

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

BARBARA ORBAN,

Plaintiff,

v.

CASE NO.: 8:04-CV-1904-T-23MA

CITY OF TAMPA, FLORIDA,

Defendant.

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**MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Plaintiff, Dr. Barbara Orban ("Dr. Orban"), by and through her undersigned attorney, and hereby files this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

By orders dated April 5, 2006 (Doc. #74) and April 18, 2006 (Doc. #77), this Court requested motions for summary judgment on the limited issue of probable cause be filed by June 15, 2006.

**Standard**

The Eleventh Circuit in *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11<sup>th</sup> Cir. 1996) discussed summary judgment standards and stated:

Summary Judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. [Authority omitted]. The evidence must be viewed in the light most favorable to the non-moving party. [Authority omitted].

In *Augusta Iron & Steel v. Employer's Ins. Of Wausau*, 835 F.2d 855, 856 (11<sup>th</sup> Cir. 1988), the Eleventh Circuit addressed consideration of evidence and inferences and stated:

We must view the evidence and all factual inferences that flow from the evidence in the light most favorable to the party opposing the motion for summary judgment. [Authority omitted]. "If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." *Id.*

### **Undisputed Material Facts**

On March 27, 2000, Dr. Orban left work at the University of South Florida in an automobile and headed to South Tampa. *Orban Affidavit, Exhibit A*, at para. 2. She was heading south on Howard Avenue. *Dr. Orban's October 25, 2005 deposition transcript* (hereinafter "*Orban tr.*") at p. 13. Dr. Orban was involved in an accident in which her car bumped into the rear end of one driven by Matthew Collins ("Mr. Collins"). *Orban tr.* at 13, 15. Mr. Collins first became aware of the accident when he felt a hit or "jar." *Collins' October 25, 2005 deposition transcript* (hereinafter "*Collins tr.*") at p. 6, L 6-10; p. 37, L. 10-14. There were no witnesses who saw why the accident occurred other than Dr. Orban. *Id.*

Officers Edward Bowden and David Duncan were called to the scene. *Bowden's August 23, 2005 deposition transcript* (hereinafter "*Bowden tr.*") at p. 8. Officer Duncan was in training and Officer Bowden was his field training officer ("FTO"). *Id.* All new officers are assigned to FTOs, for about 16 weeks after the officers graduate from the academy. *Bowden tr.* at p. 12-13. To assume the role as an FTO, an officer undergoes a 40 to 80-hour training course. *Id.*

Officer Bowden questioned Dr. Orban. *Orban tr.* at p. 25; *Bowden tr.* at p. 8; *Duncan's September 27, 2005 deposition transcript (hereinafter "Duncan tr.")* at p. 11. Eventually, a citation was issued by Officer Bowden. *Bowden tr.* at p. 14-15, and 16, *Exhibit 1*. Officer Duncan questioned Mr. Collins. *Orban tr.* at p. 24, L13-L20. Officer Duncan wrote a short form crash report. *See Duncan tr.* at p. 9, *Exhibit 2*. In addition, Officer Duncan wrote a long form traffic crash report. *Duncan tr.* at p. 9, *Exhibit 3*. Neither Tampa police officer had observed the traffic accident.

Despite having investigated some 4000 traffic crashes over his 19-year career, Officer Bowden testified that that he remembered Dr. Orban's event because of the civil litigation and her efforts "over the past five years." *Bowden tr.* at p. 7. For example, he remembered that (*Bowden tr.* p. 8, lines 6-22):

Q Is the – tell me what you recall about Dr. Orban's accident or crash.

A Best I recall, it was on Howard Avenue. I pulled up on the computer-- just for a specific location it showed Howard and Bristol, which I haven't been able to get a copy of the written report because they only hold on to them for a couple years. So I wasn't able to pull that from records today.

But I can recall that – or the best I recall, I think it was either raining or it had just rained. I can remember being near the Meeting Place Restaurant, which is now closed, on Howard Avenue, pulling into a parking lot or investigating it while in the parking lot. I can recall speaking with Dr. Orban. I recall that Officer Duncan was with me, that I was training him. And the extent of the damage, I think, was fairly minimal.

Officer Bowden described his conversation with Dr. Orban as follows (*Bowden tr.* at p. 10, lines 2-23):

Q Okay. And you recall speaking with Dr. Orban?

A Yes, I do.

