IN THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT
STATE OF FLORIDA

CLAY G. COLSON,

Appellant,

v.

THE CITY OF TARPON SPRINGS, FLORIDA,

Appellee. /

Case No.: 2D22-3637
L.T. No.: 21-005793-CI

THERESA D. RUBALCAVA'S INITIAL BRIEF ON THE ORDER DENYING MOTION FOR SUBSTITUTION OF APPELLANT

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STATEMENT OF THE CASE

The record of this Court shows that this appeal stems from the lawsuit filed by Appellant, Clay Colson, pursuant to Section 163.3215, Florida Statutes, challenging the approval of a series of land development orders by the Appellee, The City of Tarpon Springs, Florida ("City"), in favor of the Appellee, Morgan Development Group, LLC, ("Morgan Group").

The trial court dismissed Mr. Colson's complaint for failure to join an indispensable party, cautioning that a failure to amend to add the Morgan Group as a party within 30 days would result in a dismissal of the action with prejudice. When Mr. Colson did not timely amend, the trial court entered a subsequent order dismissing this action with prejudice. Mr. Colson timely appealed that subsequent order. See the Morgan Group's Response in Opposition to Motion for Substitution of Appellant in Appendix A.

In spite of the timeliness of Mr. Colson's Notice of Appeal, counsel for the City filed a Motion to Dismiss this appeal, and on

January 13, 2023, this Court entered its Order Denying the City's Motion to Dismiss.

The record of this Court shows that on December 8, 2022, the Morgan Group filed its Motion to Recognize it as an Appellee or to Intervene; that on January 30, 2023, Mr. Colson filed his Response to the Morgan Group's Motion to Intervene opposing such motion; and that on February 16, 2023, this Court entered an Order Granting the Morgan Group's Motion to Intervene and recognized the Morgan Group as an Appellee.

The record of this Court shows that on March 17, 2023, I filed my Motion for Substitution of Appellant based upon Clay Colson's Transfer of Interest in this action to me; that on March 27, 2023, the Morgan Group filed its Response in Opposition to Motion for Substitution of Appellant; that on March 29, 2023, the City filed its Response in Opposition to Motion for Substitution of Appellant in which the City "concurred" with the Morgan Group's Response but did not join in it or incorporate it in any way; and that on April 5, 2023, this Court issued its Order relinquishing jurisdiction to the lower court to hold an evidentiary hearing on my Motion for Substitution of Appellant and issue a report and recommendation

concerning whether the Transfer of Interest is authentic and whether it served to transfer Mr. Colson's interest in this action to me.

The Morgan Group's Response in Opposition to Motion for Substitution of Appellant alleged that the Transfer of Interest was not authentic because Mr. Colson passed away suddenly rather than from a terminal illness, and therefore, that it was extremely unlikely that Mr. Colson executed the Transfer of Interest. See the Morgan Group's Response in Opposition to Motion for Substitution of Appellant in Appendix A pages 2-3.

An evidentiary hearing was set in the lower court for May 22, 2023, and on May 17, 2023, I filed my Notice of Filing Affidavit of Chris Hrabovsky which was verified and showed that Mr. Colson gave him the Transfer of Interest to give to me if Mr. Colson was not able to pursue this action. See my Notice of Filing Affidavit of Chris Hrabovsky with Mr. Hrabovsky's affidavit in Appendix B.

At the hearing on May 22, 2023, I moved that the Affidavit of Chris Hrabovsky be accepted into evidence. See page 8 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

Counsel for the Morgan Group objected to the admission of the Affidavit of Chris Hrabovsky into evidence because counsel claimed that Mr. Hrabovsky had dodged service of subpoenas issued by counsel for the Morgan Group for weeks, and claimed that evidence would show that Mr. Hrabovsky "was at the forefront of the creation and delivery of the alleged assignment...." In addition, counsel for the Morgan Group claimed that this Court "has called into question the authenticity of this" Transfer of Interest. See pages 10-11 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

At the hearing on May 22, 2023, counsel for the Morgan Group provided of a book of materials to the Court which included copies of four Returns of Service showing a lack of service of subpoenas on Mr. Hrabovsky. However, counsel did not request that these materials be admitted into evidence and did not provide a copy to me before the hearing. See page 7 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

The copies of the four (4) Returns of Service showing a lack of service of subpoenas on Mr. Hrabovsky actually only show that there were attempts to serve Mr. Hrabovsky on three (3) days: one Return shows two attempts before 10:00 AM at this home on April

15, 2023, a Saturday morning; one Return shows an attempt at service on April 26, 2023 at a meeting at City hall, and two of the Returns show that one attempt was made on May 5, 2023 at his office and that Return which was filed with the clerk of the lower court on May 10, 2023 indicates that counsel instructed the process server to cease attempts to serve Mr. Hrabovsky after the attempt on May 5, 2023 failed. See the Returns of Service provided in the book of materials provided to the lower court at the hearing on May 22, 2023 in Appendix D and note that they are not sworn or verified.

