

**STATE OF FLORIDA  
DISTRICT COURT OF APPEAL  
FIRST DISTRICT**

**STEVEN SHANE CLOUD &  
WILLIAM JEFFREY DAVIS**

**Appellants,**

**CASE No.: 1D23-0242  
L.T. CASE No. 2020-CA-000936**

**vs.**

**FLORIDA DEPARTMENT OF CORRECTIONS,  
RICHARD JOSEPH, individually, ARVEL  
COPELAND, individually, & JOSEPH  
VARNUM, individually**

**Appellee.**

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**On Appeal From the Second Judicial Circuit  
In and For Leon County, Florida**

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**APPELLEE'S ANSWER BRIEF**

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**Table of Contents**

Table of Citations.....IV

PRELIMINARY STATEMENT.....1

STATEMENT OF THE CASE .....1

STATEMENT OF THE FACTS.....2

SUMMARY OF THE ARGUMENT.....4

ARGUMENT.....7

    I.    The trial court correctly granted FDC’s motion to dismiss because the Complaint established that Appellants were arrested pursuant to legal authority.....7

        A. Appellants cannot maintain a false arrest claim because they were arrested pursuant to a valid arrest warrant.....8

        B. A voidable arrest warrant still constitutes lawful authority and precludes any false arrest claim.....12

        C. Even if a *Franks* analysis could void a warrant, Appellants have not sufficiently alleged a *Franks* claim because their allegations of false statements are conclusory and the omissions complained of are immaterial.....16

            i. Appellants’ allegations of false statements are conclusory and insufficient to raise a *Franks* claim.....16

            ii. Any omissions in the probable cause affidavits were immaterial and thus do not justify a *Franks* analysis.....18

D. The trial court properly dismissed the false arrest claim because sovereign immunity bars claims based on <i>Franks v. Delaware</i> 's intentional or reckless false statement analysis.....	22
II. The trial court correctly granted FDC's motion to dismiss Appellants' claim for negligent supervision.....	25
A. Appellants failed to establish the requisite connection and foreseeability for a negligent supervision claim.....	26
B. Appellants cannot maintain a claim relating to the criminal investigation because FDC does not owe a duty to Appellants and FDC is entitled to sovereign immunity.....	28
CONCLUSION.....	32
CERTIFICATE OF SERVICE.....	33
CERTIFICATE OF COMPLIANCE.....	34

## TABLE OF CITATIONS

### **CASES**

<i>Andrews v. Fla. Parole Comm'n</i> , 768 So. 2d 1257 (Fla. 1st DCA 2000).....	15
<i>Curbelo v. Ullman</i> , 571 So. 2d 443 (Fla. 1990).....	9
<i>Dahly v. Dep't of Children and Family Servs.</i> , 876 So. 2d (Fla. 2d DCA 2004).....	32
<i>Department of Environmental Protection v. Hardy</i> , 907 So. 2d 655 (Fla. 5th DCA 2005).....	26, 32
<i>Dickinson v. Gonzalez</i> , 839 So. 2d 709 (Fla. 3d DCA 2003).....	6, 26, 27
<i>Dodson v. Solomon</i> , 183 So. 2d 825 (1938).....	5, 7
<i>Erp v. Carroll</i> , 438 So. 2d 31 (Fla. 5th DCA 1983).....	15
<i>Fla. Dep't of Environmental Protection v. Green</i> , 918 So. 2d 920 (Fla. 4th DCA 2007).....	23
<i>Florez v. Broward Sheriff's Off.</i> , 270 So. 3d 417(Fla. 4th DCA 2019).....	15
<i>Ford v. Rowland</i> , 562 So. 2d 731 (Fla. 5th DCA 1990).....	23
<i>Franks v. Delaware</i> , 438 U.S. 154 (1978).....	<i>passim</i>
<i>Harder v. Edwards</i> , 174 So. 3d 524 (Fla. 4th DCA 2015).....	5, 7, 21
<i>Harris v. Kearney</i> , 786 So. 2d 1222 (Fla. 4th DCA 2001).....	31
<i>Island City Flying Serv. v. Gen. Elec. Credit Corp.</i> , 585 So. 2d 274 (Fla. 1991).....	6, 26, 27
<i>Jackson v. Navarro</i> , 665 So. 2d 340(Fla. 4th DCA 1995).....	5, 7, 15

<i>Jibory v. City of Jacksonville</i> , 920 So. 2d 666 (Fla. 1st DCA 2005).....	11, 14
<i>Johnson v. State</i> , 660 So. 2d 648 (Fla. 1995).....	18
<i>Johnson v. Weiner</i> , 19 So. 2d 699 (Fla. 1944).....	7, 10, 14, 24
<i>KB Home Fort Myers LLC v. Taishan Gypsum Co., Ltd.</i> , 336 So. 3d 841 (Fla. 2d DCA 2022).....	9
<i>Kelly v. Curtis</i> , 21 F.3d 1544 (11th Cir. 1994).....	24
<i>King v. State of Florida</i> , 650 F. Supp. 2d 1157 (N.D. Fla. 2009).....	32
<i>Landmark Funding, Inc. on Behalf of Naples Syndications, LLC v. Chaluts</i> , 213 So. 3d 1078 (Fla. 2d DCA 2017).....	19
<i>Lee v. Geiger</i> , 419 So. 2d 717 (Fla. 1st DCA 1982).....	21
<i>Malicki v. Doe</i> , 814 So. 2d 347 (Fla. 2002).....	26
<i>Malu v. Sec. Nat'l Ins. Co.</i> , 898 So. 2d 69 (Fla. 2005).....	22
<i>McCray v. State</i> , 496 So. 2d 919 (Fla. 2d DCA 1986).....	14
<i>Montejo v. Martin Memorial Medical Center, Inc.</i> , 935 So. 2d 1266 (Fla. 4th DCA 2006).....	10, 14
<i>One Call Property Services Inc. v. Security First Ins. Co.</i> , 165 So. 3d 749 (Fla. 4th DCA 2015).....	19
<i>Parker v. State of Fla. Bd. of Regents ex rel. Fla. State Univ.</i> , 724 So. 2d 163 (Fla. 1st DCA 1998).....	23
<i>Patin v. Davis</i> , 289 So. 3d 998 (Fla. 1st DCA 2020).....	17
<i>Peterson v. Pollack</i> , 290 So. 3d 102 (Fla. 4th DCA 2020).....	23
<i>Pollock v. Fla. Dep't of Highway Patrol</i> , 882 So. 2d 928 (Fla. 2004).....	30

