DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

DCA CASE NO.: 3D23-1247
L.T. CASE NO.: 2021-016685-CA-01

KRISTIAN J. HALL,

Appellant

v.

DYAN MYARA, JEAN JACQUES MYARA, JUSTIN MYARA, JORDAN MYARA, JAKE MYARA, REYNALDO TARAFA, MARQUIS ASSOCIATION MANAGEMENT, LLC, and ST. TROPEZ ON THE BAY I CONDOMINIUM ASSOCIATION, INC.

Appellees

APPELLEES' JOINT ANSWER BRIEF

On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

Other Authorities

INTRODUCTION

This appeal arises from an Order granting Final Summary Judgment in favor of Appellees, DYAN MYARA, JEAN JACQUES MYARA, JUSTIN MYARA, JORDAN MYARA, JAKE MYARA, REYNALDO TARAFA, MARQUIS ASSOCIATION MANAGEMENT, LLC, and ST. TROPEZ ON THE BAY I CONDOMINIUM ASSOCIATION, INC.

The trial court properly entered final summary judgment in favor of the Appellees because Appellant/Plaintiff, Kristian J. Hall ("Hall"), is bound to his previous guilty plea to the very charges which form the basis of his causes of action for slander below. Hall may not now alter his previous positions with respect to the criminal court proceedings and may not deviate from his pleadings or claimed relief so to avoid summary judgment. Moreover, the undisputed record evidence establishes that Hall's incarceration was attributable to the drug charges, for which he also entered a guilty plea; and, therefore, there is no causation attributable to Hall's causes of action and his incarceration. For these reasons, the order entering final summary judgment in favor of the Appellees should be affirmed in all respects.

Citations to the Initial Brief will be designated "IB. [page number(s)]." Citations to the Record on Appeal will be designated "R. [page number(s)]."

STATEMENT OF THE CASE AND FACTS

I. Background

This appeal arises from an incident related to communications with the Sunny Isles Beach Policy Department in July of 2019. R. 21–25, 26–32. By way of background, Hall was charged with robbery, battery, assault, and possession of illegal drugs, resulting in his arrest on July 6, 2019 when the Sunny Isles Beach Policy Department responded to a domestic disturbance. R. 78–79, 93–94.

Hall entered a knowingly, intelligent, and voluntary guilty plea to the robbery, battery, assault, and possession of illegal drugs charges. R. 94, 179 (citing case files ## F19-13290 and F19-012689), 117–139, 192. Hall allocuted an admission of guilt to the charges of assault and battery before the Miami-Dade Circuit Court sitting in its criminal capacity. *See* R. 179 (citing case files ## F19-13290 and F19-012689); *see also* R. 146–147 (Agreed Order on Defendants' Request to Take Judicial Notice of the aforementioned criminal case files), 250. Hall was incarcerated and thereafter sentenced to

probation for the possession of cocaine and controlled substance charges. R. 79–147.

Hall moved for post-conviction relief to vacate his conviction for assault and battery; however, the circuit court denied the motion. R. 79 n. 1., 94. The State thereafter agreed to vacate the plea and dismiss the robbery, assault, and battery charges. R. 79 n. 1., 94.

II. Plaintiff's Allegations of Slander

In the underlying lawsuit, Hall alleges causes of action for slander *per se* and civil conspiracy to commit false imprisonment against Dyan Myara ("Dyan Myara"), Jean Jacque Myara, Justin Myara, Jordan Myara, Jake Myara ("the Myaras"), as well as Reynaldo Tarafa, Marquis Association Management, LLC, and St. Tropez on the Bay I Condominium Association, Inc. (collectively, "Appellees"). R. 21–25, 26–32.

Specifically, Hall alleges that he was falsely accused of an assault and battery upon Dyan Myara and that his arrest and incarceration were caused by purported false statements made by the Appellees to the police department and to employees and residents at the St. Tropez Condominium regarding the domestic dispute. R. 26–32, 78–79. Hall further alleges that the Appellees "devised a

scheme" wherein Dyan Myara "would falsely accuse [Hall] of battery/domestic violence" and that the other Appellees "would repeat the known lie/false allegations to the authorities with the intent of having [Hall] arrested and incarcerated." R. 27–32.

