DOCKET NUMBER 07-12635-B
IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

BARBARA ORBAN,

Appellant/Plaintiff,

v.

CITY OF TAMPA, FLORIDA,
Appellee/Defendant.
_____/

APPELLEE/DEFENDANT, CITY OF TAMPA'S "APPELLEE'S BRIEF"

Appeal from the United States District Court
Middle District of Florida
Tampa Division

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Orban v. City of Tampa
Case No.: 04-01904-CV-T-23-MAP - MERRYDAY/PIZO
Appeal Docket No.: 07-12635-B

CERTIFICATE OF INTERESTED PERSONS

Barbara Orban, Appellant/Plaintiff;

Joseph D. Magri, Esquire, Attorney for Appellant/Plaintiff BARBARA ORBAN;

Ward A. Meythaler, Esquire, Attorney for Appellant/Plaintiff BARBARA ORBAN;

Gerard J. Roble, Esquire, Attorney for Appellant/Plaintiff BARBARA ORBAN;

Merkle & Magri, P.A., 5415 Mariner Street, Suite 301, Tampa, Florida 33609 Law Firm representing the Appellant/Plaintiff, BARBARA ORBAN;

John A. Makholm, Esquire, Attorney representing the Appellee/Defendant, CITY OF TAMPA;

The Makholm Law Group, Counsels for the Appellee/Defendant, CITY OF TAMPA;

Ursula D. Richardson, Esquire, Assistant City Attorney for the CITY OF TAMPA, Attorney representing the Appellee/Defendant, CITY OF TAMPA;

City of Tampa, Appellee/Defendant, a municipal corporation of the State of Florida;

Pam Iorio, Mayor of the CITY OF TAMPA;

Self-Insured Retention Programs, Inc., insurer of the CITY OF TAMPA;

The Honorable Steven D. Merryday, United States District Judge for the Middle District of Florida, Tampa Division – Presiding Judge.

The Honorable Mark A. Pizzo, United States District Magistrate Judge for the Middle District of Florida, Tampa Division.

STATEMENT REGARDING ORAL ARGUMENT

Appellee/Defendant, CITY OF TAMPA does not believe that Oral Argument is necessary for the Honorable Court's review, since the material facts and legal concepts are clear and distinct, and the arguments of the parties are extensive and complete both in the lower court and before this Honorable Court. Moreover, the CITY OF TAMPA specifically denies Dr. ORBAN's continued assertions that the CITY OF TAMPA deprives any citizens of their procedural and/or substantive due process rights, the issue that has been thoroughly briefed, argued, and ruled upon in the court below. Nevertheless, the CITY OF TAMPA stands ready to present Oral Argument, should the Court deem it helpful.

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is "Times New Roman" 14 point, and contains **10,589 words.**

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: **PAGE**

STATUTES:

RULES:

STATEMENT OF THE ISSUES

I. Whether the District Court erroneously ruled that there was probable cause, as a matter of law, for the Uniform Traffic Citation issued to Dr. ORBAN.

II. Whether the District Court erroneously characterized the practice, policy, or scheme at issue here.

III. Whether the District Court erred in its determination that there was no actionable claim of a practice, policy, or scheme to improperly issue and enforce Uniformed Traffic Citations of the State of Florida, which allegedly constituted a violation of procedural and substantive due process rights of the Appellee/Plaintiff.

STATEMENT OF THE CASE

(i) **Course of the proceedings and dispositions in court below**: In light of the Appellant/Plaintiff, Dr. ORBAN's decision to argue her case/appeal to this Honorable Court in the first paragraph her "Statement of the Case" (See: Pg. 2of the ORBAN'S "BRIEF FOR APPELLANT BARBARA ORBAN" ["APPELLANT'S BRIEF"]), the Appellee/Defendant, CITY OF TAMPA feels compelled to present the following short clarification/addition to the "Statement of the Case" as presented by Dr. ORBAN: The, Appellee/Defendant, CITY OF TAMPA specifically denies the allegations/assertions/argument made in the first paragraph of her "Statement of the Case", specifically, that the CITY OF TAMPA,

by and through it's Police Department, asserts that it does not have a *practice, policy, or scheme* to [1] issue/prosecute Uniformed Traffic Citations (of the State of Florida) following the investigation of a traffic accident (aka "Crash") regardless of probable cause. It is specifically Denied that any policy, practice, or procedure of the CITY OF TAMPA, by and through its Police Department, is motivated by a *scheme* to increase insurance casualty premiums resulting in increased premiums for the pension fund of the CITY OF TAMPA Police Department. Further, the Tampa Police Department, like all the other Law Enforcement agencies issuing Uniform Traffic Citations of the State of Florida within the jurisdiction of the Traffic Division of the 13th Judicial Circuit for Hillsborough County, Florida, follows the Order(s) of that Court in terms of appearances of and submissions by its Officers to the court in traffic cases such as Dr. ORBAN's. Nothing more, nothing less.