<i>Pritchett v. City of Homestead</i> , 855 So. 2d 1164 (Fla. 3d DCA 2003).....	29, 30
<i>Robertson v. State</i> , 829 So. 2d 901 (Fla. 2002).....	22
<i>Santiago v. Mauna Loa Invs., LLC</i> , 189 So. 3d 752 (Fla. 2016).....	17, 19
<i>Spinnenweber v. Williams</i> , 825 Fed. App'x. 730 (11th Cir. 2020).....	7, 15
<i>State By &amp; Through Office of State Attorney v. Kowalski</i> , 617 So. 2d 1099 (Fla. 5th DCA 1993).....	32
<i>State Farm Mut. Auto. Ins. Co. v. Statsick</i> , 231 So. 3d 528 (Fla. 2d DCA 2017).....	9
<i>State v. Petroni</i> , 123 So. 3d 62 (Fla. 1st DCA 2013).....	17, 18
<i>Sterling Factors Corp. v. U.S. Bank Nat. Ass'n</i> , 968 So. 2d 658 (Fla. 2d DCA 2007).....	10
<i>Storm v Town of Ponce Inlet</i> 866 So. 2d 713 (Fla. 5th DCA 2004) .....	28, 29
<i>Slonin v City of West Palm Beach</i> , 896 So. 2d 882 (Fla. 4th DCA 2005).....	28, 29
<i>Summerlin v. L3 Commun'ns Integrated Sys., LP</i> , 348 So. 3d 673 (Fla. 1st DCA 2022).....	19
<i>Terry v. State</i> , 668 So. 2d 954 (Fla. 1996).....	14
<i>Toney v. C. Courtney</i> , 191 So.3d. 505 (Fla. 1 <sup>st</sup> CA 2016).....	2
<i>Trianon Park Condominium Assoc. v. City of Hialeah</i> , 468 So. 2d 912 (Fla. 1985).....	31
<i>U.S. v. Cantu</i> , 625 F. Supp. 656 (N.D. Fla 1985).....	17

<i>Wallace v. Dean</i> , 3 So. 3d 1035 (Fla. 2009).....	31
<i>Walsingham v. Dockery</i> , 671 So. 2d 166 (Fla. 1st DCA 1996).....	21
<i>Willingham v. City of Orlando</i> , 929 So. 2d 43 (Fla. 5th DCA 2006).....	8, 15, 30

**STATUTES AND RULES OF COURT**

<i>Fla. Stat.</i> § 768.28.....	6, 22, 23, 24
<i>Fla. Stat.</i> § 768.28(9)(a)-(d).....	22

**OTHER CITATIONS**

Florida Rule of Civil Procedure 1.130(a) .....	19
--	----

**SECONDARY SOURCES**

<i>Black’s Law Dictionary</i> (11th ed. 2019).....	8
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## **PRELIMINARY STATEMENT**

Appellants/Plaintiffs, Steven Cloud and William Davis, will be referred to as “Cloud and Davis” or “Appellants.” Appellee/Defendant, Florida Department of Corrections will be referred to as “FDC.”

The record on appeal will be cited as “R” followed by the record page number(s).

## **STATEMENT OF THE CASE**

Appellants/Plaintiffs, Steven Cloud and William Davis, brought numerous causes of action, in several versions of their complaint, against Appellee/Defendants, Florida Department of Corrections (FDC), and Joseph Varnum, Arvel Copeland, and Richard Johnson, in their individual capacities. (R. 9-25, 50-68, 100-125, 175-202, 295-315) At issue on appeal are the claims against FDC for false arrest and negligent supervision. Both claims were dismissed with prejudice.

The Third Amended Complaint alleged false arrest against FDC (Count 1). (R. 179) The trial court granted FDC’s motion to dismiss the false arrest counts on the basis that, because the complaint established that the arrests at issue were made pursuant to a valid arrest warrant, Appellants could not maintain a false arrest claim against FDC. (R. 292-293)

The Fourth Amended Complaint alleged one count (Count V) against FDC for negligent supervision. (R. 311) The trial court granted FDC's motion to dismiss, on the basis that Appellants had failed to plead sufficient connection or foreseeability between the individual defendants' employment history and the current tort at issue. Because Appellants could not establish sufficient similarity between the past and alleged conduct, they could not establish supervisory liability against FDC. (R. 323-327, 336-339) Because all claims against FDC had been dismissed, the trial court entered final judgment of dismissal with prejudice in favor of FDC. (R. 339)

### **STATEMENT OF FACTS**

As set forth in the operative versions of the complaint,<sup>1</sup> the facts are as follows:

#### **False Arrest Allegations (Third Amended Complaint – Count 1)**

Appellants/Plaintiffs Cloud and Davis were correctional officers employed by FDC. (R. 179-180) In April of 2017, Cloud and Davis were involved in a use of force incident in which chemical agents were used on inmate Daniels. (R.183) Another officer, Copeland, was in the vicinity and also responded to the incident. (R. 184) Cloud submitted reports justifying

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<sup>1</sup> On review of a trial court's order dismissing a complaint, the complaint's well-pleaded factual allegations are accepted as true. *Toney v. C. Courtney*, 191 So.3d. 505, 507 (Fla. 1<sup>st</sup> CA 2016).

the use of force. (R. 184) Two days after the incident, Copeland submitted an incident report, which Appellants claim contained knowingly false allegations that Daniels had not been disruptive, and that Daniels had been locked in the closet and sprayed by Davis. (R. 184) Appellants alleged that Copeland made the “false allegations” as a favor to Johnson, who had a personal vendetta against Cloud. (R. 185) IG Investigator Varnum was assigned to investigate the allegations in Copeland’s report. Appellants further allege that Johnson, *who was warden at a completely different institution at the time of the incident*, instructed Varnum to “expedite the case to get rid of” Cloud. (R. 185) Varnum allegedly included false statements in his investigative report and probable cause affidavit; omitted that Copeland broke the seal on his chemical agent canister during the incident with Daniels (R. 185, 188); and omitted that Daniels had purportedly been promised to “get off the compound” for giving testimony against Appellants. (R. 188-89) As a result of Varnum’s allegedly false investigative report and arrest affidavit, Appellants were arrested and charged with battery and falsifying state documents. (R. 188-189) Following a jury trial, Appellants were found not guilty. (R. 189)

