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

RICHARD LEE MASSEY,
Appellant. **CASE NO. 6D23-2152**

VS.

CITY OF PUNTA GORDA, FLORIDA,
Appellee.
_____/

Appeal from Judgment of the
Twentieth Judicial Circuit in and for Charlotte County, Florida,
L.T. Case No. 21001014CA

REPLY BRIEF
FOR THE APPELLANT

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

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ARGUMENT IN RESPONSE AND REBUTTAL

I. All necessary elements of Fla. Stat. § 57.112 are met in this case and the City's Ordinance is not exempt by subsection (6) because the Ordinance was not a "land development regulation" adopted pursuant to part II of Chapter 163.

First, the City claims in its Answer Brief that its Ordinance is exempt from the provisions of Fla. Stat. § 57.112 by subsection (6) of the statute, which states that "[t]his section does not apply to local ordinances adopted pursuant to part II of chapter 163…." The City asserts, for the first time, that since it placed the Ordinance in the "Land Development Regulations" section of the City Code regulating signs, it thereby automatically falls under Fla. Stat. § 163.3202(2)(f) for regulating signage. (Answer Br. at 9-10.)

But Fla. Stat. § 163.3202(2)(f) does not apply to any and all signs or sign regulations. The statute states that "[l]ocal *land development regulations* shall contain specific and detailed provisions necessary or desirable to implement the adopted comprehensive plan and shall at a minimum:…(f) Regulate signage." § 163.3202(2)(f), Fla. Stat. (emphasis added).

The term "**land development regulations**" is defined under Fla. Stat. § 163.3164, which states that the phrase "means ordinances enacted by governing bodies *for the regulation of any*

aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations *controlling the development of land*...." § 163.3164(26), Fla. Stat. (emphasis added).

The word "**development**" is also defined under Fla. Stat. § 163.3164(14), which refers to and provides the same meaning as in Fla. Stat. § 380.04 to be "the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels."

But far from regulating or controlling such development of land, the City's Ordinance in Chapter 26, Article 11, Section 11.5 of the Punta Gorda Code provided in relevant part that

> no person shall erect, *display, wear*, alter, maintain, or relocate any of the following signs in the City...:...(z) Any sign which contains...indecent speech...*which can potentially be viewed by children* under the age of 17. This provision *includes signs or flags in or on any vehicle, vessel or on any apparel and accoutrements*.

(R. at 439 (emphasis added).)

Thus, the City's Ordinance regulating the content and viewpoint of words displayed on handheld signs, flags, and shirts for the "protection of children" from what it considers to be bad

morals (R. at 446) was clearly not for "the regulation of any aspect of development [i.e., the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels]" to constitute a "land development regulation." §§ 163.3164(14) and (26), 380.04,163.3202(2)(f), Fla. Stat. By the City's reasoning, localities could easily circumvent Fla. Stat. § 57.112 and shield themselves from liability by just shoving an unconstitutional ordinance into a section of the locality's code which might otherwise fall under part II of Chapter 163, but which the ordinance itself has nothing to do with.

Therefore, the City is not exempt from the liability imposed under Fla. Stat. § 57.112 because the City's Ordinance was not "adopted pursuant to part II of chapter 163" since it is not a "land development regulation" as defined by statute.

Second, while the City argues that the proceeding in the lower court was not a "civil action," it fails to provide any direct authority to support its argument that an appeal from a code enforcement board to a circuit court is not a "civil action." (Answer Br. 10-11.)

On every Order, the lower court wrote the words "CIVIL ACTION." (R. at 125, 127, 437, 506.) As argued in Massey's Initial

Brief, *the appeal* was a civil action. (Am. Initial Br. at 18-20.) Nothing cited in the City's Answer Brief stands for the principle that a "civil action" cannot encompass or include an appeal heard in a circuit court challenging the findings, penalties, and constitutionality of a code enforcement proceeding. Thus, the appeal in the lower court constituted a civil action which Massey "filed against a local government to challenge the adoption or enforcement of a local ordinance." § 57.112(2), Fla. Stat.

Further, although this is clear from the plain meaning of the statute, if there is any ambiguity, then this Court 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). It is obvious from Fla. Stat. § 57.112 itself that the Legislature clearly intended to enable a person to challenge the enforcement of unconstitutional ordinances—as Massey did here—without imposing a financial burden on the person or his attorneys.

