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

PALM COAST INTRACOASTAL, LLC,
a Florida limited liability company,
Plaintiff,

vs. CASE NO. 23-CA-000093

PRESERVE FLAGLER BEACH & BULOW CREEK, INC., a Florida not for profit corporation, STEPHEN NOBLE, an individual, and JOHN TANNER, an individual,
Defendants.
_____/

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS CASE is before the Court on the "Amended Motion to Dismiss, or, In the Alternative, Motion for Summary Judgment" ("Amended Motion"), that Defendants Preserve Flagler Beach & Bulow Creek, Inc. ("Preserve"), Stephen Noble ("Noble"), and John Tanner ("Tanner") (collectively, "Defendants") filed on August 23, 2023. (Dkt. 26). The Court received and considered competing proposed orders from the parties, reviewed the extensive notes taken during the hearing, and re-reviewed parts of the record. The Court, otherwise having considered the Defendants' Amended Motion and the Plaintiff's Response thereto, heard argument of counsel on August 22, 2024, reviewed the Court file, and being otherwise fully advised, the Court hereby finds as follows:

I.

INTRODUCTION

This case arises from the Defendants' challenge to a decision by the Flagler County Board of County Commissioners ("BOCC") to approve a proposed modification to the Site Development Plan for the Hammock Beach River Club Planned Unit Development ("Development

Application"). Following the BOCC's 3-to-2 vote to approve the Development Application, the Defendants sought first-tier certiorari review of the BOCC's decision in circuit court. By Order dated September 15, 2021, the circuit court denied the Defendants' petition for writ of certiorari. The Defendants then sought second-tier certiorari review before the Fifth District Court of Appeal. The Fifth District denied the Defendants' petition for writ of certiorari on May 5, 2022.

On March 7, 2023, the Plaintiff filed a one-count Complaint against the Defendants for "malicious prosecution," seeking monetary damages based upon the Defendants' filing of their certiorari petitions. In response, the Defendants timely moved to dismiss the Plaintiff's Complaint, asserting that the Plaintiff's Complaint violates Florida's anti-SLAPP statute – Section 768.295, *Florida Statutes* – and fails to state a cause of action for malicious prosecution. Thereafter, on August 23, 2023, the Plaintiff's filed their Amended Motion seeking, in the alternative, summary judgment on the same grounds as in their motion to dismiss. For the reasons discussed herein, the Court concludes that the Defendants are entitled to final summary judgment in their favor on the Plaintiff's Complaint.

II.

UNDISPUTED FACTUAL BACKGROUND

In 2005, the BOCC approved Ordinance 2005-22, thereby rezoning approximately ±1,999 acres located on the south side of State Road 100 and east and west of John Anderson Highway to "Planned Unit Development" and creating the Hammock Beach River Club PUD. The Hammock Beach River Club PUD entailed a residential/golf community consisting of a maximum of 453 residential units, an 18-hole golf course, 230,694 square feet of retail/commercial uses, and various parcels dedicated for County facilities.

Section 2.B of Ordinance 2005-22 provided that:

> Development within the boundaries of the PUD District as approved shall take place in accordance with . . . the PUD Concept Plan . . . received by Flagler County on 10/26/05 and The Hammock Beach River Club PUD Development Agreement executed by owner and Flagler County pursuant to this Ordinance. A copy of said Agreement containing the PUD Concept Plan is attached hereto as and made a part hereof.

Section 5.5 of the Hammock Beach River Club PUD Development Agreement stated, in part, that "[t]he Developer may also provide below grade or aerial crossings over John Anderson Highway for internalizations and circulation of traffic and services."

The 2005 Conceptual Site Plan attached to Ordinance 2005-22 showed access to the community being from a signalized intersection at State Road 100 and Colbert Lane, with an off-grade crossing of John Anderson Highway for the residents living in the eastern portion of the PUD near the Intracoastal Waterway. Pursuant to Ordinance 2005-22, the BOCC approved a Site Development Plan for the Hammock Beach River Club PUD in July 2006. Similar to the 2005 Conceptual Site Plan, the 2006 Site Development Plan depicted the vehicular access point to the project being located at State Road 100 and Colbert Lane, with an off-grade crossing of John Anderson Highway. Due to the economic downturn in 2008, the property was never developed pursuant to the 2006 Site Development Plan. The Plaintiff subsequently acquired the property in 2018.