**Negligent Supervision Allegations  
(Fourth Amended Complaint – Count V)**

Appellants allege that before the use of force incident at issue, Defendant Johnson, as Warden of Jackson CI, demoted Cloud. Cloud appealed through PERC and was reinstated to his previous position. (R. 297-298) Cloud believes this demotion was the result of a personal issue between Johnson and Cloud that had spilled over into the workplace. (R. 197) FDC determined that Cloud should be moved to another facility and transferred Cloud to Liberty CI. Cloud's attorney opposed this transfer claiming that Johnson had previously been a warden at Liberty CI and "had significant connections and power at Liberty CI." (R. 298) Cloud "later learned" that Johnson had previously placed Copeland in an administrative position at Liberty CI and assisted Varnum in getting his inspector position. (R. 299) According to the complaint, Johnson – *who was not employed at Liberty CI at the time of the use of force incident* – used his connections at Liberty CI to intentionally orchestrate a false investigation against Cloud for personal reasons, with Davis as "collateral damage." (R. 301)

**SUMMARY OF THE ARGUMENT**

The trial court did not err in granting FDC's motions to dismiss Appellants' false arrest and negligent supervision claims because appellants'

arrest was pursuant to legal authority and there has been no factual basis for establishing supervisory liability.

Appellants were arrested pursuant to a warrant, and an arrest pursuant to valid process cannot be false, even if the warrant is irregular or voidable. *E.g., Harder v. Edwards*, 174 So. 3d 524, 529-30-3 (Fla. 4th DCA 2015); *Dodson v. Solomon*, 183 So. 825, 826 (Fla. 1938); *Jackson v. Navarro*, 665 So. 2d 340, 341-42 (Fla. 4th DCA 1995).

Appellants' argument that false statements in the warrant render it voidable does not change the outcome. Only void process can serve as a basis for a false arrest claim. Appellants have not alleged any facts establishing that the warrant affecting their arrest was void.

Though not specifically stated, Appellants clearly rely on the framework established in *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), for their assertion that a warrant is void if the affidavit supporting the warrant contains deliberate falsity or reckless disregard for the truth. (Initial Brief, p. 21-24) However, *Franks* provides a process by which a warrant – which is presumptively valid - may be found *voidable*. 438 U.S. at 155–56. Under *Franks*, intentionally or recklessly false statements or omissions in an affidavit may render a warrant *voidable*, if the court finds that without the false statements or omissions, the warrant does not support probable cause.

However, the *Franks* analysis does not render an arrest warrant **void**. Because voidable warrants are still legal authority, Appellants' false arrest claim against FDC, fails as a matter of law.

Moreover, even if this Court finds that *Franks* rendered the warrant at issue void, Appellants' claim would still be barred by the doctrine of sovereign immunity. Specifically, *Franks* requires an affiant to make intentional or reckless misstatements, for which misconduct a state agency like FDC is immune under section *Fla. Stat. § 768.28*.

Furthermore, Appellants' negligent supervision claim fails because they have failed to plead facts establishing any connection or foreseeability between the individual defendants' employment history and the tort at issue. See *Dickinson v Gonzalez*, 839 So. 2d 709, 713-14 (Fla. 3d DCA 2003); *Island City Flying Serv. V. Gen. Elec. Credit Corp.*, 585 So. 2d 274, 277 (Fla. 1991).

Finally, to the extent Appellants seek to hold FDC liable for its alleged negligence in conducting or failing to adequately supervise the criminal investigation leading to Appellants' arrest, such cause of action is barred by the doctrine of sovereign immunity.

For these reasons, the trial court's order should be affirmed.

## ARGUMENT

- I. **The trial court correctly granted FDC's motion to dismiss because the Complaint established that Appellants were arrested pursuant to legal authority.**

False arrest is “the unlawful restraint of a person against his will, the gist of which action is the unlawful detention of the plaintiff and the deprivation of his liberty.” *Johnson v. Weiner*, 19 So. 2d 699, 700 (Fla. 1944). The purpose of false arrest as a tort is to protect a person’s freedom of movement by curtailing “‘detention without color of legal authority,’ which ‘occurs when there is an improper restraint [that] is *not the result of a judicial proceeding.*’” *Harder v. Edwards*, 174 So. 3d 524, 529-30-3 (Fla. 4th DCA 2015)(quoting *Card v. Miami-Dade Cnty. Fla.*, 147 F. Supp. 2d 1334, 1347 (S.D. Fla. 2001)) (emphasis added).

An arrest pursuant to legal authority cannot be false. *Dodson v. Solomon*, 183 So. 825, 826 (Fla. 1938). If the imprisonment is under legal authority “it may be malicious, but it cannot be false. This is true where legal authority is shown by valid process, even if irregular or voidable.” *Id.*; *Jackson v. Navarro*, 665 So. 2d 340, 341-42 (Fla. 4th DCA 1995). *See also*, *Spinnenweber v. Williams*, 825 Fed. App'x. 730, 733 (11th Cir. 2020) (affirming the district court’s dismissal of the complaint for failure to state a cause of action because “[t]he fact that a state judge issued a warrant in this

case thus extinguishes the [plaintiffs'] false arrest claim."); *Willingham v. City of Orlando*, 929 So. 2d 43, 48 (Fla. 5th DCA 2006).

Here, the trial court's order dismissing Appellants' false arrest claims against FDC should be affirmed because the complaint alleges that they were arrested pursuant to legal authority. (R. 188) Therefore, Appellants cannot maintain an action for false arrest under Florida law.

**A. Appellants cannot maintain a false arrest claim because they were arrested pursuant to a valid arrest warrant.**

Contrary to Appellants' arguments, questions regarding probable cause are irrelevant to the false arrest analysis when the arrest is made pursuant to legal authority. Since Appellants were arrested pursuant to legal authority (R. 188-189, 293), they cannot state a claim for false arrest.