Counsel for the Morgan Group called its process server to testify about his attempts to serve Mr. Hrabovsky, but the process server did not provide any testimony showing that Mr. Hrabovsky took any action to avoid service. See pages 40-43 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

No evidence was submitted showing that Mr. Hrabovsky had anything to do with creation of the Transfer of Interest. See the Transcript of the Hearing of May 22, 2023 in Appendix C.

At the hearing on May 22, 2023, counsel for the Morgan Group argued that if there is a genuine question regarding the

authenticity of a document, the document would be inadmissible, and again, stated to the lower court that this Court "has indicated that there's already a genuine question regarding the authentication." See pages 14-15 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

Mr. Colson's sister testified at the hearing on May 22, 2023 that he had been sick, that she had taken him to the doctor, that another developer tried to kill him, and that he wanted me to carry on this case if anything happened to him. See pages 16-19 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

Counsel for the Morgan Group also included Mr. Colson's Death Certificate in the book of materials provided to the lower court, and the death certificate showed that Mr. Colson was nearly sixty-eight (68) years old and that the cause of death was cardiomyopathy. See Mr. Colson's Death Certificate in Appendix E.

The forensic document examiner testified that Mr. Colson's signature was electronically duplicated. See pages 29-34 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

On June 1, 2023, the lower court issued an Order with its Findings and Recommendations which found that the signature on

the Transfer of Interest was electronically duplicated, but such Order included numerous factual errors, including, but not limited to a finding that the lower court had dismissed the complaint with prejudice on June 22, 2022 when in fact the record shows that such Order was signed on June 27, 2022 and filed with the clerk of the lower court on June 28, 2022; and a finding that Mr. Hrabovsky's Affidavit was not sworn and was not offered into evidence in spite of the facts that it was verified and was offered into evidence. Moreover, without any evidence of fraud being committed, the lower court's Order found that "It is more likely than not that the purported Transfer of Interest was "manufactured" by fraudulent means." Most importantly, the lower court's Order recommended that the Transfer of Interest did not serve to transfer Mr. Colson's interest to me. Interestingly, but unsurprisingly due to common usage, this Order includes an electronically duplicated signature. See the lower court's Order issued on June 1, 2023 in Appendix F.

On June 16, 2023, I timely filed and served my Motion for Rehearing and Exceptions to the Report and Recommendations on Motion for Substitution of Appellant which showed that

electronically duplicated signatures are allowed by Florida Statutes § 668.004 (2022), by Florida Statutes § 668.50 (2022), and by Florida Rule of General Practice and Judicial Administration 2.515(c)(1)(B) as well as precedent. See my Motion for Rehearing and Exceptions to the Report and Recommendations on Motion for Substitution of Appellant in Appendix G.

On June 26, 2023, the lower court issued an Order Denying my Motion for Rehearing and Exceptions to the Report and Recommendations on Motion for Substitution of Appellant.

SUMMARY OF ARGUMENT

Florida Statutes, the Florida Rules of General Practice and Judicial Administration, and Florida precedent provide that electronic copies of documents and electronic duplicated signatures are acceptable as originals, and therefore, the Transfer of Interest should be accepted as an original and given the same effect as an original. Wherefore, the lower court should have recommended that my Motion for Substitution of Appellant be granted.

Furthermore, as the evidence showed that the Appellant, Clay G. Colson, was nearly 68 years old, that he was sick, that he had been to the doctor, that he was suffering from cardiomyopathy, that

an attempt had been made on his life by another developer, and that he wanted to have this action continued, it was certainly foreseeable that he would prepare a transfer of interest. Moreover, no allegations were raised which showed any genuine issue concerning the authenticity of the Transfer of Interest. Finally, no evidence was produced showing that any person other than the Appellant, Clay G. Colson, was involved in production of the Transfer of Interest, and the Affidavit of Chris Hrabovsky showed that Mr. Colson gave him the Transfer of Interest to deliver to me if anything prevented Mr. Colson from continuing to pursue this action. Therefore, the lower court should have recommended that my Motion for Substitution of Appellant be granted.

