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

INITIAL BRIEF
FOR THE APPELLANT

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STATEMENT OF THE CASE

This case comes by appeal from a ruling of the Twentieth Judicial Circuit in and for Charlotte County, Florida (hereinafter "the lower court") denying costs and attorneys' fees to the prevailing party under Fla. Stat. §§ 57.112 and 768.295 as well as Fla. R. App. Pro. 9.400. (R. at 506-08.) The lower court had decided an appeal from the Code Enforcement Board for the City of Punta Gorda (hereinafter "the Board"), which found the Appellant, Richard Lee Massey, to have violated the City's sign ordinance against "indecent speech." (R. at 6-8.) The Board imposed a fine of $500 against Massey. (R. at 8.) But the lower court agreed with Massey and found that Massey had not violated the terms of the ordinance, and alternatively that the ordinance was facially unconstitutional for violating Massey's right to freedom of speech. (R. at 437-50.)

In accordance with Fla. R. App. Pro. 9.190(d)(1) and 9.400, Massey had filed a Motion and two Addendums requesting costs and attorneys' fees to be awarded pursuant to Fla. Stat. §§ 57.112 and 768.295, as well as Fla. R. App. Pro. 9.400. (R. at 433-36, 451-55, 495-99.) The initial Motion was filed at the time of Massey's Reply Brief, prior to oral argument and the final decision of the lower court. (R. at 128, 433-37.) Additionally, in its Order on Case

Management, the lower court had asked that, prior to oral argument, each party submit a proposed Order, in which Massey asked for rulings that the City's ordinance was expressly preempted by the Florida Constitution and for an award of costs and attorneys' fees. (R. at 125, 513-19.) In its Order Vacating the Judgment of the Board, the lower court ruled in Massey's favor, but failed to make the requested rulings as to an award of costs and fees. (R. at 437-50.) As the prevailing party, Massey then filed two Addendums to his Motion for Attorneys' Fees, for which oral argument was held on February 14, 2023. (R. at 451-55, 495-99, 506.) The following day, however, the lower court issued its Order Denying Motion for Attorney's Fees and Costs, finding that there was no statutory basis for awarding costs or attorneys' fees as requested by Massey. (R. at 506-07.)

Regarding Fla. Stat. § 57.112,[1] despite the lower court having "CIVIL ACTION" written on each of its Orders, including the final

[1] Fla. Stat. § 57.112 provides in relevant part:

> (2) If a civil action is filed against a local government to challenge the adoption or enforcement of a local ordinance on the grounds that it is expressly preempted by the State Constitution or by state law, the court shall assess and award reasonable attorney fees and costs and damages to the prevailing party. . . . (4) The provisions in

Order denying costs and fees (R. at 125, 127, 437, 506), the lower court reasoned that the appeal from the Board hearing was not a "civil action," but failed to explain what kind of action it is instead (R. at 506). And despite having found that the City's "ordinance violates Massey's right to freedom of speech" (R. at 438) and "does not pass constitutional muster" (R. at 449), the lower court reasoned that the City's ordinance was not "expressly preempted" by the Florida Constitution (R. at 506).

Regarding Fla. Stat. § 768.295,[2] despite the lower court finding that the City's indecent speech "ordinance does not apply to Massey's sign as the sign has *nothing* to do with sexual activities"

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this section are supplemental to all other sanctions or remedies available under law or court rule.

[2] Fla. Stat. § 768.295 provides in relevant part:

(3) A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity 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 . . . .
(4) . . . The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.

(i.e., how the ordinance defined "indecent speech") (R. at 437 (emphasis added), see also R. at 444), the lower court reasoned that "the ordinance, the enforcement and the defense of the appeal all had merit" (R. at 506).

Regarding Fla. R. App. Pro. 9.400(a)[3] as an independent basis for an award of costs separate from attorneys' fees, despite Rule 9.400(a) providing that—as a default and without the need for any motion—"[c]osts *shall* be taxed in favor of the prevailing party" (emphasis added) to include "fees for filing" and "any hearing or trial transcripts," and despite Massey's Motions specifically requesting that, in addition to attorneys' fees, "he also recover all additional costs, including filing fees and charges for preparation of the trial transcripts, as directed by Fla. R. App. Pro. 9.400" (R. at 451, 495), the lower court stated that "the Motion cites no specific authority for an award of costs" and the "Rules of Appellate Procedure do not create a substantive right to costs" (R. at 507).

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[3] Fla. R. App. Pro. 9.400(a) provides in relevant part:

> Costs shall be taxed in favor of the prevailing party unless the court orders otherwise. Taxable costs shall include: (1) fees for filing . . .; (2) charges for preparation of the record and any hearing or trial transcript necessary to determine the proceeding.