Third, the City's attempt to claim that preemption is not a prohibition is unsupported. The City points out that preemption "takes a topic or field in which local government might otherwise establish appropriate local laws and reserves the topic for regulation exclusively by the legislature," quoting City of Hollywood

v. Mulligan, 934 So.3d 1238, 1243 (Fla. 2006). (Answer Br. at 12-13.) The City then argues that the legislature reserving a topic from local governments is somehow different than the topic being "forbidden by authority" or "prohibited." But a lower authority being forbidden or prohibited from doing something by a higher authority is exactly what preemption means.

As explained more fully in Massey's Initial Brief, preemption occurs when a higher authority of law displaces or precludes in advance the law of a lower authority. (Am. Initial Br. at 21-23.) For example, under the Supremacy Clause in Article VI, Clause 2 of the U.S. Constitution, "Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." Arizona v. United States, 567 U.S. 387, 399 (2012). Likewise, Article 1, Section 4 of the Florida Constitution, expressly withdraws specified powers from state governmental entities when it states that "no law shall be passed to restrain or abridge the liberty of speech."

"Municipal ordinances are inferior to the laws of the state and must not conflict with any controlling provision of a statute," and thus a "municipality cannot forbid what the legislature has expressly licensed." Mulligan, 934 So.2d at 1246-47 (Fla. 2006).

Municipal ordinances are even more inferior to the Florida Constitution, and the City's Ordinance blatantly "forbid what the [Florida Constitution] has expressly licensed"—the liberty of speech.

The provision in Article 1, Section 4 of the Florida Constitution, stating that "no law shall be passed to restrain or abridge the liberty of speech," is just like the language in two examples of express preemption given by the Florida Supreme Court: "no local authority shall enact or enforce any ordinance on . . .," and "[n]o municipality may adopt any ordinance relating to . . ." D'Agostino v. City of Miami, 220 So.3d 410, 422 (Fla. 2017). The Florida Supreme Court did not characterize those laws as "prohibitions" which did not constitute express preemption. Thus, the Florida Constitution expressly preempted the City from adopting and enforcing the Ordinance.

Fourth, the City claims that Massey is not the "prevailing party" because the City mischaracterizes the lower court's ruling on the constitutionality of the statute as dictum. (Answer Br. at 13-14.)

As explained in Massey's Initial Brief, the lower court's holding that the City's ordinance "violates Massey's right to freedom of speech" is not dictum, but is an alternative holding. (Am. Initial Br. at 25-26.) "[A]lternative holdings are binding precedent and not

obiter dictum." Jarkesy v. SEC, 34 F.4th 446, 459 n.9 (5th Cir. 2022). The Fifth District Court of Appeal affirmed and explained this principle, citing both the U.S. Supreme Court and the Florida Supreme Court:

> Woods v. Interstate Realty Co., 337 U.S. 535, 537 . . . (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); Parsons v. Fed. Realty Corp., 105 Fla. 105, 143 So. 912, 920 (1932) ("Two or more questions properly arising in a case under the pleadings and proof may be determined, *even though either one would dispose of the entire case upon its merits*, and *neither holding is a dictum, so long as it is properly raised, considered, and determined.*").

Campbell v. State, 288 So.3d 739, 744 (Fla. 5th DCA 2019) (emphasis added).

The City notes that "[a]ny statement of law in a judicial opinion that is not a holding is dictum.…A holding consists of those propositions along the chosen decisional path *or paths* of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment," quoting Pedroza v. State, 291 So.3d 541, 546 (Fla. 2020). (Answer Br. at 14 (emphasis added).) The propositions in both of the lower court's "paths of reasoning" were actually decided, were based upon the facts of the case, and led to the judgment. Either path of reasoning "would dispose of the entire case on its merits" in Massey's favor, and each holding was

"properly raised, considered, and determined." See Parsons, 143 So. at 920.

The lower court's Order Vacating the Judgment of the Board made it abundantly clear that its alternative holding was dispositive and not merely dictum when it explained that it gave a thorough constitutional analysis "to allow full review without the necessity of remand" should its finding that Massey did not violate the plain terms of the ordinance be reversed on appeal. (R. at 444.) And in another place, after noting that "the ordinance does not apply to Massey's sign," the lower court went on to state in the very next paragraph that "[g]iven the implications for the parties, the possibility that I've over read the constitutional avoidance canons and the likelihood of appellate review, *the court does rule* that the ordinance violates Massey's right to freedom of speech" (R. at 437-38 (emphasis added))—this *ruling* is not dictum. Thus, the lower court clearly set forth a formal and binding holding on the constitutionality of the Ordinance, and nothing in Fla. Stat. § 57.112 requires that the finding of a local ordinance to be expressly preempted by the Florida Constitution not be an alternative holding in order for someone to be a prevailing party.

