No. SC2023-1675

IN THE SUPREME COURT OF FLORIDA

DJB RENTALS, LLC,

Defendant-Petitioner,

v.

CITY OF LARGO,

Plaintiff-Respondent.

On Appeal from the Florida District Court of Appeal,
Second District
Honorable J. Andrew Atkinson, District Judge

DEFENDANT-PETITIONER DJB RENTAL, LLC'S BRIEF ON JURISDICTION

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INTRODUCTION AND STATEMENT OF THE ISSUES

Defendant-Petitioner DJB Rentals, LLC ("DJB"), seeks discretionary review of a final order of the Second District Court of Appeal, which denied DJB due process of law and left in place unconstitutionally excessive fines. The lower court's opinion not only harms DJB, it will also leave countless Florida property owners defenseless against a shocking and unconstitutional imposition by municipalities of daily-growing fines. *See* Ben Weider, *Families lose homes after Florida cities turbocharge code enforcement foreclosures*, Miami Herald (Oct. 11, 2023), https://www.miamiherald.com/news/business/real-estate-news/article273093600.html (recently, 775 similar foreclosure cases filed, many against poor families).

According to the Second DCA in this case, a property owner cannot challenge the constitutionality of fines that accrue *after* the time to appeal a code enforcement decision has run—no matter how large those fines become or even if the government misleads the owner about the process. Here, in 2015, the City of Largo ("City") imposed a code enforcement order finding a list of violations on DJB's property. Fines would accrue at $250 per day. But a City code enforcement officer repeatedly assured DJB that fines would be

forgiven later, when DJB corrected the violations. Based on those repeated assurances, DJB spent tens of thousands of dollars over several years correcting the violations. But rather than forgive the fines, the City sought full payment six years later through foreclosure and sale of the property. DJB tried to raise procedural due process and excessive fines counterclaims for the City's enforcement activities that occurred after the time to appeal the 2015 order elapsed. But in conflict with other appellate decisions in this state, the Second DCA held that property owners cannot challenge the ultimate size of the fine or the related enforcement procedures unless a property owner raises such claims in an appeal within 30 days of the original code enforcement order. In other words, a property owner in the Second DCA must predict the future within the 30-day appellate deadline for challenging code enforcement orders. Failure to foresee excessive fines claims and procedural due process violations before they occur will result in forfeiture of the owner's constitutional rights.

The primary issue is whether a property owner is barred by Chapter 162 from bringing excessive fines and procedural due process claims for fines and procedures that are only known after the

30-day time to appeal has expired. Alternatively, (1) whether the Excessive Fines Clause only protects a property owner against daily accruing fines—not aggregate fines; and (2) whether the Due Process Clause defends an owner against deceptive notices by the government.

If this Court grants review, Petitioner will argue that the lower court abused its discretion by denying DJB's motion to amend the answer to add the due process and excessive fines counterclaims and those claims were meritorious as pleaded.

STATEMENT OF THE CASE AND FACTS

In September of 2013, DJB purchased a small, multi-unit rental property in Largo for $260,000. The property, which was appraised this year by Pinellas County as worth $480,000,[1] was to provide retirement income for retired architect Donald J. Bourgeois ("Donald"), who is the manager of DJB. At the time of the purchase, the property needed maintenance, but there were no known code violations on the property. Given his background in building, Donald

[1] *See* Pinellas County Property Appraiser Database results for 570 Clearwater-Largo Rd. N., Largo, https://www.pcpao.org/?pg=https://www.pcpao.org/general.php?strap=152934000002201900.

expected to undertake much of the maintenance himself. *See* Bourgeois Affidavit (Jan. 10, 2022).

Within a month of purchasing the property, DJB received a permit to replace the roof, and Donald began the work himself. *Id.* Unfortunately, after only six months, the City revoked the permit. *Id.* On July 22, 2015, the City issued a code enforcement notice for a dozen violations on the property, including the required repairs for the roof and lack of heating for the units. Appendix ("App.") 4. The notice ordered DJB to cure the list of violations before September 3, 2015, or face $250 daily fines. *Id.* Neither Donald nor DJB could afford to hire third-party contractors to make all the repairs at the same time. *Id.*

Donald hired a roofing company, *id.*, which received a permit for the roof on September 22, 2015. *See* Pinellas County, *supra*, n.1. Two days later, on September 24, the Municipal Board entered an order of violation imposing $250 per day fines beginning the prior September 4. App.4. The order was recorded and became a lien on October 1, 2015. App.5.

The City allowed those daily fines to balloon for nearly 6 years to more than $550,000, waiting until June 22, 2021, to file a

foreclosure action to take the property. App.3–5. During that time, DJB received numerous permits from the City, costing tens of thousands of dollars, and corrected the violations. App.6–8; Pinellas County, *supra*, n.1. And a code enforcement officer repeatedly told Donald that the fines would be forgiven "as long as work was regularly progressing and eventually brought to code." App.4.