In August 2019, the Plaintiff submitted an Application for Sketch Plat Review with the County for the subdivision of 329 acres of the Hammock Beach River Club PUD located east of John Anderson Highway. By letter dated October 11, 2019, the County's Growth Management Director advised the Plaintiff that the proposed sketch plat was "not in accordance with the

entitlements granted in the original PUD" because, among other things, the sketch plat proposed direct at-grade roadway access onto John Anderson Highway.

In December 2019, the Plaintiff filed an application with the County seeking approval of a proposed modification to the 2006 Site Development Plan for the Hammock Beach River Club PUD – *i.e.*, the Development Application. In addition to other modifications, the Development Application proposed direct at-grade roadway access onto John Anderson Highway.

The BOCC held quasi-judicial hearings on the Plaintiff's Development Application in September and November 2020. Defendants Preserve and Noble, who were represented by Defendant Tanner, opposed the Plaintiff's Development Application before the BOCC. One of the Defendants' primary objections was that the Development Application violated Ordinance 2005-22 by providing direct vehicular access onto John Anderson Highway. The City of Flagler Beach also opposed the Plaintiff's Development Application before the BOCC, with the city attorney opining that the Development Application violated Ordinance 2005-22 because the plan included direct vehicular access onto John Anderson Highway. At the conclusion of the November 2020 hearing, the BOCC, by a 3-to-2 vote, approved the Development Application.

In December 2020, the Defendants sought first-tier certiorari review of the BOCC's approval of the Plaintiff's Development Application in circuit court. The primary issue on certiorari review was whether Ordinance 2005-22 prohibited direct vehicular access from the Plaintiff's development onto John Anderson Highway. By Order dated September 15, 2021, the circuit court denied the Defendants' petition for writ of certiorari. Thereafter, the Defendants sought second-tier certiorari review before the Fifth District Court of Appeal, arguing the circuit court departed from the essential requirements of law in upholding the BOCC's approval of the Plaintiff's Development Application with direct vehicular access from the development onto John

Anderson Highway. The Fifth District denied the Defendants' petition for writ of certiorari on May 5, 2022.

Neither the circuit court nor the Fifth District in any way opined that the Defendants' arguments were frivolous. Both courts required a response on the merits of the petitions instead of either dismissing the petitions upon review. The petitions for the writs of certiorari seek relief only against the Flagler Board of County Commissioners [BOCC], not PCI. Pursuant to the rules of appellate procedure PCI *had* to be named by the Defendants as an appellee on the petitions for certiorari in spite of relief being sought only against BOCC.

III.

FLORIDA'S ANTI-SLAPP STATUTE

Since 2000, Florida law has prohibited the filing of "Strategic Lawsuits Against Public Participation" or so-called "SLAPP" suits against individuals or entities for exercising their constitutional right to seek redress for grievances before a governmental entity. *See* § 768.295, Fla. Stat. (2022). In this regard, Section 768.295, *Florida Statutes*, provides:

> (1) It is the intent of the Legislature to protect the right in Florida to exercise the rights of free speech in connection with public issues, and the rights to . . . instruct representatives, and petition for redress of grievances before the various governmental entities of this state as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution. ***It is the public policy of this state that a person . . . not engage in SLAPP suits*** because such actions are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues. ***Therefore, the Legislature finds and declares that prohibiting such lawsuits as herein described will preserve this fundamental state policy, preserve the constitutional rights of persons in Florida, and assure the continuation of representative government in this state***. It is the intent of the Legislature that such lawsuits be expeditiously disposed of by the courts.

(Emphasis supplied).

Consistent with the foregoing legislative intent, Florida's anti-SLAPP statute provides:

> ***A person . . . may not file . . . any lawsuit, cause of action, [or] claim . . . against another person or entity*** without merit and primarily ***because such person or entity has exercised the constitutional right*** of free speech in connection with a public issue, or right . . . ***to instruct representatives of government, or to petition for redress of grievances*** before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

Id. at § 768.295(3) (emphasis supplied).

