UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 07-12635-B

BARBARA ORBAN

Appellant,

v.

CITY OF TAMPA, FLORIDA

Appellee.

Appeal from the United States District Court
For the Middle District of Florida

REPLY BRIEF FOR APPELLANT BARBARA ORBAN

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I. THE COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT THERE WAS PROBABLE CAUSE FOR THE TRAFFIC CITATION ISSUED TO DR. ORBAN

The court erred when it found that there was probable cause for the traffic citation. Dr. Orban's initial brief specifically lays out her uncontested description of the facts and compares the court's description of the undisputed facts against Dr. Orban's. Her brief sets out what she was told by Officer Bowden (pp.9-12 and 17-19), identifies the false statements and omissions in the citation and crash report (pp.12-13), and discusses the court's failure to address the false statements and omissions that were intended to justify the citation (pp.19-20). The City's brief is replete with italicized, bolded, underlined and intemperate criticisms of Dr. Orban's brief, but it avoids a direct response to the points made.[1]

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[1] At page 16 of it's brief, the City accuses Dr. Orban of mischaracterizing the factual record and case law but does not give a pertinent citation. She is also accused of misciting the record because the citation to Officer Bowden's testimony was, for example, "Doc79-EXB7-Pg38". The City's brief claims the correct citation should have been Doc79-EXB8-Pg38. In other words the City claims that Officer Bowden's deposition was Exhibit 8, not Exhibit 7. That citation was used because the docket sheet appears to list Officer Bowden's deposition as Exhibit 7. The clerk appears to have identified the first exhibit of Document #79 as No.'s 1 and 2 on the docket sheet. Consequently, it appeared that Officer Bowden's deposition was Exhibit 7. Ultimately, the attorneys for Dr. Orban resolved the ambiguity by choosing to refer to Officer Bowden's deposition as Exhibit 7. Otherwise, the last exhibit to Document 79 would have no number on the docket sheet. In any event, there cannot be any confusion because the docket sheet references the person whose deposition was being taken (i.e. Officer Bowden or Duncan or Dr. Orban).

The City does not dispute that Florida law requires probable cause determinations to be made by juries where there is a dispute concerning material facts. *City of Pensacola v. Owens,* 369 So.2d 328, 329-30 (Fla. 1979); *Alamo Rent-A-Car, Inc. v. Mancusi,* 632 So.2d 1352, 1357 (Fla. 1994). Rather, it cites to Fla. Stat. §316.1925 and argues that the court did not disregard material facts. The City argues that because Fla. Stat. §316.1925 fails to identify items like a car's speed or how far one car is following another, those facts are not material. Fla. Stat. §316.1925 provides the following:

> Any person operating a vehicle . . . shall drive the same in a careful and prudent manner, having regard for the width, grade, curves, corners, traffic, and all other attendant circumstances so as not to endanger the life, limb, or property of any person. Failure to drive in such manner shall constitute careless driving and a violation of this section.

Obviously, as the statute states, the manner (and all "attendant circumstances") in which someone is driving is material to whether that person has engaged in careless driving. If the careless driving action cannot be specified, there can be no

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In double-checking the citations contained in Dr. Orban's brief, only one citation was found to be inaccurate. In the second paragraph on page 11 a citation is made to Doc79-EXB**8**-Pg27-28,30-32. That citation should have been to EXB**6** because that citation is to Dr. Orban's testimony.

Having criticized Dr. Orban, the City makes a substantial number of factual assertions and present-tense denials of an improper policy without any citation to the record. It also offers cites to deposition transcripts without reference to a page. For example, at page 3 of its brief, the City cites to excerpts of Dr. Orban's brief to support the assertion that Dr. Orban "collided" with the rear of another vehicle. Review of the citation excerpts reveals that Dr. Orban actually testified she "bumped" the vehicle. Doc79-EXB6-Pg13.

probable cause to cite someone for careless driving. In fact, this is why the Florida Supreme Court has required since its 1934 decision in *Robinson v. State,* 152 So. 717 (Fla. 1934) that the police officer must list the specific elements of the careless driving charge on the traffic citation. By ignoring the manner in which Dr. Orban was driving, the City ignores the material facts that would determine whether there was probable cause.

Dr. Orban also argued that Officer Bowden's failure to list the specific elements of the careless driving charge on the traffic citation as required by *Robinson* corroborates the fact that he did not, and concluded that he did not have probable cause to issue a ticket for careless driving, especially since even his trainee, Officer Duncan, was aware of the requirement. The City argues at page 20 of its brief that "NOWHERE on these pages [of his deposition] or anywhere else does Ofc. Duncan acknowledge ANYTHING about *Robinson v. State"* (emphasis in original). However, Duncan testified at his deposition as follows (Doc79-EXB8-Pg32):

> Q. Based on your understanding, this citation was dismissible under *Robinson* because it didn't have the improper driving action?
> A. I would imagine; sure.

