IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY,
FLORIDA

WILLIAM G. MAYFIELD, on behalf of himself and all other persons similarly situated,

Plaintiff,

v.

CITY OF PALM COAST, AMERICAN TRAFFIC SOLUTIONS, LLC, and ATS AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendants.
_____/

CASE NO.: 2009-CA-2245

DEFENDANT, CITY OF PALM COAST'S, MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S AMENDED MOTION TO AMEND COMPLAINT AND PUTATIVE CLASS MEMBER'S MOTION TO INTERVENE

Defendant, the CITY OF PALM COAST hereby files this Memorandum of Law in Opposition to Plaintiff's Amended Motion to Amend Complaint and Putative Class Member Bernard L. Upshur's Motion to Intervene, and asserts the following in support thereof:

I. Introduction and Relevant Factual Background.

A. William Mayfield's passing in December of 2012, and actions taken by Plaintiff's counsel on Mayfield's behalf following his death.

Plaintiff William G. Mayfield and his counsel filed this action in August of 2009. Crucially for purposes of the issues before this Court, although the matter is purported to be a class action, no class has ever been certified as to the claims against the City at any time during the nearly six years this matter has been pending.

On December 17, 2012, Mr. Mayfield passed away. *See,* Composite Exhibit "A" to the City's Motion to Abate. Two days later, on December 19, 2012, Plaintiff's counsel and counsel for co-defendants American Traffic Solutions, LLC and ATS American Traffic Solutions, Inc.,

attended a fairness hearing in order to obtain Court approval of a settlement reached between those parties. An order approving the settlement was entered the same day. *See,* this Court's December 19, 2012 "Order and Final Judgment Certifying Settlement Class [as to co-defendants only], Approving Settlement Agreement, and Awarding Lead Counsel Fees and Costs." As part of that Order, this Court specifically approved and ordered payment of a class representative fee to the named plaintiff, William Mayfield. *Id.*

Following the fairness hearing and order, the settlement between co-defendants and the Plaintiff was finalized. Presumably, Plaintiff's counsel would have attempted to fulfill their obligations to keep their client, Mayfield, reasonably informed regarding the partial settlement and his receipt of a class representative fee. Accordingly, counsel for Mayfield should have become aware of their client's passing shortly after December 19, 2012.

On June 20, 2014 Jason Weisser, counsel for Mayfield, issued correspondence to counsel for the City regarding this matter. Applicable Florida law, including relevant portions of the Florida Evidence Code, mandate that the contents of this June 20 correspondence remain confidential. The June 20 correspondence did, however, take certain positions and set forth propositions which would have required Plaintiff's counsel to confer with their client. *See, Affidavit of Scott Danahy,* attached hereto as Exhibit "A," at paragraph 4. Accordingly, Plaintiff's counsel should have become aware of the death in June of 2014 at the very latest, although they presumably would have made efforts to keep their client reasonably informed of the status of this case well before that date.

B. The City's Filing of Suggestion of Death, and Jason Weisser's acknowledgment in August of 2014 that he had been aware Mayfield had passed some time ago.

On August 8, 2014 the undersigned became aware Mayfield had passed nearly two years earlier, but that Plaintiff's counsel had never advised the Court of their client's passing. *See,*

Danahy Affidavit at paragraph 3. The undersigned determined that the appropriate course of action was to file a Suggestion of Death and a Motion to Abate.

In the early afternoon of August 18, 2014 the undersigned contacted Mr. Weisser in order to discuss the death of Mayfield, among other matters. *See,* Danahy Affidavit at paragraph 5. Also participating in the phone conference was Nicole Turcotte, another attorney in the same firm as the undersigned, who had been involved in this litigation. *See,* Danahy Affidavit at paragraph 5; Affidavit of Nicole Turcotte, attached as Exhibit "B," at paragraph 3. The phone conference was conducted via speaker phone so the undersigned and Ms. Turcotte could both speak with and hear Mr. Weisser. *See,* Danahy Affidavit at paragraph 6; Turcotte Affidavit at paragraph 4. Towards the end of the conference, the undersigned advised of the City's intent to file the Suggestion of Death and Motion to Abate. *See,* Danahy Affidavit at paragraph 6; Turcotte Affidavit at paragraph 4. Mr. Weisser responded that he intended to file a motion to substitute in an appropriate party. *See,* Danahy Affidavit at paragraph 6; Turcotte Affidavit at paragraph 4. Mr. Weisser stated he knew Mayfield "had been dead for a while," and that he was unsure what Mayfield's family's plans were. *Id.*

On August 19, 2014, the undersigned served and filed the City's Suggestion of Death of Mayfield, and the Motion to Abate. Both documents were served via the Florida Courts E-Filing Portal, as indicated by the e-service confirmation dated August 19, and attached to Plaintiff's Amended Motion to Amend as Composite Exhibit "A." *See also,* Danahy Affidavit at paragraph 9. As reflected by the confirmation email from the e-portal system, all individuals from Plaintiff's counsel's firm who were registered with the E-portal for this case were served with both documents; specifically, the confirmation email reflects that there were "no matching entries" for "e-recipients deselected for service." The documents were served by selecting the

"Serve All" option on the e-portal system. As reflected by the confirmation email, the only two individuals from Plaintiff's counsel's firm who were designated e-service recipients in this case at that time were David Kerner and Jennifer Kirby. It is undisputed Mr. Kerner was served.

Mr. Kerner and Ms. Kirby were still the only e-service recipients from Plaintiff counsel's firm designated in this case as of December 19, 2014 when Plaintiff's counsel belatedly filed their original Motion to Amend the Complaint. This is reflected in the confirmation email sent by the e-portal system for that motion, which is attached as Exhibit "C." Mr. Kerner served that motion and he and Ms. Kirby were the only individuals from Plaintiff's counsel's firm selected for service, as designated by Mr. Kerner, with no e-filers deselected.

By January 14, 2015 Plaintiff's counsel apparently had finally realized the error in only designating Mr. Kerner and Ms. Kirby as e-filers in this case, and not designating Mr. Weisser and his assistants. On that date, Plaintiff's counsel served a Notice of Hearing, and the confirmation email reflects Mr. Weisser and his assistants had finally been added as e-recipients. *See,* confirmation email of the January 14, 2015, included within Composite Exhibit "C."

C. David Kerner takes responsibility for substituting another party, but fails to timely file a motion for substitution. When the motion is filed, it is improper.

More than two months after his receipt of service of the Suggestion of Death, Mr. Kerner first contacted attorneys in the undersigned's firm to discuss substitution of another party. On October 22, 2014 Mr. Kerner sent an email to Ms. Turcotte and to Usher L. Brown inquiring as to whether the City would agree to a substitution of lead plaintiff. *See,* Exhibit "D." Mr. Kerner engaged in a series of emails with counsel for the City discussing possible substitution, as documented in Plaintiff's Exhibit "B" to their Amended Motion to Amend Complaint. All of those emails were sent from Mr. Kerner, clearly demonstrating that he and not Mr. Weisser was responsible for handling substitution. Those emails were all copied to Mr. Weisser.

