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

CITY OF DUNNELLON, FLORIDA

Appellant,

Appellate Case No.: 5D09-2004
Lower Tribunal Case No: 08-5202-CA

vs.

RAINBOW RIVER RANCH, LLC

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

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PREFACE

The City of Dunnellon will be referred to as "City" or "Appellant"

Rainbow River Ranch, LLC will be referred to as "RRR" or "Appellee"

Department of Community Affairs will be referred to as "DCA"

Bert J. Harris, Jr., Private Property Rights Protection Act, Florida Statutes, Section 70.001 Et. Seq., will be referred to as "Bert Harris" or "Harris"

Florida Statute, Section 57.105 (1) will be referred to as "Section 57"

(R.) Record on Appeal.

STATEMENT OF THE FACTS AND THE CASE

This case is about a piece of land located in a little part of old Florida, removed from the frenetic development of South Florida, where growth management, concurrency and comprehensive planning were still "just" words.. This City of Dunnellon –still a Florida "Cracker" refuge, with beautiful springs, rivers and a simple uncomplicated lifestyle, comes face-to face with Florida's schizophrenic relationship with growth management, land planning, preserving natural Florida and protection of private property rights.

This piece of land now owned by "RRR" has been a part of the City of Dunnellon since the City incorporated in 1891. [R. Volume 1 (1-83) Complaint at 2 par. 4] The land was originally owned by an old homesteading family (Cubbage) and a Comprehensive Plan Amendment was approved in 1996 (Ordinance 96-15) by the City Council that would allow development on the Cubbage property. [R. Volume 1 (141-164) Amended Motion to Dismiss 3 par. 9] The Amendment was then sent to DCA who refused to approve it. While the City and the Cubbages tried to resolve DCA's concerns, it ended up at a DOAH Hearing (DOAH Case 97-1112GM). [R. Volume 1 (141-164) Amended Motion to Dismiss 3 par. 9]

The matter was resolved in an agreement between DCA, the City and Cubbage and was subsequently memorialized in Ordinance 2001-02, which included a Stipulated Agreement with DCA and an Agreement Limiting

Development Rights with Cubbage. [R. Volume 1 (1-83) Complaint Appraisal at 13]

In 2007, we join the story as the actions of the parties become the basis for the "Bert Harris" claim that is filed by "RRR" and the "City's" actions in response to that claim. The City of Dunnellon held its first public hearing of Ordinance No. 2007-25 on November 13, 2007. [R. Volume 1 (1-83)Complaint at 2 par. 7] After the first public hearing, the City, as required by Section 163.3184, Florida Statutes and Rule 9J-11.011, Florida Administrative Code, transmitted, "the proposed Comprehensive Plan Amendments to the various public agencies listed in Section 163.3184 (3) (a), Florida Statutes", including the Department of Community Affairs (hereinafter, "DCA") for review and comments. [R. Volume 1 (1-83) Complaint at 2 par. 7]

The facts are clear that, under Florida Law, the ordinance at transmittal stage is not adopted. "City" had many statutorily required steps to complete before it could hold a second (2nd), and final adoption hearing. [R. Volume 2 (177-330) Reply Brief at 2 par. 3] Similarly, the "City" had statutory obligations under Section 166.041 (3)(c)2a, Florida Statutes, Procedures for Adoption of Ordinances and Resolutions;

> (3)(c)2 "In cases in which the proposed ordinance changes the actual list of permitted, conditional or prohibited uses within a zoning category, or changes the actual zoning map designation of a parcel or parcels of land involving 10 contiguous acres or more, the governing body shall provide for

> public notice and hearings as follows: (a) The local governing body shall hold two advertised public hearings, which requires that a municipality hold two (2) advertised public hearings."

However, almost simultaneously, "RRR's" appraiser began the "bona fine" appraisal process [R. Volume 1 (1-83)Complaint Appraisal at 3] required under Section 70.001, Florida Statutes, "Bert Harris".

On March 25, 2008, "RRR" submitted a claim under Bert Harris and it stated; [R. Volume 1 (1-83)Complaint Exhibit D Notice of Claim]

> "This claim seeks compensation for the loss of value of a parcel of real estate the City has caused through the Council's vote which approved the adoption of Ordinance 2007-25 on November 13, 2007. (the first of the two required readings) This ordinance effected a change to the City's Comprehensive Plan on my client's property which restricted the allowable land uses that were previously allowed."

When the claim letter was filed, "City" had held one (1) public hearing and had not adopted Ordinance 2007-25. [R. Volume 1 (85-137) City Motion to Dismiss at 2 par. 4].

On October 13, 2008, the City held its 2nd public hearing on Ordinance No. 2007-25 and transmitted it for review to DCA, pursuant to Section 163.3184 (8)(b), Florida Statutes. As statutorily provided, DCA then had 45 days from receipt on October 23, 2008 to perfect their final review. As of October 13, 2008, "City" had fulfilled the requirements of Section 166.041 (3) (c) 2a, Florida Statutes, which requires that a municipality hold two (2), advertised public hearings. [R. Volume 1 (141-164) City Amended Motion to Dismiss at 2 par. 5].

On October 2, 2008, a Complaint, [R. Volume 1 at 1-83], was filed and on October 7, 2008, a Summons was issued to serve the "City" with "RRR's" Bert Harris Complaint. The summons was issued before the "City" held its 2nd hearing on Ordinance No. 2007-25 as required by Florida Statute. [R. Volume 1 (141-164) Amended Motion to Dismiss at 2 par. 5] The City was actually served with "RRR's" Bert Harris Complaint on October 13, 2008.

On October 29, 2008, the City filed a Motion to Dismiss Plaintiff's Complaint. [R. Volume 1 at 85-137] On December 9, 2008, City filed an Amended Motion to Dismiss. [R. Volume 1 at 141-164] On December 15, 2008, Judge Singbush ordered Plaintiff to respond to City's Motion to Dismiss. [R. Volume 1 at 165-166] On December 26, 2008, the "City's" Comprehensive Plan Amendments, Ordinance 2007-25 became effective, the period for DCA review having expired. [R.Volume 2 (331-334)Plaintiff's Supplemental Response to Defendant's Motion to Dismiss at 2]

Due to "RRR's" failure to respond to "City's Motion to Dismiss and amended Motion to Dismiss and "City's" opinion that the Bert Harris Complaint was utterly and clearly devoid of merit, not ripe and made in derogation of Florida Statue, the "City" filed a notice of frivolous action with "RRR's" attorney. [R. Volume 2 Motion to Determine Entitlement to Fees at 338-342] On December 30, 2008, the "City" filed notice under Section 57.105(1) with "RRR" stating that

"City" would, after the statutory notice of 21 days, file a claim for fees and costs under Section 57.105 (1), Florida Statutes, with the Court.