Finally, the issue that was the basis of this appeal was the lower court's decision to require the Appellant to add the Morgan Group as an indispensable party. In spite of that, on February 16, 2023, when this Court's motion panel entered an Order Granting the Morgan Group's Motion to Intervene and recognized the Morgan Group as a party, the motion panel, like the lower court, ignored controlling precedent which holds that the applicant for a zoning change or permit is not an indispensable party, and it essentially

affirmed the lower court's ruling without review of the record or consideration of the full briefing of the appeal. But for this erroneous ruling, there would have likely been no opposition to my Motion for Substitution of Appellant because counsel for the City did not state any reason for denying my Motion for Substitution and quite likely would not have been allowed to oppose it and the continuation of this action by me. Therefore, this Court's motion panel's erroneous decision to allow the Morgan Group to intervene should be reversed, and the Morgan Group's opposition to my Motion for Substitution of Appellant and the lower court's baseless findings and recommendations should be stricken from the record. Wherefore, my Motion for Substitution of Appellant should be granted.

STANDARD OF REVIEW

Purely legal matters, such as the interpretation and application of a statute or case law, are subject to de novo review. *Pantoja v. State*, 59 So. 3d 1092 (Fla. 2011). Evidentiary questions that are not factually based are reviewed under the de novo standard. See *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006).

When the evidence is disputed, courts apply the competent, substantial evidence test. *Mario's Enterprises Painting & Wallcovering, Inc. v. Veitia Padron, Inc.*, 52 So. 3d 819 (Fla. 3d DCA 2011); *Acoustic Innovations, Inc. v. Schafer*, 976 So. 2d 1139 (Fla. 4th DCA 2008); *Lee v. State*, 868 So. 2d 577 (Fla. 2d DCA 2004). Competent, substantial evidence is that which "will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

ARGUMENT

POINT I

Electronically produce signatures are allowed by Florida law, and therefore, the Transfer of Interest and my Motion for Substitution of Appellant should be accepted and approved by this Court.

The forensic document examiner testified that Mr. Colson's signature was electronically duplicated. See pages 29-34 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

The pertinent part of Florida Statutes § 668.004 (2022) states, "an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."

Florida Statutes § 668.50(2)(h) (2022) states, ""Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."

Florida Statutes § 668.50(7)(a) (2022) states, "A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form."

Florida Statutes § 668.50(7)(b) (2022) states, "A contract may not be denied legal effect or enforceability solely because an electronic record was used in the formation of the contract."

Florida Statutes § 668.50(7)(c) (2022) states, "If a provision of law requires a record to be in writing, an electronic record satisfies such provision."

Florida Statutes § 668.50(7)(d) (2022) states, "If a provision of law requires a signature, an electronic signature satisfies such provision."

Florida Statutes § 668.50(9)(a) (2022) states, "An electronic record or electronic signature is attributable to a person if the record or signature was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of

any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."

Florida Statutes § 668.50(9)(b) (2022) states, "The effect of an electronic record or electronic signature attributed to a person under paragraph (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law."

Florida Statutes § 668.50(13) states, "ADMISSIBILITY IN EVIDENCE.—In a proceeding, evidence of a record or signature may not be excluded solely because the record or signature is in electronic form."

Florida Rule of General Practice and Judicial Administration 2.515 governs the signatures of attorneys and parties, and 2.515(c)(1)(B) provides that acceptable signatures include "original signatures that have been reproduced by electronic means, such as on electronically transmitted documents or photocopied documents...."

"[T]he general rule that, "in the absence of a statute or rule prescribing the method of a signature, a signature may be validly

affixed by a number of different means," is applicable here." *Bernard v. Rose*, 68 So.3d 946, 948 (Fla. 3d DCA 2011) quoting *Haire v. Florida Department. of Agriculture & Consumer Services*, 870 So.2d 774, 789 (Fla.2004) discussing the acceptability of electronic signatures provided by Florida Statutes § 668.004.