On October 29, 2014 Mr. Kerner wrote to Ms. Turcotte regarding substitution. Mr. Kerner wrote "[a]s ***time is somewhat of the essence,*** any input would be greatly appreciated." *See,* Exhibit B to Plaintiff's Amended Motion to Amend Complaint (*emphasis added).* Accordingly, Mr. Kerner acknowledged being aware of an impending deadline. On November 14, 2014, the undersigned wrote to Mr. Kerner and indicated counsel for the City would have to see a draft motion and complaint in order to determine whether it would consent to substitution.

Over a month later, on December 19, 2014, Plaintiff's counsel belated filed "***Plaintiff's*** Motion to Amend Complaint to Substitute Lead Party Plaintiff." The motion was untimely as it was filed more than ninety days after service of the Suggestion of Death. Moreover, the motion was improper and is a nullity, as argued in the City's Motion to Dismiss, since Plaintiff's counsel could not have acted on behalf of a deceased client. The motion was signed by Mr. Kerner.

D. The City files its Motion to Dismiss and Plaintiff's counsel continues the original hearing date based on the position Mr. Kerner is the attorney responsible for handling the substitution issue.

On January 21, 2015, Plaintiff's counsel served an amended notice setting a hearing on their Motion to Amend to take place on March 25, 2015. The notice was signed by Mr. Kerner.

On February 23, 2015, the City filed and served its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. This motion is premised on the argument that there was no attempt by any appropriate party to substitute for the deceased plaintiff within ninety days of suggestion of death, and that purported class members do not have standing to seek to amend. The City's Motion also expressly put Plaintiff's counsel on notice that the Motion to Substitute was improper as it purported to take action on behalf of a deceased client when no estate or personal representative had been substituted in his place. The City cross-noticed its Motion to Dismiss to be heard at the same hearing as the Motion to Amend.

On March 19, 2015, less than a week before the hearing Mr. Kerner had set for a date he had selected, he wrote to the undersigned counsel to advise he would not be able to attend and would seek a legislative continuance. *See,* Email chain between Mr. Kerner and the undersigned, attached hereto as Exhibit "E." [1] Mr. Kerner stated the basis for the continuance was that the Florida legislature was in session at the time of the hearing, and Mr. Kerner is a member of the Florida House of Representatives. *Id.* At the time Mr. Kerner requested the continuance, Plaintiff's counsel had not filed any response to the City's Motion to Dismiss, nor any affidavits or any other documentation seeking to establish excusable neglect or any basis for avoiding dismissal for failure to comply with Rule 1.260.

The undersigned requested additional information why the continuance was necessary:

> "Can't Jason [Weisser] argue the motions – and isn't Jason lead counsel on this case? I believe that everything we have in our file, and our interaction over the course of the case (and in all the related red light cases), is consistent with Jason having always been lead counsel.
>
> If you are going to seek a continuance based on 11.111, then it would be our understanding you would be lead counsel for this case going forward, is that correct? It would also be our understanding that you would personally be arguing the issues currently set for hearing if they are continued to a later date?" *Id.*

The undersigned also inquired as to why the issue of the legislature being in session was being raised at such a late date when Mr. Kerner had selected the hearing date. *Id.*

Mr. Kerner responded on March 20, stating in relevant part:

> "If I recall correctly, ***i authored the motion that I called up to be heard, and I am the one arguing it.*** I cannot agree to the several stipulations contained in your email, as the statute does not address or contemplate them. . ." *Id (emphasis added).*

Mr. Kerner filed a Motion for Continuance which was granted. The hearing was re-scheduled to take place June 26, 2015.

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[1] Although the subject line of these emails references a different case with different parties, it is clear they refer to the hearing in this matter, based on the dates.

E. Plaintiff's counsel files an amended motion seeking intervention on behalf of a purported class member, ten months after receiving the suggestion of death and two and a half years following the passing of their client.

On June 17, 2015 Plaintiff's counsel filed the instant Motion to Substitute and Intervene. Plaintiff's counsel seeks intervention on behalf of a purported class member for the first time – two and a half years since the death of Mayfield, nearly a year after the undersigned discussed the death of Mayfield with Mr. Weisser and served a suggestion of death, almost four months since the City filed its Motion to Dismiss, almost three months since the hearing on the Motion to Dismiss was originally scheduled, and just over one week before the rescheduled hearing. The Amended Motion provides no explanation as to why intervention was not sought in the ten months since the Suggestion of Death was filed or in the six months since Plaintiff's counsel filed the original Motion to Amend. For the reasons set forth below, and in the City's previously filed Motion to Dismiss, the City respectfully asserts that the Amended Motion should be denied.

II. Argument and Citations to Legal Authority

A. Dismissal is appropriate pursuant to Rule 1.260.

Dismissal of this action under Rule 1.260 Florida Rules of Civil Procedure is appropriate for the reasons previously set forth in the City's Motion to Dismiss. The City incorporates that motion herein by reference. As set forth in that motion, no one filed any motion to substitute another party in place of the deceased plaintiff until more than ninety days after the filing and service of the Suggestion of Death. As also argued in the City's Motion to Dismiss, when substitution was finally attempted, it was done so improperly via Plaintiff counsel's original Motion to Amend Complaint, filed in December of 2014. The motion was improper as it was purportedly brought on behalf of Mayfield, who had been deceased at that point for two years. As set forth in greater detail in the City's Motion to Dismiss, when a party to civil litigation

passes away, the attorney who represented that party while he or she was alive no longer has authority to act on the decedent's behalf, at least not until the estate or other appropriate representative has been substituted.

Plaintiff counsel's argument that Rule 1.260 is not applicable to this action is entirely without merit. This argument is based on the language in the Rule which states that if an appropriate motion for substitution is not made within ninety days, the action shall be dismissed "as to the deceased party," without any other citation to other legal authority. As argued below and in the City's Motion to Dismiss, however, the ***only*** plaintiff or entity with a claim to date in this matter is the deceased Plaintiff. This is because there never has been any other named plaintiff, no class has ever been certified as to the claims against the City, and members of the uncertified class have no standing to seek substitution or take any other action in this matter. There is no basis for arguing Rule 1.260 is inapplicable in this case.

Plaintiff made no attempt to act on behalf of any other party, or to seek intervention, until filing its Amended Motion last week, six months after filing the original Motion to Amend. In now seeking to intervene, Plaintiff's counsel implicitly acknowledges that their prior attempt to amend on behalf of a deceased client was not appropriate. Otherwise, there would be no need to now seek intervention on behalf of a purported class member. Neither intervention nor amending in order to substitute in a purported member of the uncertified class is appropriate, however. This is because, as argued in Section II(C) of the City's Motion to Dismiss, when a class action has never been certified, the uncertified class has not achieved any separate legal status from the class representative and accordingly lacks standing to seek amendment.

