DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EVERETT BROTHERS RECYCLING, INC.
and WATERBLASTING TECHNOLOGIES, LLC,
Appellants,

v.

MARTIN COUNTY and
SA RECYCLING LLC,
Appellees.

No. 4D2023-2943
L.T. No. 432021CA001103

Appeal from the Nineteenth Judicial Circuit, Martin County.

APPELLANTS' REPLY BRIEF TO APPELLEE MARTIN COUNTY'S ANSWER BRIEF

Gary K. Oldehoff
Gary K. Oldehoff PA
Florida Bar No. 449679
759 S.W. Federal Highway, Suite 216
Stuart, FL 34994
772-919-1040
goldehoff@oldehofflaw.com
Counsel for Appellants

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INTRODUCTION

This case arises from *ultra vires* actions of County staff. It does not arise from any act of the County – that is, the Martin County Board of County Commissioners. But throughout the Answer Brief, counsel for the Appellee has identified the actions as actions of the County. That is plainly wrong. Therefore, to keep this matter and analysis of the issues in its proper perspective, the Appellants have referred to "County staff" rather than the County.

REPLY TO THE STATEMENT OF THE CASE AND FACTS

County staff's Statement of the Facts tells a different story than it told in the Motion to Dismiss (R. 525-535) and at the hearing. Beginning at page 3 of the brief, the County staff's statement of facts asserts matters not in the motion nor argued at the hearing, that are outside the Second Amended Complaint (SAC). From the bottom of page 3 through page 4, the County staff even cites to Municode because it is simply not in the record. The contents of the second full paragraph of page 30 of County staff's brief is not in the record. Likewise, the contents of land development regulations and ordinances on mentioned on pages 36-44 are not in the body of the County staff's motion (R. 525-535) or the transcript of the hearing (R.

690-716). The purported site plan (R. 556) is impossible to read, and the zoom-in screen shots on pages 37-39 of the brief were not included in the motion or produced at the hearing.

Throughout the County staff's brief, it has misstated the facts in the SAC. Page and word limits for reply briefs precludes the Appellants from pointing out every misstatement. This Court should juxtapose County staff's statements with citation to the SAC (R. 449-494) to see that it has misstated the facts.

REPLY TO APPELLEE'S ARGUMENT[1]

Reply to County staff's claimed Standard of Review.

County staff argues at page 11 of its brief that this Court's standard of review is "abuse of discretion," according the trial court's decision "great deference". The Appellants have properly stated the standards of review for this case. County staff's single standard of review is wrong.

Gutenberg v. Smith & Wesson Corp., 357 So. 3d 690 (Fla. 4th DCA 2023), the case cited by the County staff for its proposition that

[1] The reply will use the same numbering as the County staff's brief. Appellants have added a section III.D, however, because County staff did not answer this section of the Initial Brief.

the standard is abuse of discretion with the trial court's ruling accorded great deference, does not apply to this case. Furthermore, though it does not govern this appeal, the decision actually supports the appellants' standards of review. *Gutenberg* also involves a statute that prohibits civil actions and a request for declaratory judgment deciding whether the plaintiffs could sue the defendants without violating that statute. The Appellants' case is completely, fundamentally, different. Additionally, the *Gutenberg* Court observed that (1) "to the extent that the dismissal is based upon a legal determination, our review is de novo" *Gutenberg*, 357 So. 3d at 693, and 2) the test of sufficiency of a complaint for declaratory judgment is whether the plaintiff "is entitled to a declaration of rights at all." *Id.* at 694; *see also Rose v. Village of Kings Creek Condominium Ass'n, Inc.*, 741 So. 2d 1177 (Fla. 3d DCA 1999).

County staff also misses the fact that the Appellants' case and claims (Counts) are distinct and the dismissal of each claim particularly with prejudice requires a *de novo* review by this Court.

I. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE TRIAL COURT DID NOT EXCEED THE PROPER SCOPE OF REVIEW OF A MOTION TO DISMISS.