The lower court further reasoned that despite provisions for costs and attorneys' fees by the above Rule and statutes, "the legislature did not intend to have a fee shifting provision in this case" because "Chapter 162 Florida Statutes has no provision which would authorize an award of attorney's fees in this case." (R at 506-07.) But the lower court did not explain why the legislature would need to make an unnecessarily duplicate provision for costs and fees which are already provided for under Fla. Stat. §§ 57.112 and 768.295 and Fla. R. App. Pro. 9.400, nor did the lower court explain how Chapter 162 not having a specific provision for awarding costs and attorneys' fees somehow negates the provisions under Fla. Stat. §§ 57.112 and 768.295 and Fla. R. App. Pro. 9.400.

Massey thus appeals from this final decision of the lower court's refusal to award costs and attorneys' fees, asserting that the lower court's reasoning and decision are in error and in contradiction with the lower court' s earlier findings and ruling on the substantive issues of the case.

STATEMENT OF THE FACTS

An understanding of the underlying facts is necessary to determine whether Massey is entitled to attorneys' fees and costs under Fla. Stat. §§ 57.112 and 768.295.

On June 2, 2021, the City Council of Punta Gorda adopted a new sign ordinance that banned "[a]ny sign which contains . . . indecent speech which is legible from any public right-of-way or within any public space, and which can potentially be viewed by children under the age of 17." Punta Gorda, Fla., Code of Ordinances, ch. 26, § 11.5(z) (hereinafter "the Ordinance"); R. at 110, 439-40. The Ordinance defined "indecent speech" as "language or graphics that depict or describe sexual or excretory activities or organs in a manner that is offensive as measured by contemporary community standards." Punta Gorda, Fla., Code of Ordinances, ch. 26, § 11.4(a)(32); R. at 109, 439.

Violations of the Ordinance were subject to a fine of $100 on the first offense, and $200 on the second. Punta Gorda, Fla., Code of Ordinances, ch. 9A, § 9A-13(c)(8). But if the violation was found to be "irreparable," the fine may go up to $5,000, subject to the Board's discretion. Punta Gorda, Fla., Code of Ordinances, ch. 9A, § 9A-8(f); R. at 7, 21.

Massey was issued a citation in June 2021, claiming a violation of the Ordinance due to displaying words which a police officer considered to be indecent speech. (R. at 7, 114, 440.) Massey protested in a public area outside Punta Gorda's City Hall by

holding a sign with the words “Fuck Punta Gorda, trying to illegally kill free speech.” (R. at 111, 437, 440). It was agreed that the charge was not based on Massey’s language involving obscenity or fighting words (R. at 440). Massey later testified that the word and phrase he used were not sexual, but expressed his frustration with the City “trying to kill the free speech of us” (R. at 163, 440), and the lower court agreed, noting that Massey’s sign “used Fuck to emphasize the passion and force of his political opinion and his use of the word had nothing to do with sex. In fact he was complaining about Punta Gorda taking away his right to free speech” (R. at 437).

Massey’s charge was set to be heard by the Board on July 28, 2021 (R. at 440) along with four similar charges against Andrew Bryant Sheets,[4] who likewise appealed to the lower court and had similar outcomes from four separate incidents in June 2021 where Sheets protested in a public area by displaying the phrases “Fuck Policing 4 Profit,” “Fuck Trump,” holding a sign with a photograph of the Punta Gorda City Council on which the words “R Cunts” was written, “Fuck the Police,” and “Fuck Biden.” (R. at 206-379).

[4] Sheets has likewise filed a similar appeal to this Court on the same grounds and from an identical ruling in Case No. 6D23-2165.

Matters argued and discussed at the Board hearing were incorporated into both cases. (R. at 214, 233, 279, 346).

Prior to the hearing date, Sheets and Massey submitted a memorandum to the Board arguing for dismissal of the charges on grounds that the Ordinance's prohibition against "indecent speech" is unconstitutional under the First Amendment to the United States Constitution, and Sheets's and Massey's conduct did not fall within the prohibition set forth in the Ordinance. (R. at 28-42.) In response, the City's attorney submitted a motion and supporting memorandum to strike their memorandums and requests for dismissal, arguing that the Board has no authority or jurisdiction to decide the constitutionality of the Ordinance, and that an appeal to the circuit court was the proper method for challenging the constitutionality. (R. at 43-48.)

At the hearing, Sheets and Massey argued that the charges violated "the Constitution of the United States of America and the Florida Constitution." (R. at 161.) The Board, however, agreed with the City's attorney and passed a motion that arguments concerning the constitutionality of the Ordinance were not within its purview and thus it would not consider the motions by Sheets and Massey for dismissal. (R. at 229-33.)

Throughout the hearing, it was debated how to determine whether Sheets's and Massey's words were "offensive as measured by contemporary community standards" to meet the definition of "indecent speech" under the Ordinance. Punta Gorda, Fla., Code of Ordinances, ch. 26, § 11.4(32); R. at 270-71, 337-38. The City's attorney stated that the Board is tasked with determining those standards "[b]ecause [the Board members] know what is offensive and what is not offensive in our community. It may be less offensive elsewhere." (R. at 302.) The chairman of the Board stated that the Board is "the community for Punta Gorda. And so . . . it's what offends us." (R. at 309.)