Plaintiff's counsel's attempt to avoid dismissal under Rule 1.260 by arguing excusable neglect is unpersuasive. The record in this matter fails to establish excusable neglect for failing

to timely seek substitution of an appropriate party, for the failure to seek intervention until nearly a year since the suggestion of death, or for the failure to seek intervention until nearly three years following the death of the only named plaintiff.

Plaintiff counsel's argument is that excusable neglect exists because the City's Suggestion of Death was not originally served specifically on Mr. Weisser and his assistants, although there is no dispute that it was served on Mr. Kerner and his assistant. This argument does not establish excusable neglect, however. As set forth below there is no question, as repeatedly documented in writing, that Mr. Kerner was the attorney in Plaintiff's counsel's office responsible for preparing and filing the appropriate documents to seek substitution. It is accordingly not excusable neglect if the attorney who was solely responsible for meeting a deadline completely failed to heed that deadline, and never inquired as to whether the deadline was calendared, particularly under the specific facts of detailed in this Memorandum. Moreover, Plaintiff's excusable neglect argument fails for additional reasons, as set detailed below.

As set forth in Section I(B) counsel for the City served the office of Plaintiff's counsel via the Florida Courts E-Filing Portal, and as clearly indicated by the confirming email, all individuals employed at Plaintiff's counsel's law firm who were registered with the E-portal in this case were selected for and did receive service of process. As also set forth in Section I(B), Mr. Weisser and his assistants were apparently not registered at that time to receive service of process in this case, although that error was later rectified.

It is undisputed that Mr. Kerner was served with the Suggestion of Death. *See,* Kerner Affidavit at Paragraph 4; Exhibit "A" to Plaintiff's Amended Motion to Amend and Intervene. The record in this case makes clear that Mr. Kerner was responsible for arranging for the substitution of an appropriate party. As set forth in detail in Section I above, it was Mr. Kerner

who initially contacted counsel for the City to discuss the substitution issue, and Mr. Kerner who issued the emails continuing to discuss the issue. It was Mr. Kerner who authored the original (and untimely) Motion to Amend which sought to substitute another party (as admitted in his March 20 email to the undersigned), and Mr. Kerner who signed that motion. In March, when the hearing on these issues was originally set, it was Plaintiff's counsel's position that Mr. Kerner had not only authored the motion seeking to substitute, called it up to be heard, and would be the one arguing it, but that he was so indispensable to the issues regarding substitution that the hearing would have to be continued because Mr. Weisser could not proceed without him.

It is not excusable neglect to argue that the attorney who was solely responsible for handling the substitution issue was not responsible for calendaring the deadline to do so because his supervising partner and the partner's staff were. This is particularly true given the email from Mr. Kerner to counsel for the City in which he acknowledged time was of the essence in seeking substitution, thereby demonstrating his awareness of a deadline.

Florida courts have consistently held that excusable neglect cannot be established based on gross negligence. *Hornblower v. Cobb,* 932 So.2d 402, 406 (2nd DCA 2006); *Otero v. GEICO,* 606 So.2d 443, 444 (2nd DCA 1992); *Fischer v. Barnett Bank,* 511 So.2d 1087, 1087-88 (3rd DCA 1987); *Winter Park Arms, Inc. v. Akerman,* 199 So.2d 107 (4th DCA 1967). With all due respect to opposing counsel it is gross neglect for an attorney to be responsible for filing a motion, but to not even inquire of office staff or his supervising attorney regarding whether the deadline was calendared in the first place. This is particularly true when the supervising attorney was copied on emails discussing the motion and the need to file it in a timely fashion. The gross negligence is even more pronounced when undersigned counsel specifically advised the lead attorney on the case in advance that the Suggestion of Death triggering the deadline was going to

be filed, and that the lead attorney acknowledged being aware of the death, but having taken no action to address the same[2].

The gross negligence in this case is further compounded by the fact Plaintiff's counsel took no action to attempt to substitute in another party for years following their client's death. The claim that Plaintiff's counsel was unaware of the death until years after the fact is further evidence of gross negligence as counsel should have been aware much earlier. As detailed in Section I above, Plaintiff's counsel finalized and had approved a settlement with another defendant in this action after Plaintiff's death. In order to keep their client reasonably informed about the status of the matter, Plaintiff's counsel should have made some effort to contact their client at that point. Plaintiff also engaged in communications with the undersigned in June of 2014 which should have required Plaintiff's counsel to contact their client and obtain his approval. At the very least, Plaintiff's counsel should have made some attempt to consult with their client at some point in the nearly two years following his death in order to keep their client reasonably informed regarding the status of the matter. If they had done so, they should have discovered his passing at that time and taken appropriate steps to timely seek substitution. To not do so is grossly negligent.

Moreover, Florida courts have found that excusable neglect does not exist when a party discovers he or she has missed a deadline as the result of neglect, but then fails to act with due diligence to address the error. *Fisher,* 511 So.2d at 1088 (finding defendants failed to act with

[2] Moreover, sophisticated parties cannot establish excusable neglect, as opposed to gross negligence, when they fail to make reasonable inquires about the status of litigation. *See, e.g., Ray v. Thompson-Kernaghan & Co.,* 761 So.2d 1197, 1198 (Fla. 4th DCA 2000). Considering that Mr. Kerner was responsible for preparing and filing a motion for substitution, and that he was aware time was of the essence, at some point he clearly should have discussed the status with Mr. Weisser and determined that Mr. Weisser was unaware that a suggestion of death had been filed.

due diligence when they discovered they had been defaulted, but then waited five weeks to contact their attorney to address the default); *Bayview Tower Condo. Ass'n, Inc. v. Schweizer*, 475 So.2d 982, 983 (3rd DCA 1985) (holding defendant failed to act with due diligence necessary to establish excusable neglect when it waited a month before moving to vacate default). In this action, although a motion seeking substitution was finally filed in December of 2014, that motion was improper as it was filed on behalf of a deceased party. Plaintiff's counsel did not attempt to seek intervention, or to address or explain the failure to meet the ninety day deadline, until June 17, nearly a year after the Suggestion of Death and nearly four months after the City filed its Motion to Dismiss addressing the failure to meet the ninety day deadline. Particularly considering that Plaintiff's Amended Motion is premised largely on the purported right of a purported class member to intervene, Plaintiff's counsel did not act diligently to address the failure to meet the ninety day deadline even after filing an invalid motion seeking to substitute.