Florida's anti-SLAPP statute provides that a person sued in violation thereof "has a right to an expeditious resolution of a claim that the suit is in violation of this section." *Id.* at § 768.295(4). Consistent therewith, a defendant facing an alleged SLAPP suit may simultaneously file a motion to dismiss and a motion for summary judgment, together with supplemental affidavits. *See id.*; *see also Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 312-313 (Fla. 2d DCA 2019).

The district courts are currently split as to the standard applicable to a motion to dismiss filed pursuant to Florida's anti-SLAPP statute. The Second District Court of Appeal has adopted a "burden shifting" standard, whereby the initial burden is on the defendant to establish that the statute applies, and once the defendant has done so, the burden shifts "to the claimant to demonstrate that the claims are not 'primarily' based on First Amendment rights in connection with a public issue and not 'without merit.'" *See Gundel*, 264 So. 3d at 314; *see also Davis v. Mishiyev*, 339 So. 3d 449, 453 (Fla. 2d DCA 2022). By contrast, the Third District Court of Appeal has held that motions to dismiss under Florida's anti-SLAPP statute are governed by traditional pleading standards. *See Lam v. Univision Commc'ns*, 329 So. 3d 190, 197 (Fla. 3d DCA 2021).

For the reasons detailed in *Gundel*, this Court agrees that application of a "burden shifting" standard is consistent with Florida's anti-SLAPP statute and the harm the statute seeks to prevent. *See Gundel*, 264 So. 3d at 311 (recognizing that the "harm that results from the court's improper denial of a motion to dismiss or in its failure to rule on pending motions for summary judgment . . . is precisely the harm that the Anti-SLAPP statute seeks to prevent – unnecessary litigation"); *see also* Ch. 2000-174, § 1, Laws of Fla. (noting that SLAPP suits "are abuse of the judicial process" and that "the threat of financial liability, litigation costs . . . and other personal losses from groundless lawsuits seriously affects . . . individual rights"). Given this Court's determination that the Defendants are entitled to summary judgment on the Plaintiff's Complaint, however, it is not necessary for the Court to undertake a "burden shifting" analysis in this case – although doing so would reach the same result.

IV.

SUMMARY JUDGMENT STANDARD

Florida recently adopted the Federal summary judgment standard. *See In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 317 So. 3d 72, 74 (Fla. 2021); Fla. R. Civ. P. 1.510(a) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."). Pursuant to the revised version of Rule 1.510, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fla. R. Civ. P. 1.510(a).

The party moving for summary judgment has the initial burden to prove the nonexistence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant satisfies the initial burden by demonstrating the nonexistence of any genuine

issue of material fact, the nonmoving party must present evidence sufficient to reveal a genuine issue – it is not enough for the nonmoving party merely to assert that a genuine issue of material fact does exist. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Rather, the nonmoving party must go beyond the pleadings and show that there is a genuine disputed issue of material fact for trial. *See* Fla. R. Civ. P. 1.510(c)(1). "For factual issues to be considered genuine, they must have a real basis in the record." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009).

Lastly, "[t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000). Thus, "[a] court need not permit a case to go to a jury. . . when the inferences that are drawn from the evidence, or upon which the non-movant relies, are 'implausible.'" *See Mize v. Jefferson City Bd. of Educ.*, 92 F.3d 739, 743 (11th Cir. 1996); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 ("[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.").

V.

THE PLAINTIFF'S COMPLAINT VIOLATES FLORIDA'S ANTI-SLAPP STATUTE AND THE DEFENDANTS ARE ENTITLED TO FINAL SUMMARY JUDGMENT

In their Amended Motion, the Defendants maintain that they are entitled to summary judgment on Count I of the Plaintiff's Complaint pursuant to Florida's anti-SLAPP statute because

the Plaintiff's malicious prosecution claim is "without merit" and was filed "primarily" because the Defendants exercised their constitutional right to instruct the BOCC and seek judicial review of the BOCC's approval of the Plaintiff's Development Application. For the reasons detailed below, the Court agrees.