However, although the chairman of the Board stated that he "hear[s] a lot of phrases using [the word 'fuck']" when playing golf, and indicated that he might even use the term himself when he "ha[s] a bad swing," he thought that Sheets's and Massey's use of the word on a sign was different and offensive as measured by contemporary community standards. (R. at 260, 335.)

Another Board member referred to Sheets and Massey as "bozos" during the hearing, and when the member's animosity was raised as a concern by Massey's counsel, the Board member responded by saying "Send me to the electric chair, counselor" (R.

at 261) and later said that he wanted to "appear at the court case [on appeal] and hear this counselor when he stands up in front of the judge and says, 'You know, that fucking code enforcement board' - -" (R. at 362).

The Board found Massey to be in violation, but the Board's vote was not unanimous. (R. at 440.) Massey then appealed the finding of the Board to the lower court. (R. at 6-8).

To file the appeal and have his constitutional arguments heard, Massey had to pay a $400.00 filing fee to the lower court. (R. at 9.) Although Massey sought to keep costs low by contacting the City's attorney 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, the City insisted on having a transcript of the video recording. (R. at 10-11.) Massey thus had to pay $405.00 for preparation of that transcript (and because certain arguments were consolidated with the hearings on Sheets, the cost of $1,117.50 to prepare a transcript of Sheets's hearings was involved as well).

Massey prevailed on appeal in the lower court, which found that the Ordinance "does not apply to Massey's sign as the sign has

nothing to do with sexual activities," and that the Ordinance "violates Massey's right to freedom of speech" and "does not pass constitutional muster." (R. at 437-38, 449.)

After the City had sought to unnecessarily raise the costs for Massey to pursue the appeal by requiring a transcript, which created an additional financial obstruction threatening to prevent Massey's appeal from proceeding and further punished Massey for his political speech, the City then refused to pay the costs for the filing fee and transcripts as required under Rule 9.400(a) when it lost the appeal and had its Ordinance declared unconstitutional. (R. at 456-64). The lower court denied Massey's request for costs and attorneys' fees (R. at 509-10), failing to hold the City responsible for its unconstitutional suppression of free speech, and leaving the financial impact upon Massey and his attorneys for being vindicated in the appeal and relieved from the City's wrongful threats and penalty of a $500 fine.

SUMMARY OF ARGUMENT

The Florida Legislature has set forth two statutes— Fla. Stat. §§ 57.112 and 768.295—to help ensure that the government does not violate the constitutional rights of its citizens. The statutes do

this by removing the financial burdens of costs and attorneys' fees so as to enable those who have had their rights violated to bring forth cases and defenses to correct these wrongs. Fla. Stat. § 768.295(1) begins by clearly explaining that

> It 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 connections with public issues.

It is entirely unjust and against legislative intent that someone like Massey, who was found to have 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 a Board hearing so as not to pay the $500 fine imposed by the City, and that the City would not have to pay a penny or bear any responsibility at all for those costs or the attorneys' fees caused by the City's unjust and unconstitutional actions.

Such an outcome goes completely against the intent of the Legislature and encourages government entities to freely violate the

constitutional rights of the people since the government, like the City here, will suffer no consequence for its wrongful and unconstitutional actions.

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," expressly preempts local governments, like the City, from passing and enforcing ordinances, like the Ordinance here, which severely penalize and punish what the City officials consider to be "indecent speech." Further, The City's charges against Massey for his public protest criticizing the government was clearly a SLAPP suit.

Therefore, Massey must be awarded costs and attorneys' fees as required by Fla. Stat. §§ 57.112 and 768.295. Additionally, Massey must be awarded costs for the appeal as required by Fla. R. App. Pro. 9.400(a). The lower court's ruling and interpretations of these statutes and this Rule was in error and must be reversed.

ARGUMENT

Whether Massey is entitled to an award of attorneys' fees and costs under these statutes and the Rule presents issues of statutory construction, which are to be reviewed *de novo*. State v. Peraza, 259

So.3d 728, 730 (Fla. 2018). "The starting point for any statutory construction issue is the language of the statute itself—and a determination of whether that language plainly and unambiguously answer the questions presented." Id. Thus, the "first (and often only) step is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used." Id. at 733. And where a question of preemption of an ordinance is involved, that is likewise to be reviewed *de novo*. D'Agastino v. City of Miami, 220 So.3d 410, 421 (Fla. 2017).

I. Under the plain and unambiguous language of Fla. Stat. § 57.112, Massey must be awarded attorneys' fees and costs because the appeal heard in the lower court was a civil action and the City was expressly preempted from adopting and enforcing its Ordinance by Article 1, Section 4 of the Florida Constitution.