For these reasons, Plaintiff's counsel fails to establish excusable neglect. In the event that this Court is inclined to entertain their explanations regarding the issue however, the City requests leave to depose Mr. Weisser and Mr. Kerner in order to obtain additional information in light of the issues and discrepancies discussed above.

B. Plaintiff's Amended Motion to Amend and Motion to Intervene Should be Denied as Amendment is Futile.

1. Purported members of the uncertified class lack standing.

For the reasons set forth in the City's Motion to Dismiss, neither the deceased Plaintiff nor any purported member of the class has standing to seek amendment of Plaintiff's Complaint. A decedent cannot take such action, and his former attorneys have no authority to do so. Additionally, as asserted in the Motion to Dismiss, federal courts have consistently held that when a plaintiff loses standing to assert a claim, he or she does not retain standing to control the

litigation by substituting new plaintiffs. Plaintiff does not attempt to refute, and does not even mention, the case law cited in the City's Motion to Dismiss standing for the proposition that purported members of an uncertified class "never achieved any separate legal status," and "therefore there is no interested party whom the court could allow to locate a substitute named plaintiff" once a named plaintiff no longer has a viable claim and no class was ever certified.

The only cases cited in the Motion to Intervene in support of the alleged ability of a purported class member of an uncertified class to intervene are distinguishable. Plaintiff first cites to *Okeelanta Corp. v. Bygrave,* 660 So.2d 743 (Fla. 4th DCA 1995). Unfortunately, however, Plaintiff completely misrepresents the history and the holding of *Okeelanta*, which in no way supports his argument. The Motion inaccurately asserts that the trial court in *Okeelanta* "originally denied class certification" based on a finding that "the proposed class representatives lacked standing . . ." To the contrary, the *Okeelanta* suit originally ". . . ***was certified*** as a class action covering the period of 1983 to 1991." *Okeelanta,* 666 So.2d at 746 *(emphasis added).* Accordingly, it was determined that "the original complaint set forth a class claim for unpaid wages, and the trial court determined that the claims were subject to treatment as a class." *Id,* at 751. The trial court later determined "none of the workers which it found were capable of being class representatives had claims" against the defendants. *Id,* at 750. The court ruled at that time that the case would proceed only as to the ***individual claims*** of two plaintiffs. *Id,* at 750.

Contrary to the mischaracterization of *Okeelanta,* neither the trial court nor the appellate court ever determined that any of the purported class representatives "lacked standing." The trial court actually found that the purported class representatives who had worked for the defendants "were so lacking in an understanding of the claims and unable to testify truthfully that they could not be adequate class representatives." *Id,* at 751. Accordingly, the "defect in the class

representatives was ***not that those plaintiffs did not have a claim similar to the entire class*** but that the attributes personal to themselves precluded their representation of the class." *Id (emphasis added).* In fact, the issue of the class representatives' standing is never discussed anywhere in the *Okeelanta* decision.

Equally inaccurate is Plaintiff's misrepresentation that in *Okeelanta* "months later, two members of the putative class sought to intervene as class representatives." In actuality, separate motions to intervene were filed by two different individual plaintiffs at two different times, and those individuals were later added as parties. *Id,* at 750. Critically, at the time these two plaintiffs moved to intervene, the only remaining claims were ***individual claims*** of two other individual plaintiffs. *Id.* Accordingly, the intervenors in *Okeelanta* were not "putative class members" who "sought to intervene as class representatives" as asserted by Plaintiff. Nearly a year after the two ***individual plaintiffs*** were allowed to intervene, "over the strenuous objections" of the defendants, the trial court certified the claim as a class action with the two new plaintiffs as class representatives. *Id.* Therefore, Plaintiff's assertion that the court permitted the intervenors "to intervene and certified the class" is inaccurate as well. Plaintiff's contention that the appellate court in *Okeelanta* "affirmed the trial court's orders permitting the intervention and certifying the class" is likewise a complete mischaracterization. To the contrary, the Court actually reversed a summary judgment granted by the trial court, based on the finding that the contract at issue was clear and unambiguous, and also ruled that the statute of limitations did not bar claims due to the relation back doctrine. *Id,* at 744, 751.

Accordingly, the accurate history of *Okeelanta* case is that the plaintiffs who intervened did so at a time when viable ***individual claims*** were actively being pursued by other plaintiffs, and at a time when the trial court had already determined that class action treatment of the claims

would be appropriate with the proper class representatives – and had actually already certified the class once. Moreover, the *Okeelanta* case does not specify the basis for the "strenuous objections" by the defendants to the class later being re-certified, or whether those objections were ever presented in any appeal of the certification. Nothing in the *Okeelanta* case even considers the issue of whether it is appropriate for putative class members to seek intervention and amendment at a point in time when a class action has never been certified and the sole named plaintiff no longer has a viable claim.

The next decision cited in Plaintiff's motion, *Heikes v. Republic Ins. Co.*, 866 So.2d 97 (Fla. 3rd DCA 2004), is likewise completely distinguishable. In *Heikes,* the trial court certified the class, and that certification was affirmed on appeal. *Id,* at 98. It was only ***after*** the class was certified that the defendants moved for summary judgment, and the appellate court recognized that the class could still move to substitute class representatives. *Id,* at 99. Accordingly, the *Heikes* decision is illustrative of the principle recognized in the City's motion to Dismiss that "***[o]nce certified***, a class acquired a legal stats separate from that of the named plaintiffs." The case is completely irrelevant, however, to this situation where no class was ever certified.

The *Hall v. Humana Hospital* case cited by Plaintiff (686 So.2d 653, Fla 5th DCA 1996), is completely irrelevant. There is absolutely no discussion in the *Hall* decision of whether or not the class was certified, although it is certainly implied that certification was granted. Moreover, the *Hall* decision involved a class action in which there were clearly multiple class representatives. The very title of the case, in which both "Jan Hall" and "Eugene Kiernan" are listed as named plaintiffs, reflects this fact. Moreover, the issues on appeal involved "only those class plaintiffs represented by Gayle Hoffman." *Id,* at 655. The appellate court also found that the lower court had erred in "dismissing Eugene Kiernan ***as a class representative*** without a

hearing in light of his death . . ." *Id,* at 658 *(emphasis added)*. *Hall* had nothing to do with the propriety of allowing a purported class member of a class which had never been certified to substitute or intervene when no other named plaintiffs had viable existing claims.