Q What do you recall about that?

A She's a pleasant lady. Again, just brought to recollection because of being aware of these civil proceedings that she was courteous. It wasn't any antagonistic-type conversation.

I recall that she was issued a citation. At the time I think there was some disagreement with the citation but nothing that she got nasty about or anything.

Q Okay. Anything else?

A Not specifically. No, sir.

Q Do you recall what the citation was for?

A At this time, no. And I can't pull up the report or, again, I didn't get a copy of the report before I got here.

I don't recall if it was following too closely or careless driving. As I recall, her vehicle struck the back of the other involved vehicle in the rear, and that would have been the choice of the two options at the time for the citation.

Officer Bowden did not recall specifics about the circumstances of the accident. He testified (*Bowden tr.* at p. 11, lines 9-18):

Q Okay. Now, do you recall anything she told you about the circumstances of the accident?

A No. Nothing specific. Just based on our investigation, our observations and information provided by the involved parties that her vehicle, for whatever reason, had struck the back end of the other involved vehicle.

I don't recall at the time she gave any excuses as far as him abruptly stopping or the wet roads or whatever conversation might have pertained.<sup>1</sup>

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<sup>1</sup>Officer Bowden did not contradict many statements Dr. Orban has claimed he made to her. These included: that he told her that he called his supervisor (*Bowden Tr.* at 34-35; *Orban tr.* at 27, L.21); that he told her that a citation for following too closely was not applicable because the two cars needed to be moving (*Orban tr.* at 31, L.10; *Bowden tr.* at 29, 43); and that careless driving may not have been applicable either (*Orban tr.* at 31, L.18; *Bowden tr.* at 43-47). Officer Duncan concluded the citation which Officer Bowden wrote (*Bowden tr.* at 14, 15, and 16, *Exhibit 1*) violated *Robinson v. State*, 152 So. 717 (Fla. 1934) because it failed to document the conduct which constituted careless driving. *Duncan tr.* at 32. Officer Bowden also admitted many aspects of the policy alleged in this case, including that officers are expected by their supervisors to write a crash report and citation at every crash ("supposed to") (*Bowden tr.* at 89, 99, 100, 101, 124); that to avoid writing a citation, even if an officer believes it is inappropriate, the officer must obtain supervisor approval (*Bowden tr.* at 34-35); that this citation-writing policy had something to do with insurance companies paying money into the pension (*Bowden tr.* at 88, 114-115,

### **TPD's Description of Probable Cause**

In its Memorandum of Law in Support of its Motion to Dismiss and Dispositive Motion for Summary Judgment the City of Tampa at several points describes its asserted basis for probable cause to issue the citation to Dr. Orban. Doc. #53. Attached to that Memorandum of Law is the Affidavit of Edward Bowden in which he asserts that "...it was clear from Officer Duncan's and my investigation that the Plaintiff skidded into the rear of Mr. Collins' vehicle and was therefore at fault." Doc. # 53, Exhibit A, paragraph number 5. The assertion that Dr. Orban skidded into or bumped the rear of Mr. Collins' car is advanced as the probable cause basis for Dr. Orban's citation in the body of that Memorandum of Law at page 3, fn. 3. *See also* pages 2, 10, 12, 18.<sup>2</sup>

### **Dr. Orban's Description**

It is an undisputed fact that Dr. Orban is the only witness to the accident. She describes an unavoidable accident caused by another vehicle. *See Milton Meckler Affidavit* ("Meckler Affidavit") at paragraph 3. Dr. Orban described the events as follows:

- Dr. Orban was driving slowly south on South Howard Avenue in South Tampa. *Orban Affidavit, Exhibit A* at p.3; *Orban tr.* at 13.

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125); that for the last four or five years there have been an increased emphasis on citations (*Bowden tr.* at 84); and that officers were told numbers they were expected to meet for citations in order to receive a satisfactory performance evaluation (*Bowden tr.* 82, 84). As a result, he understood citations were up 70%. *Bowden tr.* at 88. He further testified that he had a "rough recollection" of issuing Dr. Orban's citation because of the policy of requiring citations at every crash and the fact he was then acting as an FTO. *Bowden tr.* at 118-119.