The City seems to suggest at page 17 of its brief that the only material fact

was that Dr. Orban "ran into" the rear of a stopped vehicle.[2] While the mere bumping of someone from behind might involve careless driving under some circumstances, it does not provide probable cause for a careless driving citation if the person has provided an uncontested explanation which negates any carelessness. Dr. Orban's explanation cannot be ignored simply because there was a rear-end bumping. Having investigated the "attendant circumstances," Officer Bowden admitted that Dr. Orban did not violate the traffic laws. Nevertheless, the trial court ignored that fact and other facts relating to how the bumping occurred when deciding there was probable cause. That constitutes the resolution of disputed material facts which the court cannot do. The evidence justifies a jury's review, not blind acceptance of a self-serving position by an interested police department whose credibility is at issue. *See e.g. Kingsland v. City of Miami,* 382 F3d 1220, 1230 (11 Cir. 2004); *Skup v. City of Atlanta,* 485 F.3d 1130, 1143 (11th Cir. 2007)(acknowledging holding in *Kingsland* that it is "error for the district court to omit the plaintiff's allegations of falsification and knowing lack of probable cause from its analysis").

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[2] The concept that Dr. Orban "ran into" or "collided" with another car itself violates the notion that facts should be construed in the light most favorable to the non-moving party. *See e.g. Dibrell Bros. v. Banca Nazionale Del Lavoro,* 38 F.3d 1571, 1578 (11th Cir. 1994). As noted above, Dr. Orban testified that she merely bumped Mr. Collin's car. Turning that into a concept that she "ran into" or "collided" with another car is an attempt to make the impact appear greater than it was in order to suggest greater speed and therefore carelessness.

Throughout its brief, the City basically attempts to ignore the admissions made by Officer Bowden that Dr. Orban had not violated any traffic laws. Officer Bowden told Dr. Orban that she had not violated any traffic laws and even specifically explained to Dr. Orban why the two potentially applicable citations, following too closely and careless driving, did not apply to her. Doc79-EXB6-Pg27-28,30-32;Doc64-EXBA-Pg2. Obviously, then, Officer Bowden concluded and did not feel that he had probable cause for a traffic citation. Moreover, Officer Bowden never testified in his deposition or stated in his affidavit that he felt he had probable cause to issue Dr. Orban a ticket for careless driving.

Nonetheless, the City asserts that Officer Bowden did conclude that he did have probable cause. For example, the City states the following at page 18 of its brief:

> Dr. ORBAN argues (on and on) that "*the police officer concluded that she did not violate any law*" [footnote omitted] Obviously, that is <u>not</u> what the officer concluded <u>because</u> he issued her a citation for *Careless Driving*. [all emphasis in original]

This demonstrates well the City's disregard of the facts and the illogical nature of its argument. The City is assuming that because Officer Bowden issued the careless driving ticket, he "obviously" felt he had probable cause to do so. This is a disputed factual issue since Officer Bowden admitted to Dr. Orban that there was no basis for a careless driving citation. Further, even at his deposition, Officer

Bowden acknowledged that careless driving did not fit Dr. Orban's circumstances. Doc79-EXB7-Pg29,43-47.

In fact, Officer Bowden himself acknowledged at his deposition, which is also ignored by the City, that he had a "rough recollection" of issuing Dr. Orban's citation only because of the policy of requiring citations at every crash and the fact that he was acting as a field training officer. Doc79-EXB7-Pg118-119. Consequently, the careless driving citation was not "obviously" issued because Officer Bowden concluded there was probable cause; but was obviously issued because of the City's policy even though Officer Bowden thought Dr. Orban had not violated any traffic law.

The trial court identified undisputed facts from which it claimed it could find probable cause. However, the undisputed facts relied on by the court unquestionably did not include all the material facts before the court. The trial court's order omits any reference to Dr. Orban's uncontested description of the facts showing that she was not driving carelessly, including how far she was behind the SUV and that she was traveling at one-half the speed limit.[3] The order also ignores the fact that Dr. Orban's vehicle was even farther behind the SUV than Officer Bowden testified she needed to have been under the circumstances.

[3] The City asserts that the court recognized that she was traveling 15 mph. However, that can mean different things if the speed limit is 15 mph, 30 mph, and so on. Recognizing speed without the context of the speed limit ignores material facts.