(ii) **Statement of the Facts**: While the legal arguments of the Appellant/Plaintiff are quite imaginative and seemingly complex, the *undisputed* "facts" of this case are simple and direct:

On March 27, 2000, Appellant/Plaintiff, Dr. ORBAN was driving southbound on Howard Avenue in a white Mercedes Benz.[2] On March 27, 2000, the front end of

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[1] This issue was thoroughly briefed, reviewed, and ruled upon by the court below, and will be elaborated upon infra.

[2] See composite exhibit deposition of Dr. ORBAN Exhibit A to [DE#78].

the white Mercedes Benz driven by ORBAN collided with the rear of a BMW.[3] The BMW was at a complete stop at the time it was hit by the Mercedes Benz.[4] The driver of the BMW was Matthew Collins.[5] The road conditions were wet, Dr. ORBAN claimed that her Mercedes Benz brakes did not *immediately engage* due to being wet.[6]

On March 27, 2000, between 6:00 p.m. and 6:30 p.m., Matthew Collins was traveling southbound on Howard Avenue and came to a complete stop due to other stopped traffic which extended from a red light at the intersection of Morrison and Howard. [7] Matthew Collins did not in any way contribute to, or cause, the rear-end collision in any manner.[8] There was visible damage to the front end of the Dr. ORBAN's Mercedes Benz[9], and there was visible damage to the rear bumper of the Matthew Collins's BMW.[10]

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[3] See composite exhibit deposition of Dr. ORBAN - Exhibit A to [DE#78].
[4] See composite exhibit deposition of Dr. ORBAN - Exhibit A to [DE#78].
[5] See composite exhibit deposition of Dr. ORBAN - Exhibit A to [DE#78].
[6] See [DE#83] at pages 3-4.
[7] See Composite deposition of Matthew Collins, Page 4, lines 22-25; page 5, Lines 1-2 and 15-20 Exhibit B [DE78].

[8] See Composite deposition of Matthew Collins, page 6, Lines 1-10 - Exhibit B [DE78].
[9] **Deposition of Matthew Collins, page 9, Lines 7-13** (Exhibit B [DE78].

Q. After the police responded to the accident scene can you recall or can you detail for us what investigation steps they took while they were present?

The Appellee/Defendant, CITY OF TAMPA's Police Department was called to the scene by the Plaintiff to investigate the traffic accident[11]. Officers Edward Bowden and David Duncan of the CITY OF TAMPA Police Department arrived on the scene to investigate the traffic crash. Appellant/Plaintiff, Dr. ORBAN spoke to the police about the accident[12]. At that same time, Matthew Collins spoke

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A: I don't recall all the steps on it. They took a report. Obviously it was pretty apparent she hit me from behind. She had damage to the front of her vehicle and the rear end of the car I was riding was hit.

[10] See Composite deposition of Matthew Collins, page 9, Lines 7-13 - Exhibit B [DE78].

[11] **Deposition of Barbara Orban, page 19, Lines 4-14** (Exhibit A [DE78].

"So I thought the right thing to do here if this man feels like he's got major damages, the correct thing to do is call the police, which I did. And I called it through the non emergency number, and he was upset with that, and he told me that he wanted me to call it through 911. And I told him that they're not going to come any sooner once we tell them we don't have an emergency. And then he told me call it through 911 and tell them there is an emergency. I said no, he could do that himself and he pulled his cell phone out of his car, but he never called."

[12] **Deposition of Barbara Orban, page 24, lines 11-20** (Exhibit A – [DE78]

Q: When the police officers arrived can you describe what happens at that point?

A: Yeah. Officer Duncan asked if either of us were injured and we both said no. And then he asked if either of us wanted an ambulance and we both said no. And I thought the question was funny because you would have uninjured people wanting an ambulance, but maybe it's a way of rephrasing the question. And then at that point Officer Bowden talked to me and Officer Duncan talked to Mr. Collins.

to the police about the accident.[13] Following the interviews with each driver, and review of all the attendant circumstances, the Officers concluded their investigation of the accident, and Appellant/Plaintiff, Dr. ORBAN was issued a State of Florida promulgated Uniform Traffic Citation ("UTC") for *Careless Driving* pursuant to and in violation of F.S. §316.1925.

A traffic hearing on the "UTC" issued to Dr. ORBAN was held on August 30, 2000, before the Honorable Judge Gaston Fernandez, and Judge Fernandez found the Appellant/Plaintiff, Dr. ORBAN **Guilty** of *Careless Driving*.

Thereafter, Appellant/Plaintiff, ORBAN appealed the decision by Judge Fernandez, and the traffic ticket ("UTC") issued to the Plaintiff on March 27, 2000 for Careless Driving was ultimately Dismissed by the Honorable Judge Eric Myers on January 9, 2002.

On September 23, 2005, Appellant/Plaintiff, ORBAN filed her FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL [DE#45] (hereinafter "1st AMENDED COMPLAINT [DE45]") alleging three Counts of Malicious Prosecution pursuant to 42 U.S.C. §1983.

