13:21, and 37:50 to 38:20, https://www.youtube.com/watch?v=PKBQRg8hUtU.

Though the rationale for this was not explicitly stated in Terlizzese, there seem to be some likely reasons for it.

One reason is that when the adverse party itself is the "lower tribunal," then it should be clearly understood that this provision of Rule 9.400(a) requiring a motion to be filed with the lower tribunal does not apply. Here, as in Terlizzese, the adverse party is the City and its Board which committed the error reversed on appeal. It makes no sense to require the prevailing party to submit a motion to the opposing party, asking it to decide upon costs to be awarded against itself. And because the lower tribunal is itself a party to the case, it still receives notice of a motion for costs when filed with the circuit court.

Another reason for not requiring a motion for costs to be filed with the opposing party / lower tribunal in this situation is that it would be futile since the local board does not have a process or authority to rule on such a motion, as has been stated by both parties in this appeal. As the City itself explained at oral argument, "[f]rankly, it would have been useless for the [Appellant] to file a motion for attorneys' fees after the circuit court in its appellate capacity ruled in favor of them on ultimately vacating the [Board's] Order" because "there is nothing in the statute that would allow the Code Enforcement Board to do that, and so they would run the risk of

having the Code Enforcement Board taking an action that [the Board] didn't have any lawful authority to do"—i.e., considering and ruling on a motion for costs.[3] The City explained the reason for this being that "the Legislature hasn't given our Code Enforcement Board the authority to deal with fees and/or costs" and "when the Florida Supreme Court makes rules of procedure that are applicable to administrative bodies / municipal bodies…[the Court is] also familiar with the limitations of the boards and authorities that [the Court] may be putting under the framework of a rule that can't be accomplished because the Legislature hasn't given them the tools to do so" because "there is nothing in [Chapter] 162 that would give [the Board] authority to assess costs."[4] So, the parties are agreed that there was no need or purpose for Appellant to file a motion for costs with the City's Board in order to comply with Rule 9.400(a) because the City's Board does not have the authority or any process to handle such a motion. Even if this Court wonders otherwise, it should accept this agreement by

[3] "Oral Arguments 02/06/2024 Case # 23-2152, 23-2165, and 23-2544," FLORIDA SIXTH DISTRICT COURT OF APPEAL (Feb. 6, 2024) at 35:30 to 37:10, https://www.youtube.com/watch?v=PKBQRg8hUtU.

[4] "Oral Arguments 02/06/2024 Case # 23-2152, 23-2165, and 23-2544," FLORIDA SIXTH DISTRICT COURT OF APPEAL (Feb. 6, 2024) at 43:30 to 44:42, https://www.youtube.com/watch?v=PKBQRg8hUtU.

both parties as a stipulation in this case—though, under Terlizzese, such a stipulation should not be needed anyway.

Additionally, prior to the lower court's final order determining the prevailing party on the substantive matters in the case, Appellant had filed with the circuit court a motion for attorneys' fees which would have included costs if granted (R. at 433-36) and also submitted a proposed Order at the circuit court's request (R. at 125) in which Appellant asked for an award of costs and attorneys' fees (R. at 519). These filings for fees and costs were of course received by counsel for the opposing party, which was the lower tribunal to the appeal in the circuit court. But in its Order Vacating the Judgment of the Board, the lower court failed to rule as to an award of costs and attorneys' fees. (R. at 437-50.) So, this issue and a motion relating to the Appellant recovering costs was already pending before the circuit court prior to its final order on the substantive issues of the case, and the issue remained pending with the circuit court until it ruled on Appellant's motion and addendums, which did not occur until after the 45-day period had passed, at which time it denied the motion for costs (R. at 506-07). It would have been improper to file a motion for costs with the Code Enforcement Board while the circuit court was still considering that motion, which it ultimately denied. Asking the circuit court to preemptively rule on

costs in this case is similar to the situation in Essenson v. Bloom (In re Bloom), 251 So.3d 1026 (Fla. 2nd DCA 2018), where the Second District Court of Appeal, upon motion, preemptively ruled on whether costs could be awarded by the lower tribunal.

These facts and Terlizzese appear to have been overlooked by this Court in its decision. Therefore, the Court should grant Appellant's motion for rehearing to reconsider the third issue of costs pursuant to Rule 9.400(a) in addition to issuing a written opinion and certifying that the issue is of great public importance and in conflict with Terlizzese.

Conclusion

For these reasons, Appellant asks that this court certify all three issues presented, along with the related motion for appellate attorneys' fees, as being of great public importance, issue a written opinion addressing all three issues presented and the motion for appellate attorneys' fees to give guidance to lower tribunals and the parties in similar cases likely to recur, and rehear the issue related to costs under Rule 9.400(a) as well as certify the ruling on that third issue as directly and expressly conflicting with the Fourth District's ruling in Terlizzese.

Respectfully submitted,

/s/ Phares Heindl
Phares Heindl
Participating Attorney for
THE RUTHERFORD INSTITUTE
P.O. Box 1009
Marco Island, Florida 34145
pmh@heindllaw.com
Florida Bar No. 0332437
239-285-5048
Attorney for Appellant

Certificate of Service

I certify that this Motion for Rehearing, Certification, and Written Opinion has been furnished for service to David M. Levin, attorney for Appellee City of Punta Gorda, by and through the Court's e-filing Portal on February 28, 2024.

/s/ Phares Heindl
Phares Heindl
Attorney for Appellant