Legal authority can be shown by valid process, such as an arrest warrant, even if the process was irregular or voidable. *Jackson*, 665 So. 2d at 341-42. The proper remedy when process is irregular or voidable is a claim for malicious prosecution, rather than false arrest. *Id.* In contrast, void process does not constitute legal authority. *Id.*

The distinction between "void" and "voidable" is clear when the legal definition of each term is considered. *Black's Law Dictionary* (11th ed. 2019) defines "void" and "voidable" as follows:

**void** *adj.* 1. Of no legal effect; to null. The distinction between *void* and *voidable* is often of great practical importance. Whenever technical accuracy is required, *void* can be properly applied only to those provisions that are of no effect whatsoever — those that are an absolute nullity.

**voidable** *adj.* Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that may be ratified.

In the context of trial court judgments, the distinction between void and voidable has been similarly described. In *KB Home Fort Myers LLC v. Taishan Gypsum Co., Ltd.*, the central question was whether an adoption order “was void or merely voidable.” 336 So. 3d 841, 848 (Fla. 2d DCA 2022). The *KB Home* court held that the order was merely voidable, not void, and quoted *Curbelo v. Ullman*, 571 So. 2d 443, 445 (Fla. 1990) to frame its analysis of the central question:

It is well settled that where a court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities or wrongdoing in proceedings, short of illegal deprivation of opportunity to be heard, will not render the judgment void.

*KB Home*, 336 So. 3d at 848; see also, *State Farm Mut. Auto. Ins. Co. v. Statsick*, 231 So. 3d 528, 531–32 (Fla. 2d DCA 2017) (“A judgment is void when it is entered by a court lacking jurisdiction over the subject matter of the case or jurisdiction over the person or where there is a violation of due process.”).

The difference between a judgment that is “void” and one that is “voidable” was also clearly explained by the Court in *Sterling Factors Corp. v. U.S. Bank Nat. Ass’n*, 968 So. 2d 658, 665 (Fla. 2d DCA 2007):

A void judgment is so defective that it is deemed never to have had legal force and effect. In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated.

Arrest warrants are considered void only in a narrow set of circumstances. An example is when the wrong person is arrested pursuant to the arrest warrant. See *Johnson*, 19 So. 2d at 700. In *Johnson*, the sheriff had an arrest warrant for one “Jack Johnson.” *Id.* The defendant advised the sheriff that the man named in the arrest warrant was in the defendant’s store. *Id.* The sheriff and one of his deputies arrived at the store, where the defendant identified the plaintiff as the man they were looking for. *Id.* at 699-700. However, the plaintiff was not the Jack Johnson identified in the warrant. *Id.* at 700. Since the arrest warrant did not identify the plaintiff, and there was no other lawful authority to arrest the plaintiff, the plaintiff could state a claim for false imprisonment. *Id.* at 700-01.

Another example of process being void is where a court lacks subject matter jurisdiction. *Montejo v. Martin Memorial Medical Center, Inc.*, 935 So. 2d 1266, 1269 (Fla. 4th DCA 2006). In *Montejo*, the court held that the

plaintiff could state a cause of action for false imprisonment because the trial court issuing the order that defendant relied on to take its action lacked subject matter jurisdiction to order the deportation of the plaintiff. *Id.* at 1271.

Finally, a warrant previously executed is considered void or invalid because it becomes void once it is executed. *Jibory v. City of Jacksonville*, 920 So. 2d 666, 667 (Fla. 1st DCA 2005) (*citing State v. White*, 660 So. 2d 664, 666 (Fla. 1995)).

In this case, Appellants have not alleged any facts demonstrating that the warrant effecting their arrest was void. They have not alleged that the issuing trial court lacked personal or subject matter jurisdiction; that they were not the persons identified in the arrest warrant; or that the arrest warrant had been previously executed.

Accordingly, the trial court correctly granted FDC's motion to dismiss Appellants' false arrest claim because their restraint was the result of a judicial proceeding which resulted in the issuance of a valid arrest warrant. Appellants' allegations that Inspector Varnum acted wrongfully to obtain the arrest warrant would merely render the judicial process *voidable*, rather than void; and while allegations of a voidable arrest warrant could serve as the basis for a malicious prosecution claim, they do not support a claim for false arrest.

**B. A voidable arrest warrant still constitutes lawful authority and precludes any false arrest claim.**

Appellants rely on the constitutional framework set forth in *Franks v. Delaware*<sup>2</sup> for their assertion that a warrant is facially invalid if “procured based on an officer’s false sworn testimony.” (Initial Brief p. 21-24) However, false statements in a probable cause affidavit may render a warrant *voidable*, not void.

*Franks* is a criminal case involving the suppression of evidence. In *Franks*, the Supreme Court held as follows:

[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be *voided* and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

*Franks v. Delaware*, 438 U.S. 154, 155–56 (1978) (emphasis added). The *Franks* Court held that there is a presumption of validity with respect to the

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<sup>2</sup> Appellants do not specifically declare their reliance on *Franks v. Delaware*, 438 U.S. 154 (1978), but this is the seminal case giving rise to the constitutional framework on which Appellant relies, and *Franks* is cited on pages 23 and 24 of the Initial Brief.

affidavit supporting the warrant. *Id.* at 171. In applying *Franks*, a criminal defendant must challenge the probable cause affidavit with sufficient specificity to overcome the presumption of the affidavit's validity—conclusory allegations are insufficient, and any allegations should be supported by an offer of proof. *Id.* If these requirements are met, the allegedly false material will be jettisoned from the affidavit to determine whether probable cause still exists. *Id.* at 171-72. If the affidavit still supports probable cause notwithstanding the jettisoned statements, the analysis ends, and the warrant remains valid. *Id.* at 172.