Fla. Stat. § 57.112 states in relevant part that

> (2) If a civil action is filed against a local government to challenge the adoption or enforcement of a local ordinance on the grounds that it is expressly preempted by the State Constitution or by state law, the court shall assess and award reasonable attorney fees and costs and damages to the prevailing party. . . . (4) The provisions in this section are supplemental to all other sanctions or remedies available under law or court rule.

First, the case and proceeding on appeal in the lower circuit court was "a civil action." On every Order, the lower court wrote the words "CIVIL ACTION." (R. at 125, 127, 437, 506.) Despite this, and even though "CIVIL ACTION" appeared at the top of the final Order appealed from here, the lower court stated in that very Order that the "underlying Punta Gorda Code Enforcement proceeding and this appeal are not 'civil actions,'" citing Sarasota County v. National City Bank of Cleveland, Ohio, 902 So.2d 233 (Fla. 2nd DCA 2005). (R. at 506.)

In Sarasota County, the Second District Court of Appeal held that a statute of limitation provision in Section 95.11(3)(c) did not apply to a county code enforcement proceeding conducted by a special master pursuant to Part 1 of Chapter 162 for the construction of habitable space within a flood zone. 902 So.2d at 234-35. The code enforcement proceeding was characterized as an "administrative action," which the court indicated was "quasi-judicial" and could not be "equated . . . with a civil action." Id.

However, the holding in Sarasota County does not apply to the situation here. Sarasota County dealt with the applicability of a statute of limitations preventing the code enforcement proceeding, but Massey's claim for attorney's fees under Fla. Stat. § 57.112

involves the applicability of that statute to the appeal itself in the circuit court rather than to the underlying Board hearing. *The appeal* was a civil action, as correctly noted by the lower court itself on each and every one of its Orders in the case. (R. at 125, 127, 437, 506.)

At most, the lower court was possibly half-right when it stated that the "underlying Punta Gorda Code Enforcement proceeding *and this appeal* are not 'civil actions'" (emphasis added to the incorrect portion). The proceedings are not criminal since "[code enforcement] boards . . . cannot impose criminal penalties." Michael D. Jones, P.A. v. Seminole County, 670 So.2d 95, 96 (Fla. 5th DCA 1996). Even if the underlying Board hearing is not considered to be a civil action, nothing in Sarasota County stands for the principle asserted by the lower court that an appeal heard in a circuit court challenging the findings, penalties, and constitutionality of a code enforcement proceeding is somehow a "quasi-judicial" or "administrative" action rather than a civil action.

Massey is not asking for costs and attorneys' fees from the underlying Board hearing—rather, he is asking for costs and attorneys' fees from the appeal challenging the Board hearing, to which Fla. Stat. § 57.112 does apply. The appeal, even if arising

from a quasi-judicial administrative hearing, was still a fully-judicial proceeding of a completely different nature than the underlying Board hearing. Otherwise, the well-recognized rule that "constitutional claims may be raised in an appeal to a circuit court from a final order of the code enforcement board" would be incorrect if the appeal remained of a quasi-judicial and administrative nature. See Ricketts v. Village of Miami Shores, 232 So.3d 1095, 1098 (Fla. 3d DCA 2017) (citing and summarizing Holiday Isle Resort & Marina Associates v. Monroe County, 582 So.2d 721 (Fla. 3d DCA 1991)). The lower court even quoted Holiday Isle for this very proposition in confirming its jurisdiction to hear the appeal from the Board hearing. (R. at 439.)

The lower court was therefore in error to find that the appeal itself was anything other than a civil action, as shown by the lower court's failure to be able to characterize what other type of action the appeal was instead.

Second, Massey "filed" the appeal (a civil action) "against a local government" (the City of Punta Gorda, Florida) "to challenge the adoption or enforcement of a local ordinance" which was used to penalize him for publicly protesting the government with a sign containing what the City considered to be "indecent speech" for

which the City fined him $500. None of this appears to be in dispute.

Third, Massey challenged the enforcement of the City's Ordinance against him in part "on the grounds that it is expressly preempted by the State Constitution." (R. at 161, 433-36, 451-55, 513, 518.) The lower court, however, stated that "there is no express preemption here." (R. at 506.)

But Article 1, Section 4 of the Florida Constitution states that "*[n]o law shall be passed* to restrain or abridge the liberty of speech" (emphasis added). That is clearly an express preemption against any governmental entity in Florida, such as the City, passing any law which restrains or abridges the liberty of speech, as the City's Ordinance did here.

Preemption occurs when a higher authority of law displaces or precludes in advance the law of a lower authority. Just as 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), so too Article 1, Section 4 of the Florida Constitution, expressly withdraws specified powers from state government entities to pass laws which "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." City of Hollywood v. Mulligan, 934 So.2d 1238, 1246-47 (Fla. 2006). Municipal ordinances are thus far more inferior to the Florida Constitution, and the City blatantly violated the Florida Constitution's express preemption by passing its Ordinance against "indecent speech."