Finally, the last case cited by Plaintiff in their motion, *Owensby v. Citrus County* 13 So.3d 136 (5th DCA 2009), is distinguishable and unpersuasive. In a short, two paragraph opinion that provides no specific factual background, the *Owensby* appellate court found that in the specific case before it "the trial court gave no reason for denying the intervention" when two purported class members moved to intervene following the original denial of class certification based on the inadequacy of the first proposed class representatives. *Id,* at 137. In that case, the appellate court also expressly found that "the case met all the criteria for class certification except the adequacy of the proffered representative." *Id.*

Conversely, in this action, there are several "reasons for denying the intervention." First, the complaint should be dismissed pursuant to Rule 1.260. Second, as argued below, the motion to amend and intervene is untimely. Third, as also argued below, amendment should be denied as futile. Unlike in *Owensby*, there has been no finding in this matter that "all the criteria for class certification except the adequacy of the proffered representative" have been met. To the contrary, this remains a hotly contested issue and the City in fact adamantly maintains that the other criteria for certification are not met.

Moreover, there is no indication in the *Owensby* decision that the defendants argued or that the court considered the line of cases cited in the City's Motion to Dismiss establishing that putative members of an uncertified class "never achieved any separate legal status" and therefore have no standing to seek amendment of a complaint after the sole named plaintiff has been rejected. In fact, the *Owensby* decision does not cite to any specific legal authority for the

proposition that it is appropriate to allow a putative class member to intervene when a class has not been certified and the only class representative is no longer viable. Moreover, since *Owensby* was decided six years ago, no other decision, either in Florida or any other jurisdiction, has cited to the case in support of that proposition. For all of these reasons, *Owensby* is distinguishable and unpersuasive.

2. Amendment is futile because the purported new class representative cannot possibly be "adequate," as required for class certification.

Plaintiff's Motion to Amend and Intervene should be denied based on futility because, particularly given the passage of time since this action commenced, the representative cannot establish that he is an adequate class representative.

Rule 1.220)(a) Fla. R. Civ. P. mandates (among the other requirements for class certification), that in order to conclude certification is appropriate it must be demonstrated that "the representative party can fairly and adequately protect and represent the interests of each member of the class." The adequacy requirement "requires close scrutiny" in order to ensure due process for absent class members, and "mandates an inquiry into the willingness and ability of the representatives to take an active role in and control the litigation . . . ." *See, e.g., Schirmer v. Citizens Property Ins. Corp.,* 2012 WL 781878, No. 05-3974-CL, at p. 15 (Fla. Cir. Ct. March 2, 2012). *See, also, e.g., Berger v. Compaq Computer Corp.,* 257 F.3d 475, 482 (5th Cir. 2001). Establishing adequacy "requires the class representatives to possess a sufficient level of knowledge and understanding to be capable of controlling or prosecuting the litigation," *See, Schirmer,* 2012 WL 781876, at p. 15; *Berger,* 257 F.3d at 482-483. "A finding of adequacy must include specific factual findings that the class representatives are knowledgeable as to the status and underlying legal basis of their claims, that they are willing and able to pay the cost of notifying the class members and other costs, that they will diligently pursue all claims and that

their interests are not antagonistic to those of the class." *Cheatwood v. Barry University, Inc.*, 2001 WL 1769914, No. CIO 01-0003986 at **9-10 (Fla. Cir. Ct. Dec. 26, 2001); *Schirmer,* at p.15.

In *Schirmer,* the court found that the proposed class representative failed to establish adequacy because after the case had been litigated for almost six years, the purported class representative lacked knowledge of the status and factual basis of the claims, had not controlled or participated actively in the litigation, had "left the litigation to his lawyers," and was "ignorant of the complaint, the Amended Complaint, and the various proceedings in this case." *Id,* at pp. 15-16. As further grounds for determining the proposed representative was inadequate, the Court noted that he "did nothing to locate counsel," that class counsel had initiated contact, and that the proposed representative "did not recall if he ever participated in any decisions regarding the prosecution of this case or if he ever set forth any strategies for the prosecution of this case:" Accordingly, the court found that "[i]n sum, [the purported class representative] fails to meet the adequacy requirement of Rule 1.220(a)(4) because he lacks any knowledge or understanding of his own claims or the claims of the putative class, and the limited understanding he has comes solely from his counsel or public adjusters." *Id (citations omitted).* The court further found that the proposed representative failed the adequacy test because "his total lack of knowledge and understanding of the case renders him incapable of prosecuting or controlling the litigation." *Id (citations omitted); see also, e.g., Berger,* 257 F.3d at 482-483.

In this case, intervention and amendment is now sought nearly six years since the purported class action was commenced, and more than six years since the proposed class representative was allegedly cited for the traffic violation at issue (*see paragraph 4 of the proposed Fourth Amended Complaint).* The proposed class representative has not been

involved in any way in this litigation, its strategy, drafting of the complaint, or prosecution of this action which includes allegations of purported complex constitutional issues. It is simply not possible that, becoming involved at this late stage, the proposed class representative could have any meaningful knowledge or understanding of her claims or the claims of the putative class, or of the history of the proceedings to date. Under the circumstances, any limited knowledge the proposed representative may have would come solely from her attorneys, attempting to bring her up to speed nearly five years into the case. The proposed substitute representative cannot establish adequacy and the amendment should be denied for futility.

C. Plaintiff's Motion should be denied as untimely.

Rule 1.220(d) of the Florida Rules of Civil Procedure requires that a determination as to whether or not a purported class action is maintainable as a class be made "as soon as practicable" after service of any pleading alleging the existence of a class. Accordingly, "a decision on class certification should be made promptly." *See, e.g., Wighum v. Heilig-Meyers Furniture, Inc.*, 682 So.2d 643, 645 (1st DCA 1996).

> "The requirement of diligence in the pursuit of class certification is not a matter of mere judicial window dressing. Failure to timely certify prejudices putative class members by delaying recovery of funds to which they are ostensibly entitled. Delaying certification can foster a false sense of security in claimants who may sit on their rights in the mistaken belief they are being protected by the class counsel. If class certification ultimately is denied . . . Defendants, too, are entitled to know at the earliest practicable date whether they will be facing a limited number of known plaintiffs or a much larger mass of generally unknown plaintiffs.
> . . .
>
> Fundamental fairness, as well as the orderly administration of justice requires that defendants haled into court not remain indefinitely uncertain as to the bedrock litigation fact of the number of individuals or parties to whom they may ultimately be held liable for money damages."
>
> *See, Browning v. Angelfish Swim School, Inc.*, 1 So.3d 355, 361 (Fla 3rd DCA

2009)*(opinion by Judge Shepherd, concurring in part and dissenting in part).*

In *Browning,* Judge Shepherd noted that following five years of litigation, the class representatives and their counsel had yet to prove they satisfied all the legal criteria necessary for certification. *Id.* Judge Shepherd also noted that federal courts routinely deny motions for class certification where there has been a lack of diligence by class representatives or their counsel, even when local rules do not impose a set deadline for seeking certification. *Id,* at 262. Accordingly, Judge Shepherd opined that the trial court's order certifying the class in that action should be reversed without leave to conduct further proceedings, based on lack of diligence in seeking certification.