<sup>2</sup>This theory was also advanced by the Tampa Police Department in denying Dr. Orban's internal affairs complaint against the two officers in 2000 and 2001. *Orban Affidavit, Exhibit A* at ¶12; Exhibit B at p. 2. This determination was made when events were still fresh and after Dr. Orban had made a number of complaints to the police department and the City of Tampa trying to address these matters. *See Dr. Orban's Affidavit, Exhibit A* at ¶¶ 8-10.

- There were at least two car lengths between her and a Navigator sport utility vehicle (“SUV”). *Orban tr.* at 15.
- The speed limit was 30 m.p.h. *Duncan tr.* at 17 L.17. *See Duncan Deposition, Exhibit 3, Traffic Crash Report* at p. 1 of 4.
- Dr. Orban was traveling approximately 15 m.p.h. *Orban tr.* at 20.
- She was aware of the weather, road conditions and traffic moving along the road. *Dr. Orban Affidavit, Exhibit A* at paragraph 3.
- Without signaling or slowing, the SUV made a very abrupt left turn from Howard Avenue to Bristol in front of stopped traffic. *Orban tr.* at p. 13, L. 7-8; p. 20, L. 21-26.
- It was only after the SUV turned that Dr. Orban was able to see that traffic had stopped in front of the SUV, which before it abruptly turned, had blocked her viewing that traffic. *Orban tr.* at p. 13.
- Traffic was backed up from one intersection (Morrison and Howard) and virtually to the intersection where the SUV abruptly turned (Bristol and Howard). *Orban tr.* at 14. (Crash Report lists 20 feet away).
- She could not move to the right to a shoulder or parking lane because there was construction on the right side of the road. *Orban Affidavit, Exhibit A* at paragraph 6.

- Dr. Orban did not believe she could pull into the lane of oncoming traffic because she thought there might be another vehicle coming up in that lane. *Orban Affidavit, Exhibit A* at paragraph 7.
- As Dr. Orban assessed and reacted to what was happening in front of her, she immediately applied her brakes. *Orban tr.* at 13.
- Dr. Orban’s anti-lock brakes eventually engaged, but too late, and her car bumped into the rear of the car driven by Mr. Collins. *Orban tr.* at 13.
- A vehicle following Dr. Orban went partially into the vacant lane of oncoming traffic to avoid hitting Dr. Orban’s car in the rear. *Orban tr.* at 14-15.
- The physical damage to both cars was minor. *Orban tr.* at 21-22.

Officer Bowden claims he does not recall what Dr. Orban told him about the circumstances of the accident. *Bowden tr.* at p. 11, L9-18. This may not be surprising given he also testified that someone who hits another vehicle from behind “almost always” is at fault. *Bowden tr.* at 30. Moreover, “about the only time” he would credit a story that an accident was caused by another unidentified car was if there was an independent witness. *Bowden Tr.* at 35-36.

### **Conclusions of Law**

1. There was no probable cause to issue the ticket to Dr. Orban.
2. Neither officer conducted a reasonable investigation to determine whether there was probable cause. They unreasonably refused to accept readily available information inconsistent with probable cause for issuance of a citation.

## Discussion

### Probable Cause

If the facts relating to an alleged incident are not disputed, a court can decide if there is probable cause as a matter of law, but where there is a dispute concerning those facts, the issue of probable cause must be decided by a jury. *City of Pensacola v. Owens*, 369 So.2d 328, 329-330 (Fla. 1979); *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So.2d 1352, 1357(Fla.1994).<sup>3</sup>

Probable cause has been defined by *Grayson v. Thompson*, 257 F.3d 1993, 1216-17 (11<sup>th</sup> Cir. 2001):

Probable cause within the meaning of the Fourth Amendment has been described as more than bare suspicion: “Probable Cause exists where the facts and circumstances within [law enforcement officers’] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U.S. 160, 175, 176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)

In *Rankin v. Evans*, 122 F.3d 1435 (11<sup>th</sup> Cir.1998), the Court pointed out that probable cause requires that:

The facts and circumstances within the officer’s knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.

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<sup>3</sup> When this issue is addressed in Dr. Orban’s response to the City of Tampa’s motion for summary judgment, a number of facts not discussed herein will be addressed because they are in dispute and prevent issuance for summary judgment on that theory. However, the instant motion does not depend upon those facts. Given the above undisputed facts, summary judgment is appropriate on behalf of Dr. Orban.