While preemption can be expressed in different ways, the Florida Supreme Court has explained generally that "[e]xpress pre-emption requires a specific statement; the pre-emption cannot be made by implication nor by inference." Mulligan, 934 So.2d at 1243. The Second District Court of Appeal has also explained that "[t]o meet the demands of express preemption, the statute is required to contain specific language of preemption directed to the particular subject at issue." Lake Hamilton Lakeshore Owners Ass'n, Inc. v. Neidlinger, 182 So.3d 738, 742 (Fla. 2nd DCA 2015) (internal quotation marks omitted). The Florida Constitution clearly contains such specific language of preemption directed to the subject of the liberty of speech in Article 1, Section 4, expressly

prohibiting any government entity from passing any law like the City's Ordinance.

The lower court vaguely cited two cases to support its finding that "there is no express preemption here" (R. at 506), but neither case supports the lower court's finding or is analogous to the situation here. Instead, both cases assert general principles which support Massey's argument that the City was expressly preempted by the Florida Constitution from passing the Ordinance. In City of Hollywood v. Mulligan, the Florida Supreme Court held that the Florida Contraband Forfeiture Act ("FCFA"), which set forth regulations for the forfeiture of contraband articles used only in the commission of felonies, did not expressly or impliedly preempt a municipality from authorizing and regulating the impoundment of vehicles used in the commission of certain misdemeanors. 934 So.2d at 1245-47. In D'Agostino v. City of Miami, the Florida Supreme Court held that the Police Officers' Bill of Rights ("PBR"), which set forth regulations for internal investigations, did not contain "sufficient explicit language and clarity of intent" to expressly preempt other investigations like that of Miami's Civilian Investigative Panel. 220 So.3d 410, 413, 422 (Fla. 2017).

The lower court provided no explanation for how these two cases support a conclusion that the Florida Constitution did not expressly preempt the City's "indecent speech" Ordinance. Unlike the FCFA and the PBR, Article 1, Section 4 of the Florida Constitution provides sufficient explicit language and clarity of intent when it states that "*[n]o law shall be passed to* restrain or abridge the liberty of speech" (emphasis added). That language is just like the language in the two examples of express preemption given by the Florida Supreme Court in D'Agostino: "no local authority shall enact or enforce any ordinance on . . .," and "[n]o municipality may adopt any ordinance relating to . . ." 220 So.3d at 422. There is thus no question that the City was expressly preempted from passing the Ordinance.

The lower court necessarily found that the City's Ordinance is a law which restrains or abridges the liberty of speech in its Order Vacating the Judgment of the Board when it said that the City's ordinance "violates Massey's right to freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution" and "does not pass constitutional muster" (R. at 438, 449) even though the lower court did not make a specific finding of a violation of Article 1, Section 4 of the Florida Constitution as put forth and

requested by Massey (R. at 433-36, 451-55, 513-19). The lower court made this finding based on an analysis of U.S. Supreme Court opinions interpreting the free speech protections under the First Amendment. (R. at 444-49.)

The Florida Supreme Court has made clear that "[t]he scope of the protection accorded to freedom of expression in Florida under article 1, section 4 is the same as is required under the First Amendment." Dep't of Educ. v. Lewis, 416 So.2d 455, 461 (Fla. 1982). Because of this, Florida courts "must apply the principles of freedom of expression as announced in the decisions of the Supreme Court of the United States." Id. Thus, because the Ordinance violates the First Amendment to the U.S. Constitution as the lower court found, then it also necessarily "restrain[s] or abridge[s] the liberty of speech" as prohibited under Article 1, Section 4 of the Florida Constitution. Because the Ordinance is a law restraining or abridging the liberty of speech, the City was expressly preempted from passing such a law.

Even if the lower court's holding that the City's ordinance "violates Massey's right to freedom of speech" is considered an alternative holding to its other finding that the City's "ordinance does not apply to Massey's sign as the sign has nothing to do with

sexual activities" (R. at 437), "alternative 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). Thus, by giving a thorough analysis "to allow full review without the necessity of remand" (R. at 444), the lower court set forth a formal and binding holding.

Additionally, nothing in Fla. Stat. § 57.112 requires that the finding of a local ordinance to be expressly preempted by the Florida Constitution be explicit or not be an alternative holding. The lower court itself apparently recognized this, because in the final Order denying attorneys' fees, the lower court did not claim as a basis for denial that it made no formal finding or binding holding that the Ordinance did not violate the Florida Constitution.

Fourth, because the above criteria are met, the court "shall" assess and award reasonable attorney fees and costs and damages "to the prevailing party." There is no dispute that Massey is the prevailing party in this case. (R. at 437-50.) The award of attorney fees and costs is not discretionary, but is required by Fla. Stat. § 57.112.

Fifth, as discussed in detail in Section IV below, the absence of a specific "fee or cost shifting provision" in Chapter 162 (R. at 506-07) does not somehow negate the applicability of Fla. Stat. § 57.112 to this case.

In conclusion, under the plain and unambiguous language of Fla. Stat. § 57.112, Massey must be awarded attorneys' fees and costs for the appeal heard by the lower court.