Doc79-EXB7-Pg38. The order also ignores the location of the unusual construction which suddenly and unexpectedly appeared on one side of the road and was one of the factors which Dr. Orban testified contributed to her bumping the car. In short, the court made a probable cause determination by omitting material facts which the officer himself considered when he determined that there was no probable cause and told Dr. Orban that she had not violated any laws.[4]

The City purports to be confused at page 21 of its brief about whether Dr. Orban was in stop-and-go traffic or surprised by sudden and unseen dead-stopped traffic. Obviously, there is a material difference between driving in stop-and-go traffic and suddenly coming upon unexpected dead-stopped traffic. By equating the two, the City once again ignores Dr. Orban's description of the events.[5]

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[4] The City criticizes the unrebutted report by Dr. Orban's expert and notes that police officers cannot hire experts before making probable cause determinations. That misses the point. Officer Bowden concluded at the scene that Dr. Orban did not violate any traffic laws. However, he issued a citation as a result of the City's unconstitutional policies. Therefore, a jury has to resolve this issue and it might well wonder if Dr. Orban's description of her speed, following distance and other aspects of the manner in which she was driving could mathematically result in the minor bumping she described. The expert's report corroborates that her description could result in an unavoidable accident with minor bumping. This is evidence the trial court should have considered.

[5] The City argues at page 11, footnote 23, that Dr. Orban has failed to say how she could have failed to hit the SUV if it had stopped. That was discussed at pages 18, especially footnote 7, and 24-25 of Dr. Orban's brief. In order for the SUV to stop, it would have had to put on its brakes and slow (no matter how quickly) to a stop. Dr. Orban was going so slow and was so far behind the SUV she could have stopped. The problem here was that the SUV did not brake as it approached dead-stopped traffic and instead avoided an accident by its illegal turn, as it did not

The City's brief misstates what Dr. Orban expects. Dr. Orban expects not to be charged with a citation for careless driving when the officer concludes and tells her she did not violate the law. She also expects not to be the victim of a policy of the City which allows its supervisors to order the issuance of citations without probable cause and encourages officers to prepare false crash reports and citations to justify the citations in order to raise money for the police pension fund. These expectations are grounded in her constitutional rights. Dr. Orban's refusal to accept that policy, even at great monetary expense and without expectation of any personal monetary reward, is a reflection of her belief in principle and our system of justice. Dr. Orban has no problem with officers making quick decisions on the street. However, everyone should have a problem with officers making decisions which are based on a policy to generate money for the officers' pension funds rather than on probable cause.

The City repeatedly points out that Dr. Orban was originally "convicted" (actually a withhold of adjudication) and then either claims that the charges were dismissed or that Dr. Orban prevailed after an appeal. Dismissal of charges can be a favorable termination. *See e.g., Doss v. Bank of America, N.A.,* 857 So.2d 991 (Fla. 5th DCA 2003). It should also be noted that a conviction can provide a

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signal prior to turning. The SUV would not have had time to stop before hitting that traffic unless the SUV had begun braking at the time it should have. Rather than discuss the facts, the City merely refers to the SUV throughout its brief as the "*phantom* SUV" (emphasis in original).

sufficient legal determination of probable cause, even if the judgment is reversed on appeal. *See e.g., Goldstein v. Sabella,* 88 So.2d 910, 911 (Fla. 1956); *Calbeck v. South Pasadena,* 128 So.2d 138, 142 (Fla. 2nd DCA 1961); *Padrevita v. City of Lake Worth,* 367 So.2d 739 (Fla. 4th DCA 1979) (rebuttal permitted). However, this rule is not applicable where, as here, it is alleged that the judgment was obtained by fraud, perjury or other corrupt means. *Id. See* paragraphs 15, 39, 40, 57, 58, 59 and 60 and the general theory of the Amended Complaint (Doc.45) and the affidavits and testimony submitted by Dr. Orban. Dr. Orban was required to appear and was "convicted" because of the false statements and omissions contained in the crash report. *Id.; Id.* at Pg14-15-¶31,32;Doc64-EXBA-Pg2-3-¶5. When evidence of the false entries was later presented at a hearing on a motion the case was reopened and subsequently dismissed. *Id.* These allegations and this testimony clearly demonstrate that the false entries played a substantial role in the "conviction" and the reopening and dismissal of the charges.

II. THE COURT ERRED TO THE EXTENT IT DECIDED THE ISSUE OF POLICY AND PRACTICE

The City largely ignores the second issue in Dr. Orban's brief. The City does not discuss the affidavit of Sergeant Pomponio or the testimony of Officer Bowden as set forth in Dr. Orban's brief at pages 5-7. It also ignores Dr. Orban's testimony and the statistics produced in her brief as well as Dr. Orban's Affidavits.