Appellees each pled the affirmative defense of truth, among others, as a bar to Hall's claims, asserting that Hall committed the act or actions alleged to be the subject matter of the slander. R. 37, 44, 61, 66, 79, 143.

III. Appellees' Motion to Strike and Motion for Summary Judgment

The Myaras filed a Verified Motion to Strike Amended Complaint and For Sanctions, arguing that Hall's claims are a sham filing before the trial court as Hall made a public record admission to the crimes for which he was charged, and which are the basis for the alleged slander. R. 78–139. The Motion to Strike also notes that Hall was not incarcerated for the assault and battery charges but for the drug possession charges, such that Hall cannot prove causation between the alleged slanderous statements of the Appellees and his incarceration, which is the basis for Hall's claim for damages in his Complaint. R. 81.

Attached to the Motion to Strike are verified declarations from the Myaras asserting the truth of the facts stated therein, as well as documents pertaining to Hall's Miami-Dade criminal circuit court cases. R. 83–139.[1]

Thereafter, the Myaras filed a Motion for Summary Judgment on Plaintiff's claims for slander and civil conspiracy against all Appellees. R. 176–182; *see also* R. 192–198. This Motion for Summary Judgment expressly incorporates the then-pending Motion to Strike the Complaint therein. R. 179, 180 n.1; *see also* R. 192–193 ¶ 2.

The Motion for Summary Judgment argues that Hall has taken an inconsistent position in separate judicial proceedings in which the actions claimed by Hall in the underlying civil suit resulted in a wrongful incarceration, when, in fact, Hall previously allocuted an admission of guilt in the criminal case proceedings to the charges which Hall now claims he was slandered with, *and* Hall's

[1] Upon the Myaras' Request to take Judicial Notice of Hall's Miami-Dade criminal circuit court cases, an Agreed Order was entered, and the trial court took judicial notice of case files #F19-13290 and #F19-012689. R. 146–147, 250.

incarceration resulted from the drug charges which are independent of the battery charge. R. 180.

The Motion for Summary Judgment argues that Hall is unable to present a dispute of material fact such that he should be prevented from taking totally inconsistent positions in separate judicial proceedings; and, as a matter of law, the principles of the equitable doctrine of judicial estoppel apply to dismiss Hall's claims with prejudice. R. 180.

Hall filed a declaration and response in opposition to the Motion for Summary Judgment, arguing that he was wrongfully arrested and incarcerated for all charges based on alleged false accusations made by Dyan Myara and the other Appellees. R. 183–186, 187–191. The response in opposition argues that judicial estoppel does not apply because, according to Hall: 1) Hall did not take a position in the criminal case that was successfully maintained, "except for the fact that the charges relating to attacking Dyan Myara were dropped"; 2) Hall's position taken in the underlying civil case is not inconsistent with his position in the criminal case; 3) there is no mutuality of identity of the parties in the civil and criminal cases; 4) there are no special circumstances here which justify applying an exception to the

mutuality of parties requirement; and, 5) there is no evidence that Appellees were misled in any way that caused them to change their position to their detriment. R. 187–191.

Thereafter, the trial court heard argument on the Motion for Summary Judgment; the transcript of this hearing is not part of the record. *See* R. 192. At the request of the trial court at the hearing, the parties provided supplemental memorandums of law on the issue of whether Hall's admission of guilt and resulting sentence to time served as to the drug charges is dispositive of Hall's ability to now claim in the civil proceedings that the time served by Hall was instead the result of the alleged slanderous statements made by Appellees. R. 192–198, 199–202.

The trial court entered an order granting Defendants' Motion for Final Summary Judgment, finding the following undisputed facts: Hall was arrested and charged with possession of illegal drugs; Hall pled guilty to the drug charges; and the criminal court ruled that Hall's time served was attributable to the drug charges. R. 249–250. The Order also finds that Plaintiff's Amended Complaint "seeks damages for time spent incarcerated and collateral damages

associated with that incarceration based upon the alleged slander and not as a result of the drug charges." R. 250.