The position of the City of Tampa and its officers is that Dr. Orban was “at fault” (an insurance term) because she skidded into or bumped the other vehicle in the rear. This position, of course, only looks at the moment of contact between the vehicles without considering the facts which brought about that contact. It assumes probable cause does exist whenever a rear end bump occurs. Under Florida law, the facts relating to what caused contact to occur are critical to whether one committed an offense and therefore to the issue of probable cause. *See, e.g., State v. Doyle*, 1 Fla. L. Weekly Supp. 309, 310 (Co. Ct. Marion County, March 10, 1993); *Retty v. Troy*, 188 So.2d 568 (Fla. 2<sup>nd</sup> DCA 1966), *cert. denied* 200 So.2d 814 (Fla. 1967)(an accident arising from a source other than the negligence of the drivers involved is an unavoidable accident); *Abrams v. Nolen Brown Cadillac Company*, 228 So.2d 131 (Fla. 3<sup>rd</sup> DCA 1969)(the mere fact an accident occurred will never establish a *prima facie* case of negligence or carelessness).

In *Doyle*, the defendant was charged with careless driving after she struck and killed a gardener working at the side of the road. The defendant claimed that a vehicle had drifted or traveled into her lane and she swerved to the right to avoid it and struck and killed the gardener. In ruling for the defendant, the court stated (*Id.* at 310-11):

In *Scott v. Barfield*, 202 So.2d 590 (4<sup>th</sup> DCA Fla. 1967), the Court discussed the principles of sudden emergency and unavoidable accident.

The sudden emergency doctrine hinges upon a factual situation which leads one to the conclusion that these two words suggest. “Obviously, at the time one realized that a car was in his lane, an emergency was created,

and it was then that foresight, skill and care had to be employed by the driver if a collision was to be avoided.

Unavoidable accident does not necessarily mean one which is physically impossible in the nature of things for the defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the things that did happen; one which could not have been foreseen or prevented, and, in this sense, the term is held to be equivalent to or synonymous with "a mere accident" or "pure accident." An unavoidable accident is one which occurs while all persons concerned are exercising ordinary care that is not one caused by the fault of any of the persons...

\* \* \*

Florida Statute § 316.1925 does not compel perfection. It merely states that a person shall drive in a careful and prudent manner having regard for the width, grade, curves, corners, traffic and all other attendant circumstances. This essentially adopts and restates the standard of duty and care inherent in civil negligence cases.

Where a casualty occurs as a result of matters beyond knowledge, actual or implied, or of a person charged over which he has no control, he is therefore relieved of liability for reason that he is not guilty of actionable negligence. *Tropical Exterminators, Inc. v. Murray*, 171 So.2d 432 (2d DCA Fla. 1965).

Although *Doyle* is a post-trial decision, the central point of the probable cause case law cited above is equally applicable here. Specifically, the probable cause determination relates to whether an offense has been committed and, like a trial decision, it must be based upon the facts and circumstances available. While the quantum of evidence necessary may vary depending on the stage of a proceeding, one can never use constructs which ignore the available facts and circumstances. Filing a careless driving charge based simply upon a rear end bumping, constitutes a *per se* refusal to consider the totality of circumstances material to the issue of probable cause.

In the present case, there was only one version of what happened. That was Dr. Orban's version. She was the only witness to the events causing the accident. Her description establishes that another vehicle caused the accident. That description shows she was following the SUV at a safe distance and speed. She was traveling at 15 m.p.h. or at one-half the speed limit. She was at least two car lengths behind the SUV. However, the unusual and illegal (Fla. Stat. § 316.155 (1999)) failure of the SUV to signal or brake and slow down put Dr. Orban in the situation where she came upon a car which in essence "popped up" in the roadway after the SUV made an abrupt turn, doubtlessly to avoid hitting the Collins vehicle. Collins' vehicle was not beginning to brake, hard or otherwise, and it was not rolling to a stop. It appeared dead-stopped in front of her only after the SUV made an emergency turn. Dr. Orban had to move her attention from the unusual action of the SUV to the backed up traffic and immediately consider other options such as turning right onto a sidewalk under construction or pulling into a lane of potentially oncoming traffic. She had to do that in a short span of seconds and commit to full braking which would preclude these actions.