The City suggests that Dr. Orban ought to be attacking the Florida statute (Fla. Stat. §185) which allows premium revenue to be used for pension funds rather than the City's practice based on that statute. Most laws are not unconstitutional. However, when the government enforces or takes advantage of the law in an unconstitutional manner, it is entirely appropriate to attack the unconstitutional practice. An arrest without probable cause for a violation of any constitutional state law is itself unconstitutional. Citations without probable cause in order to take advantage of a state law are also unconstitutional. This case is not simply about a Fla. Stat. §185. It is about the City policy to take advantage of that statute by issuing citations for which there is no probable cause. Dr. Orban has offered evidence that the City is employing policies concerning citations which are different than the other cities in Florida. For example, only Tampa uses the unusual practice of a variable contribution rate rather than the fixed rate other cities have utilized. Doc64-EXBA-Pg7-¶17. As noted in Dr. Orban's initial brief, 185 money applicable to Tampa increased by 7.9 percent, when throughout the rest of the state it increased only .7 percent. Traffic citations in Tampa have also increased at a rate 80 times higher than the rest of the state (42.1% to .5%). Dr. Orban is attacking an unconstitutional policy by the City and has offered evidence to substantiate those claims.

The City's discussion of a "*de facto* quota system" is also nothing more than a denial of such system. Officer Bowden has testified that officers are supposed to write a crash report and citation at every crash and that officers are given numbers (i.e. a *de facto* quota) they were expected to meet for citations in order to receive a satisfactory performance evaluation. Doc79-EXB7-Pgs82,84,89,99,100,101,124. As a result, Officer Bowden has also testified that he understood that citations were up 70 percent. *Id.*at88.

Notably, the City fails to address Dr. Orban's argument that the trial court improperly recharacterized that portion of the City policy relating to supervisory approval of citations and then turned that improper recharacterization into the policy at issue here. The court's recharacterization of that aspect of the policy conflicts with the evidence produced and should be decided by a jury. Moreover, it is error to ignore the broader practice and policy alleged in the Amended Complaint.

III. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED AS TO COUNT IV

The City complains at page 29 of its brief that Count IV "has appeared to have morphed from an unspecified *due process* to embrace *malicious prosecution* to including *substantive* and *procedural due process* to its most recently averred *bad faith prosecution* mode" (sic; emphasis in original). Dr. Orban has never suggested that Count IV is a malicious prosecution claim. Next, it does not make

sense to suggest that a due process claim has "morphed" into a substantive and procedural due process claim. Further, "bad faith prosecution" is a substantive due process violation. *See Shaw v. Garrison,* 467 F.2d 113, 122n.11, (5th Cir. 1972) (recognizing substantive federal "right not to be subjected to a bad faith prosecution."); *Rowe v. Griffin,* 676 F.2d 524, 526 (11th Cir. 1982). Both of these cases were discussed in Dr. Orban's initial brief [and *Shaw* was emphasized in the table of authorities as primary authority pursuant to 11th Cir. R. 28-1(e)], but the City did not address the cases in its brief. Moreover, various elements of the substantive due process violation include procedural due process violations. Consequently, nothing has "morphed" into anything.

The City also seems to suggest that the Amended Complaint fails to state a claim in sufficient detail. However, the specific improper conduct constituting the procedural due process violations which add up to a substantive due process bad faith prosecution discussed in Orban's initial brief were set forth in the paragraphs of the Amended Complaint incorporated by reference into Count IV. Moreover, as the City itself has recognized, the bases and rationale underlying Count IV were set forth in Dr. Orban's Response to Court's Order to Show Cause Why Count IV Should Not Be Dismissed in the same detail as in her initial brief in this appeal. Doc85. Consequently, Dr. Orban has always made a consistent claim of which the City was well aware.

A. Pursuant to the City's Practice, Policy or Scheme, Officer Bowden Issued a Citation to Dr. Orban Even Though He Determined That There Was No Probable Cause

As noted above, Officer Bowden concluded he had no probable cause and told Dr. Orban that she had not violated any traffic laws.[6] The City argues at page 33 of its brief that Officer Bowden's admissions to Dr. Orban should be ignored because "no where does Ofc. Bowden state he ever said that." However, even if Officer Bowden actually disputed Dr. Orban's testimony, that would only raise a disputed issue of material fact. At page 18 of its brief, the City states that "Officer Bowden has testified that . . . at that time he believed that *careless driving* was the appropriate charge for her running into the back of another car" (emphasis in original). For a record reference to this asserted fact, the City cites the following in footnote 32 at page 18:

> See ALL the citations to Bowden's Deposition cited by ORBAN, but the Correct cite to the record is Doc79-Exb "8" not "7" as erroneously referenced in the "APPELLANT'S BRIEF". A *careful* review of these shows that was is attributed to him by ORBAN is not in fact what he testified to, but what she would have like to have heard. Also See: Affidavit of Ofc. Bowden at Exb "B" [DE# 5-3]. [sic; all emphasis in the original].