Under these circumstances, when counsel for the purported class has allowed the case to continue for this length of time with a deceased plaintiff and no timely attempt to substitute another named plaintiff, the requirement to have certification decided promptly has not been met. The Motion to Amend and Intervene is untimely.

III. Conclusion

WHEREFORE, Defendant, THE CITY OF PALM COAST, respectfully requests that this Court deny Plaintiff's Amended Motion to Amend Complaint and Putative Class Member Bernard L. Upshur's Motion to Intervene, and dismiss this action in its entirety premised on the arguments in the City's Motion to Dismiss or in the Alternative Motion for Summary Judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 22, 2015 I electronically filed the foregoing with the Florida E-Portal System which will send notice of the electronic filing to: **Jason D. Weisser, Esquire** and **David M. Kerner, Esquire**, Schuler Halvorson & Weisser, P.A., 1615 Forum Place, Suite 4-D, Barristers Building, West Palm Beach, Florida 33401, (jweisser@shw-

law.com, michele@shw-law.com, dhouyoun@shw-law.com, dkerner@shw-law.com, jkirby@shw-law.com).

/s/ Scott D. Danahy, Esq.
USHER L. BROWN, ESQUIRE
Fla. Bar No.: 321461
SCOTT DANAHY, ESQUIRE
Fla. Bar No.: 148903
NICOLE TURCOTTE, ESQUIRE
Fla. Bar No.: 102886
Brown, Garganese, Weiss & D'Agresta, P.A.
111 N. Orange Avenue, Suite 2000
Orlando, Florida 32801
407-425-9566 telephone
407-425-9596 facsimile

Attorneys for Defendant, City of Palm Coast

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY,
FLORIDA

WILLIAM G. MAYFIELD, on behalf of himself and all other persons similarly situated,

Plaintiff,

v.

CITY OF PALM COAST, AMERICAN TRAFFIC SOLUTIONS, LLC, and ATS AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendants.
_____/

CASE NO.: 2009-CA-2245

AFFIDAVIT OF SCOTT DANAHY

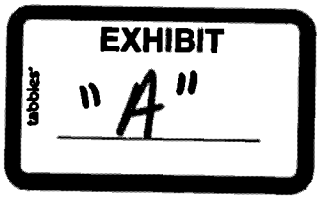
STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared SCOTT DANAHY, who, after being duly sworn, deposes and says:

1. I am over the age of eighteen (18) years, and have personal knowledge of the matters asserted herein.

2. I am an attorney with the law firm of Brown, Garganese, Weiss, and D'Agresta. In July of 2014, I was assigned to assist in several actions relating to red light cameras, including the instant litigation.

3. On August 8, 2014, I reviewed the deposition of William Mayfield, the only individual who has ever been a named plaintiff in this action. I noted that Mr. Mayfield testified he was an attorney, and I entered his name on the Florida Bar website. To my surprise, the



website indicated that Mr. Mayfield was deceased. Upon further investigation, I determined that Mr. Mayfield had been deceased for nearly two years, having passed away in December of 2012.

4. I determined that the appropriate course of action was to file a Suggestion of Death pursuant to Rule 1.260, Florida Rules of Civil Procedure, as well as a motion to abate the action pending substitution of an appropriate party. However, I decided to provide Jason Weisser, one of the attorneys who along with David Kerner had represented Mr. Mayfield and the purported class in this matter, the courtesy of a phone call in order to advise him in advance that we would be filing the suggestion of death and the motion. Part of my reason for having such a conversation was that it was difficult for me to believe that an opposing attorney would not take any action if his client had been deceased for nearly two years. Additionally, we had recently (on June 20, 2014) received correspondence from Mr. Weisser which purported to take certain positions and act on behalf of his client in a manner which would have indicated Mr. Weisser had been or should have been in contact with Mr. Mayfield prior to issuing the correspondence. I therefore wondered whether it might somehow be possible that there was some mistake and Mr. Mayfield had not actually passed away, or if there was some explanation why Plaintiff's counsel had taken no action to substitute in an appropriate party.

5. On the afternoon of August 18, 2014, I participated in a phone conference with Mr. Weisser. That conference concluded shortly before 12:19 p.m. Also participating in the phone conference was Nicole Turcotte, another attorney with my firm who has been involved in defending this matter. The purpose of the phone conference was to advise of our intent to file a suggestion of death and motion to abate in this case, and to discuss several other cases Ms. Turcotte and I were assigned to in which Mr. Weisser was opposing counsel.

6. Ms. Turcotte and I conducted the phone conference on the afternoon of August 18, 2014, via speaker phone in my office so that both Ms. Turcotte and I could hear and speak with Mr. Weisser. Towards the end of the call, I advised Mr. Weisser that we intended to file a suggestion of death in this matter, as well as a motion to abate, since Mr. Mayfield had passed away in 2012. After a pause, Mr. Weisser responded that he intended to file a motion to substitute in an appropriate party. Mr. Weisser further stated that he knew "he has been dead for a while," and that he "was unsure what his wife ever did with that." I took the last comment to mean that Mr. Weisser had reason to believe that Mr. Mayfield's widow was serving as personal representative of his estate.

7. Accordingly, Mr. Weisser acknowledged on August 18, 2014 to being aware that Mr. Mayfield had passed away some time ago, and acknowledged the need to file some type of motion for substitution.

8. Immediately after the conclusion of the August 18, 2014, phone conference, I memorialized the conversation with Mr. Weisser in an electronic format. I also vividly remember the conversation because I found it surprising that an attorney would not take prompt action to advise the court of the death of his client, and would have continued to take action on behalf of a deceased client.

9. I filed the Suggestion of Death and Motion to Abate on August 19, 2014. I asked my assistant, Stacey Johnson, to file and e-serve both documents. As indicated by the email received from the E-Filing Portal, all individuals from the office of Plaintiff's counsel who were registered e-filers in this matter were selected to receive service of these documents; no one who was registered was omitted from service. Although I did not realize it at the time, I have since

learned that Mr. Weisser had apparently not been registered as an e-filer in this action as of August 19, 2014.

10. In late October of 2014, Mr. Kerner sent a series of emails to attorneys in our office, including me, Usher L. Brown, and Ms. Turcotte. In those emails, all of which are attached either to Plaintiff's Amended Motion to Amend Complaint, or to the City of Palm Coast's response to that motion, Mr. Kerner inquired regarding whether or not the City would stipulate to the substitution of another party in light of Mr. Mayfield's death. We exchanged several emails in which I requested additional information from Mr. Kerner, culminating in an email from me to Mr. Kerner on November 14, 2014, indicating that we would need to see a motion and proposed complaint in order to determine whether or not we would object. Mr. Weisser was copied on those emails with Mr. Kerner.

11. Over a month later, on December 19, 2014, Mr. Kerner filed the motion to substitute, purportedly submitted on behalf of Mr. Mayfield, who was deceased. The motion to substitute was signed by Mr. Kerner.