On December 30, 2008, Plaintiff responded to City's Motion to Dismiss. [R. Volume 1 at 167-176] However, "RRR" did not respond to "City's" notice of intent to file a Section 57 Motion with the Court for fees and costs. After the statutory notice requirement was met, the "City" filed a "Motion to Determine Entitlement to Attorney Fees and Costs", with the Court, on January 29, 2009. [R. Volume 2 at 338-342].

On February 25, 2009, Judge Lambert granted City's Motion to Dismiss. [R. Volume 3 at 431-432]. "RRR" offered a voluntary dismissal after the Court's ruling on April 8, 2009. [R. Volume 3 at 490-491] A hearing was set on City's Motion under Section 57.105(1) for April 15, 2009 and Plaintiff responded to "City's" Motion on April 13, 2009. [R. Volume 3 at 492-504] Judge Lambert denied City's Motion for Attorney Fees and Costs pursuant to Section 57.105, Florida Statutes on April 23, 2009. [R.Volume 3 at 505-508]. Notice of Appeal was filed with the Court on May 14, 2009.

OPINION OF THE LOWER TRIBUNAL

The Honorable Judge Lambert's Decision denial of "City's" Motion for Award of Attorney Fees under 57.105 [R. Volume 3 at 505-508] creates a logical template for this Appeal and "City's" arguments. Judge Lambert states that "the

gist of Defendant's argument is that his (Plaintiff) suit was frivolous from the inception because the plaintiff's Bert Harris claim could not have accrued until the second (2nd) reading of the ordinance in question. Since the suit predated the City's adoption of the ordinance, by definition, the specific action of a governmental entity which affects real property, see Section 70.001(3) (d), Florida Statutes, had not occurred, i.e., there was no final action by the Defendant City which, if inappropriate under the Bert Harris Act, which would justify the filing of the Plaintiff's cause of action at the time suit was filed. Defendant argues that the general policy under Section 57.105, Florida statutes, is to discourage baseless claims by sanctioning those responsible for unnecessary litigation costs. Visoly v. Security Pacific Credit Corp., 768 So.2d 482 (Fla. 3d DCA 2000)."

Based on the foregoing discussion, the Court then asks; "was there a complete absence of a justiciable issue raised by the losing party?" At the hearing, "RRR" arguing from its Memorandum in Opposition [R. Volume 3 at 492-504], urged the Court to accept the following as reasons why Plaintiff should not be subjected to a Section 57.105 award of attorney fees;

1] Plaintiff's pursuit of the lawsuit was reasonable based upon the broad intent of the Bert Harris Act; 2] Plaintiff argued that mere failure to comply with pre-suit notice requirements did not allow an award of 57.105 fees; 3] Dismissal of the suit did not translate into the suit being frivolous at its inception; 4] The recent opinion of the 5th DCA in Citrus County v. Halls River Development, 2009 WL 722053 (Fla. 5th DCA 2009) demonstrated the ambiguity in the interpretation of the Bert Harris Act; 5] Finally the Plaintiff argued that due to a relative dearth of case law interpreting Bert Harris and the chilling effect of a Section 57.105

award of attorney fees would have on a party's good faith attempt to advance a novel question of law that Plaintiff should not be subjected to such an award.

The Court choose to determine that "RRR's" Complaint was not frivolous and opined that due to the relative lack of reported cases and the fact that the Court was not convinced that Plaintiff's suit, as initially filed, was so completely devoid of merit as to render it frivolous as a matter of law and fact, Defendant's Motion was denied. [R. Volume 3 at 505-508]

It is now incumbent upon the "City" to offer argument as to why Plaintiff's suit was indeed completely devoid of merit as to render it frivolous as a matter of law and fact.

STANDARD OF REVIEW

The standard of appellate review on issues involving the interpretation of statutes is de novo. Because this case involves the application of statutory law and involves pure questions of law with regard to four (4) statutes the standard of review is de novo. B.Y. v. Department of Children and Families, 887 So. 2d 1253 (Fla. 2004).

SUMMARY OF THE ARGUMENT

The trial court erred in denying "City's" Motion for attorney's fees and costs. "RRR" filed a complaint devoid of merit at its inception entitling "City" to fees and costs. "City" provided statutory notice to "RRR" of its intent to file a

Motion of Frivolous Action and "RRR" proceeded forward with its litigation. [R. Volume 2 at 343-430 Motion] [R. Volume 3 at 343-430 Brief]

This matter is governed by four different statutes. The "City" was obligated to follow Section 163.3184, Florida Statutes and Rule 9J-11.011, Florida Administrative Code with regard to adoption of a Comprehensive Plan Amendment and Section 166.041 (3) (c) 2a, Florida Statutes that requires two (2) public hearings on any ordinance that changes permitted, conditional or prohibited uses in a zoning category or changes the actual zoning map designations on parcels involving 10 or more contiguous acres. "RRR" filed a lawsuit against the "City" under Section 70.001, Florida Statutes, the Bert Harris Act and the "City" filed a motion for attorney fees and costs under Section 57.105, Florida Statutes.

"RRR" filed its claim and lawsuit under the Bert Harris Act before the "City" held its second (2nd) public hearing. [R.Volume 1 (141-164)Amended Motion to Dismiss at 2 par.5] It is equally clear the "City is statutorily bound by two (2) different statutes to hold 2 public hearings before an ordinance can be considered adopted. Recognizing that "RRR" choose the Bert Harris Act as the statutory basis for its claim, "RRR" then sought protection by arguing that since there is an absence of case law interpreting, "as applied" in Section 70.001 (1), Florida Statutes, it does not require final adoption of a regulation before one can file a Bert Harris claim or lawsuit. Further, Plaintiff argued that a reasonable

person in the Plaintiff's position would be concerned that the failure to present a claim to the local government in a timely manner would lead to a potential time bar of its claim and cites the recent opinion in Halls River as support.