There is absolutely nothing in the citations to the record in Dr. Orban's brief or anywhere else that supports the City's assertion that Officer Bowden testified that

[6] Officer Bowden also testified that he had a "rough recollection" of issuing Dr. Orban a citation only because of the policy of requiring citations at every crash and the fact that he was acting as a field training officer.

he believed at the time that careless driving was the appropriate charge for Dr. Orban. This is presumably the reason why the City did not make a specific reference to a particular page of the record.

In his affidavit[7] Officer Bowden stated only that the investigation purportedly "revealed that Dr. ORBAN was at fault and she was issued a citation for Careless Driving . . ." Nowhere in his affidavit does Officer Bowden state that he believed that careless driving was the appropriate charge or that he thought he had probable cause to issue such a citation. At most, of the two drivers at the scene, he considered her "at fault" which, as Officer Bowden acknowledged to Dr. Orban, does not mean that there was probable cause for a careless driving ticket.

Next, the City argues at page 30 that since probable cause purportedly existed in fact (regardless of Officer Bowden's belief), the "*policy* that the Dr. ORBAN alleges to be unconstitutional is not implicated" (emphasis in original). This is simply untrue and, once again, the City does not discuss any of the cases cited by Dr. Orban in this connection. Whether or not it is malicious prosecution, it is a due process violation for an officer to ignore his duty of finding probable cause before issuing a citation regardless of whether there may ultimately be probable cause or not. In *Easyriders Freedom F.I.G.H.T. v. Hannigan,* 92 F.3d

[7] Although referring to Officer Bowden's affidavit as "Exb. 'B,' [DE#5-3]", the City is presumably referring to Exhibit A of docket entry 5. In the docket sheet the clerk actually referred to Exhibit A (Officer Bowden's affidavit) as #1 to docket entry 5.

1486 (9th Cir. 1996), for example, the court found that the California Highway Patrol was violating the Constitution by not making a good faith determination of probable cause in its enforcement of the California motorcycle helmet law. Although, this case was also denoted in Dr. Orban's table of authorities as primary authority, the City did not address it.

B. Pursuant To The City's Practice, Policy Or Scheme, The Officers Prepared Reports Which Were Submitted To The Court As Evidence Which The Officers Knew Or Should Have Known Were False Or Misleading

The City does not deny that the crash report submitted to the court contained false statements or that the officer knew or should have known that they were false. Moreover, the City does not dispute or even discuss any of the cases setting forth the principle that the use of such false reports by the State is a due process violation. Rather, the City simply asserts that the officer made "small mistakes" and that Orban has not shown any intentional falsifying.[8]

First, it is a due process violation for the State to present or to permit the use of evidence which it knows or should have known is false or misleading. *Jacobs v. Singletary,* 952 F.2d 1282, 1286, 1287 (11th Cir. 1992) ("due process violation where state knew or should have known that the testimony was false..."); *cf. United States v. Rivera Pedin,* 861 F.2d 1522, 1530n14 (11th Cir. 1988) (quoting

[8] The City also claims that these "mistakes" were "corrected." The City offered no citation to show that they were corrected. In fact, despite repeated requests, the City did not correct the significant errors.

Dupart v. United States, 541 F.2d 1148, 1150 (5th Cir. 1976) (false testimony rule applies where testimony "even though technically not perjurious would surely be highly misleading to the jury...").

The false report here did not contain merely "small mistakes," nor do they appear unintentional. For example, a deliberate attempt was made to make it look like the accident involved a personal injury when there was none. For example, the citation reported a personal injury while the crash report indicated airbag deployment, when neither happened. Moreover, two crash reports were prepared here, both a short form, which was given to Dr. Orban, and the long form, which, unknown to Dr. Orban was supplied to the traffic court as evidence against her. Doc45-Pg6-7-¶18,19,20. The long crash report form is used for crashes involving personal injuries, where a wrecker was called or where criminal conduct was involved. Consequently, the "long" form was unnecessarily completed. Since the short form was also completed, this was no mistake. It is the long form crash report which is used by the insurance company to make decisions about compensation and premium increases. Doc45-Pg6-7-¶19. Consequently, the only reasons for the preparation of the unnecessary "long" form would be to prejudice Dr. Orban with respect to her trial and to cause her insurance company to raise her premiums, all of which would result in increased contributions to the police officers' pension fund.

In addition, the traffic report did not indicate that Dr. Orban was actually slowing down and did not, contrary to what the Tampa Police Chief said should have been included, set forth any of her statements about the unavoidable nature of the accident. Doc79-EXB11-Pg25-26. Such a significant omission is no small mistake.