In conclusion, under Fla. Stat. § 57.112, the City's Ordinance is not exempt under subsection (6), and Massey must be awarded attorneys' fees and costs as the prevailing party in the civil action heard by the lower court.

II. The City violated Fla. Stat. § 768.295(3) by bringing a cause of action or claim, which lacked any merit, against Massey primarily because he exercised his constitutional right of free speech in connection with a public issue.

First, the City claims that Fla. Stat. § 768.295(3) does not apply because the Board hearing was not a "civil action." (Answer Br. at 15-16.) But nothing in Fla. Stat. § 768.295(3) states that the proceeding has to be a civil action. Rather, Fla. Stat. § 768.295(3) states that it applies when a "governmental entity . . . file[s] or cause[s] to be filed . . . *any* lawsuit, cause of action, claim, cross-claim, or counterclaim." § 768.295(3), Fla. Stat. (emphasis added). These statutory provisions are thus not limited to civil actions, nor do they exclude quasi-judicial or administrative proceedings, like the Board hearing in this case, or appeals therefrom.

As explained in Massey's Initial Brief, the statute's list of broad terms encompasses every or almost every type of legal action seeking some kind of remedy, injunction, or penalty, including the action which the City filed against Massey here. (Am. Initial Br. at

28-30.) "Where possible, courts must give effect to *all* statutory provisions." Peraza, 259 So.3d at 732 (Fla. 2018). Merriam-Webster defines "claim" as simply a "demand for something due or believed to be due."[1] The City made a legal assertion that Massey violated its Ordinance and thus demanded payment due from Massey in the form of a fine up to $5,000.00 for the violation, and brought an action for a hearing upon that claim before the Board. Thus, the City made a claim and brought a cause of action against Massey.

Second, the City claims that the action it brought against Massey had merit and was primarily to protect children. (Answer Br. at 17-18.) However, the City confuses its claimed motive for enacting the Ordinance with its basis and merit for bringing the action against Massey. Those are two different things.

The lower court did not find in its Order Vacating the Judgment of the Board that the action against Massey had any merit, as the City claims. Contrary to the City's argument, the lower court thoroughly explained and stated that the City's indecent speech "ordinance does not apply to Massey's sign as the sign has

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[1] "Claim." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/claim. Accessed 24 May 2023.

nothing to do with sexual activities." (R. at 437 (emphasis added), 441-44.) The lower court further explained that "[b]ased on the words of the ordinance, the actual words on Massey's sign and current usage, Massey did not describe sexual activity therefore his sign does not violate the ordinance," and thus "the ordinance does not apply to Massey's sign" displaying the word "fuck." (R. at 444.)

Therefore, because the words Massey displayed had "nothing to do with sexual activities"—i.e., what the City's Ordinance defined as "indecent speech"—there was absolutely no basis or probable cause for the City to initiate or proceed with the action against Massey, and the action was thus brought without merit. See Am. Initial Br. at 30-31.

The City brought the action against Massey "primarily because [he] has exercised the constitutional right of free speech in connection with a public issue . . . as protected by the First Amendment to the United States Constitution." § 768.295, Fla. Stat; see Am. Initial Br. at 31-33. The sole basis for the charge against Massey for violating the City's Ordinance was the language he used—nothing else. Even if the City claims it was trying to "protect" children from Massey's exercise of his right of free speech, the City's action was still brought solely because of his speech.

In conclusion, Massey must be awarded reasonable attorney fees and costs for both the Board hearing and the appeal to the lower court under Fla. Stat. § 768.295 because the City's cause of action or claim against him for violating its Ordinance was brought "without merit and primarily because [Massey] exercised the constitutional right of free speech in connection with a public issue…as protected by the First Amendment."