"City" will discuss Halls River and show that Plaintiff's argument is specious and desperate. It is legally impossible for the "City" to adopt and apply any ordinance or regulation that requires two public hearings prior to that final second adoption hearing. If the "City" fails to follow the statute then the result is void. Statutory restraints prevent a local government from legislating regulations that "may inordinately burden, restrict, or limit private property rights", Bert Harris, Section 70.001(1), by just holding one (1) public hearing. Ordinance 2007-25 embodied a number of comprehensive plan amendments that would not constitute an adopted ordinance, by statute, until the second (2nd) public hearing was held as defined by Section 70.001 (11);

> "A cause of action may not be commenced under this section if the claim is presented more than one (1) year after a law or regulation is first applied to the property at issue".

There was no legal or factually based time bar concern that could have caused "RRR" to file their claim on March 25, 2008 and their lawsuit on October 2, 2008, all prior to "City's" statutorily required second (2nd) adoption hearing and the statutorily mandated DCA review period. Florida Statute, Section 163.3184 and Rule 9J-11.011, FAC.

Bert Harris has very specific pre-suit requirements, requirements that go to the heart of the Bert Harris Act and these were not met by "RRR". In the lower Court, "RRR" argued that not meeting pre-suit requirements, filing a claim and lawsuit before the "City held its 2nd public hearing and having their lawsuit dismissed was not evidence of a frivolous piece of litigation. Why? Because "RRR" argued that their actions were reasonable within the broad intent of the Bert Harris Act, and that there's not enough case law to allow them to know better.

Any lawyer that handles Growth Management on a municipal level must be familiar with Section 163.3184, Florida Statutes and Rule 9J-11.011, Florida Administrative Code with regard to adoption of a Comprehensive Plan Amendment and Section 166.041 (3)(c)2a, Florida Statutes that requires two (2) public hearings on any ordinance that changes permitted, conditional or prohibited uses in a zoning category or changes the actual zoning map designations on parcels involving 10 or more contiguous acres. One must be able to advise their client on how to adopt a comprehensive plan amendment that also meets the municipal requirements of ordinance adoption. In reviewing the requirements of filing a Bert Harris claim, the statue is very specific with regard to pre-suit requirements and there is case law on point.

In this case, one must assume that a very experienced lawyer in matters of growth management/planning and with many municipal clients was unaware that a

city must hold two (2) public hearings in order to adopt a comprehensive plan amendment and that Section 166.041 (3)(c)2a required a municipality to hold 2 public hearings on Ordinance 2007-25. How else can one explain why, almost simultaneous with the "City's" first public hearing, "RRR' hired an appraiser to prepare a "bona fide" appraisal needed to accompany their claim. The claim and lawsuit was filed before the "City held its second (2nd) required hearing. This sequence of events clearly does not meet the pre-suit requirements of Bert Harris, but "RRR" said that was ok because the filing of their claim and lawsuit was reasonable under the broad intent of Bert Harris. Now what does that mean?

"RRR" also argued that they made a good faith attempt to advance a novel question of law and they should not be punished for their initiative. Halls River is then waived as the standard bearer for ambiguity and confusion in Bert Harris cases. In sum, "RRR" inappropriately seeks to divert the Court's attention to "novel questions of law" and "Halls River" for one reason and one reason alone. Florida laws with regard to the issues presented in this matter, under the Bert Harris Act, are decisively against "RRR" and instead would support "City's" position. "RRR's" use of Halls River shows a clear lack of understanding of the published opinion. The only novel question raised in this case is whether "RRR" can just ignore statutory requirements and when confronted with the potentially frivolous nature of their complaint, argue that the Bert Harris Act is vague and no

one really knows what it means. If a municipality cannot rely on the pre-suit requirements of the Bert Harris Act, then the government is left with no way to determine how to avoid financially catastrophic claims in an area where no liability insurance is available.

The lower Court was reluctant to agree with the "City's" argument that the Bert Harris lawsuit was used as an improper preemptive strike by "RRR" (by premature filing of suit). The facts clearly show that "RRR" was not concerned about the statutory constraints in this matter and why should they be concerned? "RRR" had nothing to lose. "RRR" filed a complaint that did not even nominally comply with any of the statutory constraints present. For "RRR", the worst result it faced was that its lawsuit might be dismissed, if "City" hired a lawyer and fought the claim. "RRR" could then file again after Ordinance 2007-25 was actually adopted. But for the "City", the filing of the lawsuit with its large claim for damages could have been so intimidating so as to precipitate an unwise settlement and a small "City" may not have the knowledge or understanding necessary to judge whether the lawsuit was factually or legally viable. The lawsuit also carried an alleged "bona fide" appraisal based on a hot real estate market which further inflated the claim. [R. Volume 1 (1-83)Complaint Appraisal at 7, 8, 9]

The City fought the defective lawsuit, exposed defects that would be readily apparent to any lawyer familiar with growth management/planning rules and

procedures. The "City argued for dismissal of "RRR's" lawsuit and was successful in the lower court. [R.Volume 3 at 431-432] "RRR" may simply re-file its claim. The issue here is that "RRR" knew or should have known that its lawsuit was fatally defective and devoid of merit at its filing. The "City" successfully defended and now "RRR" must deal with the consequences of filing a complaint devoid of merit. "RRR" must pay fees and costs to the "City" because its strategy did not work. The piper must be paid.

While the lower Court was not convinced that "RRR's" lawsuit was totally devoid of merit, "City", would offer that "RRR's" lawsuit thumbs its nose at the statutory constraints present, in this matter, and the lawsuit was fatally flawed and totally devoid of merit at its inception. "City" has had to defend against a frivolous lawsuit. "City" put "RRR" on notice, as required under Section 57.105. "RRR" did not dismiss and instead proceeded with the litigation. "RRR" offered a voluntary dismissal after Judge Lambert dismissed the complaint. The "RRR" litigation represents the "poster child" for a frivolous action and Halls River will not offer "RRR" safe harbor to camouflage their clear and blatant disregard for the law.