Next, the City ignores the fact that Officer Bowden himself admitted to Dr. Orban that there was a practice of fabricating citations and reports which will continue until someone files a lawsuit. Doc64-EXB2-Pg2-¶29. Moreover, Tampa Police Detective Murray admitted to Dr. Orban that officers are permitted to submit false information to the court. Doc45-Pg16-¶36. In his affidavit, Sergeant Pomponio described that young officers are taught to write citations even if they do not know who is at fault. Doc64-EXB-A1-Pg2-3. Further, Officer Cragg affirmed to Dr. Orban the Tampa Police policy requiring officers to write traffic citations following accidents even if there were no traffic violation which then resulted in the officers fabricating entries on the crash report to support the citation. Doc45-Pg21-¶55. Officer Cragg stated that the officers do not regard this as "falsifying" because they are ordered to do so by supervisors. *Id.* Further, Tampa Police Cpl. Nieme explained to Dr. Orban that the reason an officer falsified another traffic citation to her was due to significant pressure from the city "to achieve revenue targets." Doc45-Pg20-21-¶54.

C. Pursuant To The City's Practice, Policy Or Scheme, The Officer Did Not Appear In Court And Instead Submitted The Crash Report *Ex Parte* To The Court In Violation of State Law

As a matter of due process, the City's policy is extraordinary. Basically, the City has a policy under which the officers can ignore subpoenas, as long as they submit a crash report, which is then provided to the court. Fla. Stat. §316.066 provides that "[n]o such [crash] report or statement shall be used as evidence in any trial, civil or criminal." In other words, the City has a policy of permitting officers to ignore subpoenas; and, to make it worse, to submit *ex parte* hearsay crash reports which it must know is illegal to submit as evidence.

The City attempts to defend this lack of due process by stating at page 34 of its brief that the policy is that the officer "will not have to appear" rather than a policy in which the officer is "directed by the City not to go to court." Whatever the semantics are here, the City has a policy that its officers can and do ignore subpoenas and submit reports to the court in violation of state law in place of their appearance. This certainly constitutes a policy. Further, Officer Pomponio's affidavit points out that recruits indicated to him that they were trained that they can avoid testifying when subpoenaed to a traffic hearing concerning a citation for which reasonable evidence did not exist to conclude that a traffic law violation had occurred by sending in a crash report. Doc64-EXB-A1-Pg2-3-¶7.

Next, the City attempts to minimize this policy by pointing out that the

policy only applies to crashes that were not witnessed by the officer and that the policy was the result of a "MEMORANDUM" from the Senior Administrative Judge of the traffic division. The City inaccurately asserts at pages 23 and 24 that the police department "merely *complies*" with a "court's order" and that the "MEMORANDUM directs/**Orders** that henceforth Officers will not have to appear in court when issuing a traffic citation at a traffic accident, which the officer(s) did not witness" (emphasis in original). This is incorrect. The MEMORANDUM actually states that the officer "may" file "accident reports in lieu of their appearance in court provided there is nothing that the officer witnessed which would be relevant ..." (emphasis in original).[9] Doc5-EXB6.

The City's policy in "634 Traffic Citations" provides that the officer "will not have to appear in court" if he "did not witness" the traffic crash and obtains and forwards a copy of the crash report so it can be provided to the court. Doc45-Pg11-12-¶25. This is different than the court's MEMORANDUM.

First, the fact that the officer did not witness the crash itself is irrelevant since the officer will usually witness and document evidence in the crash report that is relevant to the citation, including, for example, statements of witnesses, injuries, extent of damage, debris, weather, air bag deployment, etc. Indeed, Dr.

[9] Indeed, the court's MEMORANDUM actually complained that the "traffic judges were experiencing a recurrent problem of officers not honoring subpoenas for trial." Doc5-EXB6.

Orban was "convicted" on the basis of the crash report even though the officer who wrote the report did not witness the crash. Doc45-Pg14-15-¶31;Doc64-EXBA-Pg2-3-¶5.

Next, the MEMORANDUM does not order the officers not to appear; it merely states that officers are not required to appear. Further, the MEMORANDUM does not excuse the officers from appearing in response to a subpoena. Moreover, the MEMORANDUM still requires the officers to appear if they have witnessed anything relevant. In contradiction to this MEMORANDUM, the City has set forth its own policy that the officers will not appear (if they did not witness the crash itself) even if they have witnessed something relevant and even if they have been subpoenaed. *See* 634 Traffic Citations. Further, the MEMORANDUM was the result of an agreement with the City, not the unilateral action or order of the court. *See* 634 Traffic Citations, ¶2a.