A. The Defendants' Actions Were Constitutionally-Protected Acts Within The Scope Of Florida's Anti-SLAPP Statute

Florida's anti-SLAPP statute affords protection to a party who has "exercised the constitutional right of free speech in connection with a public issue, or right . . . to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state." *See* § 768.295(3), Fla. Stat. (2022). "Governmental entity" is defined in Florida's anti-SLAPP statute as "the state, including the executive, legislative, and ***the judicial branches of government and*** the independent establishments of the state, ***counties***, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, ***boards, commissions, or any agencies thereof***." *Id.* at § 768.295(2)(b) (emphasis supplied). For purposes of the statute, "[f]ree speech in connection with public issues" means "any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity." *Id.* at § 768.295(2)(a).

Here, it is indisputable that the Defendants' actions in opposing the Plaintiff's Development Application during the BOCC's public hearings involved their "constitutional right of free speech in connection with a public issue" pursuant to Florida's anti-SLAPP statute. Indeed, the Plaintiff cannot dispute that its Development Application was under consideration and review before the BOCC and that such Development Application was a matter of significant public

interest and concern. The Defendants' actions in opposing the Development Application before the BOCC also involved their constitutional right "to instruct representatives of government" for purposes of Florida's anti-SLAPP statute. The changes in the original PUD when viewed alone and opposed creates a public issue notwithstanding the other grounds sought to oppose the Development Application.

Further, it is indisputable that the Defendants' actions in seeking judicial review of the BOCC's approval of the Development Application involved the Defendants' "constitutional right . . . to petition for redress of grievances." *Id.* at § 768.295(3). It is well established that one's right to petition the government for redress of grievances includes "the right of access to the courts." *See Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."); *Curry v. State*, 811 So. 2d 736, 742 (Fla. 4th DCA 2002) ("The right to petition the government for a redress of grievances is one such constitutionally protected activity, and one of the most precious liberties 'safeguarded by the Bill of Rights.'").

Thus, the record evidence conclusively establishes that the Plaintiff's Complaint was filed "primarily" because the Defendants exercised their constitutional right to engage in free speech, instruct government representatives, and seek redress for grievances in court. *See* § 768.295(3), Fla. Stat. (2022). Accordingly, the Plaintiff's Complaint falls within the scope of Florida's anti-SLAPP statute.

B. <u>The Plaintiff's Malicious Prosecution Claim Is Without Merit As A Matter Of Law</u>

To maintain a cause of action for malicious prosecution, a claimant must allege and prove the following six elements: (1) a criminal or civil judicial proceeding was commenced against the

plaintiff; (2) the proceeding was instigated by the defendant in the malicious prosecution action; (3) the proceeding ended in the plaintiff's favor; (4) the proceeding was instigated with malice; (5) the defendant lacked probable cause; and (6) the plaintiff was damaged. *See Kalt v. Dollar Rent-A-Car*, 422 So. 2d 1031, 1032 (Fla. 3d DCA 1982). "The absence of any one of these elements will defeat a malicious prosecution action." *Id.* As detailed below, the record evidence establishes that the Defendants had sufficient "probable cause" to file their certiorari petitions challenging the BOCC's approval of the Plaintiff's Development Application. Accordingly, the Plaintiff's malicious prosecution claim fails as a matter of law.[1]

"The existence or lack of probable cause is a pure question of law for the court to determine under the facts and circumstances of a particular case." *Fee, Parker & Lloyd, P.A. v. Sullivan*, 379 So. 2d 412, 418 (Fla. 4th DCA 1980); *see also C.A. Hansen Corp. v. Wicker, Smith, Blomqvist, Tutan, O'Hara, McCoy, Graham & Lane, P.A.*, 613 So.2d 1336, 1338-39 (Fla. 3d DCA 1993) ("The existence or nonexistence of probable cause is a pure question of law to be determined by the court under the facts and circumstances of each case. . . . Just because conflicting evidence exists does not mean probable cause is a jury question."). Courts "evaluate probable cause from the perspective of the malicious prosecution defendant," not from the perspective of the party bringing the malicious prosecution claim. *See Floyd v. Stoumbos*, 2023 WL 2592297, at *2 (11th Cir. 2023).