ARGUMENT

I. THE TRIAL COURT ERRED BY NOT FINDING THAT APPELLEE'S COMPAINT, AT ITS INCEPTION WAS DEVOID OF MERIT UNDER THE BERT HARRIS ACT RENDERING ITS CLAIM FRIVOLOUS UNDER

FLORIDA STATUTES SECTION 57.105 (1) ENTITLING APPELLANT"CITY" TO ATTORNEYS FEES AND COSTS.

A. APPELLEE FILED ITS CLAIM AND COMPLAINT BEFORE APPELLANT CITY HELD ITS STATUTORILY REQUIRED SECOND HEARING ON ORDINANCE 2007-25. AS A RESULT, APPELLEE FAILED TO MEET THE DEFINITION OF A BERT HARRIS CLAIM UNDER THE STATUTE AND ALSO FAILED TO MEET THE PRE-SUIT REQUIREMENTS OF THE ACT, THUS FILING A LEGALLY BASELESS CLAIM.

1. "RRR" DID NOT PRESENT ANY EVIDENCE OF "DIRECT ACTION" UNDER "HARRIS"

"RRR" filed a complaint under the Bert Harris Act, Section 70.001 (1). However, "RRR" did not allege facts which would support a claim under the Act. "RRR's" Bert Harris claim failed to meet the factual recitals necessary for a "Harris" claim and also presented defective pre-suit requirements. The complaint posed arguments "a reasonable lawyer would either know were not warranted by existing law or by any reasonable argument", which could prove successful under the Act. Hendrix v. Evenflo Company, Inc., 2007WL 3520815 (N.D.Fla); Visoly v. Security Pacific Credit Corporation, 768 So. 2d 482 (Fla. 3rd DCA 2000).

At the time the defective claim was filed on March 25, 2008, there was no final action by the government. "RRR" never pled any type of final action by "City", or offered any well-grounded legal argument to overcome that fact and provided no evidence showing any indication that Ordinance 2007-25, was applied to "RRR's" real property. "RRR" certainly did not offer any evidence that

Ordinance 2007-25 was unfairly applied to "RRR" property, as required by Section 70.001 (1),

> "it provides for relief, or payment of compensation, when a new law, rule or regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property, or inordinately burdened real property." (Emphasis added)

Absent any allegation of final action applied to "RRR" real property, these claims against "City" were not asserted in good faith.

What constitutes "direct action" by the government is at issue because that term is found in the definition of "inordinate burden". The "City" offers that "direct action" could only be directed at "RRR's" real property when Ordinance No. 27-25 took effect and could be legally applied, on December 26, 2008. [R. Volume 2 (331-334)Plaintiff's Supplemental Response at 2] At that point, the pre-suit requirements of the Act would begin to run, giving meaning to Section 70.001 (11); which states;

> "a cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue."(Emphasis added)

In response to "City's" Motion to Dismiss for failure to state a cause of action under the Act, "RRR" stated that just publication of a "Notice of a Planning Board or City Council Meeting" would qualify as "an action of a governmental entity", [R.Volume 1 (167-176) Plaintiff's Response to Motion to Dismiss at 4 par.

9], and create a claim under the Act. A public notice of a meeting where a rule, regulation or ordinance is being discussed and considered does not create any lawful action that a government could use to enforce anything against real property. It would be impossible to determine the timeliness of required pre-suit procedure or when the statue of limitations would run, if mere consideration of an ordinance by the Planning Board constituted an actionable claim. What if an Ordinance is noticed but then rejected at First Reading after having been recommended for approval by the Planning Commission. What if an Ordinance is recommended by the Planning Commission for approval by the City Council survives a First Reading but is voted down at the Second Reading? Did a "direct action" of a governmental entity that permanently affects real property occur? Such an interpretation would allow "RRR" to file a Bert Harris claim based on conversation.

"RRR's" argument that mere "notice" of a meeting to discuss an ordinance or regulation would be sufficient to qualify as "direct action" under the Act creates unmanageable ambiguity. Practically speaking, how would a property owner determine if the statute of limitations for either pre-suit requirements (1 year) or the four year catch-all statute of limitations under Russo Associates, Inc. v. City of Dania Beach Code Enforcement Bd., 920 So. 2d 716 (Fla. 4th D.C.A., 2006), had run? According to "RRR", an appraisal, attached to a claim, with assumptions of

final approval, would be appropriate under the Act, as soon as the topic is broached at a Planning Board or City Council Meetings. Governments would be placed in tremendous financial jeopardy because the 180 day mitigation of damages provision at 70.001 (4), allowing the government and property owner to try and resolve matters would be rendered meaningless. "RRR's" argument is not one that can be taken seriously.

2. "RRR's" CLAIM WAS NOT RIPE UNDER "HARRIS".

Plaintiff's claim and complaint, at its inception, was not ripe under the requirements of Bert Harris. Bert Harris provides that a landowner's dispute will constructively ripen 180 days after that landowner submits a claim to the burdening government. But in order to file a claim, the property owner must meet the requirements of Section 70.001 (2);

> "When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government." (Emphasis added)

In this instance, final approval of the ordinance was still pending. "RRR's" real property had not been inordinately burdened under Section 70.001 (3) (e), Florida Statutes, because no action of a government that would directly restrict or limit the use of "RRR's" property had or could have occurred. In Holmes v. Marion County, 960 So. 2d 828 (Fla. 5th D.C.A. 2007), rehearing denied, the Court

followed Osceola County v. Best Diversified, Inc., 936 So. 2d 55, 58 n. 3 (Fla. 5th D.C.A. 2006) by stating that "the Bert Harris Act creates a separate and distinct cause of action for property owners where governmental regulation has inordinately burdened the property, but does not amount to a taking under the Florida or Federal Constitution."

The Court does not state that a "proposed regulation" inordinately burdened the property. The Court is discussing a final regulation. An inordinate burden is defined by the Act, in relevant part as;

> "direct government action limiting the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the property." (Emphasis added)

Since Ordinance No. 2007-25 was not a final, "direct action" under the Act and could not have been applied to Plaintiff's real property, a permanent burden, as required by the Act was factually and legally impossible. Could "RRR" and its Counsel not have known this?