The City also attempts to divorce itself from any responsibility for its policy by suggesting that, if anyone, it is the court that has violated state law by considering the crash report. In fact, the City claims at page 23 that Dr. Orban should bring a mandamus action against the Thirteenth Judicial Circuit. However, the City knows that the statute provides that the crash report is not to be "used as evidence" and the City is doing precisely that by submitting it. Further, the City is acting jointly with the court in this whole arrangement because the conduct is the

result of an agreement between the court and the City. Moreover, the fact that the court is also engaged in improper procedures does not excuse the City from aiding and abetting and participating in and agreeing to the same prohibited conduct.

The City is not bound by the court's memorandum. The fact that the officers do not attend court is because the City has a policy of and encourages them not to attend. Finally, in addition to the fact that the City's policy is different than the court's MEMORANDUM, the City's policy is also part of a larger policy, practice or scheme that does not involve the court. Remarkably, although suggesting that Dr. Orban should bring suit against the Thirteenth Judicial Circuit, it does not explain why Dr. Orban cannot maintain her suit against the City for its role in illegally submitting crash reports to the court.

D. The Officer Here Acted In A Quasi Judicial Role And As An Officer Of The Court With An Improper Financial Interest

The City asserts that "in a case of imaginative and fantastic claims, this one surely tops them all." In making this assertion, the City apparently did not review the case law cited by Dr. Orban in support of her position. No one has argued that the police officer here was the "judge" or a "hearing officer" who heard and decided the case. That is why her initial brief argued that the officer was acting in a "quasi-judicial" position. Here, although not the judge, the police officer, as the City recognized in its brief, decides who will be charged and effectively prosecutes

the case. Further, he is the person who prepares the crash report which he then submits, in violation of state law and pursuant to the City's policy, to the court. The court then gives this report more credence than even the defendant's testimony. When an officer is acting in this capacity, he is not the judge, but he is acting in a "quasi-judicial" position. See *Ganger v. Payton,* 379 F.2d 709, 714 (4th Cir. 1967) ("the prosecuting attorney is an officer of the court, holding a quasi-judicial position" and "his primary responsibility is essentially judicial-the prosecution of the guilty and the protection of the innocent..."). *See* also cases cited in initial brief in which due process requires that prosecutors be independent and free of pecuniary interest in the outcome.

Under *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927) the Supreme Court recognized the general rule that "**officers** acting in a judicial or **quasi-judicial** capacity are disqualified by their interest in the controversy to be decided," (emphasis added) including where they have "direct, personal, substantial pecuniary interest in reaching a conclusion" against the defendant. *Id.* at 441. Certainly a judge could not decide a case in which his or her pension plan received 185 money depending on his decision in the case. This would be a "direct, personal, substantial pecuniary interest in reaching a conclusion" against a defendant. It would not be a situation where a court has "a remote financial interest in fines they enforce vis-à-vis their salaries." If a judge would be

disqualified under due process considerations from deciding such cases, so should police officers acting in a "quasi-judicial" role as the person who decides who should be charged and who actually prosecutes the defendant.[10]

It is no excuse that everyone may do it. It is still a procedural due process violation. Further, the due process violation here is far more serious than in other municipalities because it is a part of several other procedural due process violations (i.e. issuing citations regardless of probable cause, preparing false crash reports, submitting the false reports *ex parte* and in violation of state law, and disregarding lawful subpoenas) that are all part of policy or scheme through which the City increases 185 money for their police officers' pension plan. This raises the conduct to a substantive due process violation.

The City argues at page 36 that there is no evidence that the officers had direct knowledge that the citations they write might benefit their pension system. However, as pointed out in the initial brief, Officer Bowden was aware that insurance companies contributed 185 money into the police pension fund and that

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[10] Interestingly, the City argues that the officers should have "quasi-judicial immunity" because they are acting at the direction of the court. The City's own misconduct in illegally submitting false reports to a court does not receive any such immunity. *See e.g. Richman v. Sheahan*, 270 F.3d 430, 437 (7th Cir. 2001) and cases cited in Dr. Orban's initial brief. Moreover, the submission of reports at all was not the result of any judicial order, but an agreement between the City and the court. The City's argument that the crash reports and the police officers serve a judicial function for the deciding judge admit the very problems identified by the case law discussed above and in Dr. Orban's initial brief. In other words, when carrying out this policy, the police officers are acting in a quasi-judicial capacity.

the citation-writing policy had something to do with insurance companies paying money into the pension fund.