The testimony and evidence submitted at the hearing in this matter on May 22, 2023 showed that Clay G. Colson wanted me to continue this action; that the signature on the Transfer of Interest was an electronic copy of Clay G. Colson's signature; that Clay G. Colson gave the Transfer of Interest to Chris Hrabovsky to give to me if anything happened to prevent him from pursuing this action; and that a true and correct copy of the Transfer of Interest was given to me and filed in the Appendix to the Motion for Substitution of Appellant.

Therefore, as the Florida Statutes, the Florida Rule of General Practice and Judicial Administration, and the precedent cited above provide that electronic copies of documents and electronic copies of signatures are acceptable as originals, the Transfer of Interest should be accepted as an original and given the same effect as an original.

POINT II

No genuine question was raised about the authenticity of the Transfer of Interest, and therefore, the Transfer of Interest and my Motion for Substitution of Appellant should be accepted and approved by this Court.

The Morgan Group's Response in Opposition to Motion for Substitution of Appellant alleged that the Transfer of Interest was not authentic because Mr. Colson passed away suddenly rather than from a terminal illness, and therefore, that it was extremely unlikely that Mr. Colson executed the Transfer of Interest. See the Morgan Group's Response in Opposition to Motion for Substitution of Appellant in Appendix A pages 2-3.

Mr. Colson's sister testified at the hearing on May 22, 2023 that he had been sick, that she had taken him to the doctor, that another developer tried to kill him, and that he wanted me to carry on this case if anything happened to him. See pages 16-19 of the Transcript of the Hearing of May 22, 2023 in Appendix C.

Mr. Colson's Death Certificate showed that Mr. Colson was nearly sixty-eight (68) years old and that the cause of death was cardiomyopathy. See Mr. Colson's Death Certificate in Appendix E.

Moreover, no allegations were raised which showed any genuine issue concerning the authenticity of the Transfer of Interest. See Appendixes A and C.

Certainly, a couple of unsuccessful attempts to serve a subpoena on Mr. Hrabovsky with no evidence that there was any attempt to even avoid service coupled with evidence showing that counsel for the Morgan Group may have instructed its process server to quit trying to serve Mr. Hrabovsky on or about May 5, 2023, seventeen (17) days before the hearing on May 22, 2023 certainly does not constitute competent substantial evidence to raise any genuine issue about anything.

In addition, no evidence was produced showing that any person other than the Appellant, Clay G. Colson, was involved in production of the Transfer of Interest. See Appendix C.

The Affidavit of Chris Hrabovsky showed that Mr. Colson gave him the Transfer of Interest to deliver to me if anything prevented Mr. Colson from continuing to pursue this action. See Appendix B.

Therefore, as there was no competent substantial evidence produced which could raise a genuine issue about the authenticity of the Transfer of Interest, the lower court had no basis to find that

"It is more likely than not that the purported Transfer of Interest was "manufactured" by fraudulent means." Wherefore, the lower court should have recommended that my Motion for Substitution of Appellant be granted, and this Court should grant my Motion for Substitution of Appellant.

POINT III

The erroneous Order allowing the Morgan Group to Intervene in this appeal should be vacated and its Opposition to my Motion for Substitution of Appellant should be stricken from the record, and therefore, my Motion for Substitution of Appellant should be accepted and approved by this Court.

The basis of this appeal was the lower court's decision to require the Appellant to add the Morgan Group as an indispensable party. In spite of that, on February 16, 2023, when this Court's motion panel entered an Order Granting the Morgan Group's Motion to Intervene and recognized the Morgan Group as a party, the motion panel, like the lower court, ignored controlling precedent which holds that the applicant for a zoning change or permit is not an indispensable party, and it essentially affirmed the lower court's ruling without review of the record or consideration of the full briefing of the appeal.

In the Morgan Group's Motion to Recognize it as an Appellee or to Intervene, it argued that it should be allowed to intervene in this appeal because "the trial court concluded that Morgan Group was required to be made a party to the action below..." and because intervention should be allowed where the intervener stands to lose or gain valuable rights citing the Florida Supreme Court's decision in *Wags Transp.* Sys., *Inc. v. City of Miami Beach,* 88 So. 2d 751, 752 (Fla. 1956).