But even if the affidavit no longer supports a finding of probable cause, the warrant is not automatically voided. *Id.* Instead, the defendant is merely entitled to an evidentiary hearing where the warrant *may* be voided, and where any evidence seized because of the warrant *may* be excluded from the criminal proceedings. *Id.* At such hearing, the defendant is required to show—by a preponderance of the evidence—that the affiant committed perjury or acted with reckless disregard for the truth in obtaining the warrant, *Id.* at 156. Additionally, if the defendant makes this showing at a hearing but probable cause still exists when the false statements are excised from the affidavit, the warrant remains valid. *Id.* at 172; *Terry v. State*, 668 So. 2d 954, 959 (Fla. 1996). If the criminal defendant proves both that the affiant acted

with intent or reckless disregard and that the affidavit no longer supports probable cause when the false statements are removed, the warrant is voided. *Franks*, 438 U.S. at 156. This procedure demonstrates that an arrest warrant is *potentially* voidable with the required showing under *Franks*, but it is not void.

Clearly, a voidable warrant differs from a void warrant. As explained above, a void warrant is one where there was a legal error, and thus it was never valid, lawful, legally binding, or legitimate at the time it was executed, and will never be enforceable at any future time. See *Johnson*, 19 So. 2d at 700; *Montejo*, 935 So. 2d at 1269; and *Jibory*, 920 So. 2d at 667. On the other hand, a voidable warrant may be legally enforceable, but there is a possibility that it could be nullified or invalidated. Thus, under *Franks*, intentionally or recklessly false statements or omissions may render a warrant *voidable* if it is no longer supported by probable case, but they do not render it *void*.

Moreover, law enforcement agencies are required to make an arrest when directed by a warrant. See, *McCray v. State*, 496 So. 2d 919, 919 (Fla. 2d DCA 1986) (“The officers who learned of the outstanding *capias* had no discretion to do anything but arrest [plaintiff]”). Agencies are also entitled to rely on voidable yet facially valid warrants when making arrests; agencies

are entitled to accept a warrant as lawful, even if it contains mistakes as to the facts or the law, so long as it is regular on its face and issued by a legal body having authority to issue warrants. *Andrews v. Fla. Parole Comm'n*, 768 So. 2d 1257, 1263 (Fla. 1st DCA 2000). This is true even if the warrant was erroneously issued by another entity but still appears facially valid to the arresting agency. *Florez v. Broward Sheriff's Off.*, 270 So. 3d 417, 422 (Fla. 4th DCA 2019).

Pursuant to *Franks*, it is clear that false statements in a probable cause affidavit could render a warrant *voidable*, but false statements in a probable cause affidavit do not render the warrant *void*. Appellants attempt to circumvent long-established, well-settled, and binding law foreclosing their claim by conflating a “void” warrant with a “voidable” warrant. There is no authority supporting this proposition. Therefore, because Appellants’ allegations of false statements in the affidavit of arrest do not render the warrant *void*, Appellants cannot maintain a false arrest action against FDC. See, *Jackson*, 665 So. 2d at 341-42; *Willingham*, 929 So. 2d at 49; *Erp v. Carroll* 438 So. 2d 31, 40 (Fla. 5<sup>th</sup> DCA 1983); see also, *Spinnenweber*, 825 Fed. App'x. at 733.

**C. Even if a *Franks* analysis could void a warrant, Appellants have not sufficiently alleged a *Franks* claim because their allegations of false statements are conclusory, and the omissions complained of are immaterial.**

**i. Appellants' allegations of false statements are conclusory and insufficient to raise a *Franks* claim.**

With respect to the allegedly “false statements” contained in the probable cause affidavit used to procure Appellants’ arrest, the Third Amended Complaint contains nothing but conclusory and self-serving allegations. The complaint alleges that: (A) “DOC was complicit . . . in procuring the charges against Plaintiffs in that DOC *failed to ensure* that their own administrative processes were not being abused and that the investigation was conducted under proper protocols and without interference from other parties with ulterior motives . . .”; (B) that Appellants were arrested “based on information provided by DOC . . . [and] the report prepared by Varnum which contained inaccurate information . . .”; (C) that Varnum, Johnson, and Copeland “prepared the false and misleading investigative report that resulted in Plaintiffs' arrests”; and (D) “[t]he power and authority of DOC, through its employees Copeland, Johnson and Varnum, procured the arrests of Plaintiffs based on false and misleading information.” (R. 188)

All of these allegations are conclusory, and thus plainly insufficient to even trigger a formal *Franks* analysis. Appellants’ Third Amended Complaint

did not identify any specific statements from the probable cause affidavit which were false and should be stricken. Instead, Appellants generally assert that Varnum used “inaccurate information;” that the investigative report was “false and misleading;” and that DOC procured Appellants’ arrest based on “false and misleading information.” (R. 188) These conclusory allegations are insufficient to trigger a *Franks* analysis. *State v. Petroni*, 123 So. 3d 62, 64 (Fla. 1st DCA 2013); *U.S. v. Cantu*, 625 F. Supp. 656, 663 fm. 14 (N.D. Fla 1985).

Appellants attempt to remedy the conclusory nature of the Third Amended Complaint by including new allegations in their initial brief. (Initial Brief p. 24) However, courts of appeal will not consider allegations that were never presented to the trial court, *see Patin v. Davis*, 289 So. 3d 998, 999 (Fla. 1st DCA 2020), and motions to dismiss are analyzed based on the four corners of the complaint and those documents specifically referenced therein. *Santiago v. Mauna Loa Invs., LLC*, 189 So. 3d 752, 755-756 (Fla. 2016). Appellants may not proffer new allegations on appeal.

Because the conclusory allegations in the complaint failed to even trigger a *Franks* analysis, the trial court properly held that Appellants were arrested pursuant to lawful authority.

**ii. Any omissions in the probable cause affidavits were immaterial and thus do not justify a *Franks* analysis.**

Appellants' Third Amended Complaint alleged that two pieces of information were omitted from Varnum's probable cause affidavits: (1) that the seal on Officer Copeland's chemical spray had been broken along with "the meaning of that fact;" and (2) that inmate Daniels was promised he would "get off the compound" for giving testimony against Appellants. (R. 188-89) Even assuming, *arguendo*, that this information was accurate and was omitted from the affidavits, omissions do not trigger a *Franks* analysis per se. *Johnson v. State*, 660 So. 2d 648, 656 (Fla. 1995); *State v. Petroni*, 123 So. 3d 62, 64 (Fla. 1st DCA 2013). In fact, omissions "may be wholly reasonable" if the police, in good faith, believed them to be "marginal, extraneous, or cumulative." *Petroni*, 123 So. 3d at 64.