While under certain circumstances and with respect to certain issues a trial court may consider evidence outside the four corners of the complaint when evaluating a motion to dismiss under Rule 1.140, a trial court is never allowed to consider a movant's counsel's unsupported or unsworn statements of facts not in the complaint or documents attached to the motion that are not admissible. The factual arguments made by County staff in the motion and the documents County staff attached to its motion could not be considered by the trial court and should have been excluded because no foundation for their admissibility was provided by the County staff in the motion or at the hearing. The law is absolutely clear that evidence submitted outside the pleadings for a rule 1.140(b)(1) motion must be admissible in the same manner as evidence submitted in support of a motion for summary judgment. *See, State ex rel. Hawkins v. Board of Control*, 53 So. 2d 116, 118 (Fla. 1951) ("a motion is not in and of itself proof of the averments therein contained"); *Leon Shafer Golnick Advertising, Inc. v. Cedar*, 423 So. 2d 1015 (Fla. 4th DCA 1982) ("Trial judges cannot rely on unsworn statements as the basis for making factual determinations."); *see also Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006, 1011

(2d Cir. 1986) (extrinsic evidence must be admissible evidence (regarding parallel federal rules 12(b)(1) and 56)); *Lawrence v. Dunbar*, 919 F.2d 1525 (11th Cir. 1990) (reversing 12(b)(1) (dismissal for lack of jurisdiction because affidavit testimony and opinion in support of motion was inadmissible). The documents County staff attached are not authenticated or self-authenticating and lack any evidentiary foundation. As such they were inadmissible and could not be considered. *Leon Shafer Golnick Advertising, Inc.*, 423 So. 2d at 1015; *Brown v. School Board of Palm Beach County*, 855 So. 2d 1267 (Fla. 4th DCA 2003). By considering them the court exceeded its scope of review.

All the improper assertions and arguments outside the SAC completely infected the trial court's consideration of the motion and are inextricably intertwined with the trial court's rulings in granting the motion and entering the subject final order dismissing the case with prejudice. The trial court's order exceeded the proper scope of review. The County staff's argument here should be rejected as meritless.

II. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE TRIAL COURT DID NOT ERR IN

DISMISSING THE SAC BASED ON FAILURE TO ALLEGE SPECIAL DAMAGES.

Appellants' Argument II is that "the trial court erred in dismissing the SAC with prejudice based on the Plaintiffs having failed to allege special damages in accordance with *Boucher v. Novotny"*, because that is what the trial court's order said. *Boucher* was expressly receded from by the Florida Supreme Court in *Renard v. Dade County*, 261 So. 2d 832, 838 (Fla. 1972) ("The facts of the *Boucher* case, if presented today, would probably be sufficient to show special damage."). If the trial court followed *Boucher* and concluded that Appellant Waterblasting Technologies did not have standing because it was an adjoining property owner, then the court's decision is absolutely wrong. The County staff has not answered this point at all. County staff's silence on this implies that it concedes this error.

County staff does not mention *Renard* at all in this section of its brief. What the County mentions instead is a requirement of special damages in certain zoning cases. But, the special damages rule is not applicable to Counts I and II of the SAC, and even if it was, the Appellants pled enough facts to satisfy "special damages", i.e., injury

which is peculiar to himself and different in kind from the injury suffered by the people as a whole for all three of its counts. (R. 453-459 (SAC ¶¶ 7-18)). Accordingly, even if special damage had to be alleged for all three counts, the trial court erred in dismissing the SAC as it did based strictly on *Boucher*.

The Appellants are not attacking the County's zoning ordinance, as staff implies at page 15 of its brief. In Count I, the Appellants are challenging void, *ultra vires* actions of County staff creating a new permitted use that was not permitted in the zoning ordinance. In Count II, they are asking the court to declare what the zoning ordinance means, i.e., whether the scrap metal salvaging use and operation shown on the subject property is a permitted use in the M-2 zoning district and is allowed by the zoning regulations on a property of its size. And in Count III, Appellant Waterblasting Technologies is asking for relief from the nuisance of the illegal operation on the subject property.

Additionally, the outside scrap metal salvaging operation which County staff states are "SA's *refuse and storage* activities" (Appellee County Staff Brief p. 15) are not in an area that allows "dust, debris, smells, and traffic." (Id.). It can plainly be seen from M-2 zoning

ordinance set forth at paragraph 31 of the SAC (R. 464-466) that this zone is for **indoor** manufacturing operations conducted inside plant buildings and "dust and dirt shall be confined within the buildings of the plant." (R. 465). The M-2 zoning district plainly prohibits dust and dirt outside of buildings. The M-2 zoning district is not an area filled with dust, debris, smells, and traffic, as County staff claims.