3. THE "HARRIS" STATUTE IS CLEAR AND UNAMBIGUOUS AS APPLIED TO "RRR's" COMPLAINT.

"The preeminent canon of statutory interpretation requires us to "presume that [the] legislature says in a statute what it means and means in a statute what it says there." Broz v. Rodriquez, M.D., 2005 WL 236176 (Fla. 4th DCA). When the

language of a statute is plain and unambiguous and conveys a clear meaning, there is no reason to resort to rules of statutory interpretation, since to do otherwise would constitute an abrogation of legislative power. Starr Tyme, Inc. v. Cohen, 659 So.2d 1064 (Fla. 1995); Nicoll v. Baker, 668 So.2d 989 (Fla. 1996). The statute must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984). The language of the Harris Act is plain and unambiguous on its face, with regard to the Claim at issue and does not require application of the rules of statutory interpretation. The Act must be construed by the plain and ordinary meaning of the words used. However, a reading of the statute must give effect to every clause in it and give meaning to all of its parts. Reviewing the following Sections of the Act, "RRR's" interpretation of "direct action" would make these provisions inconsistent and meaningless;

In Section 70.001 (1), the reasons for the enactment of the Bert Harris Act are explained, "....the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulations, or ordinance of the state or political entity in the state, as applied, unfairly affects real property." At Section 70.001 (2), "when a specific action of a government entity.....At Section 70.001 (3) (d), "The term "action of a government entity" means a specific action of a government entity which affects real property ..." At Section 70.001 (11), "A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue....."

A government cannot apply an ordinance that is not adopted to property. Until final adoption/approval, the old rules are in effect. In this case the old rules, in effect when "RRR" filed its claim and lawsuit did not harm it under the Act.

4. RRR FAILED TO MEET THE PRE-SUIT REQUIREMENTS OF HARRIS".

Sosa v. City of West Palm Beach, 762 So. 2d 981 (Fla. 4th D.C.A. 2000), provides the definitive standard concerning the pre-suit requirements of a Bert Harris claim;

> The pre-suit requirements are; 1] an action of a governmental entity which affects real property and 2] the submittal of a timely notice of claim accompanied by a bona fide, appraisal that supports the claim and demonstrates the loss in fair market value to the real property.

In the trial court, "RRR" argued that Sosa v. City of West Palm Beach, 762 So. 2d 981 (Fla. 4th D.C.A. 2000) did not support Defendant's Motion to Dismiss. [R. Volume 1 (167-176)Plaintiff's Response to Defendants Motion to Dismiss at 7 par. 20] "RRR" stated that it did not fail to meet the pre-suit requirements of Bert Harris, or if it did then the alleged failure to meet pre-suit requirements, standing alone, was insufficient to support an award under Section 57.105, or initial defects in pre-suit requirements can be cured after a complaint is initially filed. "RRR" used Widmer V. Caldwell, 714 So.2d 1128, 1129, (Fla. 1st DCA 1998) and VonDrasek v. City of St. Petersburg, 777 So.2d 989,991 (Fla. 2nd DCA 2000) to support its multitude of options.

These cases offer little support to "RRR's" failure to meet pre-suit requirements. The Widmer decision is distinguishable from this case because it

involved the pre-1999 version of Section 57.105, which included a higher standard. Also in Widmer, the failure to comply with pre-suit notice was the only basis for an award of fees. While in Barthlow v. Jett, 930 So.2d 739 (Fla. 1st DCA 2006), the Court awarded fees and costs because not only did the complaint fail to meet pre-suit notice, as in Widmer, but Mr. Barthlow refused to dismiss and re-file when notified of same. In VonDrasek, a tort case concerning a loss of consortium claim, the case was originally dismissed because the pre-suit notice did not specifically reference the consortium claim. The Court was concerned that the City had not raised this defect until after the statute of limitations had run on the filing of the claim. The Court said that while notice is a condition precedent to a lawsuit, "notice is not intended to be a special "gotcha" that allows governmental entities to sandbag plaintiffs; it functions as a tool to allow these entities to identify and settle claims on a timely basis without the expense of extended litigation."

In this case, "RRR" received notice of the defects in its complaint and did not dismiss or withdraw its complaint. Without final action, "RRR" faced no threat of time bar and "City" certainly did not "sandbag" "RRR" in anyway. The "gotcha" strategy described in VonDrasek, worked against the "City" in this case. When "City" received "RRR's" notice of a Bert Harris claim 8 months before its final hearing on Ordinance 2007-25, "City" did not have an approved ordinance which effectively denied the "City" the opportunity to proceed through the

statutory provisions of the Bert Harris Act. "City" could not issue a Ripeness Decision without final action or some final determination from the City Council. Prior to final action and adoption of Ordinance 2007-25, any attempt to respond to "RRR's" claim would have been speculative and inappropriate. "City" was unable to pursue the mitigation of damages provisions in the Act and was prevented from attempting to settle the claim on a timely basis without the expense of litigation, as mandated in Vondrasek.

5. "RRR's' COMPLAINT FAILED TO MEET THE FACTUAL RECITALS NECESSARY FOR A "HARRIS" CLAIM.

"RRR" did not meet the necessary cause and effect of "an action of a governmental entity which affects real property", Section 70.001(2), Florida Statutes and "specific action", as previously discussed, did not occur. The "City" faced with statutory restraints with regard to adoption of Ordinance 2007-25 was required to hold two advertised public hearings on the proposed ordinance, as provided by statute. Ordinances like Ordinance 2007-25 must be strictly enacted pursuant to the statute's notice provisions. 7 Fla. Jr 2d Building, Zoning, and Land Controls Section 183. In Coleman v. City of Key West, 807 So.2d 84 (3rd DCA 2002), the Court states, "the courts have consistently held that ordinances which fall within the ambit of section 166.041(3), Florida Statutes must be strictly enacted pursuant to the statute's notice provisions or they are null and void."