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[1] In their Amended Motion, the Defendants also contend that the Plaintiff has not and cannot establish that: (1) the Defendants instigated a civil against the Plaintiff; and (2) the Defendants acted with malice. Defendants Preserve and Noble also contend that they relied upon the advice of counsel, which further bars the Plaintiff's claim for malicious prosecution. Given the Court's finding that the Plaintiff cannot establish that the Defendants lacked probable cause for their actions, the Court does not need to address the Defendants' additional arguments as they have essentially been rendered moot.

The party bringing a malicious prosecution claim has the "onerous" burden of demonstrating the absence of probable cause, which is "essential" to maintaining such claim. *See Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217, 1218-19 (Fla. 1986). Further, "there can be no claim for malicious prosecution where at least part of the [underlying proceeding] was asserted with probable cause." *Endacott v. Int'l Hosp., Inc.*, 910 So. 2d 915, 923 (Fla. 3d DCA 2005). Thus, the party bringing a malicious prosecution claim must "show that probable cause was lacking at all stages of the underlying proceeding." *See id.* Malice is not synonymous with want of probable cause, *White v. Miami Home Milk Producers Ass'n*, 143 Fla. 518, 197 So. 125, although the former may be inferred from the latter.

"The standard for establishing probable cause in a civil action is ***extremely low and easily satisfied***." *Gill v. Kostroff*, 82 F. Supp. 2d 1354, 1364 (M.D. Fla. 2000) (emphasis supplied) (citing *Wright v. Yurko*, 446 So. 2d 1162, 1166 (Fla. 5th DCA 1984)). A party need not be certain of the outcome of the underlying proceeding to have probable cause for bringing such claim. *See Goldstein v. Sabella*, 88 So. 2d 910, 911 (Fla. 1956). Rather, "probable cause" to institute a civil judicial proceeding, as will defeat a malicious prosecution claim under Florida law, requires no more than a "reasonable belief" that there is a chance that a claim may be held valid upon adjudication. *See DeMartini v. Town of Gulf Stream*, 942 F.3d 1277, 1300-01 (11th Cir. 2019); *see also Cohen v. Amerifirst Bank*, 537 So. 2d 1108, 1110 (Fla. 3d DCA 1989) ("To have probable cause to commence or continue an action does not mean that the plaintiff will, or must, ultimately prevail, but only that his commencement or continuance is of an arguably valid cause of action.").[2]

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[2] In a malicious prosecution action against an attorney – such as the Plaintiff's claim against Defendant Tanner – a plaintiff must satisfy an even higher standard to show lack of probable cause. *See Endacott*, 910 So. 2d at 920-21 ("In an action against an attorney, '[i]t is the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation, and not the attorney's conviction that his client must prevail.'" (quoting *C.A. Hansen Corp.*, 613 So.2d at 1338)).

Turning to the instant case, the undisputed record evidence establishes that sufficient "probable cause" existed for the Defendants' filing of their certiorari petitions seeking judicial review of the BOCC's approval of the Plaintiff's Development Application on the basis that such approval allegedly violated Ordinance 2005-22. For example, in considering the earlier sketch plat application that the Plaintiff submitted, the County's Growth Management Director concluded that the proposed development was "not in accordance with the entitlements granted in the original PUD" because, among other things, the sketch plat proposed direct at-grade roadway access onto John Anderson Highway.