Count I of the "1st AMENDED COMPLAINT [DE45]" alleged Malicious Prosecution for a Fourth Amendment Constitutional violation and Counts Two and Three alleged Malicious Prosecution for Fourteenth Amendment constitutional

[13] See composite exhibit deposition of Dr. ORBAN, page 24, Ln 11-20 - Exhibit A

violations. Count IV was simply "Count IV" without further title, and simply alleged *"The Defendant violated the Plaintiff's right to due process of law guaranteed by the United States Constitution."*

On April 5, 2006 the lower court **Dismissed with Prejudice** **Count I** of the "1st AMENDED COMPLAINT [DE45]".[14]

On July 31, 2006, the lower court **Granted** the Appellee/Defendant, CITY OF TAMPA'S **Motion for Summary Judgment** as to **Counts II and III** of the "1st AMENDED COMPLAINT [DE45]". At that same time, Judge Merryday Ordered the Appellant/Plaintiff, ORBAN to *show cause* why the remaining Count IV of the "1st AMENDED COMPLAINT [DE45]", should also not be Dismissed.

On June 6, 2007, after being thoroughly briefed by both sides, Judge Merryday **Granted Summary Judgment** to the Appellee/Defendant, CITY OF TAMPA on the final **Count IV** of the "1st AMENDED COMPLAINT [DE45]"[15]

Thereafter, the Appellant/Plaintiff, ORBAN appealed to this Honorable Court. However, it should be noted here, that while Dr. ORBAN initially noticed that she was Appealing the Decision of the lower court to Dismiss COUNT I of the

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to [DE#78].

[14] See ORDER of lower court [DE#74].

[15] See ORDER of lower court [DE#88]

"1st AMENDED COMPLAINT [DE45]", in her "APPELLANT'S BRIEF" Dr. ORBAN notices, via footnote [16], that she is *abandoning that issue.*

(iii) **Standard of Review:** This Honorable Court has established that the appropriate **Standard of Review** for a district court's decision to Grant **Summary Judgment** is ***de novo review***, and further, that the same legal standards as the district court should be applied. Summary Judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to ***Summary Judgment*** as a matter of law and further that all evidence and reasonable inferences must be viewed in a light most favorable to the nonmoving party. McCormick v. City of Ft. Lauderdale, 333 F.3d 1234, 1243 (11th Cir. 2003), *Rehearing and Rehearing en Banc Denied by* McCormick v. City of Fort Lauderdale, 85 Fed.Appx. 728 (11th Cir.(Fla.) Oct 06, 2003).

As to the **Standard of Review** of the **Dismissal** of **Count I – Malicious Prosecution under 42 U.S.C.§ 1983 4th Amendment Detention** of the Appellant/Plaintiff, Dr. ORBAN's "1st AMENDED COMPLAINT": This Honorable Court has established that the appropriate **Standard of Review** for a district court's decision to Grant **Dismissal** of a Complaint (or Count thereof) is ***de novo review***, and further, that the same legal standards as the district court should be applied. Appellant/Plaintiff's Complaint should not be dismissed for

[16] See "INITIAL BRIEF" fn 4, page 16.

failure to state a claim *"unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"* and the facts should be accepted as true and construed in a light most favorable to the plaintiff. Pautala Elec. Membership Corp. v. Whitworth, 951 F.2d 1238, 1240 (11th Cir.1992). [17]

SUMMARY OF THE ARGUMENT

The Honorable, United States District Court Judge, Steven D. Merryday, of the United States District Court for the Middle District of Florida, after extensive briefing by both parties, and nearly three (3) years of litigation in this matter, correctly **Granted** the Appellee/Defendant, CITY OF TAMPA's **Motion to Dismiss** [DE#52] as to **Count I - Malicious Prosecution under 42 U.S.C.§ 1983 4th Amendment Detention** of the Appellant/Plaintiff, ORBAN's 1st AMENDED COMPLAINT [DE45], since as Judge Merryday correctly held in his ORDER [DE#74] there was no 4th Amendment *detention* since ORBAN was never *detained* and was in fact *free to leave* after the issuance of the Uniformed Traffic Citation

[17] Appellant/Plaintiff, ORBAN cited to Covad Communications, Co. v. Bellsouth Corp., 299 F.3d 1272 (11th Cir. 2002) without the qualification that Covad was *vacated* by Bellsouth Corp. v. Covad Communications, Co., 540 U.S. 1147, 124 S.Ct. 1143 (2004).

("UTC") issued by the CITY OF TAMPA Officers, who she had summoned to the scene of her traffic accident.

Judge Merryday also correctly ruled that there can be no *Malicious Prosecution* under 42 U.S.C. § 1983 **under the 4th Amendment** under the facts of the instant case because a *seizure* would have had to have occurred *after* the issuance of the "UTC" since said issuance commences the *Malicious Prosecution.*[18] Dr. ORBAN called the police to the scene, she was found at fault, was issued a "UTC", **she was never *seized,*** and then left the area *after* being issued the Citation. Judge Merryday correctly dispensed with Dr. ORBAN's argument of *continuing seizure*, which, while imaginative, did not hold water, since there was *never* even a bare minimum of deprivation of liberty consistent with a *seizure* after being issued a traffic citation.[19]

The District Court was also correct in **Granting Summary Judgment** to the Appellee/Defendant, CITY OF TAMPA as to all remaining Counts as alleged by the Appellant/Plaintiff, ORBAN in her 1st AMENDED COMPLAINT [DE45].