However, counsel for Morgan ignores that during the hearing on the City's Motion to Dismiss for Failure to Join Indispensable Parties, hereinafter referred to as the City's Motion to Dismiss, Mr. Colson pointed out that this Court's decision in *City of St. Petersburg, v. Marelli*, 728 So.2d 1197 (Fla. 2d DCA 1999) held that a property owner and developer for whom a variance was granted to allow a development is not an indispensable party, and thus, that such precedent requires denial of the City's Motion to Dismiss. See pages 48-49 of the transcript of the hearing on the City's Motion to Dismiss in the Appendix to Morgan's motion.

Also, please note that at the hearing on the City's Motion to Dismiss, Mr. Colson also mentioned the Florida Supreme Court's

decision in *Brigham v. Dade County*, 305 So.2d 756 (Fla.1974) in opposition to the City's Motion to Dismiss. See pages 48-49 of the transcript of the hearing on the City's Motion to Dismiss in the Appendix to Morgan's motion.

In *Brigham*, the Florida Supreme Court held that a party challenging a zoning regulation change does not have to join the affected property owner who was the applicant for the zoning change because such property owner is not an indispensable party and reversed the lower courts which had dismissed the action for failure to join such property owner and specified that "The real respondent is the tribunal whose judgment is sought to be quashed...." *Brigham* at 757.

In addition to following the Florida Supreme Court's decision in *Brigham* in reaching its decision in *City of St. Petersburg, v. Marelli*, this Court has followed the Florida Supreme Court's decision in *Brigham* when this Court stated "The Florida Supreme Court has held that in proceedings to review completed administrative action where it is claimed that the essential requirements of law have not been followed, it is not absolutely necessary that interested third parties be joined as respondents."

Tampa Bay Cab Company, Inc. v. Yellow Cab Company of Tampa, Inc., 446 So.2d 246, 247 (Fla. 2d DCA 1984) citing *Brigham.*

Finally, it should be clear to everyone involved that neither the Florida Supreme Court's 1956 decision in *Wags* nor other lower court opinions can be a basis for this Court or the lower court to ignore the Florida Supreme Court's 1974 decision in *Brigham* in order to allow Morgan to intervene in this appeal or in proceedings in the lower court.

Therefore, this Court's motion panel's Order allowing the Morgan Group to Intervene in this appeal should be vacated and its Opposition to my Motion for Substitution of Appellant should be stricken from the record.

Furthermore, as the City's Response in Opposition to Motion for Substitution of Appellant in which the City "concurred" with the Morgan Group's Response but did not join in it or incorporate it in any way, it raised no basis to oppose my Motion for Substitution of Appellant.

Therefore, my Motion for Substitution of Appellant should be accepted and approved by this Court.

CONCLUSION

Florida Statutes, the Florida Rules of General Practice and Judicial Administration, and Florida precedent provide that electronic copies of documents and electronic duplicated signatures are acceptable as originals. In addition, there was no competent substantial evidence produced which could raise a genuine issue about the authenticity of the Transfer of Interest. Furthermore, this Court's motion panel's Order allowing the Morgan Group to Intervene in this appeal violated controlling Florida Supreme Court precedent, it should be vacated and its Opposition to my Motion for Substitution of Appellant should be stricken from the record. Finally, as the City's Response in Opposition to Motion for Substitution of Appellant in which the City "concurred" with the Morgan Group's Response but did not join in it or incorporate it in any way, it raised no basis to oppose my Motion for Substitution of Appellant.

Wherefore, my Motion for Substitution of Appellant should be accepted and approved by this Court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition has been served by U.S. Mail to Andrew J. Salzman, Esq. of Unice Salzman Jenson, P.A. at 1815 Little Rd., Second Floor in Trinity, FL 34655; to Shane T. Costello and Ed Armstrong of Hill, Ward & Henderson, P.A. at at 600 Cleveland St., Suite 800 in Clearwater, FL 33755 on this 9 day of October, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the applicable font and word limit requirements of the Florida Rules of Appellate procedure and contains 4,542 words.

THERESA D. RUBALCAVA

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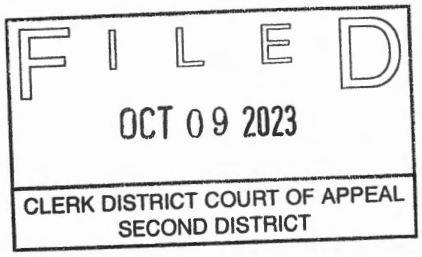

APPENDIX TO
THERESA D. RUBALCAVA'S INITIAL BRIEF ON THE ORDER DENYING MOTION FOR SUBSTITUTION OF APPELLANT

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