Furthermore, the trial court found that Hall "admitted to the very charges which [Hall] now claims was the basis for the slander claims against the [Appellees]"; that following Hall's allocution, he was sentenced to time served for the drug charges upon which he was arrested; and that arrest forms the basis of Hall's claims for slander and civil conspiracy to commit false imprisonment. R. 250–251.

As a matter of law, the trial court found a lack of causation attributable to Hall's causes of action and his incarceration as a result of an arrest and plea for drug possession. R. 251. As there is no record evidence which creates a genuine dispute of material fact that Hall's incarceration was directly related to anything other than the drug charges, and not for an alleged wrongful arrest or slander, the trial court granted Appellees' Motion for Final Summary Judgment. R. 251.

Hall moved for rehearing, arguing that the trial court erred in its conclusions of law; that Hall can change his position with respect to matters in the criminal case for purposes of the civil proceedings;

and that judicial estoppel does not apply to bar Hall's claims in the underlying lawsuit. R. 225–229. Hall's rehearing motion further seeks to relitigate the criminal action and argues his incarceration was caused by the alleged false statements made by the Appellees to the police. R. 227–228.

In opposition to Hall's motion for rehearing, the Appellees argued that Hall impermissibly reargues points made in his opposition response to the Motion for Summary Judgment and raises argument for the first time on rehearing. R. 230–233. The trial court denied Hall's Motion for Rehearing. R. 253–254.

SUMMARY OF THE ARGUMENT

This Court should affirm the Summary Judgment Order since Hall has not presented any basis for reversal. In the lower court, the Appellees moved for summary judgment and sustained their initial burden of establishing that, based upon the record evidence, Hall could not prove causation attributable to Hall's causes of action alleged for slander and civil conspiracy to commit false imprisonment and his incarceration. Moreover, the Appellees also established it is an undisputed material fact that Hall allocuted a guilty plea to the very charges which Hall claims were the basis for the causes of action

below; and, Hall may not now alter his previous positions with respect to the criminal court proceedings. Hall then failed to sustain his burden to combat the Appellees' summary judgment motion as his arguments are unsupported by evidence and fail to establish a genuine issue of material fact so to survive summary judgment.

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED FINAL SUMMARY JUDGMENT IN FAVOR OF APPELLEES.

A. Standard of Review.

A trial court's granting of summary judgment is subject to *de novo* review. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). Following the amended standard of Florida Rule of Civil Procedure 1.510, entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As such, in evaluating the trial court's summary judgment order, this Court must determine whether the record evidence shows there is no genuine dispute of

material fact while viewing the facts in light most favorable to the non-moving party. Fla. R. Civ. P. 1.510 (c).

B. Summary Judgment Principles

Summary judgment is proper when there are no genuine issues of material fact conclusively shown from the record and the movant is entitled to judgment as a matter of law. *See* Fla. R. Civ. P. 1.510 (c). An issue of fact is "material" if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *Byrd v. BT Foods, Inc.*, 948 So. 2d 921, 923 (Fla. 4th DCA 2007).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex*, 477 U.S. at 323-24. In such a situation, there can be "no genuine issue as to any material fact," as a failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial. *Id.* at 322-23. The moving party is, therefore, "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the

burden of proof. *Id.* at 323; *see also Landers v. Milton*, 370 So. 2d 368 (Fla. 1979), *Naples Cay Development Corp. v. Ferris*, 555 So. 2d 1272 (Fla. 2d DCA 1989) (holding defendant is entitled to summary judgment where there is no evidence on an issue on which the plaintiff has the burden of proof). Such was the case here.

In order to defeat a motion for summary judgment that is supported by record evidence revealing no genuine factual issue, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue of material fact. *Arce v. Wackenhut Corp.*, 40 So. 3d 813, 814 (Fla. 3d DCA 2010). If the opposing party fails to do so, summary judgment is proper. *Landers*, 370 So. 2d at 368; *Harvey Building v. Haley*, 175 So. 2d 780, 782-83 (Fla. 1965); *Naples Cay*, 555 So. 2d at 1272 (without any evidence on an issue on which the plaintiff has the burden of proof, defendant is entitled to summary judgment).