III. Fla. R. App. Pro. 9.400(a) provides an award of costs because Massey was the prevailing party.

First, the City argues that due process does not support an award of costs. (Answer Br. at 19.) But procedural due process requires an opportunity to be heard on constitutional claims and defenses. Holiday Isle Resort & Marina Associates v. Monroe County, 582 So.2d 721, 721-22 (Fla. 3d DCA 1991). Massey clearly did not get that opportunity at the Board hearing and had to appeal to the lower court. To be heard and to correct the injustice caused by the City, Massey had to pay over $800 in costs, which was more than the $500 fine imposed against him. No one who has had their constitutional rights to freedom of speech violated through such a local board hearing should be required to bear the costs for their due process right to have their constitutional defense fairly heard

and to correct that wrong. See Am. Initial Br. at 37-38. And a local government should not be able to discourage appeals of unconstitutional penalties by imposing fines which cost a person less to pay than the costs for appealing to correct the wrongful decision, which a person cannot then recover from the locality even after prevailing on the appeal.

Second, the City conflates attorneys' fees and costs. (Answer Br. at 19-20.) Massey is not arguing that he is entitled to attorneys' fees separate from a statutory basis for such—only that costs do not require a statutory basis, and can be solely allowed by rule. (Am. Initial Br. at 35-36.)

The City relies on Israel v. Lee, 470 So.2d 861 (Fla. 2nd DCA 1985), but that case involved the question of whether an attorney could be held personally liable for attorney's fees and costs incurred by the opposing party, 470 So.2d at 862-63, which is an entirely different situation than what is involved in this case (see Answer Br. at 8 n.1). Also, the Florida Supreme Court later "disapprove[d] the decision[] in Israel…to the extent that [it] rejected the inherent authority of the trial court as a basis for awarding attorneys' fees" against an attorney upon an express finding of bad faith conduct. Moakley v. Smallwood, 826 So.2d 221, 226-27 (Fla. 2002).

Regardless, the Second District Court of Appeal itself later 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 added).

In conclusion, unlike for an award of attorneys' fees, no statutory authority is needed for an award of costs to a prevailing party on appeal under Fla. R. App. Pro. 9.400(a), and due process demands that Massey should at least recover his costs for having his constitutional defenses heard against the $500 fine imposed against him by the City Board for exercising his right of free speech.

IV. Fla. Stat. §§ 57.112 and 768.295, and Fla. R. App. Pro. 9.400, apply to this proceeding by their own terms without the need for any additional express provision in Chapter 162, Florida Statutes.

The City acknowledges that "there is nothing in the plain language of Chapter 162, Florida Statutes that would negate the right to a prevailing party to recover attorneys fees and costs if such right is provided in another statute or rule." (Answer Br. at 21.) But the City then claims that this Court "has no power to engraft into Chapter 162, Florida Statutes a right to attorneys fees and costs to the prevailing party where the Legislature has not seen fit to include such a right in said statute." (Answer Br. at 21.) But there is no

need for this Court to "engraft" such a right into Chapter 162 at all, because the right is already clearly provided by Fla. Stat. §§ 57.112 and 768.295 as well as Fla. R. App. Pro. 9.400(a).

Fla. Stat. § 57.112(5) states that "[t]he provisions in this section are *supplemental* to all other sanctions or remedies available under law or court rule" (emphasis added).[2] Fla. Stat. § 768.295(3) applies widely to "*any* lawsuit, cause of action, claim, cross-claim, or counterclaim" (emphasis added). And Fla. R. App. Pro. 9.400(a) does not exclude this proceeding; and for a judicial review of an administrative action, the Committee Notes to the 1996 Amendment of Fla. R. App. Pro. 9.190(d)(1) state that "[r]ecoupment of costs is still governed by rule 9.400," which necessarily means that costs can still be recovered under Rule 9.400(a) in appeals of administrative actions. Therefore, each of these provisions apply to this proceeding and are not precluded or in any conflict with the provisions of Chapter 162, Florida Statutes. (Am. Initial Br. at 38-41.)

[2] Prior to the amendments effective October 1, 2023, this was subsection (4) of § 57.112, Fla. Stat., and the exemption in subsection (6), discussed *supra* at 1-3, was previously subsection (5).

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 the foregoing document of the Reply Brief for the Appellant 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 October 12, 2023.

/s/ Phares Heindl
Phares Heindl
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with the applicable font and word count limit requirements set by the Florida Rules of Appellate Procedure, and that it contains 3,272 words according to the word count feature of MS Word, this 12th day of October 2023.

/s/ Phares Heindl
Phares Heindl
Attorney for Appellant