II. Under the plain and unambiguous language of Fla. Stat. § 768.295, Massey must be awarded attorneys' fees and costs because the City's claim that Massey violated the Ordinance was without any merit and was in response to Massey's free speech activity on a public issue.

In addition to Fla. Stat. § 57.112, or even if that statute is found not to apply, Massey is entitled to attorneys' fees and costs under Fla. Stat. § 768.295, which states in relevant part that

> (3) A person or governmental entity in this state may not file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity 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 . . . . (4) . . . The court shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section.

There does not appear to be any dispute that the City is a "governmental entity in this state," see § 768.295(2)(b), Fla. Stat., and had "file[d] or cause[d] to be filed, through its employees or agents," the action "against" Massey for violating the City's Ordinance.

The lower court, however, found that "[t]his code enforcement matter is not one of the listed actions" (R. at 506), i.e., not "*any* lawsuit, cause of action, [or] claim" (emphasis added). And yet again, the lower court failed to identify what kind of action the code enforcement matter was instead or give any explanation for how the code enforcement matter was not a cause of action or claim. The statute's list of broad terms encompasses almost every type of legal action seeking some kind of remedy, injunction, or penalty, including the action which the City filed against Massey here.

"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."[5] 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, 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.

Although this is clear from the plain meaning of the words in the statute, 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." Peraza, 259 So.3d at 732-33. The Legislature made that inquiry quite simple here by clearly stating in Fla. Stat. § 768.295(1) that

> It 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 . . . . 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

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

> exercise such constitutional rights of free speech in connections with public issues.

Thus, the purpose of awarding attorneys' fees and costs is to deter governmental entities, like the City, from engaging in any type of SLAPP suits, like the one brought against Massey, which falls under the broad scope of "any lawsuit, cause of action, claim, cross-claim, or counterclaim." § 768.295(3), Fla. Stat.

Next, the lower court stated that "the ordinance, the enforcement and the defense of the appeal all had merit." (R. at 506.) But this is impossible to reconcile with the lower court's earlier finding in its Order Vacating the Judgment of the Board where 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 *nothing* to do with sexual activities." (R. at 437 (emphasis added).) Because the words on Massey's sign had "nothing to do with sexual activities"—i.e., what the City defined as "indecent speech"—there was not even probable cause for the City to initiate or proceed with the claim against Massey. Therefore, contrary to the lower court's finding, the City's enforcement of the Ordinance and the defense of the appeal were all "without merit."

Although the lower court stated that the City tried to draft the Ordinance in line with the holding and reasoning from FCC v. Pacifica Foundation, 438 U.S. 726 (1978), (R. at 506), that does not mean the enforcement of the Ordinance against Massey had any merit when there was a lack of probable cause since Massey's words had *nothing* to do with sexual activities in violation of the Ordinance. Further, the lower court even noted in its earlier Order Vacating the Judgment of the Board that the City's reliance on Pacifica was flawed because Pacifica is "an outlier opinion" (R. at 438) which was "specifically limited" (R. at 448) to broadcast media while "Massey's speech was purely political and in a public forum, not broadcast" (R. at 438), "Massy's Sign was a political statement critical of local leaders and is protected speech, within the rational[e] of what would be protected *even under Pacifica*" (R. at 449), and the City's "ordinance fails for the same reasons as the Statute in Reno[v. ACLU, 521 U.S. 844 (1997)]" (R. at 447) which the City should have been aware of.

There does not appear to be any dispute that the City brought charges 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. The sole basis for the charge against Massey for violating the City's Ordinance was the language he used. Massey protested the City and its Ordinance by displaying a sign that said "Fuck Punta Gorda, trying to illegally kill free speech." (R. at 440.) Thought it was already obvious, Massey testified that the word and phrase he used were not sexual, but expressed his frustration with the City "trying to kill the free speech of us" (R. at 440), and the lower court agreed, noting that Massey's sign "used Fuck to emphasize the passion and force of his political opinion and his use of the word had nothing to do with sex. In fact he was complaining about Punta Gorda taking away his right to free speech" (R. at 437).

That Massey was targeted and penalized for the City's disapproval of his free speech in connection with a public issue of the Ordinance was made even more clear by Board's double-standards and open hostility toward Massey. The chairman of the Board stated that the Board is "the community for Punta Gorda. And so [what is offensive as measured by contemporary community standards is] what offends us." (R. at 309.) Hypocritically, the chairman of the Board stated that he "hear[s] a lot of phrases using [the word 'fuck']" when playing golf, and

indicated that he might even use the term himself when he "ha[s] a bad swing," which he deemed acceptable and not offending community standards, while he thought that Massey's use of the word on a political sign criticizing the City was offensive as measured by contemporary community standards. (R. at 260, 335.) Additionally, another Board member referred to Sheets and Massey as "bozos" during the hearing and made comments such as "[s]end me to the electric chair, counselor" (R. at 261) and expressed wanting to "appear at the court case [on appeal] and hear this counselor when he stands up in front of the judge and says, 'You know, that fucking code enforcement board' - -" (R. at 362).