It is insufficient for the opposing party to merely assert the existence of a potential issue; rather, a party must come forward with counter-evidence and that counter-evidence must raise a "genuine dispute." *Skala v. Lyons Heritage Corp.*, 127 So. 3d 814, 816 (Fla. 2d DCA 2013) (quoting *Lomack v. Mowrey*, 14 So. 3d 1090, 1091 (Fla.

1st DCA 2009)) ("A trial court's grant of a motion for summary judgment is appropriate where there 'is no genuine dispute as to any issue of material fact and the moving party is entitled to judgment as a matter of law.'"). A "genuine" dispute is one that has a real basis in the record. *See Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996) (concluding that a "genuine dispute" requires factual issues to have a real basis in the record). Thus, a party opposing summary judgment must do more than raise paper issues and merely assert that a fact issue does exist. *See Williams v. Garden City Claims, Inc., of N.Y.*, 796 So. 2d 586, 587 (Fla. 3d DCA 2001) ("It is not enough for the opposing party merely to assert that an issue does exist."); *Byrd v. Leach*, 226 So. 2d 866, 868 (Fla. 4th DCA 1969) ("The term 'genuine issue' means a real, as opposed to a false or colorable, issue.").

C. Appellees sustained their initial burden of showing that, based upon the record evidence, Hall could not prove causation attributable to his incarceration and the causes of action for slander and conspiracy to commit false imprisonment below.

At the time he filed the underlying lawsuit, Hall knew that he allocuted an admission of guilt to the charges of assault and battery, as well as the drug possession charges, before the criminal circuit

court. *See* R. 81, 94, 117–139, 146–147, 179, 192; *but see* I.B. 4 (conceding to guilty plea but contending "he did so only for his best interests"). Hall may not alter his position taken, like a previous admission, in order to defeat summary judgment in the underlying proceeding. *Jain v. Buchanan Ingersoll & Rooney, PC*, 322 So. 3d 1201 (Fla. 3d DCA 2021) ("A party who opposes summary judgment will not be permitted to alter the position of his or her previous…admissions…in order to defeat summary judgment."); *MacNeil v. Singer*, 389 So. 2d 232 (Fla. 5th DCA 1980) ("A guilty plea is a kind of "admission against interest."). As the trial court's order granting final summary judgment found, Hall is bound to his admission and plea of guilty accepted by the criminal court and may not deviate from his pleadings or claimed relief so to avoid summary judgment. R. 192–198, 250–251.

Despite Hall's claim on appeal, the State's dropping of the assault and battery charges in no way changes the prior admissions of record and the circuit court's denial of Hall's motion for post-conviction relief. R. 79 n. 1. Hall made statements directly against his interest in admitting his incarceration was a result of drug possession. R. 83–139. *See Hatfield v. York*, 354 So. 2d 426 (Fla. 4th

DCA 1978) ("The guilty plea is admissible as a declaration against interest and may be considered by the finder of fact…."); *Metropolitan Dade County v. Wilkey*, 414 So. 2d 269, 271 (Fla. 3d DCA 1982) (holding defendant's criminal plea of guilty is a statement against interest in subsequent civil matter).

It is an undisputed material fact that the incarceration upon which Hall's claims below are based are as a result of an arrest and charges for drug possession—not the assault and battery charges. According to the Amended Complaint's prayers for relief, Hall's damages claims are based upon his alleged wrongful incarceration, *see e.g.,* R. 30 ¶ 27, 31 ¶ 32; however, the record evidence demonstrates that the criminal court ruled Hall's incarceration was attributable to the drug charges, to which he pled guilty. R. 180, 194; *cf.* I.B. 11 (Hall blaming his incarceration on his own voluntary, knowing, and intelligent guilty plea to drug charges but on "all the damage caused by Dyan Myara and those assisting her in the plot to have [Hall] incarcerated").

This Court should affirm the trial court's ruling because the record is devoid of any facts or evidence which support a finding that Hall's incarceration was attributable to the assault and battery

charges; and, Hall is bound to his previous admissions of guilt to the aforementioned charges.

D. Hall failed to present evidence sufficient to establish a genuine issue of material fact existed as to the fact that Hall's incarceration resulted from drug charges independent of the battery charge which forms the basis of the slander allegations in the Amended Complaint.