It is clear that "RRR" had no reason to fear a potential time bar of their Bert Harris Claim. Statutory requirements mandated that "City" have 2 public hearings and if "City" failed to do so then Ordinance 2007-25 would be null and void. It was legally impossible for the "City" to enforce "an action of a governmental entity, as applied, which affects real property", Section 70.001 (2), Florida Statutes, on "RRR prior to the second (2nd) adoption hearing of Ordinance 2007-25. It is equally clear that "RRR's" reason for filing its claim and complaint, concern for a possible time bar as to its claim, was developed after the fact and the threat of an award of attorney fees and offered no law, fact or basis that would allow "RRR" to ignore the requirements of the Bert Harris Act.

"City" has discussed the legal inability of the City to take any action which would have affected "RRR's" real property since "City" had not held the statutorily required second public hearing when the Claim and Lawsuit were filed. In previous pleadings, "RRR" [R.Volume I(167-176) Plaintiff's Response to Defendant's Motion to Dismiss at 6, par.18] also admitted its failure to provide a "bona Fide" appraisal with its notice of claim, which admission it has subsequently backed away from. By this admission, "RRR" failed to meet any of the requirements of Sosa. If a lawsuit filed under the Bert Harris Act did not meet the pre-suit requirements of Sosa or the factual definition of an actionable claim, then you have a case totally devoid of merit, at its inception. Under the Bert Harris Act,

the pre-suit requirements go to the very heart of a claim. If you do not have "an action of a governmental entity which affects real property", then you do not have a claim at law or fact under Bert Harris. If the claimant proceeds with litigation after notice of a Section 57.105 Motion then the claimant is financially responsible for filing a frivolous claim. [R. Volume 2 (338-342) Motion for Fees]

"RRR" argued that the Bert Harris Act is a remedial statute. [R. Volume 1(167-176) Plaintiff's Response to Motion to Dismiss at 3 par.8] "RRR" stated; "This is to say it creates a remedy for a loss which previously did not exist." "City" does not disagree with "RRR" characterization of the Act. "City's" argument was that the loss had not yet occurred and as such "RRR" could have proceeded forward with a development plan. No plans or permits had been denied, nor was there any evidence or suggestion offered that plans or permits would be denied. The Act provides a remedy where real property is inordinately burdened as described under the Act. But the Act does not provide a remedy for a bad real estate market, too many similar available properties for sale, or for necessary expensive infrastructure improvements required as a cost of development. Again, "RRR" failed to meet the statutory definition of a claim under the Act;

> " (2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief,..." and at (2) (d) "the term "action of a governmental entity" means a specific action of a governmental entity which affects real

> property, including action on an application or permit.", Section 70.001 (2) & (2)(d), Florida Statutes. (Emphasis added).

Old rules still applied and the property owner was not precluded in any way from pursuing his property rights. While the Act may be remedial, it is not fanciful.

This is not about a failure of proof but the failure of a case. Florida Statute Section 57.105 (1); Forum v. Boca Burger, Inc., 788 So. 2d 1055 (Fla. 4th D.C.A. 2001); Wagner v. Uthoff, 868 So. 2d 617 (Fla. 2nd D.C.A. 2004); Rockledge Mall Associates, Ltd. v. Custom Fences of Brevard, Inc., 779 So. 2d 558 (Fla. 5th D.C.A. 2001).

B. APPELLEE FILED A FRIVOLOUS COMPLAINT UNDER SECTION 57.105(1) AND APPELLANT CITY IS ENTITLED TO ATTORNEY FEES AND COSTS.

Section 57.105 (1), Florida Statutes, permits the trial court to award fees and costs on any claim or defense at any time during a civil proceeding or action when the trial court finds:

> (1) .... That the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court ..... (a) Was not supported by the material facts necessary to establish the claim or defense; or (b) Would not be supported by the application of then-existing law to those material facts. Wendy's v. Vandergriff, 865 So. 2d 520 (Fla. 1st DCA (2003).

Frivolous is determined when the claim is initially filed. Wendy's. If the Court determines that the claim was frivolous when initially filed then the Court may determine that the party or its counsel knew or should have known that the claim or

defense asserted was not supported by the facts or an application of existing law to those facts. Wendy's and Boca Burger. Both cases recognize that the "material facts standard", as cited above, fleshes out the "frivolous standard" used prior to statutory revision in 1999. Wendy's, recognizes that the bar for imposition of sanctions has been lowered and requires a case by case analysis. In, Mason v. Highlands County Bd. Of County Comm'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002), attorney's fees were awarded under 57.105(1), Florida Statutes, where the "party and counsel knew or should have known that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of then existing law." Boca Burger

A finding that a losing party knew or should have known that a claim was not supported by the facts or would not be supported by application of then-existing law to those material facts is tantamount to a conclusion that the claim was frivolous when filed and would support awarding attorney fees and costs as a sanction. Section 57.105, Florida Statutes, Eastern Industries, Inc. v. Florida Unemployment Appeals Cmm'n, 960 So.2d 900 (Fla. 1st DCA 2007).

In its previous argument, "City" has established that "RRR's" claim was not supported by the facts or then-existing law. "RRR" and its attorney, admitted in its Memorandum of Law In Response to Defendant's Motion to Dismiss, [R. Volume 1 (167-176) at 2 par. 4]; that Ordinance 2007-25 had not gone into effect when

"RRR" filed its claim and lawsuit; that "City" had not held its statutorily required second (2nd) adoption hearing when "RRR" filed its claim and lawsuit, [R. Volume 1 (167-176) at 2 par. 2]; "RRR" even argued that if their appraisal was not correct that was OK too. [R. Volume 1 (167-176) at 6 par.18]. "City" offers that these admissions demonstrate "RRR's" failure to meet the requirements of a claim under the Bert Harris Act and the pre-suit requirements of Sosa.

In this action, "City" can demonstrate "RRR's" failure with regard to both Sections 57.105 (1) (a) and Section 57.105 (1) (b). There is an absence of material facts necessary to establish "RRR's" Claim. Further, the Claim was not supported by application of then existing law. Bert Harris provides that a landowner's dispute will constructively ripen 180 days after that landowner submits a claim to the burdening government. In this instance, final approval of the Ordinance occurred on December 26, 2008. The claim was filed on March 25, 2008, and the lawsuit was filed on October 2, 2008.