Notwithstanding Dr. ORBAN's statements to the contrary, there are no genuine issues of *material* fact, and ORBAN's imaginative assertions of fantastical conspiracies and/or *schemes* to fund the Tampa Police Officers' Pension Fund to

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[18] See: Ivory v. State, 588 So.2d 1007, 1008 (Fla. 5th DCA 1991).
[19] See: Nieves v. McSweeney, 241 F.3d 46, 54 (1st Cir. 2001); Williams v. Chai-Hsu Lu, 335 F.3d 807, 809 (8th Cir. 2003).

deprive her of due process or other civil rights guaranteed under the Constitution of the United States, are no more than *conclusory allegations*, which are not supported by *material facts* and cannot support a Denial of Summary Judgment to the Appellee/Defendant, CITY OF TAMPA, as was held by Judge Merryday.

Judge Merryday correctly **Granted** the CITY OF TAMPA **Summary Judgment** as to Dr. ORBAN's **Count II – (Malicious Prosecution under 42 U.S.C. § 1983 – Denial of Procedural Due Process)** and as to **Count III – (Malicious prosecution under 42 U.S.C. § 1983 – Denial of procedural due process – *Zinermon*)**, holding that *as a matter of law* where there are no *material facts* in dispute (as in the instant case at bar), on the facts of this case, the CITY OF TAMPA Police Officers had *probable cause* to issue Dr. ORBAN a traffic citation for the offense of *Carless Driving*, to wit, that she drove or skidded her Mercedes Benz into the rear of another driver's car, which was lawfully stopped.

Judge Merry explained to Dr. ORBAN that she bore the *onerous burden* [20] of demonstrating that the Officers lacked *probable cause* to issue a traffic citation, at the scene of a traffic accident to someone (Dr. ORBAN) who drove or skidded into the rear of another driver's stopped vehicle. And, Judge Merryday found that Dr. ORBAN did not meet that burden citing to Florida Statute 316.1925 (*Careless Driving*) and the undisputed *material* facts of this case. Judge Merryday

succinctly and correctly explained that: *"...the present case presents not the question whether the accident was unavoidable according to laborious and retrospective deductions of a scientist* [21] *but the question whether city police, unaided by a scientist, properly found probable cause that the accident arose from carelessness"*[22] and, this accident did arise from *carelessness* - by Dr. ORBAN. Judge Merryday's holding took notice of Dr. ORBAN's specious argument that the Officers *should* have found her not at fault because *she said* that another *phantom* vehicle turned suddenly from in front of her, thus causing to hit Mr. Collins stopped vehicle. [23] Be that as it may, it was the Officers' task to make a determination based on the totality of the circumstances revealed by their investigation, *including* but not limited to, what Dr. ORBAN told them. The Officer made that determination, and contrary to what Dr. ORBAN would have this Court believe in her "APPELLANT'S BRIEF" the Officers *did* have probable cause and issued her a traffic citation for *Carless Driving*. Since it was determined by the lower court that the Officers *did* have *probable cause*, Judge

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[20] This phrase is from the seminal *malicious prosecution* case of Burns v. GCC Beverages, 502 So.2d 1217, 1219 (Fla. 1986).
[21] As Dr. ORBAN and her alleged Traffic Expert would have us do here.
[22] See ORDER [DE#83] at Page 4.
[23] Dr. ORBAN does not explain how she *would* have avoided hitting the alleged *phantom* vehicle had said *phantom* vehicle stopped like Mr. Collins did, instead of turning suddenly. More likely than not, Dr. OBAN would have just "bumped" the *phantom* vehicle instead of Mr. Collins, but none of us will really ever know for sure.

Merryday correctly concluded, as to Counts II & III that, in light of the holdings of this Court, the existence of probable cause for the citation **provides a complete defense of a claim of *malicious prosecution.*** Wood v. Kesler, 323 F.2d 872, 882 (11th Cir. 2003).

As to the enigmatic **Count IV** of the "1st AMENDED COMPLAINT" which, without further title, simply alleges *"The Defendant violated the Plaintiff's right to due process of law guaranteed by the United States Constitution"*, after giving fair warning in his July 31, 2006 ORDER [DE#83] that Dr. ORBAN *"...must show cause why count four should not be dismissed for **lack of standing, failure to allege a case of controversy,** and **failure to state a claim for relief,*** (emphasis added) Judge Merryday **Granted** the CITY OF TAMPA'S **Motion for Summary Judgment** [DE#83] **as to Count IV**. It should not have come as a surprise to ORBAN since she had not shown: ***standing, a case of controversy,*** nor had she ***stated a claim for relief.*** Instead Dr. ORBAN railed on in a *curious document* , as she does in this Honorable Court, about how her claim in Count IV is not about *malicious prosecution* as would seem to be indicated by Count IV's lack of specificity on its face coupled with its adoption or realleging of paragraphs 1 – 82 of the "1st AMENDED COMPLAINT", but rather about *bad faith prosecution.* In fact, the argument offered by Dr. ORBAN to the District Court

and here to this Court, while imaginative, is fantastical, lacks factual basis, and is legally untenable.