Likewise, during the County Staff's technical review of the Plaintiff's Development Application, the Assistant County Attorney specifically advised that "access to the PUD via State Road 100 (requiring a grade-separated crossing and prohibiting direct access to John Anderson Highway except for emergency access) must be part of Phase 1A of the development because this was a material term upon which the County Commission approved the rezoning to PUD in order to alleviate impacts on John Anderson Highway." Similarly, during his presentation at the BOCC's September 2020 hearing, the Assistant County Attorney opined that direct access from the PUD to John Anderson Highway was not authorized pursuant to Ordinance 2005-22 and the Development Agreement. In so doing, the Assistant County Attorney stated, "[t]he 2005 PUD Agreement . . . emphasized the minimization of impacts on John Anderson Highway, and required the access to this development to be at State Road 100" and "the only access to this development was at State Road 100 and Colbert Lane." As support for his opinion, the Assistant County Attorney relied upon the 2005 Conceptual Site Plan and the legislative history from the County's original 2005 approval of the Hammock Beach River Club PUD. According to the Assistant

County Attorney, such approval "was subject to conditions, including off-grade crossing of John Anderson Highway and access point at southern terminus of Colbert Lane at SR 100."

In addition to the above, the record further reflects that the City Attorney for the City of Flagler Beach – who is Board Certified by The Florida Bar in City, County, and Local Government Law – appeared at the BOCC's November 2020 hearing in opposition to the Development Application and submitted a detailed letter on Flagler Beach's behalf objecting to the Plaintiff's modified Site Development Plan. In so doing, the Flagler Beach City Attorney opined that the County's original 2005 approval for the Hammock Beach River Club PUD required an off-grade crossing of John Anderson Highway and such "off-grade crossing was essential" and "a fundamental part of this plan."

The County's former Planning and Zoning Director from when the BOCC originally approved the Hammock Beach River Club PUD in 2005 – Walter Fufidio – also testified at the BOCC's November 2020 hearing in opposition to the Plaintiff's Development Agreement. Mr. Fufidio testified that a grade-separated crossing of John Anderson Highway was part of the original 2005 PUD approval because the County "wanted to preserve the ambiance of John Anderson Highway."

The above-summarized record evidence – which is undisputed – constitutes "probable cause" as a matter of law for the Defendants' filing of their certiorari petitions challenging the BOCC's approval of the Plaintiff's Development Applications. *See Gill*, 82 F. Supp. 2d at 1364 ("The standard for establishing probable cause in a civil action is extremely low and easily satisfied." (citing *Yurko*, 446 So. 2d at 1166)). Simply put, two separate attorneys (*i.e.*, the County's own attorney and Flagler Beach's board-certified attorney) and two separate land use planners (*i.e.*, the County's current Growth Management Director and the County's former

Planning and Zoning Director) opined that the County's 2005 approval required an off-grade crossing of John Anderson Highway. Additionally, the BOCC approved the Plaintiff's Development Application by a mere 3-to-2 vote. Thus, even amongst the BOCC members themselves, there was reasonable disagreement as to whether the Plaintiff's Development Application with direct at-grade vehicular access onto John Anderson Highway complied with Ordinance 2005-22.[3]

Based upon such indisputable record evidence, the Plaintiff has not and cannot establish that the Defendants filed their certiorari proceedings to review the BOCC's approval of the Development Application "without probable cause," which is an essential element to maintain a cause of action for malicious prosecution. Accordingly, the Plaintiff's "malicious prosecution" claim is without merit and fails as a matter of law. *See Concord Shopping Ctr., Inc. v. Litowitz*, 183 So. 2d 562, 563 (Fla. 3d DCA 1966) (holding defendant who filed lawsuit challenging rezoning of land for a shopping center could not be liable for malicious prosecution where want of probable cause was not shown).

Lastly, the Plaintiff's suggestion that summary judgment is not proper because discovery has not been conducted in this case is without merit. First, Florida's anti-SLAPP statute expressly authorizes the filing of a motion for summary judgment at the outset of the case and requires "an expeditious resolution" thereof. *See* § 768.295(4), Fla. Stat. (2022). Second, it is undisputed

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[3] Contrary to the Plaintiff's contention, the fact that the Defendants were ultimately unsuccessful in their challenge to the BOCC's approval of the Development Application is not evidence of the lack of probable cause. *See Stewart v. Sonneborn*, 98 U.S. 187, 191 (1878) ("[F]ailure of the proceedings against the plaintiff . . . is not evidence of . . . want of probable cause in instituting them"); *see also Endacott*, 910 So. 2d at 923-24 ("[T]ermination of an underlying civil proceeding in favor of the present plaintiff is not sufficient evidence that the defendants lacked probable cause"). Indeed, if that were the standard, the losing party in every civil proceeding would be automatically subject to a malicious prosecution claim – which is not the law in Florida.