Officers Bowden and Duncan had this information. *Orban tr.* at 25. Armed with these facts and circumstances a reasonable man would have concluded he did not have probable cause. Indeed, Officer Bowden admitted this to Dr. Orban when he said she had not violated the traffic laws. *Orban tr.* at 27-28, 30. 31-32. Officer Bowden testified he has a "rough recollection" that he only issued a citation in this instance because of TPD's policy to require a citation at all

crashes and because he was an FTO that evening. *Bowden tr.* at 118-119. In his deposition, Officer Bowden also admitted that of the only two possible citations, following too closely was not applicable and careless driving also did not fit. *Bowden tr.* at 29, 43-47. Significantly, he also testified that he would not contradict Dr. Orban's recollection that he contacted his supervisor about this ticket. *Bowden tr.* at 34-35. Contacting a supervisor is only necessary when an officer decides not to write a citation at a crash. *Bowden tr.* at 34, 89.

The problem here is that Officers Bowden and Duncan or their supervisors, at best, choose to ignore Dr. Orban's information either because Dr. Orban hit a car from behind or she did not have another witness. In keeping with that, the City of Tampa has actually taken the position that none of Dr. Orban's description of the events need be considered because Dr. Orban's car bumped the rear of Mr. Collins' car. *Memorandum of Law*, p. 3, fn. 3. In the context of probable cause, their positions are tantamount to improperly refusing to consider material facts. *See Rankin, supra*, 133 F.3d at 1435 (probable cause is examined under totality of circumstances); *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1243 (11<sup>th</sup> Cir. 2003)(probable cause is based upon the surrounding circumstances); *Kingsland v. City of Miami*; 382 F.3d 1220, 1230 (11<sup>th</sup> Cir. 2004) (totality of circumstances, including conditions leading up to an outward manifestation and not those manifestations alone); *United States v. Tinkle*, 655 F.2d 617, 623 (5<sup>th</sup> Cir. 1981)(It is necessary to take into account "any information that is found after the arrest decision and before the arrest."); *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5<sup>th</sup> Cir.

1988) (must consider “totality of facts” and not disregard facts which dissipate probable cause); *Ahler v. Schebil*, 188 F.3d 365, 372 (6<sup>th</sup> Cir. 1999) (Officers must consider all evidence known to them and not ignore exculpatory evidence in order to find probable cause); *Kennedy v. Los Angeles Police Dept.*, 90 F.3d 702, 706 (4<sup>th</sup> Cir. 1989). While officers may weigh the credibility of witnesses in making a probable cause determination, they may not ignore available and undisputed facts. *Baptiste v. J.C. Penney Company, Inc.*, No. 97-1047 (10<sup>th</sup> Cir. 1998). *See also*, *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6<sup>th</sup> Cir. 1999) (Officer had knowledge of exculpatory evidence); *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6<sup>th</sup> Cir. 2000) (must consider totality of circumstances).

The officers, or their supervisors, chose to ignore Dr. Orban’s description by relying upon a rear-end bump always making an offender out of the driver of the car doing the bumping.<sup>4</sup>

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<sup>4</sup> Similarly, if as Officer Bowden testified, he requires an independent witness before considering what he described as a non-contact vehicle claim (*Bowden tr.* at 35-36), that would amount to an unreasonable refusal to consider available facts material to the probable cause decision. Indeed, one of the police department’s 30(b)(6) training witnesses testified that an independent witness is not necessary if the officer believes the witness. *Thiel tr.* at 21, L.8. In fact, Police Chief Hogue gave the same testimony. *Hogue October 26, 2005 deposition transcript (hereinafter “Hogue tr.”)* at 25. Interestingly, when Officer Bowden was asked during his deposition to consider Dr. Orban’s description of the SUV’s very abrupt turn before stopped traffic without signaling or slowing: rather than ignore it, he hypothesized that he would assume Dr. Orban was following too closely. *Bowden tr.* at 38-42. He claimed that a proper distance was 10 feet for each 10 m.p.h. *Bowden tr.* at 38, L.16. The City’s main 30(b)(6) witness on traffic citation training of officers, Captain Hugh Miller, testified the standard was one car length for each 10 m.p.h. *See Hugh Miller February 21, 2006 deposition transcript (hereinafter “Miller tr.”)* at 48, 49. This is the guideline Dr. Orban recalls being taught in California. *Orban Affidavit* at ¶ 8. In any case, Dr. Orban testified she was at least 2 car lengths behind the SUV at 15 m.p.h. *Orban tr.* at 15,20. This is closer to 40 feet which is actually further than Officer Bowden or Captain Miller said was required. Bowden’s assumption was wrong. More importantly, this was a hypothetical answer for Officer Bowden and not a description of a fact that he possessed on March 27, 2000. Indeed, the crash report lists the reason for the rear end bumping as:

“Veh. #1 traveling S. Macdill (sic) Ave. at approx. 5-10 m.p.h. when she failed to observe Veh. #2 in time and struck Veh. #2 at points listed on diagram.”