In the final analysis, as found by Judge Merryday, this case, notwithstanding all of the ink that has been dedicated to it, is really quite simple: Dr. ORBAN had and accident, she crashed ("bumped") into the rear of another car that was legally stopped. She can blame the brakes of her Mercedes Benz, the wet road, a *phantom vehicle*, that she could not move the right side of the road, that she did not believe she could pull into the lane of on-coming traffic, construction in the area that diverted her eyes, that there were no injuries and *only minor damage*, a not perfectly correct traffic citation, a not perfectly correct accident/crash report, the fact that she *allegedly* did not know there would be a traffic accident report, that she did not *know* the police would not just mail her an accident report, that she did not know *what* the first traffic court judge was reviewing/reading as he heard her defense and found the she did commit the offense of *Careless Driving*, that fact that she and other members of her family have received traffic citations for various violations, that the legislature of the State of Florida decided *state-wide* to partially fund both fire and police pension plans from the premiums of insurance policies throughout the State of Florida, that the Judge in charge of the Traffic Court in Hillsborough County *long ago* [24] decided that under certain specific circumstances

[24] See ORDER of Traffic Court, attached as Exb "1" to Exb "F" [DE#5-7].

Officers who write traffic citations as a result of their traffic accident investigations don't have to appear in court, that the Officers were perhaps not as sophisticated as the traffic accident expert that she retained to *review* her accident with the benefit of *hindsight*, **but, at the end of the day**, none of the afore argued changes the ultimate fact that Dr. ORBAN did not fully have control of her vehicle, and struck the rear of a stopped vehicle, and her driving qualifies as a violation of F.S. 316.1925[25] as *Careless Driving*, **and more importantly** that the Officers investigating her accident, at her request, had *probable cause* to believe that Dr. ORBAN was a fault, and issued her a traffic citation.

Finally, Dr. ORBAN had all the *due process* that one could hope to have, and ultimately prevailed in her second hearing in Traffic Court. As to the CITY OF TAMPA, the CITY's Police Pension Fund operates pursuant to F.S. 185 as do most other Cities of the State of Florida, and the funding *scheme* was devised by the legislature of the State of Florida and not the CITY OF TAMPA. Further, as the undersigned counsel has argued in this case, including orally in the Middle District Court, that if Dr. ORBAN *truly* believed that her *due process rights* were in fact infringed upon by the Court's *officer attendance policy* [26] (i.e. that Officers do not have to attend Traffic Hearings for Citations they issue at accident scenes and that the crash reports are forwarded to the Court and then potentially reviewed

[25] See FS 316.1925 attached as Exb "E" [DE#5-6].

by the magistrate of the Traffic Hearing), then the proper and most expeditious way for Dr. ORBAN would be to seek a *Mandamus* from the Federal Courts to stop what she clearly sees as a violation of her's and other's *due process* rights under the Constitution. Dr. ORBAN should seek to stop the policy of the traffic court of the Thirteenth Judicial Circuit in and for Hillsborough County and not the policy of the CITY OF TAMPA Police Department that merely *complies* with that court's Order.

Dr. ORBAN's case has been fully heard and entertained by the court below, and she has no case or standing for a case against the CITY OF TAMPA.

ARGUMENT

Issue I

THE DISTRICT COURT DID NOT ERR IN FINDING THAT THERE *WAS* PROBABLE CAUSE FOR THE TRAFFIC CITATION ISSUED TO DR. ORBAN BY THE CITY OF TAMPA POLICE OFFICERS.

In Judge Merryday's final ORDER [DE#88] in the District Court below, he correctly notes that: *"[t]he Plaintiff's response to the July 31st order to show cause* [27] ***is a curious document."*** The same can certainly be said of the "APPELLANT'S BRIEF" before this Honorable Court, since, as in many of the

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[26] See ORDER of Traffic Court, attached as Exb "1" to Exb "F" [DE#5-7].

filings in the court below, the "APPELLANT'S BRIEF" resplendent in *conclusory allegations* supported by *mis-characterizations of the factual record* and supported by case law that either misses the point entirely or is inapplicable to the instant case. Additionally ORBAN has complicated any review of her "APPELLANT'S BRIEF", by this Court or by the CITY OF TAMPA, by frequently, mis-citing to the record below, e.g.: citing to **"DOC79-EXB7-P38"** as alleged testimony of Officer Bowden, when in fact the correct cite would be "DOC79-EXB**8**-P38".[28] Moreover the "APPELLANT'S BRIEF" is not only inaccurate in its criticism of Judge Merryday's rulings, but at times is down right insulting to the Judge, at one point accusing him of making *gratuitous and unfair* comments in his Orders. Judge Merryday? Gratuitous and unfair comments? Judge Merryday's reputation is that of a studied and thoughtful jurist who gives parties every opportunity to make their case, were this not the case, Judge Merryday would have granted the CITY OF TAMPA's first MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT [DE# 4 & 5]. The entire record before this Honorable Court clearly reveals that Judge Merryday was patient, well-reasoned, and allowed Dr. ORBAN

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[27] Referencing: ORDER [DE#83].