Once the Appellees sustained their initial burden of establishing the absence of any evidence that his incarceration was directly related to any alleged wrongful arrest or slander, it then became incumbent on Hall to provide sufficient counter-evidence revealing a genuine issue of material fact existed as to defeat the causal link between the drug possession charges and his incarceration.

Furthermore, Hall did not supply the Court with the transcript of the Motion for Summary Judgment hearing and this Court should affirm the order entering final summary judgment in favor of Appellees in all respects, as the record fails to demonstrate an existence of a genuine dispute of material fact that would establish a reversible error. "In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) (citing *Se. Bank, N.A.*

v. David A. Steves, P.A., 552 So. 2d 292, 293 (Fla. 2d DCA 1989)); *Umana v. Citizens Property Ins. Co.*, 282 So. 3d 933 (Fla. 3d DCA 2019) (explaining that, while the absence of a transcript is not necessarily fatal to review of a trial court's summary judgment decision, "it is the nature of the alleged error which dictates the adequacy of the record on appeal"). Here, the available record reveals undisputed evidence supporting the decision to grant summary judgment.

II. JUDICIAL ESTOPPEL APPLIES AS A MATTER OF LAW TO PREVENT HALL FROM TAKING AN INCONSISTENT POSITION IN SEPARATE JUDICIAL PROCEEDINGS.

"Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial proceedings." *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1066 (Fla. 2001) (quoting *Smith v. Avatar Properties, Inc.*, 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998)). The doctrine functions to prevent parties from "making a mockery of justice by inconsistent pleadings[.]" and protects the integrity of the judicial process. *Id.* (quoting *American Nat'l Bank v. Federal Deposit Ins. Corp.*, 710 F. 2d 1528, 1536 (11th Cir. 1983)).

No single formulation of the doctrine has gained widespread acceptance as each court tends to apply a different construction of the rule. Mark J. Plummer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L.Rev. 409, 410–411. The Florida courts have adopted the following general rule of judicial estoppel:

> A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the 'special fairness and policy considerations' exception to the mutuality of parties requirement.

Grau v. Provident Life and Acc. Ins. Co., 899 So. 2d 396, 400 (Fla. 4th DCA 2005); *see also Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 913–914 (Fla. 4th DCA 2013).

"A situation justifying the application of judicial estoppel 'is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'" *Grau*, 899 So. 2d at 401 (quoting *Scarano v. Cen. R. Co. of N.J.*, 203 F. 2d 510, 513 (3d Cir. 1953)).

Judicial estoppel should apply here to "bar the introduction of a party's factual assertions to a court when these assertions are

inconsistent with some other version of the facts that inured to the party's benefit in some other judicial proceeding." *Grau*, 899 So. 2d at 400 (citing Mark J. Plummer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L.Rev. 409 (1987)).

The Initial Brief claims that there is no mutuality of identity of the parties in the underlying civil and criminal matters such that judicial estoppel does not apply; and, Hall argues, there are no special circumstances which would justify an exception to the rule requiring the mutuality of parties. I.B. 13.

However, the modification of the mutuality of parties requirement has "long been recognized by the United States Supreme Court." *Zeidwig v. Ward*, 548 So. 2d 209, 212 (Fla. 1989) (applying defensive collateral estoppel to prevent a criminal defendant as a plaintiff from relitigating the same issue which has been litigated in prior criminal proceedings) (citing *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)); *see also Blumberg*, 790 So. 2d at 1067 (acknowledging exceptions to the mutuality of parties requirement in collateral estoppel and res judicata doctrines and holding that such an exception also reasonably extends to the

doctrine of judicial estoppel) (citing *West v. Kaasaki Motors Mfg. Corp.*, 595 So. 2d 92, 94 (Fla. 3d DCA 1992) and *Zeidwig*, 548 So. 2d at 209)).

In *Zeidwig*, the Florida Supreme Court relied upon section 85(2)(a) of the Restatement (Second) of Judgments, providing in pertinent part:

> With respect to issues determined in a criminal prosecution:
>
> (2) A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action:
>
> (a) Against the defendant in the criminal prosecution as stated in § 29.