In response to the City's foreclosure action, DJB filed an answer and affirmative defenses. App.3. On October 15, 2021, the City moved for summary judgment and set a hearing on the motion for January 31, 2022. *Id.* Two weeks before the hearing, DJB moved for leave to add counterclaims alleging that the City violated DJB's rights under the Florida Constitution. App.5–6. Relevant here, DJB alleged the $550,000 fine violated Florida's Excessive Fines Clause and that the City violated the Due Process Clause by giving DJB repeated false assurances that the City would forgive the fines once the repairs were complete. *See* Exhibit A to Motion to Add Counterclaims (Defendant's Counterclaims) at ¶¶83, 112.

The trial court denied DJB's request to add counterclaims, holding the claims must "be brought in a separate action." App.12. On appeal, the Second DCA rejected that rationale, but affirmed on

other grounds, holding the as-applied constitutional claims were futile because they should have been brought within 30 days of the 2015 code enforcement order to comply with Florida Statute § 162.11. App.15–16. DJB's failure to appeal that original order by October 24, 2015, "waived any arguments regarding the amount of the fine," or the City's false assurances, even though those constitutional violations occurred and could only be known long *after* the time to appeal had expired. *Id.*

Shortly after the Florida appellate court ruled against DJB, the City foreclosed and auctioned DJB's property in a fire sale, for a fraction of its value—$99,100—robbing DJB of title, income from the property, and savings in the property. *See* Pinellas County, *supra*, n.1. The City has now filed a deficiency judgment against DJB.

ARGUMENT

I. This Court has discretionary jurisdiction to review the DCA order because it directly conflicts with decisions in other DCAs and this Court.

This Court has discretionary jurisdiction to review the DCA Order because it expressly and directly conflicts with decisions of other District Courts of Appeal and this Court on the same question of law. *See* Fla. Const. art. V, § 3(b)(3); Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court has conflict jurisdiction where the lower court's order "announce[s] . . . a conflicting rule of law" or "appl[ies] . . . a rule of law in a manner that results in a conflicting outcome despite substantially the same controlling facts." *Kartsonis v. State*, 319 So. 3d 622, 623 (Fla. 2021) (quotation omitted). The conflicting decision of this Court need not squarely address the issue on which the conflict exists if it "reasonably may be read" to conflict with the lower court's decision. *See Pub. Health Tr. of Dade Cnty. v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991).

A. The DCA's order conflicts with other district court decisions

Unlike the Second DCA in this case, the Third and Fourth DCAs have upheld a property owner's right to challenge subsequent accruing fines and enforcement procedures.

In *Hardin v. Monroe Cnty.*, 64 So. 3d 707, 710 (Fla. 3d DCA 2011), the property owner filed a motion seeking rehearing and stay of the daily fine after the 30-day time to appeal the original code enforcement order had expired. The Special Master for code enforcement denied those motions and instead entered an order imposing a lien on the property. *Id.* The owner appealed the denial of the motion and imposition of the lien. The Third DCA held that the motion for rehearing was untimely. *Id.* But the owner could challenge subsequent, related enforcement activity and seek relief from the subsequently accruing fines. *Id.* at 711. To avoid "a miscarriage of justice," the Third DCA granted relief from most of the fines and remanded for the lower court to consider further relief. *Id.* at 711–12.

The Fourth DCA recognized a similar distinction between challenging the original order and challenging related lien enforcement after that order in *City of Plantation v. Vermut*, 583 So.

2d 393, 394 (Fla. 4th DCA 1991). The owner could not challenge the original code enforcement order after the 30-day appeal period, but the owner could challenge subsequent related enforcement action imposing a lien. *Id.*

Here, DJB is not challenging the facts found by the City in its 2015 code enforcement order. Rather, DJB is challenging the excessive aggregate fine that accrued after the deadline to appeal the 2015 order passed, and the City's failure to forgive some or all of the fine, despite its officer's repeated assurances. *See, e.g.*, *Stevens v. City of Columbus*, No. 21-3755, 2022 WL 2966396, at *12 (6th Cir. July 27, 2022) (review of excessive fines claim "is best done after the imposition of a punishment or fine"). DJB must have an opportunity to challenge the excessiveness of the total fine, which is larger than the County appraiser's estimated value for the entire property and which financially ruins DJB. *See* Fla. Const. art. I, § 17 ("[e]xcessive fines ... are forbidden."); *State v. Jones*, 180 So. 3d 1085, 1089 (Fla. 4th DCA 2015) (Excessive Fines Clause bans fines that "are patently and unreasonably harsh or oppressive as penalties for the wrongs sought to be redressed"); *Timbs v. Indiana*, 139 S. Ct. 682, 687–89 (2019) (ban on excessive fines has been a shield "throughout Anglo-

American history" from government's financial interest in collecting fines). The Court should grant review to decide whether Floridians may challenge the post-order procedures and the total aggregate fine amount once the total is known.