Waterblasting Technologies is directly across the street from the subject property. County staff contends that "Its only allegations are that the property is an eyesore, creates traffic and dust." (County Staff Brief p. 16). The allegations for standing go far beyond these words, and include that "Trucks attempting to enter (or entering) and leaving the scrap metal salvage yard site routinely block traffic on SE Commerce Avenue . . . *resulting in scores of vehicles entering and travelling through the Hog Technologies [Waterblasting Technologies] parking lot to get around the blockage*." (R. 455-458 ¶ 12) (italics added)

Everett Brothers does allege that it is in the same exact business as SA, scrap metal salvaging (or recycling as the Appellees want to call it). (R. 453-454 ¶ 7) Both Everett Brothers and SA are operating the same scrap metal salvage yard operation. (R. 449 ¶1; 453 ¶ 4)

Everett Brothers alleges that it is properly zoned for scrap metal salvage yard use. (R. (453-454 ¶ 7). Paragraph 10 of the SAC plainly states why Everett Brothers was compelled to spend over $800,000 to comply with the County's zoning requirements, which has not been enforced upon SA. (R. 454 ¶ 10)

County staff also claims that Everett Brothers' damage is just speculation. Again, County staff has also failed to read paragraph 13 of the SAC, which states and shows that the damage is not speculative, but is real and actual. (R. 458 ¶ 13).

III. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE COURT DID NOT COMMIT ERROR FINDING THAT THE PLAINTIFFS DID NOT HAVE STANDING.

"Whether a party is the proper party with standing to bring an action is a question of law to be reviewed *de novo*." *Westport Recovery Corp. v. Midas*, 954 So.2d 750, 752 (Fla. 4th DCA 2007); *see also FCD Development, LLC v. South Florida Sports Committee, Inc.*, 37 So. 3d 905, 909 (Fla. 4th DCA 2010).

City of West Palm Beach v. Haver, 330 So. 3d 860 (Fla. 2021), only addresses the issue of whether the plaintiffs can maintain an action for an injunction against the City and two zoning officials requiring them to investigate and take enforcement action against an

alleged zoning violation. *Id.* at 862. In fact, it is clear from the decision that the plaintiffs' count for declaratory judgment that the City violated its ordinance was not disturbed by the Court. *Id.*; *see also* footnote 4.

A closer reading of *Citizens for Responsible Development, Inc. v. City of Dania Beach*, 358 So. 3d 1 (Fla. 4th DCA 2023) ("*CRD*"), as well as the prior opinion (2022 WL 270947647 Fla. L. Weekly D1489) which was reversed 2-1 on rehearing, reveals that the majority based its decision on the fact that the matter involved a development agreement – "a contract" - rather than a zoning action, and this was a critical difference and factor in the court's decision; indeed, had the matter involved a zoning decision the outcome on standing would have been a 2-1 ruling that the plaintiffs had standing. Additionally, the plaintiffs in *CRD* sued the City for declaratory and injunctive relief, and the order on appeal was based on a motion for summary judgment, not a motion to dismiss. *Id.* at 5.

This case *sub judice* is not about a *development agreement*. Nor is it about a valid ordinance. It is about void actions by county staff and a zoning ordinance that does not permit scrap metal salvage (or "recycling") yards in the M-2 zoning district. Count I of the SAC

claims that the Staff's actions are *ultra vires and* void and can only be accomplished by the board of county commissioners by ordinance amendment in accordance with the public notice and hearing procedures of section 125.66 of the Florida Statutes. Count II is for a declaratory judgment as to whether the scrap metal salvage yard (or scrap metal recycling yard) use on the subject property is lawful according to the plain language of the County's zoning ordinance.

County staff contends that the Appellants had to satisfy *Renard's* standing requirement for enforcing a valid zoning ordinance, which is wrong. Count I specifically challenges County staff's *ultra vires*, void actions which are without legal authority and usurped the functions of the board of county commissioners.[2] None of these amendments were enacted by the board nor were then in conformity with the notice and public hearing requirements of law.