Under penalty of perjury, I declare that I have read the foregoing Affidavit and the facts stated in it are true and correct to the best of my knowledge, information and belief.

SCOTT DANAHY

Sworn to and subscribed before me on ~~June 23~~ July 22, 2015, by SCOTT DANAHY, who is personally known to me.

Notary Public, State of Florida

CHARLOTTE MEEKS

Printed Name of Notary Public

My Commission Expires:

CHARLOTTE MEEKS
Commission # FF 190935
Expires May 17, 2019
Bonded Thru Troy Fain Insurance 800-385-7019

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY,
FLORIDA

WILLIAM G. MAYFIELD, on behalf of himself and all other persons similarly situated,

Plaintiff,

v.

CITY OF PALM COAST, AMERICAN TRAFFIC SOLUTIONS, LLC, and ATS AMERICAN TRAFFIC SOLUTIONS, INC.,

Defendants.
_____/

CASE NO.: 2009-CA-2245

AFFIDAVIT OF NICOLE TURCOTTE

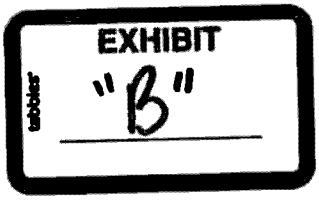
STATE OF FLORIDA
COUNTY OF ORANGE

BEFORE ME, the undersigned authority, personally appeared NICOLE TURCOTTE, who, after being duly sworn, deposes and says:

1. I am over the age of eighteen (18) years, and have personal knowledge of the matters asserted herein.

2. I am an attorney with the law firm of Brown, Garganese, Weiss, and D'Agresta. Prior to becoming an attorney, I worked as a legal assistant and paralegal for the firm. I have been working on the instant litigation in all 3 capacities since 2010.

3. On the afternoon of August 18, 2014, I participated in a phone conference with Plaintiff's counsel, Jason Weisser, around noon. Also participating in the phone conference was Scott Danahy, another attorney with my firm who has been involved in defending this matter.



The purpose of the phone conference was to advise of our client's intent to file a Suggestion of Death and Motion to Abate in this case, and to discuss several other cases on which I was working in opposition to Mr. Weisser.

4. Mr. Danahy and I conducted the phone conference on August 18, 2014, via speaker phone so we could both hear and speak with Mr. Weisser. Towards the end of the conference, Mr. Danahy advised Mr. Weisser that we intended to file a Suggestion of Death and Motion to Abate in this case because the Plaintiff had passed away in 2012. Mr. Weisser responded that he knew the Plaintiff was deceased, that he did not know what the Plaintiff's family's plans were, and that he was going to file a motion addressing the issue with the Court.

Under penalty of perjury, I declare that I have read the foregoing Affidavit and the facts stated in it are true and correct to the best of my knowledge, information and belief.

Nicole Turcotte
NICOLE TURCOTTE

Sworn to and subscribed before me on ~~June~~ July 22, 2015, by NICOLE TURCOTTE, who is personally known to me.

Stacey G. Johnson
Notary Public, State of Florida

STACEY G. JOHNSON
MY COMMISSION # FF 147980
EXPIRES: August 5, 2018
Bonded Thru Notary Public Underwriters

Stacey G. Johnson
Printed Name of Notary Public
My Commission Expires:

Stacey Johnson

From: eservice@myflcourtaccess.com
Sent: Friday, December 19, 2014 11:05 AM
Subject: SERVICE OF COURT DOCUMENT - CASE NUMBER 182009CA002245XXXXXX
Attachments: Motion.pdf

Notice of Service of Court Documents

E-service recipients selected for service:

Name	Email Address
David M. Kerner	dkerner@shw-law.com
	jkirby@shw-law.com
Nicole Turcotte	nturcotte@orlandolaw.net
	jbrowning@orlandolaw.net
	sjohnson@orlandolaw.net
Scott D Danahy	sdanahy@orlandolaw.net
	sjohnson@orlandolaw.net

E-service recipients deselected for service:

Name	Email Address
No Matching Entries	

Filing Information

Filing #:	21806936
Filing Time:	12/19/2014 11:05:11 AM ET
Filer:	David M. Kerner 561-689-8180
Court:	Seventh Judicial Circuit in and for Flagler County, Florida
Case #:	182009CA002245XXXXXX
Court Case #:	2009 CA 002245
Case Style:	MAYFIELD, WILLIAM G vs. CITY OF PALM COAST

Documents

EXHIBIT Composite "C"

Title	File
Motion	Plt's Motion to Amend Complaint to Substitute

This is an automatic email message generated by the Florida Courts E-Filing Portal. This email address does not receive email.

Thank you,
The Florida Courts E-Filing Portal

request_id#:21806936;Audit#:74414369;UCN#:182009CA002245XXXXXX;

Stacey Johnson

From: eservice@myflcourtaccess.com
Sent: Wednesday, January 14, 2015 8:22 AM
Subject: SERVICE OF COURT DOCUMENT - CASE NUMBER 182009CA002245XXXXXX
Attachments: Notice.pdf

Notice of Service of Court Documents

E-service recipients selected for service:

Name	Email Address
David M. Kerner	dkerner@shw-law.com
	jkirby@shw-law.com
Jason D. Weisser	jweisser@shw-law.com
	michele@shw-law.com
	dhoyoun@shw-law.com
Nicole Turcotte	nturcotte@orlandolaw.net
	jbrowning@orlandolaw.net
	sjohnson@orlandolaw.net
Scott D Danahy	sdanahy@orlandolaw.net
	sjohnson@orlandolaw.net

E-service recipients deselected for service:

Name	Email Address
No Matching Entries	

Filing Information

Filing #:	22519002
Filing Time:	01/14/2015 08:22:17 AM ET
Filer:	David M. Kerner 561-689-8180
Court:	Seventh Judicial Circuit in and for Flagler County, Florida
Case #:	182009CA002245XXXXXX
Court Case #:	2009 CA 002245

Case Style: MAYFIELD, WILLIAM G vs. CITY OF PALM COAST

Documents

Title	File
Notice	Notice of Hearing.pdf

This is an automatic email message generated by the Florida Courts E-Filing Portal. This email address does not receive email.

Thank you,
The Florida Courts E-Filing Portal

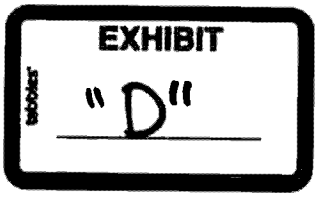
request_id#:22519002;Audit#:76956370;UCN#:182009CA002245XXXXXX;

From: David Kerner [mailto:dkerner@shw-law.com]
Sent: Wednesday, October 22, 2014 3:28 PM
To: Usher L. Brown; Nicole Turcotte
Cc: Jason D. Weisser
Subject: Palm Coast Red Light Camera lead plaintiff

Mr. Brown and Ms. Turcotte:

As you are aware, our lead Plaintiff in this suit has passed away. Unfortunately, this happened before, and we have entered into agreed orders for substitution of lead plaintiff with opposing counsels in those cases. Can you agree to this as it pertains to Palm Coast?