(fn continues on page 14).

As Mr. Meckler's report and affidavit establish, the accident here involved a multifactorial decision-making sequence which research establishes, and common sense tells us, delays reasonable reaction time. *Meckler Affidavit* at paragraph 4. This causes a driver to reasonably take longer to brake. *Id.* Dr. Orban's reaction time under this circumstance was within the reasonable range. *Id.*; *See also Meckler's Report Exhibits 4 and 5.* However, it was not sufficient to avoid an accident. *Id.*

Moreover, once one begins to brake in this circumstance he or she does not have the benefit of the fact that it takes a distance for the car in front to brake and come to a complete stop. Rather, the car Dr. Orban hit was already stopped in the roadway which Dr. Orban could not know because the SUV, which had not slowed for the stopped car, blocked her view. Indeed, the SUV did not even brake for or signal its abrupt turn. The driving action of the SUV deprived Dr. Orban of both early awareness of the stopped car and concomitant reaction time and distance to stop. Under these circumstances this was an unavoidable accident. *Id.*

Mr. Meckler's report was provided to the City of Tampa under the expert disclosure deadlines set by the court. *Meckler Affidavit* at paragraph 2; Doc # 27. It too has not been rebutted.

In the present case, neither officer, especially Officer Bowden who talked to Dr. Orban, claimed they rejected her story because they did not find her to be

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It should be noted the only witness for the reasons for the alleged failure to observe Veh #2 is Dr. Orban, which the officers and the City refused to consider.

credible. In fact, Officer Bowden has described her in favorable terms and refused to dispute many of the key statements she claimed he made. *See fn. 1, supra*. Rather, they simply chose to ignore material facts. Those facts, properly considered, destroy any potential for probable cause that an offense was committed.

## **2. Failure to conduct a reasonable investigation.**

The officers can also be found to not have probable cause because they chose not to investigate both sides of the story. In *Kingsland v. City of Miami, supra*, the Eleventh Circuit held that the sufficiency of a probable cause investigation could be constitutionally deficient where officers “failed to investigate both sides of the story.” This means “an officer may not choose to ignore information that has been offered to him or her” or “elect not to obtain easily discoverable facts.” *Id.* at 1229. In that case, the Eleventh Circuit quoted from *Sevigny v. Dicksey*, 846 F.2d 953, 1957 n. 5 (4<sup>th</sup> Cir. 1988) and stated:

...[A] police officer may not close his or her eyes to facts that would help clarify the circumstances of an arrest.” *BeVier v. Hucal*, 806 F.2d 123, 128 (7<sup>th</sup> Cir. 1986)(officer must be held to knowledge of reasonably discoverable information bearing upon probable cause to arrest for child neglect).

*Sevigny*, 846 F.2d at 957 n.5. Because the officer in *Sevigny* made an arrest without heeding certain, easily obtained information, the Fourth Circuit held that the officer failed to act reasonably. *Id.* at 957.1 The court articulated that the officer “simply did not bother to do what any police officer acting reasonably in the circumstances would have done to clarify the factual situation” and that “[t]here was no exigency which prevented his doing so.” *Id.* at 958.

382 F.3d at 1228-29.

The Eleventh Circuit recognized that these concepts were especially important in *Kingsland* because it involved an accident between a civilian and a police officer. The court pointed out that:

The district court focused on the reasonableness of *Kingsland's* arrest given what the officers *did* investigate, ignoring the fact they may have subjectively failed to investigate both sides of the story. On the other hand, *Kingsland* argues (and *Sevigny* implies) that officers must investigate objectively and consider all information available to them at the time. While the constitutional reasonableness of a police investigation does not depend on an officer's subjective intent or ulterior motive in conducting the investigation; see, e.g. *Whren v. United States*, 517 U.S. 806, 812-13 (1996), it does not follow that the officer may then investigate selectively. The Fourth Circuit's approach serves to deter dishonest officers from fabricating charges to cover up improper detentions by including only selective evidence in their reports.