[2] The void actions added scrap metal salvage yard (or scrap metal recycling yard) to the list of permitted uses in the M-2 zoning district, added "recycling yard" and the parameters of the subject property's use and operation as a "recycling yard" use to the text of the zoning ordinance, and amended sections 3.97.A.1 and 3.97.B.1 of the zoning ordinance - which requires that "salvage yards" have a minimum of ten acres and "recycling plants or recycling transfer stations" must have a minimum of five acres – to change the word "ten" and "five" to "less than three" (the size of the subject property).

On this point, the County staff agrees: "The Stipulated-Order was issued as a settlement to a zoning ordinance violation imposed on the prior owner. Such proceeding does not require the general public to be noticed nor do they (sic) impose a right to speak at same." (County Staff's Brief p. 22) The Appellants showed in the SAC that they are "affected resident[s], citizen[s] or property owner[s] of the county", and have standing according to *Renard's* standing test for challenging a zoning action or ordinance which is void. *Renard*, 261 So. 2d at 838.

Nevertheless, the facts set forth in the SAC even satisfy *Renard's* most demanding standing requirement, which County staff wrongly argues is applicable, because the Appellants have satisfied the special damages test. As set forth above, Waterblasting Technologies is directly across the 2-lane road from the subject property and dust, dirt, grime, and smoke from the illegal salvage yard operation on the dirt yard on the property falls squarely on the Waterblasting Technologies property. In addition, vehicles that must stop and become backed up due to this illegal operation, or have to get around scrap metal debris falling off trucks onto the road, drive through the Waterblasting Technologies property. Waterblasting

Technologies clearly has special damages from the illegal use. Everett Brothers has also set forth enough to satisfy special damages. Scrap metal salvage yard operators, and scrap metal salvage yard operations like the ones on the subject property and on Everett Brothers' property are highly regulated by the state and federal governments, as well as the County in its zoning ordinance and lend development regulations. To properly qualify in accordance with the zoning ordinance, Everett Brothers was required to spend $800,000 on an earthen berm and concrete wall around its property and have a property in excess of ten acres. The subject property is operating the same scrap metal salvage yard use and operation without complying with these requirements and has not spent the enormous sums the County demanded from Everett Brothers. Everett Brothers SAC establish that it has suffered significant, palpable damages from the County staff's actions different in kind and degree than the damage suffered by the community as a whole. *See also Rinker Materials Corp. v. Metropolitan Dade County*, 528 So. 2d 904, 906 (Fla. 3d DCA 1987) ((“If Rinker could have demonstrated that the commission's action had adversely affected the value of its property

interests, which surely represents a legally recognizable interest, it would have established that it had standing to pursue its suit.").

Count II is not an attack on a valid zoning or to enforce a valid zoning ordinance. Nor is it an attack on a validly enacted zoning ordinance as being an unreasonable exercise of legislative power. It is for a judicial declaration of the meaning of the M-2 zoning ordinance and whether the scrap metal salvage yard use on the subject property is a permitted use in the M-2 district. Therefore, County staff's argument that the Appellants have to satisfy the special damages test for standing is incorrect. The Appellants have set forth facts in the SAC showing that they have standing to seek this declaratory judgment. They have a sufficient stake – a legitimate interest which will be affected by the outcome - to have standing for the declaration they seek. *See Argonaut Insurance Co. v. Commercial Standard Insurance Co.*, 380 So. 2d 1066, 1076 (Fla. 2d DCA 1981); *Geiger v. Sun First National Bank of Orlando*, 427 So. 2d 815 (Fla. 5th DCA 1983). Regardless, the SAC sets forth standing even if *Renard's* most demanding test applied.

A. The County staff has not answered Appellants' point that Waterblasting Technologies has standing for its Count III nuisance claim because it is directly across the street from

the subject operation and has suffered actual damages from the nuisance.

County staff has not answered Appellants' argument III.d in their Initial Brief that Waterblasting Technologies has set forth standing to bring its Count III nuisance claim. It appears staff has conceded this point, as indeed it must.

IV. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THE CASE BASED ON ITS BELIEF THAT THE STAFF'S INTERPRETATION THAT A SCRAP METAL SALVAGE YARD (OR SCRAP METAL RECYCLING YARD) USE IS A PERMITTED USE IN THE M-2 ZONING DISTRICT IS A PERMISSIBLE INTERPRETATION.