[28] The Appellant/Plaintiff makes this same mis-citing *mistake* numerous times on pages: 5, 9, 11,12, 13, 18, 20, 23,33, 34. While herein the Appellee/Defendant characterizes these inaccuracies as *mistakes*, doubtlessly Dr. ORBAN would characterize them as *bad faith, false, false entries, misleading, a scheme*, or some other derogatory characterization, as she does when referring to the several simple

every opportunity to *make* a federal claim, notwithstanding the fact the from the outset, Dr. ORBAN had no case against the CITY OF TAMPA.

Judge Merryday was thoroughly and repeatedly briefed by both parties and correctly determined that the CITY OF TAMPA Officers has *Probable Cause* to believe that on March 27, 2000, Dr. ORBAN drove or skidded her Mercedes Benz into the rear of a lawfully stopped vehicle driven by Mr. Collins.

The Court did Not Disregard *material* facts

While it is evident that Dr. ORBAN believes that *every* fact that she and her expert can think of is a *material* fact, that does not make is so. For example, Dr. ORBAN chastises Judge Merryday for *omitting* that at the time of the accident/crash Dr. ORBAN was *"traveling at one-half the speed limit"*[29], yet is his "facts" Judge Merryday clearly credits her as *"driving at fifteen miles per hour"*, which would be, *half the speed limit.* But is this *material?* No. Whether Dr. ORBAN was traveling at the posted speed limit or not, she ran into ("bumped" she would say) the rear of a stopped vehicle, her speed is credited and ultimately immaterial.

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mistakes made by the Officers in submitting their traffic citation and Crash Report following their investigation of her traffic accident.

[29] "APPELLANT'S BRIEF at pg 18.

F.S. 316.1925 [30]states:

> *Any person operating a vehicle upon the streets or highways within the state* ***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.*** (emphasis added).

The statute does not address *speed*, or how far behind a person is behind the *phantom* SUV in front of them.

Dr. ORBAN argues (on and on) that *"the police officer concluded that she did not violate any law"* [31]. Obviously that is <u>not</u> what the Officer concluded <u>because</u> he issued her a citation for *Careless Driving*. While the facts must be viewed in a light most favorable to the plaintiff, Officer Bowden has testified that no one told him to cite Dr. ORBAN, and that at that time he believed that *careless driving* was the appropriate charge for her running into the back of another car.[32]

As noted by Judge Merryday in his ORDER [DE#88] ORBAN mischaracterizes the record. Nowhere is that more clear than in referencing the *mistakes* made by the Officers to both the traffic citation and the accident reports.

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[30] See FS 316.1925 attached as Exb "E" [DE#5-6].
[31] "APPELLANT'S BRIEF" at fn 7, pg 18 and numerous other places.
[32] 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

Dr. ORBAN rails on effusively about *false statements* and *omissions*, but a careful review of the record, as conducted by the court below, shows that the *mistakes* of the Officers were simple common errors that are in any case *immaterial* to the fact that the Dr. ORBAN ran, drove, or skidded into the back of a stopped vehicle. Whether it was *raining* at that exact moment is *immaterial* since she does not dispute that it *had been raining* and that the roadway was *wet*!

A perfect example of ORBAN's prestidigitation is where she argues that: *"[t]he submission of false reports is evidence that there is no probable because it shows the officer felt that probable cause could only be shown by creating false information or omitting material information."* (emphasis added). Conclusory argument at its worst. First, there were no *false reports*, but there were some *mistakes* that were corrected and ultimately did not change the facts or the charge against ORBAN. Further, the Officers are under no obligation in the reporting system to write down everything people tell them. Officers have discretion as to write what they believe is needed at the time, otherwise each report would start with: perpetrator states *I did not do it.*

Another glaring example of Dr. ORBAN's playing fast and loose with the truth can be found in fn 8 as continued onto page 28 of the "APPELLANT'S BRIEF", where Dr. ORBAN incorrectly represents to this Court that: *"Even*

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to him by ORBAN is not in fact what he testified to, but what she would have like