B. The DCA's order also conflicts with this Court's precedent

The DCA's order also conflicts with this Court's decision in *State ex rel. Pittman v. Stanjeski*, which construed a collection statute to provide an opportunity to challenge the aggregate amount owed. 562 So. 2d 673, 679 (Fla. 1990). In *Stanjeski*, this Court considered Florida statute section 61.14, which imposed weekly child support obligations on a parent. The lower courts had construed the statute as requiring payment of whatever accrued under the original support order and forbidding the parent from challenging any amount that had already accrued under that order. *Id.* at 676. Accordingly, the lower courts held the statute violated the Florida Constitution's guarantee of due process, access to courts, and the separation of powers. *Id.* But this Court held that the courts have a "duty … to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity." *Id.* 676–77 (internal quote

omitted). Thus, the Court construed the statute to allow parents to challenge the total amount owed after the debt accrued.

Relying on *Stanjeski*, a different Second DCA panel in *Massey v. Charlotte Cnty.* held that due process *requires* that an owner have an opportunity to challenge accrued code enforcement fines. 842 So. 2d 142, 145–47 (Fla. 2d DCA 2003). In that case, Charlotte County imposed a $10,240 lien on the family's property. *Id.* at 144. The family could not challenge the original order imposing $100 daily fines, but due process required an opportunity to challenge the total "amount of fines imposed and the propriety of the lien" in that amount. *Id.* at 147. The court noted that "procedural gaps in chapter 162" must be supplemented with "the common-sense application of basic principles of due process." *Id.* at 145–46 (cleaned up).

By contrast, here, the Second DCA denies common sense principles by construing Chapter 162 to bar any meaningful opportunity to challenge the aggregate fine as unconstitutionally excessive or the unfair procedures that follow a code enforcement order. Chapter 162 does not require this aggressive interpretation. And under *Stanjeski,* courts have a duty to avoid it. The Second DCA departed from that duty and this Court's precedent.

II. Alternatively, this Court has jurisdiction because the lower court construed the Florida Constitution's Excessive Fines Clause and Due Process Clause

The Second DCA apparently eschewed construing the Constitution. *See* App.16 ("This court expresses no opinion on the rectitude of the City's practices or DJB's claims impugning them because this is not the appeal in which answers to those questions should have been sought."). But the City may wish to avoid the conflict among the courts by arguing the DCA instead rejected the *merits* of the constitutional claims based on its finding that it "lacks procedural jurisdiction" to entertain these claims because they "could have been properly raised on appeal" from the 2015 order since "[a]ll the information about the workings of the City's purportedly unconstitutional fining regime with which DJB takes issue in its counterclaims was available in the order imposing the fine." *Id.*

Obviously, the total amount of the fine was *not* known in 2015. Only the daily amount was known. And DJB persistently argued that it was the "aggregate" fine—exceeding $550,000—that violated the Excessive Fines Clause. *See, e.g.*, Ex. A to Mot. to Amend 11; Motion for Rehearing En Banc 2. Thus, an alternative basis for discretionary

review is that the Second DCA necessarily interpreted the Excessive Fines Clause as only permitting a challenge to the daily fine amount—not the aggregate fine. *Cf. Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 822 (11th Cir. 2009) (suggesting that a daily accruing fine is "literally, directly proportionate to the offense" so long as the *daily* fine amount is constitutional).

If so, this Court has jurisdiction under Rule 9.030(a)(2)(A)(ii), because it necessarily construed a provision of the state constitution. *See Buchman v. State Bd. of Acct.*, 262 So. 2d 198, 200 (Fla. 1972) (DCA did not write an opinion, but affirmance of circuit court inherently interpreted the Constitution).

Similarly, the Second DCA did not explain its rationale for rejecting DJB's claim that the City violated procedural due process by misleading DJB about fine forgiveness. Since DJB pressed this throughout the litigation, the Second DCA may have simply rejected that as a valid claim under Florida's Due Process Clause. This would also grant the Court jurisdiction over this case.

CONCLUSION

This Court has jurisdiction and should grant review to protect countless Floridians from being subjected to unconstitutionally excessive fines and to ensure they are given the due process required by the Constitution.

DATED: December 11, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant-Petitioner's Brief on Jurisdiction has been furnished to all counsel of record by filing the document with service through the Florida Courts E-Filing Portal, Fla. R. Jud. Admin. 2.516(b)(1), this 11th day of December, 2023, and via email upon the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable form and font requirements under Florida Rule of Appellate Procedure 9.045. I further certify that this brief contains 2,499 words, and therefore complies with the word limit for computer-generated briefs stated in Florida Rule of Appellate Procedure 9.210(a)(2)(A).

DATED: December 11, 2023.

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