County staff's argument implies that the County, not the staff, was the one that interpreted the code. This is wrong, as well as disingenuous. The Martin County Board of County Commissioners did not do anything in connection with this matter. (R. 476-477 ¶¶ 58-60). This is a critical distinction. The County staff had no right or authority to add a use to the list of permitted uses in a zoning district by interpreting the code when no such right or authority has been given them.

County staff has also misstated the old rule of construction and left out a critical provision of the rule that defeats their argument.

The Florida Supreme Court first expressed the rule using the following language:

> 'Although not necessarily controlling, as where made without the authority of or repugnant to the provisions of a statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.'

Gay v. Canada Dry Bottling Co. of Fla., 59 So. 2d 788, 790 (Fla. 1952). The rule has these two key exceptions: 1) where it is made without authority; and 2) where it is clearly erroneous or unauthorized. County staff certainly knew this to be so because the case it quoted and cited to in its brief, "*Vanderbilt Shores Condo. Ass'n, Inc. v. Collier County*, 891 So. 2d 583, 585 (Fla. 2d DCA 2004)" states these two exceptions on this cited page.

The SAC clearly pleads that the County staff had no authority to add and recognize this use as a permitted use in the M-2 zoning district. (R. 486 ¶ 90; 473-477 ¶¶ 44, 46-60; 485 ¶ 86; 467-478 ¶ 33, 34; 483-484 ¶¶ 79-82; 485 ¶ 86; 487-490 ¶¶ 91-98).[3] The SAC also

[3] The Court should especially look at paragraphs 54 and 86 of the SAC.

clearly pleads that the interpretation arrived at by the County staff is clearly erroneous and unauthorized. (R. 473 ¶ 44). In addition, the County and County staff had consistently, correctly followed the zoning ordinance and prohibited this salvage use and activity on this property for years before it made this about-face change; indeed had done so up to the day staff submitted the Stipulation and Agreed Final Order to the Special Magistrate. (R. 468-473 ¶¶ 35-45).

The County staff also cannot avail themselves of the rule of construction if staff has changed the interpretation from the interpretation it had followed and consistently used in the past. This rule of construction cannot be applied when interpretations change with the direction of the wind.

V. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE TRIAL COURT DID NOT ERR WHEN IT RELIED ON MATTERS OUTSIDE THE SAC IN RULING THAT THE CASE IS MOOT AND THE APPELLANTS CASE MUST BE DISMISSED WITH PREJUDICE BECAUSE THE CASE IS MOOT OR THE APPELLANTS HAD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

As explained in section I, herein, the statements County staff made in the motion and at the hearing, and the documents County staff attached to its motion could not be considered by the trial court

and should have been excluded and the trial court erred in not limiting its examination to the four corners of the SAC.

In addition, County staff's argument that the Appellants' entire case is moot because of the purported minor development plan is patently wrong, even if the trial court could consider it, though of course it cannot. County staff's substantive argument is that:

> The complaint is based on allegedly ultra vires actions of County employees which was asserted in the Stipulated-Order that was approved by a special magistrate and was between the County and the prior owner. That Stipulated-Order is null and void because the prior owner is gone and there is a new Minor Development Order on the property which the current owner sought, which supersedes the Stipulation-Order.

(Appellee County Staff's Answer Brief, 32).

The argument is simply absurd. Even if the exhibits to the staff's motion to dismiss could be considered, and they cannot, it is irrefutably obvious from the exhibits themselves that the argument does not hold water. Exhibit D is the purported "Development Order". (R. 552-557). It is for a "revised final site plan". (R. 552 ¶ A). What is approved with the revised final site plan "is to add an adjacent undeveloped .9-acre parcel" and "make infrastructure and access improvements to the entire approximate 3-acre site." (Id.) It

authorizes "Development" "in accordance with the approved revised final site plan." (Id.). The Development Order only references or incorporates two documents, specifically an attached legal description (R. 555), and an attached "revised final site plan" (Id.; R. 556). No other documents are referenced in or incorporated into the Development Order. (R. 552-556). Thus, nothing in Exhibit B (R. 539-541) was referenced or actually approved by the Development Order. That is simply indisputable. The argument is just plain wrong.