Officer Bowden's trainee, Officer Duncan, knew about Robinson *and its requirements for writing a careless driving citation. Doc79-EXB8-Pg31-32."* Actually, of course, Duncan's Depo is at Doc79-EXB**9**-Pg31-32, and NOWHERE on those pages, or anywhere else does Ofc.Duncan acknowledge ANYTHING about Robinson v. State, and further on Pages 31-32 of his Deposition he ACTUALLY testifies that he *believes* that *you* (an officer) needs *just one* improper driving action to constitute *Careless Driving* and further that *"I **think** on the citation you're supposed to list what actual careless driving was."* "THINK" being the operative word. A complete review of Ofc. Duncan reveals that he is an average officer, with an average officer's understanding of the law. He DID NOT *"know about* Robinson v. State [OR] *...its requirements for writing a careless driving citation."* And, while we're on the topic of rather ancient case of Robinson v. State, 152 So.2d 717 (Fla. 1934), that case was a ruling on the *quashing* of an insufficient "Affidavit" and that the author (non-officer) of an "Affidavit" on a charge of *Careless* and *Reckless Driving* (Reckless driving being a criminal traffic /arrestable offense in Florida) needed to specify in the "Affidavit" *"what conduct on his part is the basis of that charge"* (Robinson at 855) so that the accused *knew* what they did wrong. In the instant case, while she didn't like it Dr. ORBAN, a

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to have heard. Also See: Affidavit of Ofc. Bowden at Exb "B" [DE# 5-3].

college professor, knew full well what she was charged with and why she was being charged, i.e. she crashed ("bumped") into the rear of a lawfully stopped car.

Dr. ORBAN also writes *"[t]he order* [DE#83] *also ignores the fact that the traffic in front of the SUV, which Dr. Orban could not see, was dead-stopped which would be totally unexpected to anyone in light of the location of the accident and the speed of the SUV in front of Dr. Orban.*[33] But, later in her brief, Dr. ORBAN argues that she *"...was not in stop-and-go traffic"*[34] Which is it? If the SUV was going, and Mr. Collins was stopped, and Dr. ORBAN was *going* it certainly was *stop-and-go traffic*, which further stopped when she ran into ("bumped") the rear of Mr. Collins' vehicle. Enough. As Judge Merryday ruled, *"Orban cannot expect a police officer charged with investigating an accident to arrive at the scene, collect evidence, and weigh the evidence to adjudicate under Florida law the statutory presumption that a rear-end driver is at fault has been overcome by a 'substantial and reasonable explanation.'"* [35] Exactly! Dr. ORBAN refuses to be *wrong* in this accident. But, she went back to court and at the second hearing won! Due Process won out. While it would be *nice* of Officers could carry around traffic experts with them and perhaps a crystal ball, in reality, as the courts have frequently held Officers are called upon to make quick

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[33] "APPELLANT'S BRIEF" at pg 19.
[34] "APPELLANT'S BRIEF at pg 24.
[35] ORDER [DE#88} at page 5.

judgments, on the street, sometimes under rapidly evolving circumstances, sometimes while tasked with training new Officers [36]and usually, in Tampa, under a usual back-log of incidents holding. *Could* Dr. ORBAN have been right? That she actually *did* overcome by a "substantial and reasonable explanation" the presumption that a rear-end driver is at fault under Florida law. Perhaps. But, that is why she and the rest of us get our day in court that is why we are before this Court. On the facts available at the time, including the Officers discretionary evaluation of what *both* Mr. Collins and Dr. ORBAN told them, they determined they had *probable cause* for a violation of F.S. 316.1925 *careless driving* and so cited her.

Issue II

THE DISTRICT COURT DID NOT ERR TO THE EXTENT THAT COURT DETERMINED THE ISSUE OF *POLICY* AND *PRACTICE* AS ALLEGED BY DR. ORBAN.

Dr. ORBAN has not shown that any *policy*, *custom*, or *practice* of the CITY OF TAMPA deprived her or was the *driving force* behind any alleged violation of her civil rights. Dr. ORBAN has not shown that any violation of her civil rights has take place. If Dr. ORBAN *truly* believed that her *due process rights* were in fact infringed upon by the Court's *officer attendance policy* [37] (i.e. that Officers do

[36] As was the case here, Ofc. Bowden was training new Officer Duncan.
[37] See ORDER of Traffic Court, attached as Exb "1" to Exb "F" [DE#5-7].

not have to attend Traffic Hearings for Citations they issue at accident scenes and that the crash reports are forwarded to the Court and then potentially reviewed by the magistrate of the Traffic Hearing), then the proper and most expeditious way for Dr. ORBAN would be to seek a *Mandamus* from the Federal Courts to stop what she clearly sees as a violation of her's and other's *due process* rights under the Constitution. Dr. ORBAN should seek to stop the policy of the traffic court of the Thirteenth Judicial Circuit in and for Hillsborough County and not the policy of the CITY OF TAMPA Police Department that merely *complies* with that court's Order. For whatever reason, Dr. ORBAN has not attempted to stop the Court's policy in the Thirteenth Judicial Circuit in and for Hillsborough County, as it remains in effect to this very day.