382 F.3d at 1229.

*Kingsland* has special applicability to this case because Dr. Orban has alleged that what happened to her was part of a policy or practice within the police department to issue citations in accident cases where no citation is appropriate or where a reasonable investigation has not occurred in order to reduce employee and City contribution rates to the Tampa police pension fund and increase officers' take home income. See paragraph 23 of *First Amended Complaint*. Officer Bowden admitted facts which support much of what is alleged in paragraph 23, including that supervisors expect citations to be written in every traffic crash, which he acknowledged had something to do with insurance companies and pensions. *Bowden tr.* at 89, 99, 100, 101, 124, 125. He admitted that an officer

who determines that a citation is inappropriate must obtain supervisor approval not to write a citation at a crash scene. *Bowden tr.* at 34. He also admitted that the policy to write a citation at every crash may have affected his thought process in this case because he was training a younger officer. *Bowden tr.* at 118-119.

Officer Bowden also provided evidence of a quota system enforced through the performance appraisal process when he admitted that officers are told the number of citations they are expected to write to obtain a satisfactory performance appraisal. *Bowden tr.* at 82, 84. Finally, this case also includes allegations, as in *Kingsland*, of erroneous or fabricated entries to support the policies and practices of the police department. A comparison of the citation and the crash report with the testimony of Officers Bowden and Duncan and Dr. Orban show many inaccuracies which all seem designed to further the inappropriate careless driving citation. *See also First Amended Complaint* at ¶21. Therefore, the same dynamics addressed in *Kingsland* and *Sevigny* are present in this case and a rule of law needs to be employed which would have the salutary effort of deterring the fabrication of citations.

The rule announced in *Kingsland* and *Sevigny* has support in broader contexts. In *Moore v. Marketplace Restaurants, Inc.*, 754 F.2d 1336, 1345-7 (7<sup>th</sup> Cir. 1985), the court found officers who failed to ask putative defendants to explain what happened before arresting them failed to conduct a reasonable investigation and therefore did not have probable cause to arrest. Beyond that, a refusal to consider Dr. Orban's version of the facts because of a policy to ignore a

driver's explanation when a rear-end bumping is involved, or where an independent corroboratory witness is not available amounts to a rejection of facts material to the probable cause decision. *See, e.g., Lusby v. T.G.&Y. Stores, Inc.*, 749 F.2d 1423, 1432, 1434 (10<sup>th</sup> Cir. 1984)(policy to take suspects that the merchant designated as shoplifters into custody without conducting an independent investigation supports a jury's finding of a civil rights violation).

While *Kingsland* and *Moore* involved situations where a jury ultimately resolved the facts, they do not require a jury decision based upon the undisputed facts set forth above in this case. There are not two versions of what happened in this case, only Dr. Orban's. The officers have not rejected her story on a credibility ground. On the one hand, the officers basically admit to using assumptions or, in the parlance of probable cause cases, mere suspicion, to justify failing to consider her evidence. However, they may have just ignored Dr. Orban's description of the accident because of the policy of writing citations at all crashes, and without the non-contact car chose Dr. Orban for the citation. In any case, they failed to consider her evidence. As such, this court can take the above undisputed facts and enter partial summary judgment in favor of Dr. Orban on the issue of lack of probable cause to issue her a careless driving citation.

WHEREFORE, for the reasons set forth above, partial summary judgment on the issue of a lack of probable cause should be entered in favor of Dr. Orban.

Respectfully submitted,

S/JOSEPH D. MAGRI  
JOSEPH D. MAGRI  
MERKLE & MAGRI, P.A.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 15, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing to the following: John Makhholm, Esquire, 696 First Avenue North, Suite 205, St. Petersburg, Florida 33701 and Ursula Richardson, Esquire, City Attorney's Office, 315 East Kennedy Boulevard, Fifth Floor, Tampa, Florida 33602.

S/Joseph D. Magri  
Joseph D. Magri  
Florida Bar Number 0814490  
Attorney for Plaintiff Barbara Orban  
Merkle & Magri, P.A.  
550 North Reo Street, Suite 301  
Tampa, Florida 33609  
Tel.: (813) 281-9000  
Fax.: (813) 28102223  
[jmagri@merklemagri.com](mailto:jmagri@merklemagri.com)