The City also argues at page 37 that there could be no policy here because such a policy would increase traffic enforcement which "would ultimately be counter-productive to *the scheme* alleged by DR. ORBAN, for *theoretically* where more intense traffic enforcement is conducted *less* accidents occur!" (emphasis in the original). As the City correctly notes, this is theoretical and the City has produced no evidence to support it. In fact, the opposite appears to be the case. Insurance companies do not regard a driver who receives a citation as likely to reduce crashes. They increase his or her rates. Citations serve the purpose of notifying the State and insurance companies of drivers who have violated a traffic law and are associated with higher risk. Scientific research has actually shown that citations are not the most effective means to reduce crashes. Doc45-Pg25-¶59; Doc64-EXBA-Pg9-10-¶23. For example, roadway improvements are a more effective means to reduce crashes as they reduce the probability of driver error. *Id.* This includes adding traffic signals, left turn arrows, left turn lanes, medians, and street markings adjacent to stop signs. *Id.* In the meantime, requiring officers to become highly visible is likewise effective as it fosters conformance with traffic laws, rather than the Tampa police practice of hiding while attempting to find persons who have violated such laws. *Id.*

Finally, the City suggests that the adequacy of the underlying process is evidenced by the dismissal obtained by Dr. Orban. However, the right not to be subjected to bad faith prosecution "cannot be vindicated by undergoing the prosecution." *Shaw v. Garrison, supra,* at 122nll. *See also Bishop v. State Bar of Texas,* 736 F2d 292, 294 (5th Cir. 1984).

E. Dr. Orban Has Standing

Dr. Orban has asserted a claim for damages under § 42 U.S.C. § 1983 with respect to Counts II and III based on malicious prosecution. She has also asserted a claim for damages for substantive and procedural due process violations in Count IV. Since a substantive due process violation is complete when it occurs and the availability of an adequate post deprivation remedy is irrelevant, particularly since the right here is to free of bad faith charges and proceedings, not to endure them. *See Shaw v. Garrison,* 467 at 122n.11; *Bishop v. State Bar of Texas,* 736 F.2d at 294; *McKinney v. Pate,* 20 F.3d 1550, 1556-1557 (11th Cir. 1994). Consequently, it is also actionable under §1983. The City does not dispute this.

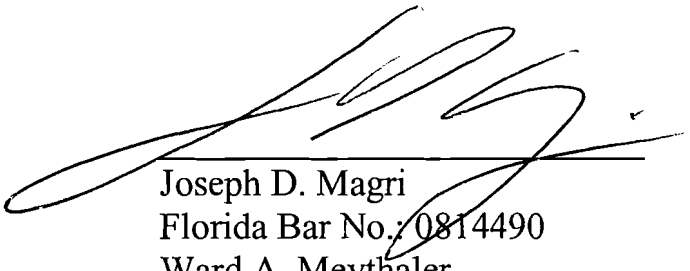
Further, each of the procedural due process violations set forth in Count IV (and the bad faith prosecution claim if it is considered a procedural due process violation) are actionable under the principles set forth in *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) and *Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975 (1990) as set forth in Dr. Orban's initial brief and not disputed or even

discussed by the City. Consequently, there is an actual, present case or controversy, and Dr. Orban has standing to bring this action.

In addition to seeking monetary damages, Dr. Orban has also requested declaratory judgment. Since Dr. Orban has set forth an actual, present case or controversy in which she has a personal stake in the outcome, she has standing to seek this relief. Moreover, declaratory relief does not require irreparable injury. *Steffel v. Thompson,* 415 U.S. 452, 471-2, 94 S.Ct. 1209, 1222 (1974) (recognizing that the Federal Declaratory Judgment Act would be *pro tanto* repealed if a plaintiff could not obtain declaratory judgment that a local ordinance was unconstitutional even though no state prosecution is pending.).

Since there is an actual case or controversy here, Dr. Orban also has standing to seek injunctive relief. Whether or not injunctive relief is appropriate is not something to be determined now, but at the time that relief is considered. The City here is confusing the standing issue with the issue of relief. The trial court has not declared the requested relief inappropriate. In fact the court has not even addressed the issue of remedy. Rather, the court decided, incorrectly, that Dr. Orban did not have standing to bring a lawsuit at all because it essentially rejected her claims on the grounds of probable cause. Finally, Dr. Orban set forth various reasons why injunctive relief may prove appropriate depending on the facts developed in this case. *See* pages 52 and 54 of Dr. Orban's initial brief.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). According to the word processing system, this brief contains 6,965 words.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that one copy of the foregoing reply brief was furnished by U. S. Mail, postage prepaid, on the 15th day of November, 2007 to:

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I further certify that the foregoing reply brief was filed pursuant to FRAP 25(a)(2)(B) by sending the original and the appropriate number of copies to the Clerk by U.S.First Class mail on the 15th day of November, 2007.

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