For a formal *Franks* analysis to even be triggered in the context of omissions, a party must make a preliminary showing that (1) the omitted material would have eliminated probable cause if it had been included; and (2) there was intentional or reckless conduct amounting to deception. *Johnson*, 660 So. 2d at 656; *Petroni*, 123 So. 3d at 64. Appellants cannot make this showing because the allegedly omitted statements would not defeat probable cause.

Appellants attempt to explain that the broken seal on Officer Copeland's chemical agent proves that Copeland saw or was involved in an incident with a disruptive inmate. (R. 185) Additionally, Appellants posit that a judge would not have signed the arrest warrants if he/she knew that inmate Daniels was promised to "get off the compound" for giving testimony against Appellants. (R. 188-89).

Both claims miss the point. The charges brought against Appellants, and the reasoning behind such charges as explained in Inspector Varnum's probable cause affidavit, were based partially on Cloud and Davis forcing inmate Daniels into a supply closet "to wear the chemical agent for an undetermined amount of time while un-handcuffed." (R. 270, 273)<sup>3</sup> Additionally, the probable cause affidavits alleged that Davis failed to report

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<sup>3</sup> On a motion to dismiss, the court is limited to the four corners of the complaint and any exhibits or incorporated attachments. *Mauna Loa Invs., LLC*, 189 So. 3d 752, 755-756. Moreover, Rule 1.130(a) of the Florida Rules of Civil Procedure requires documents on which the action may be brought to be attached to the complaint. *Summerlin v. L3 Comm'n's Integrated Sys., LP*, 348 So. 3d 673, 676 (Fla. 1st DCA 2022). In addition, documents that are *impliedly* incorporated by reference in the complaint may be considered by the trial court in ruling on a motion to dismiss. *One Call Property Services Inc. v. Security First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015). Therefore, if the plaintiff's action derives from the referenced document and the document is essential to the plaintiff's claim, it may be impliedly incorporated into the complaint. *Id.*, see also, *Summerlin*, 348 So. 3d at 677; *Landmark Funding, Inc. on Behalf of Naples Syndications, LLC v. Chaluts*, 213 So. 3d 1078, 1080 (Fla. 2d DCA 2017).

the chemical agent use of force; that Cloud allowed Davis to conceal the use of chemical agents; and that the two submitted a use of force report falsely stating that inmate Daniels approached Davis in a threatening manner, all of which violated FDC policy and Florida law. (R. 270, 273) And whether or not any promises were made to Daniels for testimony, both Copeland and a nurse provided sworn accounts of what happened on the day in question, implicating both Davis and Cloud in the crimes with which they were later charged. (R. 273-274, 277-278)

The existence of probable cause is unaffected by the allegedly omitted information. Forcing an inmate into a supply closet while covered in chemical agent for the purpose of hurting him—instead of immediately taking him to decontamination—would violate the law regardless of whether Copeland opened the seal on his canister. Moreover, failing to report the use of force, concealing use of chemical agents, and falsifying official documents would be unlawful regardless of whether inmate Daniels was incentivized to testify against Appellants.

As explained above, even when a law enforcement officer knowingly provides false statements in an affidavit for arrest, courts will uphold the

affidavit if the remaining facts support probable cause after the false statements are stricken. *Harder*, 174 So. 3d at 532–33.

To establish probable cause, it is not necessary to show facts that “would absolutely prove beyond a reasonable doubt the guilt of the person charged. Probable cause is much less than that.” *Lee v. Geiger*, 419 So. 2d 717, 719 (Fla. 1st DCA 1982). Rather, “[p]robable cause exists when the circumstances are sufficient to cause a reasonably cautious person to believe that the person accused is guilty of the offense charged.” *Id.* Additionally, “[a]n officer seeking an arrest warrant does not have an affirmative obligation to seek out exculpatory information of which the officer is not aware.” *Walsingham v. Dockery*, 671 So. 2d 166, 172 (Fla. 1st DCA 1996).

Here, the probable cause affidavit clearly establishes probable cause, even when the omitted allegations are included. (R. 144-145) Because the probable cause affidavit still supports probable cause even when omitted facts are considered, the warrant is valid, and Appellants’ claim fails.

**D. The trial court properly dismissed the false arrest claim because sovereign immunity bars claims based on *Franks v. Delaware's* intentional or reckless false statement analysis.**

Although the trial court dismissed the Third Amended Complaint against FDC because Appellants' arrest was pursuant to legal authority,"<sup>4</sup> even if this Court finds that *Franks v. Delaware* applies to this situation, Appellants' claim would still be barred by the doctrine of sovereign immunity. Specifically, *Franks* requires intentional or reckless misconduct for which a state agency like FDC would be immune under section *Fla. Stat.* § 768.28.

Appellants argue that an arrest warrant does not constitute legal authority if it is secured by a probable cause affidavit in which the affiant intentionally included false information. (Initial Brief p. 21-24) But for *Franks* to apply, Appellants must plead and prove that Inspector Varnum and the individual defendants acted with intentional or reckless misconduct in falsifying the affidavits at issue.

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<sup>4</sup> The tipsy coachman doctrine allows an appellate court to affirm a decision despite a finding of error in the lower court's reasoning as long as there is an alternative basis to justify affirming the decision. *Malu v. Sec. Nat'l Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005); *Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (the tipsy coachman doctrine, a longstanding principle of appellate law, allows an appellate court to affirm a trial court that reaches the right result but for the wrong reasons so long as there is a basis which would support the judgment in the record).

However, section 768.28(9) of the Florida Statutes immunizes state agencies like FDC from liability for the acts of employees “committed in bad faith or with a malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property.” The statute does not define the terms “bad faith” or “malicious purpose,” see *Fla. Stat.* § 768.28(9)(a)-(d); however, “bad faith” has been “equated with the actual malice standard,” *Parker v. State of Fla. Bd. of Regents ex rel. Fla. State Univ.*, 724 So. 2d 163, 167 (Fla. 1st DCA 1998), which encompasses both actual knowledge of falsity and a reckless disregard for the truth. *Ford v. Rowland*, 562 So. 2d 731, 734 (Fla. 5th DCA 1990). “Malicious purpose” has been interpreted as conduct “committed with ‘ill will, hatred, spite, [or] an evil intent.’” *Peterson v. Pollack*, 290 So. 3d 102, 109 (Fla. 4th DCA 2020).