Massey's speech was "protected by the First Amendment to the United States Constitution," as the lower court plainly found in its Order Vacating the Judgment of the Board that the City's ordinance "violates Massey's right to freedom of speech under the First and Fourteenth Amendments to the U.S. Constitution." (R. at 438.) Because the statutory criteria are met, the court "shall award the prevailing party reasonable attorney fees and costs incurred in connection with a claim that an action was filed in violation of this section."

There is no dispute that Massey was the "prevailing party." And to have his constitutional claim heard and to prevail, he had to appeal to the lower court from the Board's final Orders (R. at 229-33).[6] Thus, the appeal to the lower court and Massey's Motion for attorneys' fees and costs pursuant to Fla. Stat. § 768.295 (R. at 495-99) were "in connection with [his] claim that an action was filed in violation of [Fla. Stat. § 768.295]."

Further, as discussed in detail in Section IV below, the absence of a specific "fee or cost shifting provision" in Chapter 162 (R. at 506-07) does not somehow negate the applicability of Fla. Stat. § 768.295 to this case.

In conclusion, under the plain and unambiguous language of Fla. Stat. § 768.295, Massey must be awarded reasonable attorney fees and costs incurred in connection with his claim that the City's cause of action or claim against him for violating its Ordinance were brought "primarily because [Massey] exercised the constitutional right of free speech in connection with a public issue . . . as protected by the First Amendment."

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[6] Also, if Massey failed to appeal the Board's finding of violation, then that finding against him could have "barred as a matter of res judicata and waiver" certain constitutional challenges to the Ordinance. See Ricketts, 232 So.3d at 1097 (Fla. 3d DCA 2017).

III. Under the plain and unambiguous language of Fla. R. App. Pro. 9.400(a), Massey should be awarded costs because he was the prevailing party and due process demands it.

In addition to Fla. Stat. §§ 57.112 and 768.295, or even if neither of those statutes apply, Massey should still at least be awarded costs under Fla. R. App. Pro. 9.400(a), which states in relevant part that

> [c]osts shall be taxed in favor of the prevailing party unless the court orders otherwise. Taxable costs shall include: (1) fees for filing . . .; (2) charges for preparation of the record and any hearing or trial transcript necessary to determine the proceeding; . . . .

Massey had asked the lower court for an award of these costs on separate grounds under Rule 9.400(a). (R. at 451.) However, the lower court concluded without citing authority that the "Rules of Appellate Procedure do not create a substantive right to costs." (R. at 507.)

But 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 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 Fla. R. App. Pro. 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, in a judicial review of an administrative action, Fla. R. App. Pro. 9.190(d)(1) states that a "motion for attorneys' fees . . . shall state the grounds on which recovery is sought, citing all pertinent statutes," but the Rule is silent as to requiring any motion or statutory authority for recovering costs, and the Committee Notes to the 1996 Amendment explain that "[r]ecoupment of costs is still governed by rule 9.400."

Thus, the lower court was in error when it claimed that the Rules of Appellate Procedure do not create a substantive right to costs. The lower court gave no other reason than its mistaken lack of authority for denying an award of costs to Massey. As discussed in detail in Section IV below, the absence of a specific "fee or cost

shifting provision" in Chapter 162 (R. at 506-07) does not somehow negate the applicability of Fla. R. App. Pro. 9.400(a) to this case. Additionally, there is no valid reason to deny an award of such costs to Massey.

Procedural due process requires Massey to have an opportunity to be heard on his constitutional claims and defenses. Holiday Isle Resort & Marina Associates, 582 So. 2d at 721-22. 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). Massey clearly did not get that opportunity at the Board hearing where he was referred to as a "bozo," had his case considered under a vague double-standard, and had his constitutional claims completely ignored. Indeed, as the Fifth District Court of Appeal has recognized, "some [code enforcement] boards . . . may well deserve [the] characterization of them as 'kangaroo courts.'" Michael D. Jones, P.A., 670 So.2d at 96.

No one who has been vindicated as having had their constitutional rights to freedom of speech violated through such a hearing should be required to bear the costs for being heard. This is also why attorneys' fees and costs are provided for under 42 U.S.C.

§ 1988 for violations of 42 U.S.C. § 1983. Massey has paid hundreds more in costs just for the procedural due process right to have his case fairly heard by the lower court than what he would have had to pay in the $500.00 fine.

Thus, although the City's Ordinance was found to be unconstitutional, the City has still succeeded in even more severely financially penalizing Massey for exercising his constitutional rights in criticizing the government. This unjust outcome cannot be allowed to stand or it will create a chilling effect causing others to think it is not financially reasonable or possible to stand for their constitutional rights and be heard if it will just cost them more to prevail than to pay the fine or silence themselves to avoid the violation altogether.