Furthermore, the Appellants did not need to challenge this purported development order. All the development order does is authorize the development of the improvements shown on the purported revised final site plan. (R. 556) Appellants' complaint is about the illegal use and activity on this property, not the improvements, the building, or the pavement on the property. These are all use-neutral. The Development Order does not moot the Appellants' case at all.

Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001) sheds light on the effect of a Martin County development order for construction of improvements and whether it moots a challenge to the use of the property that is inconsistent with terms of the

County's ordinances.[4] In this Court's decision, the Court noted that the plaintiffs had sued to challenge the approval of a multi-family use development plan that violated the tiering policy in the County's Comprehensive Plan and that while the case was pending in the circuit court the defendant applied for and received permits from the County to build the project. The subsequent permit and construction of the project did not moot the case against the inconsistent approved plan that violated the tiering policy. Nor did it supersede and make irrelevant the illegal approved development order. The case proceeded to trial, where the trial court determined that the site plan violated the plain language of the tiering policy and ordered demolition of the project. *Id.* at 195-6. This Court agreed *Id.* at 204.

Furthermore, as explained in the preceding section, for the same reason as the purported development order did not moot the Appellants' case, it also did not require the Appellants to challenge it and exhaust administrative remedies.

VI. THIS COURT SHOULD REJECT COUNTY STAFF'S ARGUMENT THAT THE TRIAL COURT DID NOT ERR WHEN IT DISMISSED THE ACTION WITH PREJUDICE BASED ON SEPARATION OF POWERS.

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[4] A comprehensive plan is adopted as an ordinance. *See* §163.3184, *Fla. Stat.* (2023).

> A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner. Such collateral agreements have been held void in all of the cases to which we have been referred. Any contrary rule would condone a violation of the long established principle that a municipality cannot contract away the exercise of its police powers. When a zoning ordinance is amended by changing the classification of particular property, such amendment must be justified by a change in the use value of the property involved.

Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956) (citations omitted).

If the Martin County Board of County Commissioners cannot enter into an agreement with a property owner that provides for and effects an amendment to the zoning ordinance, County staff certainly cannot settle a code enforcement case with an agreement that effects an amendment to the zoning ordinance.

Detournay v. City of Coral Gables, 127 So. 3d 869 (Fla. 3d DCA 2013), does not overrule this fundamental principle in *Hartnett v. Austin*. A county's staff cannot settle a code enforcement action by violating the zoning ordinance and effecting an amendment to the ordinance. *See also Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996) (voiding a settlement agreement entered into by the

County); *Broward County v. Conner*, 660 So. 2d 288 (Fla. 4th DCA 1995) (a county attorney cannot enter into a contract that requires formal action by the county commission at a meeting required by statute and cannot bind the county to such a contract).

CONCLUSION

For the foregoing reasons, the Appellants respectfully renew their request that this Court reverse the order of the trial court dismissing their action with prejudice.

Respectfully submitted,

/s/ Gary K. Oldehoff
Gary K. Oldehoff
Gary K. Oldehoff PA
Florida Bar No. 449679
759 S.W. Federal Highway, Suite 216
Stuart, FL 34994
772-919-1040
goldehoff@oldehofflaw.com
Counsel for the Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was filed on the Florida Courts E-Portal and furnished this 17th day of June 2024, via email upon:

Melissa Pietrzyk, Esq.
2401 SE Monterey Road

Tim B. Wright, Esq.
Paul Parton, Esq.
Wright, Ponsoldt & Lozeau, LLP

Stuart, FL 34996
mpietrzyk@martin.fl.us
rramey@martin.fl.us

1002 SE Monterey Commons Blvd.
#100
Stuart, FL 34996
timwright@wpltrialattorneys.com
pparton@wpltrialattorneys.com
smitchell@wpltrialattorneys.com

By: */s/ Gary K. Oldehoff*
Gary K. Oldehoff
FBN 449679

CERTIFICATE OF COMPLIANCE
FOR COMPUTER-GENERATED BRIEFS

I certify that the document complies with the applicable font, line spacing requirements of Rule 9.045, and word count is 4773 words. A motion for leave to accommodate the word count has been filed contemporaneously with this filing.

/s/ Gary K. Oldehoff
Gary K. Oldehoff
FBN 449679