Accordingly, section 768.28(9) bars plaintiffs from bringing malicious prosecution claims against state agencies because malice is a necessary element of malicious prosecution. See *Fla. Dep’t of Environmental Protection v. Green*, 918 So. 2d 920 (Fla. 4th DCA 2007). Section 768.28(9) also bars plaintiffs from bringing fraudulent misrepresentation claims against state agencies because bad faith is inherent in all fraudulent misrepresentation claims. *Parker*, 724 So. 2d at 169 (stating that “bad faith must be deemed to

be a necessary element of any action for fraud, whether the fraud action is based on intentional misconduct or on reckless disregard for the truth.”)

While malice and bad faith are not inherent in a cause of action for false arrest, see *Johnson*, 19 So. 2d at 700, the application of *Franks* has been explicitly limited to “cases of perjurious or recklessly false statements or omissions made by a police officer in support of a warrant.” *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994). The rule in *Franks* does not apply when misrepresentations or omissions are simply negligent. *Id.* In other words, bad faith is an inherent requirement in every *Franks* claim. As a result, under section 768.28, a plaintiff cannot maintain a false arrest claim against state agencies when the false arrest claim is premised on *Franks*.

In this case, Appellants’ false arrest claim rests entirely on the assertion that the arrest warrants are void under *Franks/Harder* because Johnson conspired with Inspector Varnum to cause Cloud’s arrest for personal reasons, by intentionally including false statements and omissions in the probable cause affidavit. Regardless of whether *Franks* renders an arrest warrant void or voidable, bad faith on the part of an affiant officer is inherent in every *Franks* claim, and therefore cannot be asserted against state agencies under section *Fla. Stat.* § 768.28. Thus, for this separate and

independently sufficient reason, the trial court's order dismissing Appellants' false arrest claim against FDC.

**II. The trial court correctly granted FDC's motion to dismiss Appellants' claim for negligent supervision.**

Appellants' negligent supervision claim, set forth in the Fourth Amended Complaint, fails for two reasons: (1) Appellants did not plead a sufficient connection between the employment history of Johnson, Varnum, and Copeland and the arrests of Cloud or Davis to create liability for negligent supervision; and (2) sovereign immunity precludes FDC's liability for claims relating to discretionary criminal investigations for which no common law duty of care exists.

Negligent supervision occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment. *Department of Environmental Protection v. Hardy*, 907 So. 2d 655, 660 (Fla. 5th DCA 2005) (citing *Garcia v. Duffy*, 492 So. 2d 435, 438-39 (Fla. 2d DCA 1986)). Put slightly differently, negligent supervision exists when the defendant "negligently placed [the plaintiff/purported victim] under the supervision of [an employee], when [the defendant] either knew or should have known that [the employee] had the propensity to commit [the torts

committed]." *Malicki v. Doe*, 814 So. 2d 347, 362 (Fla. 2002). The plaintiff must allege facts sufficient to show that once an employer received actual or constructive notice of problems with an employee's fitness, it was unreasonable for the employer not to investigate or take corrective action. *Id.* at 441; *Hardy*, 907 So. 2d at 660-61.

**A. Appellants failed to establish the requisite connection and foreseeability for a negligent supervision claim.**

The employer's liability for negligent supervision is limited; not only must the employer owe a duty to the plaintiff, but there must be a connection and foreseeability between the employee's employment history and the current tort committed by the employee. *Dickinson v Gonzalez*, 839 So. 2d 709, 713-14 (Fla. 3d DCA 2003) (citing *Island City Flying Serv.*, 585 So. 2d 274, 277); *Hardy*, 907 So. 2d at 660-61.

Here, Appellants have not shown any connection between the individual Defendants' employment history and the tort they allegedly committed.

Appellants do not make any allegation suggesting prior incidents or discipline by Varnum or Copeland. Instead, Appellants only allege that FDC should have known that Johnson had a personal vendetta against Cloud and that Johnson would purportedly conspire against Cloud and take action to influence others outside of his chain of command to orchestrate Cloud

arrested on false charges. Appellants claim that two prior incidents in Johnson's history put FDC on notice: (1) Johnson's 2016 demotion of Cloud, which was reduced by PERC (R. 297-98;) and (2) Johnson previously worked, and had connections, at Liberty CI. (R. 298-99)

However, the prior incidents<sup>5</sup> on which Appellants rely are not similar to the alleged tort at issue, and do not create the requisite connection or foreseeability to maintain a claim for negligent supervision. See *Gonzalez*, 839 So. 2d at 714 (holding that a negligent supervision claim relating to false arrest would require an employment history relating to determinations of probable cause).

Appellants' theory is that Johnson, *who was warden at another facility and had no supervisory authority over Appellants during the material timeframe*, secretly enlisted Copeland and Varnum into making false allegations against Appellants and conducting an improper IG investigation leading to their arrest. Nothing about the 2016 demotion or the fact that Johnson previously worked at Liberty CI puts FDC on notice that Johnson would commit a tort of this nature. *Id.*; *Island City Flying Serv.*, 585 So. 2d at 277 (history of drug offense and prior discipline for failing to ground airplanes,

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<sup>5</sup> Plaintiff's allegations that the criminal trial testimony placed FDC on notice are irrelevant because the trial took place after the arrest at issue. (R. 302-03)

for being late, and for taking off from work without authority were insufficient to put employer on notice in negligent supervision claim involving theft of an airplane).<sup>6</sup>

Appellants reliance on *Storm v Town of Ponce Inlet* 866 So. 2d 713 (Fla. 5th DCA 2004) and *Slonin v City of West Palm Beach*, 896 So. 2d 882 (Fla. 4th DCA 2005) are misplaced, as both cases deal solely with the application of sovereignly immunity to claims of negligent supervision against governmental entities. In *Storm*, the court was only analyzing whether a duty of care existed in the context of a sovereign immunity analysis. 866 So. 2d at 716. The court held that a duty of care may be owed but did not address the connection or foreseeability aspects of a negligent supervision claim. *Id.* at 717. Rather, the court held that, for reasons similar to those discussed below, the defendant was sovereign immune from any negligent supervision claim relating to the discretionary decision to retain government officials. *Id.* at 718-719.