Defendant is a small City with limited resources and funds and has incurred substantial fees and costs in defending a claim of this magnitude ($5,340,000.00). The general policy behind awarding attorney's fees for bringing a frivolous action is to discourage baseless claims by sanctioning those responsible for unnecessary litigation costs.

"City" has shown that "RRR's" complaint was contradicted both by the Bert Harris Act itself and prior opinions of the Court in applying the Act. A court "shall" award attorney's fees to the prevailing party where there is an absence of justiciable issue of either law or fact. It appears the Complaint was filed to harass or injure "City" by forcing a costly defense of a non-meritorious claim. "City" incurs significant legal fees and if "RRR's" Claim is dismissed for "jumping the gun" and not filing a factual or legally sustainable claim under Bert Harris, then "RRR" can just re-file. "Florida case law has established guidelines for determining whether an action is frivolous, including where a case is found: ..... (3) as having been undertaken primarily to delay or prolong the resolution of the litigation or to harass or to maliciously injure another; or (4) as asserting material factual statements that are false." Hendrix and Visoly.

This Honorable Court has itself opined on Section 57.105 (1) in three (3) key cases. The first case found that in entering an award for attorney fees under Section 57.105, the trial court must make a finding that "there is a complete absence of a justiciable issue raised by the losing party." Mahaney v. Sumter Electric, 732 So. 2d 373 (Fla. 5th DCA 1999). In the 2nd case, the 5th Circuit stated that an award of fees is authorized "at any time that the court finds that the losing party was raising an unsupported claim or defense not supported by material facts or would not be supported by the application of then existing law to those material

facts." Airtran Airways v. Avaero Noise Reduction Joint Venture, 858 So. 2d 1232 (Fla. 5th DCA 2003). Moreover the voluntary dismissal of a claim does not automatically bar an award of attorney's fees, but the award may only be made following a dismissal when there are no justiciable issues of law or fact. Horticultural Enterprises v. Plantas Decorativas, LTDA, 623 So. 2d 821 (Fla. 5th DCA 1993); Andzulis v. Montgomery Road Acquisitions, Inc., 831 So. 2d 237 (Fla. 5th DCA 2002); Froman v. Kirkland, 746 So. 2d 1120 (Fla. 4th DCA 1996).

As previously stated, "RRR" admitted that they did not submit a bona-fide appraisal, [R. Volume 1 (167-176) at 6 par. 18], that the final regulation forming the basis of "RRR's" Complaint was not final and had not been applied to "RRR's" property, [R. Volume 1 (167-176) at 2 par. 4]; and that their claim really wasn't ripe, [R. Volume 1 (167-176) par. 9]. Section 57.105 (1) was intended to offer sanctions for this type of circumstance.

A number of recent decisions take a harder line on imposing Section 57.105 (1) sanctions where a claim is not supported by material facts or the law necessary to establish their claim.

> In re Ridley Owens, Inc., 391 B.R. 867, (USBC N.D. Fla. 2008), where a request for Section 57.105 (1) attorney fees was filed after dismissal, "Section 57.105 mandates a court to award fees to the prevailing party in equal amounts to be paid by the losing party and the losing party's attorney. The purpose of Section 57.105 is to discourage baseless claims in civil litigation by placing the price tag of attorney's fees on the losing parties. These sanctions ensure that litigants are served with meritorious cases and encourage lawyers to consider

> whether a case has non-frivolous ground while discouraging them from raising meritless claims. Furthermore, the use of the word "shall" in the statute indicates that the legislature intended the sanctions to be mandatory." De Vaux v. Westwood Baptist Church, 953 So. 2d 677, (Fla. 1st DCA 2007); Army Aviation Heritage Foundation and Museum, Inc. v. Buis, 504 F.Supp. 2d 1254 (N.D. Fla. 2007); Albritton v. Ferrera, 913 So. 2d 5, (Fla. 1st DCA 2005; Yang Enterprises, Inc., v. Georgalis, 988 So. 2d 1180, (Fla. 1st DCA 2008); Danziger v. Alternative Legal, Inc., 987 So. 2d 694, (Fla. 4th DCA 2008);

The Court must look at the totality of circumstances concerning "RRR's" claim. "RRR" displayed a blatant disregard for the pre-suit provisions of the Bert Harris Act. "RRR" never explained how its claim and subsequent complaint met the factual requirements of a Bert Harris Claim. "RRR" in subsequent pleadings admitted facts that should have caused "RRR" to dismiss their suit prior to the Court's dismissal.

"RRR" and its lawyer were familiar with the Bert Harris Act, the statutory requirements imposed on a municipality with regard to the adoption of an Amendment to a Comprehensive Plan and the statutory requirements relating to adoption of ordinances affecting land use and land use maps. The cavalier arguments made by "RRR" should not be offered by lawyers having expertise in this area. "RRR" in its Memorandum of Law in Opposition to Motion for Attorney's Fees, [R. Volume 3 (492-504) at 2 par. 6], states; "In this action, the Plaintiff's claim was predicated on the City's adoption of an ordinance". At the time the Claim was filed, at the time the lawsuit was filed, the ordinance had not

been adopted. In that same Memorandum, "RRR" offered that since no appellate court had provided an interpretation of the term, "action of a government entity", "RRR's" complaint could not be deemed frivolous since "RRR" was offering a good faith attempt to advance a novel question of law. "RRR" argues that frivolous sanctions might chill counsel's enthusiasm and stifle the creativity of litigants in pursuing novel factual or legal theories. This is not a legal writing competition in Law School. For the "City", this is as serious as a heart attack. A huge claim was leveled at a very small City with limited funds. The "novel question of the law argument" is insulting and pretentious.

In the spirit of 57.105, is it not the potential cost of paying attorney's fees that should motivate a Party to dismiss a frivolous lawsuit when the Party is made aware of significant pre-suit defects and deficiencies of law and fact? Does the potential money award provide the motivating factor for promoting judicial economy and minimizing litigation costs? From the time that "City" filed its Motion to Dismiss, [R. Volume 1 at 85-137] "RRR" was on notice as to the factual deficiencies, pre-suit deficiencies, procedural deficiencies and the basic failure of "RRR" to meet the factual requirements of Section 70.001 (2), Florida Statutes. "RRR" knew, as it proceeded forward that these defects rendered its complaint frivolous.