548 So. 2d at 213; *see also id.* (quoting Comment "e" of the Restatement (Second) of Judgment) ("…the person who was convicted of an offense brings an action against the third party to assert a claim that rests on factual premises inconsistent with those established in the criminal prosecution.").

Here, Hall has taken totally inconsistent positions in separate judicial proceedings in which the actions claimed by Hall in the underlying civil suit resulted in a wrongful incarceration, when, in fact, Hall previously allocuted an admission of guilt in the criminal case to the charges which Hall was incarcerated for and now claims

he was incarcerated as a result of a slander. R. 180. *See supra* pp. 17–19 (discussion of Hall's inconsistent positions taken in judicial proceedings). As such, special fairness and public policy considerations compel the application of judicial estoppel here in this criminal-to-civil context, despite there being no mutuality of parties.[2]

The Initial Brief also claims that Hall has not taken any inconsistent positions in different judicial proceedings and that the Appellees were not misled and did not detrimentally rely on anything Hall said in the civil case that was inconsistent with his position taken in the criminal case. I.B. 13–15. However, special fairness and public policy considerations endure to compel the application of judicial estoppel here, where clearly inconsistent positions *were* taken by Hall in different judicial proceedings, despite there being no detrimental reliance claim by Appellees. *See* R. 78–139.

In *Blumberg*, plaintiff sued an insurance company, claiming that coverage existed on the theory of promissory estoppel arising

[2] The concept of mutuality of parties is antithetical to parties in a civil action and a criminal action, absent both parties in the civil action also being defendants in the criminal action. This explains the "special fairness" exception to the mutuality of parties element of judicial estoppel. *See Blumberg*, 790 So. 2d at 1067; *see also Zeidwig*, 548 So. 2d at 209.

from representations made by the insurer's agent. 790 So. 2d 1061 (Fla. 2001). Before judgment was entered in favor of plaintiff on the promissory estoppel claim, plaintiff dismissed his claim with prejudice against the insurer. *Id.* Plaintiff then filed suit against the insurer's agent, claiming the agent negligently failed to procure insurance coverage and that no coverage existed for plaintiff's loss. *Id.* at 1063.

As pointed out by the Fourth District Court of Appeal in *Grau*, the agent in *Blumberg* who successfully asserted judicial estoppel was not a party to the earlier suit; and, the opinion does not indicate that the agent was misled, changed his position, or "acted in reliance" on the plaintiff's conduct in the earlier lawsuit against the insurance company. 899 So. 2d at 399–400 (discussing *Blumberg*, 790 So. 2d at 1066–67).

Grau also cites to another case decided after *Blumberg*—*Keyes v. Bankers Real Estate Partners, Inc.*, 881 So. 2d 605 (Fla. 3d DCA 2004)—which applied the doctrine of judicial estoppel where the party invoking the doctrine was not a party to the earlier proceeding and the party did not claim being misled or changing positions. 899 So. 2d at 400 n. 2. Nevertheless, the district court held judicial

estoppel was applicable based on special fairness considerations as a party was proceeding with a conflicting position in a subsequent action to the prejudice of the adverse party. *Keyes*, 881 So. 2d at 606. The same considerations are applicable here as Hall should be judicially estopped here from taking inconsistent positions and altering his previous positions with respect to the criminal court proceedings.

CONCLUSION

The Appellees respectfully request that this Court affirm the trial court's February 14, 2023 Order Granting Final Summary Judgment in favor of the Appellees in all respects.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 16th day of February, 2024, a true and correct copy of the foregoing was filed with the Third District Clerk of Court *via* the Florida Court's e-Filing Portal, which will send an automatic service email to the following parties registered with the e-Filing Portal system: **Alan D. Sackrin, Esquire,** SACKRIN & TOLCHINSKY, P.A., 2100 East Hallandale Beach Boulevard, Suite 200, Hallandale Beach, Florida 33009, (alan@hallandalelaw.com; pleadings@hallandalelaw.com), *Counsel for Appellant.*

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CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.045(b), the undersigned counsel hereby certifies that this brief was submitted in Bookman Old Style 14-point font. This brief also complies with the word count limit requirements, excluding the parts exempted by Fla. R. App. P. 9.045(e).

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