

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,

CASE NO. 2009-CA-00-2245

CLASS REPRESENTATION

Plaintiff,

vs.

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

Defendants.

**ORDER ON CITY OF PALM COAST'S MOTION TO DISMISS, OR IN THE
ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, AND ON PLAINTIFF'S
AMENDED MOTION TO AMEND COMPLAINT, AND PUTATIVE CLASS MEMBER
BERNARD L. UPSHUR'S MOTION TO INTERVENE**

THIS CAUSE came before the Court on the Defendant, CITY OF PALM COAST's, Motion to Dismiss, or in the Alternative Motion for Summary Judgment, upon Plaintiff's Amended Motion to Amend Complaint, and Putative Class Member BERNARD L. UPSHUR's Motion to Intervene. The Court has reviewed the Motions, the various affidavits relative thereto, the Court file, heard the arguments of counsel, and is otherwise fully advised in the premises.

This case was filed in September 2009 as a proposed class action against Defendants CITY OF PALM COAST ("City"), AMERICAN TRAFFIC SOLUTIONS, LLC, and ATS AMERICAN TRAFFIC SOLUTIONS, INC. A proposed settlement between the Lead Plaintiff, WILLIAM G. MAYFIELD, and Defendants AMERICAN TRAFFIC SOLUTIONS, LLC and ATS AMERICAN TRAFFIC SOLUTIONS, INC was reached in early 2012. The City was not a

party to this proposed settlement. The Court entered an Order conditionally certifying a settlement class solely for the purposes of the proposed settlement agreement on July 18, 2012. At a December 19, 2012 “fairness hearing”, the Court approved the settlement.

Significantly, no class has ever been certified as to the claims against the City. The record reflects that on December 17, 2012, Plaintiff passed away. On August 19, 2014, counsel for the City served a “Suggestion of Death” on counsel for the Plaintiff. The certificate of service on the Suggestion of Death reflects that it was served on two attorneys in the law firm representing Plaintiff; however, affidavits filed by those attorneys and their staff indicate it was in fact served on only one of them.

Fla. R. Civ. P. 1.260, titled “Survivor; Substitution of Parties”, provides in pertinent part as follows:

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party..... **Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party.**

Fla. R. Civ. P. 1.260(a)(1) (emphasis added). Plaintiff’s counsel filed a Motion to Amend Complaint to Substitute Lead Party Plaintiff on December 19, 2014, well after the 90-day time period set forth in Rule 1.260(a) had lapsed. Accordingly, Rule 1.260(a) mandates that the action be dismissed.

Plaintiff’s counsel argues that the 90-day deadline may be extended upon a showing of excusable neglect, and asserts that such excusable neglect exists in the instant case. Plaintiff’s counsel contends that any failure to file the appropriate motion within the 90-day period is

excusable because although the certificate of service on the Suggestion of Death stated that it was electronically served on two attorneys in the law firm representing Plaintiff, David Kerner and Jason Weisser (and their respective legal assistants), it was in fact served only on Mr. Kerner and his staff. The Court finds, however, that Plaintiff's counsel (at least Mr. Kerner) was aware of the Suggestion of Death well before the 90-day period expired. While he was attempting to secure the City's consent to a substitution of parties some weeks before the time period expired, no motion was filed until December 19th. Accordingly, the Court finds that no excusable neglect has been shown.

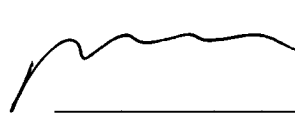
On June 18, 2015, Plaintiff's counsel filed "Plaintiff's Amended Motion to Amend Complaint, and Putative Class Member Bernard L. Upshur's Motion to Intervene." This Motion is most appropriately viewed simply as a Motion to Intervene. Under Fla. R. Civ. P. 1.230, "intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." The Court has already determined for the reasons set forth above that the instant case must be dismissed. As such, there is no case into which Mr. Upshur can intervene.

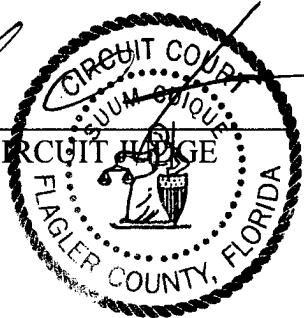
Accordingly, it is hereby ORDERED and ADJUDGED as follows:

1. The City's Motion to Dismiss is GRANTED. The City's alternative Motion for Summary Judgment is Moot.
2. The Plaintiff and Putative Class Member's Amended Motion to Amend Complaint and to Intervene is DENIED.
3. This action shall be, and the same is hereby DISMISSED WITHOUT PREJUDICE.

4. Each party shall bear its own attorney's fees and costs.

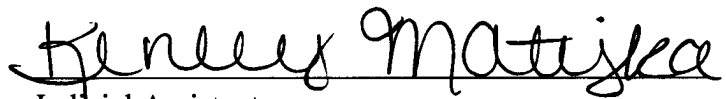
DONE AND ORDERED in Chambers at Bunnell, Flagler County, Florida, this 17th day of July, 2015.


MICHAEL S. ORFINGER, CIRCUIT JUDGE



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 17th day of July, 2015 to **Jason D. Weisser, Esq.**, Schuler Halvorson & Weisser, P.A., 1615 Forum Place, Suite 4-D, Barristers Building, West Palm Beach, Florida 33401; **David Kerner, Esq.**, Schuler Halvorson & Weisser, P.A., 1615 Forum Place, Suite 4-D, Barristers Building, West Palm Beach, Florida 33401; and **Scott D. Danahy, Esq.**, Brown, Garganese, Weiss, & D'Agresta, 111 N. Orange Avenue, Suite 2000, Orlando, Florida, 32802.


Judicial Assistant