Therefore, due process demands that Massey should at least be awarded costs for his filing fees and preparation of the hearing or trial transcripts as provided under Fla. R. App. Pro. 9.400(a).

IV. The absence of a specific fee or cost shifting provision in Chapter 162 does not negate the applicability of Fla. Stat. §§ 57.112 or 768.295 or Fla. R. App. Pro. 9.400 to this case.

The lower court reasoned that the absence of a specific "fee or cost shifting provision" in Chapter 162 somehow precludes or negates the applicability of Fla. Stat. §§ 57.112 and 768.295 as well as Fla. R. App. Pro. 9.400 to this case. (R. at 506-07.) That is a flawed statutory analysis which contradicts prior holdings interpreting Chapter 162 and the lower court's own claim to jurisdiction over the appeal from the Board.

"Where possible, courts must give effect to *all* statutory provisions." Peraza, 259 So.3d at 732 (Fla. 2018). But the lower court's reasoning ignores Fla. Stat. § 57.112(4) which states that "[t]he provisions in this section are *supplemental* to all other sanctions or remedies available under law or court rule" (emphasis added). Thus, Fla. Stat. § 57.112 must apply to all civil actions regardless of what other sanctions or remedies are provided.

Likewise, Fla. Stat. § 768.295 has wide applicability to "*any* lawsuit, cause of action, claim, cross-claim, or counterclaim." § 768.295(3), Fla. Stat. (emphasis added). And Fla. R. App. Pro. 9.400(a) does not provide a limitation to any type of appeal; rather, even in a judicial review of an administrative action, the Committee Notes to the 1996 Amendment of Fla. R. App. Pro. 9.190(d)(1) states 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.

Further, the lower court's reasoning contradicts prior holdings interpreting Chapter 162 and its own claim to jurisdiction over the appeal from the Board. Despite Chapter 162 not containing any specific provision for a circuit court to hear constitutional claims on appeal, which was the circuit court's erroneous basis for dismissing appeals in Holiday Isle, "constitutional claims . . . are properly cognizable on an appeal to the circuit court from a final order of an enforcement board." Holiday Isle Resort & Marina Associates, 582 So.2d at 721-22 (Fla. 3d DCA 1991). The lower court even quoted this from Holiday Isle to confirm its jurisdiction in its Order Vacating the Judgment of the Board. (R. at 439.) Additionally, the Second District Court of Appeal has noted that sometimes "[i]t is necessary to fill the procedural gaps in chapter 162 by the common-sense application of basic principles of due process." Massey, 842 So.2d at 145 (Fla. 2nd DCA 2003).

Therefore, Chapter 162 not explicitly providing for a certain remedy does not mean that such a remedy is unavailable if provided for elsewhere. Just as constitutional claims can be heard on appeal despite Chapter 162 containing no specific provision for

such, so too can attorneys' fees and costs be awarded under other statutes and rules despite Chapter 162 not having a specific fee or cost shifting provision. The lower court was thus in error to claim this as grounds for ignoring and negating the provisions of Fla. Stat. §§ 57.112 and 768.295 and Fla. R. App. Pro. 9.400 and for denying their applicability to this case.

CONCLUSION

This Court should not go against the plain and unambiguous meanings or Legislative intent of Fla. Stat. §§ 57.112 and 768.295. As the prevailing party in the lower court, Massey is entitled to an award of attorneys' fees and costs under either statute. Separately, Massey is entitled to an award of costs under Fla. R. App. Pro. 9.400(a). To deny Massey an award of attorneys' fees and costs would provide a map for government entities, like the City here, to have a loophole from any responsibility in paying for costs and attorneys' fees after blatantly violating its citizens' constitutional rights simply by routing such enforcement actions with severe fines through a local enforcement board to try to avoid due process rights and claim that the proceeding is somehow not a civil action, cause of action, or a claim. The Legislature clearly did not intend for such

an unjust outcome, nor did it leave any room for such an outcome in the plain language of these statutes.

For the reasons set forth above, Massey asks this Court to: (1) reverse the judgment of the lower court in its February 15, 2023 Order Denying Motion for Attorneys' Fees and Costs, (2) find that he is entitled to attorneys' fees and costs under either Fla. Stat. § 57.112 or § 768.295 or both—but if the Court finds that neither statute applies, then to find that Massey is entitled to an award of costs under Fla. R. App. Pro. 9.400(a)—and (3) to award and assess attorneys' fees and costs for the case held in the lower court as well as attorneys' fees and costs for the appeal to this Court, to include the $310.50 filing fee to this Court, the $100.00 filing fee to the lower court, and the $98.00 fee to the lower court for preparing the Record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document of the Initial 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 May 24, 2023.

/s/ Phares Heindl
Phares Heindl
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the applicable font and word count limit requirements set by the Florida Rules of Appellate Procedure, and that it contains 8,472 words according to the word count feature of MS Word, this 24th day of May 2023.

/s/ Phares Heindl
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