C. THE HALLS RIVER CASE DOES NOT OFFER ANY SANCTUARY FOR "RRR'S" FILING OF ITS "BERT HARRIS" ACTION.

Citrus County v. Halls River Development, Inc., 8 So.3rd 413 (Fla. 5th DCA 2009) offers interpretation and insight with regard to key elements of the Bert Harris Act. The facts of the case describe a government that was trying to accommodate a developer. The County approved comprehensive plan amendments. These Amendments changed the Halls River property from MXU-mixed use to CL-conservation in the plan and on the map in 1996. County Staff told the Developer that multiple units could still be built on the property and Developer purchased the property in 2001. The County approved the development of multiple units in February 2002 and in April 2002, the County adopted an ordinance conforming the LDC and the zoning maps to the Comprehensive Plan Amendments but specifically exempted the Developer. However, resident opponents challenged and a trial court overturned the County's approval of the development because it did not conform to the Amended Comprehensive Plan.

In this case, the Court concluded by determining;

> " that the adverse impact to the Developer was caused in 1997 by the adoption of the "EAR". Developer filed its Bert Harris Claim in 2003 and is time barred because a Bert Harris claim must be presented within one year from the time the law or regulation is first applied by the governmental entity to the property at issue and while the Court recognizes that there may be some instances when the impact of a governmental regulation cannot be determined prior to the submission of an actual development plan, in this instance the impact of the CL

> designation of the property was readily ascertainable when the "EAR" was passed."

In the case at hand, the alleged government action complained of also involves a comprehensive plan amendment. But the "City's" comprehensive plan amendment was not "permanent", had not been passed or adopted and could not and had not been applied to the property at issue. Halls River also stated that a claim must be presented within one (1) year from the time the law or regulations is first applied by the governmental entity to the property at issue. The Court interprets "as applied" to mean adopted. "City" finds these determinations of great value. A Bert Harris Claim requires the action of a governmental entity to "permanently affect" the real property and "as applied" means when the complained of regulation or ordinance is adopted. "RRR" did not have any permanent action of the "City" when it filed its claim and its lawsuit. "RRR" could not meet the requirement of "as applied", in order to file a Bert Harris Claim. The Halls River case offers further support to the "City's" argument that "RRR's" complaint is totally devoid of merit and frivolous under the law. Halls River fails to offer "RRR" sanctuary.

CONCLUSION

The Bert Harris Claim and lawsuit filed by "RRR" contained fatally defective pre-suit requirements and failed to meet the definitional requirements of

Section 70.001, necessary in order to file a claim under Bert Harris. It totally lacked a factual basis, as required by the Act and offered no well-grounded legal argument, no evidence of "as applied" to "RRR's"s real property by "City", resulting in damages, and as such is devoid of merit. "RRR's" claim of injury under the Bert Harris Act was frivolous.

When "RRR" filed a complaint under the Bert Harris Act, Section 70.001 (1), it was blatantly obvious to even the most casual observer, that this Complaint on its face did not meet the factual or legal requirements of the Bert Harris Act. The Complaint, as filed, was frivolous, devoid of merit, lacking good faith, demonstrated a total or absolute lack of a justiciable issue and appeared to have been filed to harass or injure "City" by forcing a costly defense of a non-meritorious claim. Under any interpretation as to when the "City's" Ordinance No. 2007-25 took effect, it was clear that it had not taken effect or been applied to the property at issue when "RRR" filed its notice of claim on March 25, 2008.

"City is entitled to an award of attorney's fees, costs, damages, and such other sanctions as the court deems appropriate. Boca Burger, Section 57.105 (1). Quoting from Albritton v. Ferrera, 913 So. 2d 8 (Fla. 1st DCA 2005); "This statue was adopted as part of the 1999 Tort Reform Act in an effort to reduce frivolous litigation and thereby to decrease the cost of employing the civil justice system.

The Legislature sought to accomplish these goals by subjecting litigants and their lawyers to a financial consequence if they assert baseless claims or defenses."

In the case at hand, "RRR" had a duty to voluntarily dismiss this suit when "City" filed its Motion to Dismiss. "RRR" and its Counsel knew or should have known that the Bert Harris Claim asserted in this matter was not supported by the facts and was not supported by any application of "existing" law.

"RRR' offered five (5) specific arguments as to why the "City" should not have received fees and costs under Section 57.105(1), Florida Statutes. "City" listed them previously. "City" in arguing for an award of fees and costs has addressed each of those arguments made by "RRR". "City" has demonstrated the unreasonableness of "RRR's" various interpretations of the Bert Harris Act. More specifically, "City" has shown; that "RRR's" complaint was not reasonable even under the "broad intent" of the Burt Harris Act; and "RRR' failed to comply with pre-suit notice requirements and the factual requirements of maintaining a claim under the Act. "RRR's" late dismissal of its complaint, after dismissal by the trial court, does not protect it from the penalty of filing a complaint that was totally devoid of merit, at its inception. Halls River can not be used to demonstrate any ambiguity in the interpretation of the Bert Harris Act relevant to "RRR's" filing of its complaint prior to the second (2^{nd}) public hearing on Ordinance 2007-25. A Bert Harris claim and lawsuit is serious business and a property owner must pursue

such an option with the same seriousness of purpose and intent, as necessary in filing any complaint. Bert Harris lawsuits often carry large damage claims which reinforce the seriousness of such an undertaking. If one files a complaint devoid of merit then they should face the "chilling effect of a Section 57.105 award of attorney fees". A Bert Harris complaint is not the place for allegedly "advancing a novel question of law".

For all the reasons set forth herein, the Circuit Court's denial of "City's" Motion for Attorneys Fees and Costs must be reversed, together with such other and further relief as this Court may deem just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Kenneth G. Oertel and Jeffrey Brown, Oertel, Fernandez, Cole & Bryant, P.O. Box 1110, Tallahassee, Florida 32302-1110 by U.S. Mail on this 27th day of October, 2009.

M Segal-George

Marsha Segal-George, Assistant City Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the undersigned has complied with the format requirements of the Florida Rules of Appellate Procedure. This Initial Brief was prepared using Times New Roman 14 point font.

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