that the Defendants' Amended Motion has been pending for more than a year and the Plaintiff has not filed any motion with this Court seeking to compel or otherwise order discovery during such time, and the Plaintiff cannot take advantage of its own failure to act to prevent the entry of summary judgment. *See Congress Park Office Condos II, LLC v. First-Citizens Bank & Trust Co.*, 105 So. 3d 602, 608 (Fla. 4th DCA 2013) ("A trial court does not abuse its discretion in granting a motion for summary judgment . . . where the non-moving party has failed to act diligently in taking advantage of discovery opportunities.").[4]

Third, the record evidence discussed above is ***indisputable*** and no future discovery would create a material issue of fact related to this Court's finding of sufficient "probable cause." *See Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 289 (Fla. 3d DCA 2007) ("Summary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact."); *see also Freire v. Citizens Prop. Ins. Corp.*, 386 So. 3d 995, 995-96 (Fla. 3d DCA 2023) (affirming summary judgment, holding "outstanding [discovery] would not reveal any material facts relevant to the court's disposition of the issues"). Accordingly, contrary to the Plaintiff's contention, summary judgment is proper and not premature.

VI.

CONCLUSION

[4] It is also undisputed that the Plaintiff's counsel did not file a written motion for continuance of the Court's August 22 summary judgment hearing pursuant to Florida Rule of Civil Procedure 1.460 or file an affidavit in opposition to summary judgment pursuant to Florida Rule of Civil Procedure 1.510(d) based upon the need to conduct discovery. *See De Los Angeles v. Winn-Dixie Stores, Inc.*, 326 So. 3d 811, 813 (Fla. 3d DCA 2021) (rejecting argument that summary judgment was premature where "counsel filed neither a written motion for continuance of the summary judgment hearing . . . nor an affidavit in opposition to summary judgment based on the need to conduct additional discovery").

In sum, for the reasons set forth above, the Court finds that the Plaintiff's malicious prosecution claim violates Florida's anti-SLAPP statute because it is without merit as a matter of law and was filed primarily because the Defendants exercised their protected constitutional right "to engage in free speech, instruct government representatives, or seek redress for grievances from a governmental entity." The Court further concludes that there are no genuine issues of material fact and that the Defendants are entitled to entry of final summary judgment in their favor as a matter of law on Count I of the Plaintiff's Complaint.

Accordingly, it is ORDERED and ADJUDGED that:

A. The Defendants' prayer for summary judgment is **granted** as stated in the Amended Motion to Dismiss, or, In the Alternative, Motion for Summary Judgment pursuant to Section 768.295, *Florida Statutes*;

B. Final Summary Judgment is hereby entered in favor of Defendants Preserve Flagler Beach & Bulow Creek, Inc., Stephen Noble, and John Tanner on Count I of the Plaintiff's Complaint, and the Plaintiff shall take nothing by this action and the Defendants shall go hence without day; and

C. The Court reserves jurisdiction to consider a motion for the award of attorneys' fees and costs to Defendants Preserve Flagler Beach & Bulow Creek, Inc., Stephen Noble, and John Tanner, as permitted by law and Section 768.295, *Florida Statutes*.

DONE and ORDER in Chambers in Bunnell, Flagler County, Florida, on this _____ day of September 2024.

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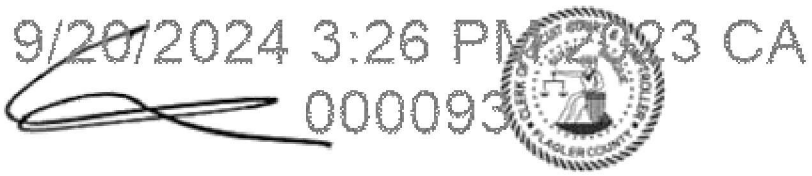

e-Signed 9/20/2024 3:26 PM 2023 CA 000093

Christopher A. France,

CC: All parties and attorneys