Sincerely,



David M. Kerner, Esq.

Schuler, Halvorson, Weisser, Zoeller & Overbeck, P.A.

Barristers Building

1615 Forum Place, Suite 4D

West Palm Beach, FL 33401

(561) 689-8180

(561) 684-9683 Fax

dkerner@shw-law.com

www.shw-law.com

Bio

For Legislative inquiries or issues, please use:

Rep. David M. Kerner

Florida House of Representatives

1101 The Capitol

402 South Monroe Street

Tallahassee, FL 32399

(850) 717-5189

dave.kerner@myfloridahouse.gov

www.myfloridahouse.gov

Legislative Bio

Trial Attorneys with offices in West Palm Beach & Port St. Lucie, Florida. For more information, please visit our website at www.shw-law.com

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From: David Kerner [mailto:dkerner@shw-law.com]
Sent: Friday, March 20, 2015 10:28 AM
To: Scott Danahy
Cc: Jason D. Weisser; Usher L. Brown; Tami Austin
Subject: Re: Stipulation of substitution of lead plaintiff - Palm Bay Red Light Camera

Scott,

If I recall correctly, i authored the motion that I called up to be heard, and I am the one arguing it. I cannot agree to the several stipulations contained in your email, as the statute does not address or contemplate them. I wanted to see if we could agree on the issue so we didn't have to bother the court with it and deal with a legislative continuance.

As stated in my original email, I was hoping circumstances would permit me to argue the motion while the legislature is in session. As schedules are released a week before, I cannot predict what the legislative calendar will be.

A legislative continuance restricts court appearances until 15 days after the session ends, and that is when I would anticipate resetting for hearing at this point.

I will file the notice with the court today. Sorry for any difficultly this has caused you.

David M. Kerner, Esq
Schuler, Halvorson, Weisser, Zoeller and Overbeck, P.A.

Sent from my iPhone

On Mar 20, 2015, at 10:07 AM, Scott Danahy <sdanahy@orlandolaw.net> wrote:

> David,
>
> Thanks for your email, but we need some additional information.

EXHIBIT "E"

Can't Jason argue the motions – and isn't Jason lead counsel on this case? I believe that everything we have in our file, and our interaction over the course of the case (and in all the related red light cases), is consistent with Jason having always been lead counsel.

If you are going to seek a continuance based on 11.111, then it would be our understanding you would be lead counsel for this case going forward, is that correct? It would also be our understanding that you would personally be arguing the issues currently set for hearing if they are continued to a later date?

Can you also give us some more information on why this issue is just being raised now when your office selected and set the original hearing date, and it has been set for some time? Is it your position that these matters should not be set for hearing until after Session?

Thanks

-Scott

<image001.png>

Brown, Garganese, Weiss & D'Agresta, P.A.

Scott D. Danahy, Esq.

111 N. Orange Ave., Suite 2000
P.O. Box 2873
Orlando, Florida 32802-2873
Phone (407) 425-9566
Fax (407) 425-9596
Kissimmee (321) 402-0144
Cocoa (866) 425-9566
Website: www.orlandolaw.net
Email: sdanahy@orlandolaw.net

potentially not received at our site at all) and/or delayed in reaching us. For that reason, we may not receive your reply and/or we may not receive it in a timely manner. Accordingly, you should consider sending communications to us which are particularly important or time-sensitive by means other than e-mail.

Confidentiality Note: This e-mail, and any attachment to it, contains privileged and confidential information intended only for the use of the individual(s) or entity named on the e-mail. If the reader of this e-mail is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that reading it is strictly prohibited. If you have received this e-mail in error, please immediately return it to the sender and delete it from your system. Thank you.

From: David Kerner [mailto:dkerner@shw-law.com]
Sent: Thursday, March 19, 2015 5:38 PM
To: Scott Danahy
Subject: Re: Stipulation of substitution of lead plaintiff - Palm Bay Red Light Camera

Scott:

Unfortunately I will not be able to appear for the hearing set for Wednesday. I set it cautiously optimistic that I would be able to escape Tallahassee or appear by phone on Wednesday, but we are going to be in session and unfortunately I have to reset the hearings.

As you're aware, chapter 11.111 bestows upon legislators in session the right to not appear in court. I try not to use it in hopes that I can move cases along, but in this particular instance, I am compelled too.

I hope you'll agree to canceling the hearing on Wednesday. If not, I will file my notice of legislative Service tomorrow. Please let me know as soon as possible.

Thanks,

David Kerner

11.111 Continuance of certain causes for term of Legislature and period of time prior and subsequent thereto and committee workdays.—Any proceeding before any court, municipality, or agency of government of this state shall stand continued, without the continuance being charged against any party, during any session of the Legislature and for a period of time 15 days prior to any session of the Legislature and 15 days subsequent to the conclusion of any session of the Legislature, and during any period of required committee work and for a period of time 1 day prior and 1 day subsequent thereto, when either attorney representing the litigants is a legislator or when a member of the Legislature is a party or witness or is scheduled to appear before any municipal government, administrative board, or agency, when notice to that effect is given to the convening authority by such member. The time period for determining the right to a speedy trial shall be tolled during the period of the continuance, but the providing of such a continuance shall not act as a waiver to the right to a speedy trial. The immunity herein granted shall, upon the filing of a notice by the witness, extend to any member not an attorney who is engaged in any proceeding before any court or any state, county, or municipal agency or board in a representative capacity for any individual or group or as a witness in any proceeding. After said notice has been filed by a member of the Legislature called as a witness, the proceeding may proceed notwithstanding such notice if the party calling such member as a witness shall agree.

History.—s. 1, ch. 15995, 1933; CGL 1936 Supp. 4356(1); s. 1, ch. 61-176; s. 1, ch. 67-2(X); s. 1, ch. 70-28; s. 1, ch. 77-119; s. 9, ch. 96-318.

David M. Kerner, Esq

Schuler, Halvorson, Weisser, Zoeller and Overbeck, P.A.

Sent from my iPhone

On Feb 24, 2015, at 9:56 AM, Scott Danahy <sdanahy@orlandolaw.net> wrote:

Hi David and Jason,

Yesterday we filed our motion to dismiss this action as it is our contention that allowing substitution of an alternative lead plaintiff is not proper when the only named plaintiff is found to lack standing pre-certification. We are going to coordinate dates for a hearing on the motion.

Thanks,