Finally, Appellant Davis has not made a single allegation connecting himself to Johnson's alleged prior misconduct. While Cloud alleges a prior personal history with Johnson, which allegedly put FDC on notice, (R. 311),

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<sup>6</sup> Additionally, allegations that Cloud's attorney supposedly told FDC not to transfer Cloud to Liberty CI because of Johnson's connections amount to pure speculation, insufficient to put FDC on notice of anything.

there is no allegation suggesting that FDC was on notice of any foreseeable tort with respect to Davis. Because Appellants failed to demonstrate any connection or foreseeability with respect to Davis, dismissal of Davis' negligent supervision claim was clearly warranted.

**B. Appellants cannot maintain a claim relating to the criminal investigation because FDC does not owe a duty to Appellants and FDC is entitled to sovereign immunity.**

Sovereign immunity does not automatically bar every negligent supervision claim against governmental entities. See *e.g.*, *Slonin*, 896 So. 2d at 9894. However, applying the two-step approach to analyzing governmental liability, sovereign immunity *may* bar a negligent supervision claim when (1) there is no duty of care owed or (2) the conduct at issue involves discretionary governmental functions immune from suit. See *e.g.*, *Storm*, 866 So. 2d at 715-19.

To the extent Appellants allege that FDC is liable for negligence associated with the criminal investigation conducted by Varnum, (R. 304), such claims are barred by the absence of any duty of care and the doctrine of sovereign immunity. See *Pritchett v. City of Homestead*, 855 So. 2d 1164, 1165 (Fla. 3d DCA 2003) (negligent conduct of police investigation does not give rise to a cause of action because the duty to protect citizens and enforce

the law is one owed generally to the public and investigative activities are discretionary functions immune from liability).

Appellants' Fourth Amended Complaint contains numerous allegations suggesting that FDC should have done a better job analyzing the evidence gathered during Varnum's investigation, which they claim would have shown that the investigation was faulty. (R. 302-304) To the extent Appellants' negligent supervision claim alleges that FDC is liable for negligent supervision associated with the criminal investigation conducted by Varnum and the failure to better oversee Varnum's collection and analysis of evidence, (R. 304), such claims are barred by the absence of any duty of care and the doctrine of sovereign immunity. See *Pritchett*, 855 So. 2d at 1165 (negligent conduct of police investigation does not give rise to a cause of action because the duty to protect citizens and enforce the law is one owed generally to the public and investigative activities were discretionary functions immune from liability).

The government cannot be held liable in tort actions unless a common law or statutory duty of care existed that was applicable to an individual, as opposed to the general public, under similar circumstances. *Willingham*, 929 So. 2d 43, 50. If no duty of care is owed to the individual regarding the alleged tortious conduct, there is no governmental liability. *Id.* See also, *Pollock v.*

*Fla. Dep't of Highway Patrol*, 882 So. 2d 928, 932-33 (Fla. 2004)(“there has never been a common law duty establishing a duty of care with regard to how these various governmental bodies or officials should carry out [discretionary functions because] . . . [t]hese actions are inherent in the act of governing.”)

Here, there is no duty of care owed to the general public with respect to how a criminal investigation is conducted. See *Harris v. Kearney*, 786 So. 2d 1222, 1226 (Fla. 4th DCA 2001) (“Kearney's actions in how she supervises her agents in enforcing the public assistance fraud laws do not carry with them a corresponding duty of care to the individual citizen who may be affected by such actions.”); *State By & Through Office of State Attorney v. Kowalski*, 617 So. 2d 1099, 1100 (Fla. 5th DCA 1993)(“the defendant State Attorney's Office owed no recognized legal duty of care to the plaintiffs arising out of its duty to enforce the laws and protect the public safety.”)

Additionally, state agencies are sovereignly immune from liability for discretionary governmental functions. Discretionary-planning level and executive officer functions are inherent in the act of governing and are thus immune from suit. *Wallace v. Dean*, 3 So. 3d 1035, 10453 (Fla. 2009). *Trianon Park Condominium Assoc. v. City of Hialeah*, 468 So. 2d 912, 918-

921 (Fla. 1985). Discretionary functions include investigating criminal activity and enforcing the law. See, *Kowalski*, 617 So. 2d at 1100 (“the State Attorney's Office is immune from suit on matters relating to its decisions as to whether and how to conduct a criminal investigation”); *King v. State of Florida*, 650 F. Supp. 2d 1157, 1167 (N.D. Fla. 2009)(“performing investigations into plaintiff’s wrongdoing is a discretionary power because it is designed to ensure that the laws of DEP, a government agency, are followed by its employees.”) See also, *Hardy*, 907 So. 2d at 661-62; *Dahly v. Dep’t of Children and Family Servs.*, 876 So. 2d 1245, 1251 (Fla. 2d DCA 2004).

Because state agencies cannot be liable for the discretionary function of conducting criminal investigations, they cannot be liable for the manner in which evidence is analyzed or collected. Therefore, the trial court correctly dismissed this portion of Appellants’ complaint with prejudice.

### **CONCLUSION**

For the foregoing reasons, the trial court’s order granting FDC’s motion to dismiss for failure to state a cause of action should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via electronic mail service to Marie A. Mattox, Marie A Mattox, P.A. 203 N. Gadsden Street, Tallahassee, FL 32301, Brian Keri, Brian Keri P.A., P.O. Box 13599, Tallahassee, FL 32317, Thomas Thompson, Thompson, Crawford & Smiley, P.A., 1330 Thomasville Rd, Tallahassee, FL 32303, & Matthew Smith, Sniffen & Spellman, 123 N. Monroe St. Tallahassee, FL 32301 on this 21<sup>st</sup> day of August 2023.

s/ Miriam R. Coles

Attorney

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b) and the word limit requirements of Rule 9.210(a)(2). This brief was typed in Ariel, size 14 font. The total word count is 8,146.

*s/ Miriam R. Coles*  
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