The mere fact that CITY OF TAMPA police officers did not appear in court with her and that the CITY OF TAMPA has a *procedure* that its Police Officers do not have to appear in court when subpoenaed for traffic citations written at the scene of an accident, which was not witnessed by the investigation officer(s), which, as this Honorable Court might imagine, is the vast majority of traffic accidents investigated. It is true that the Defendant, CITY OF TAMPA has such a "procedure", Standard Operating Procedure ("SOP") # 634 "Traffic Citations" [38], the apropos portion of this policy is Section II(D)(2)&(2)(a), which in pertinent

[38] See #634, attached as Exb "1" to Exb "F" [DE#5-7].

part reads: *"Upon receipt of a traffic court subpoena, officers will refer to the Accountability Record and determine if the case is a* ***civil infraction*** *arising from a* ***traffic crash****, which the officer did not witness. (a.) If so,* ***the officer will not have to appear in court*** ***<u>through an agreement with the traffic judges</u>****."* (emphasis added). In point of fact, the phrase *"agreement with the traffic judges"* refers to the March 29, 1985 "MEMORANDUM" from **the Honorable Judge Thomas E. Stringer, Sr.** the *then* Administrative Judge Traffic Division [39] and now an Appellate Court Judge of the Second District Court of Appeals, issued to the CITY OF TAMPA Police Department, the Temple Terrace Police Department, the University of South Florida Police Department, as well as to the Hillsborough County Sheriff and to the Florida Highway Patrol. The MEMORANDUM directs/**Orders** that henceforth Officers will <u>not</u> have to appear in court when issuing a traffic citation at a traffic accident, which the officer(s) did not witness. Therefore, if in fact Dr. ORBAN's due process rights were somehow violated by SOP # 634, i.e. Police Officers submitting their Accident Reports in lieu of their appearance in court on traffic citations issued at accidents they did not witness, the fault/violation of civil rights (due process or otherwise), if any, lies with the

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[39] See ORDER of Traffic Court, attached as Exb "1" to Exb "F" [DE#5-7].

direction/Order by the County Court, and not with the Defendant, CITY OF TAMPA.

While cases involving the issue of **"Quasi-Judicial Immunity"** are relatively rare, courts have ruled that while Judges enjoy "Absolute Immunity" from suits when they act in their "judicial capacity", this "Absolute Immunity" does extend to governmental officials conduct required by a court order or at a Judge's direction. The United States Court of Appeals for the 8th Circuit in the case of Martin v. Hendren, 127 F.3d 720 (8th Cir. 1997), citing to an 11th Circuit case, addressed this very issue in holding, in pertinent part:

> *"'**Absolute quasi-judicial immunity** derives from absolute judicial immunity.' **Roland v. Phillips, 19 F.3d 552, 555 (11th Cir.1994)**. Judges are absolutely immune from suit for money damages when they act in their judicial capacity, unless their actions are 'taken in the complete absence of all jurisdiction.' Duty, 42 F.3d at 462. **A judge's absolute immunity extends to public officials for' 'acts they are specifically required to do under court order or at a judge's direction.''** Robinson v. Freeze, 15 F.3d 107, 109 (8th Cir.1994) (quoting Rogers v. Bruntrager, 841 F.2d 853, 856 (8th Cir.1988))."*

While the Hendren case dealt specifically with the issue of the immunity of an individual Police Officer, the 8th Circuit **Granted** that individual Officer **"Quasi-Judicial Immunity"**.[40] In the instant case before this Honorable Court, to extrapolate from Hendren, if the individual Officers (Officers Bowden and

[40] The City of Gravette, Arkansas, was dismissed out as a Defendant in Hendren.

Duncan) here would be granted **"Quasi-Judicial Immunity"** for following the directive/Order of *then* Hillsborough County Court Judge Thomas E. Stringer, Sr., the Defendant, CITY OF TAMPA has argued that no Constitutional cause of action/claim can stand against the CITY OF TAMPA for simply following the directives/Orders of Thirteenth Judicial Circuit in and for Hillsborough County, as did all of the other law enforcement agencies/government entities addressed by Judge Stringer. Further, it is axiomatic that, liability of a municipal entity, such as Defendant, CITY OF TAMPA, can only be predicated on an allegation that an unconstitutional policy or custom of the agency demonstrated a deliberate indifference to the constitutional rights of the Plaintiff and were, in fact, the direct cause or the **moving force** behind any alleged **constitutional violation**. Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978) ; Carr v. Castle, 337 F.3d 1211, 1228-33 (10th Cir. 2003) **;** Carter v. Morris, 164 F.3d 215 (4th Cir. 1999) ; City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

It is well-established that once a court finds the individual Officers acted objectively reasonably and grants them Qualified Immunity or in this case could grant these Officers **"Quasi-Judicial Immunity"**, there could be no cause of action against the municipality based on a policy or custom **as there is no underlying constitutional claim or injury**. City of Los Angeles v. Heller, 475

U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed. 806 (1986); Rooney v. Watson, 101 F.3d 1378 1381 (11th Cir. 1996); Cert. Denied, 522 U.S. 966, 118 S.Ct. 412 (1997).

In the instant case, there was no constitutional claim or injury / deprivation of due process rights suffered by the Defendant, Dr. ORBAN by the Defendant, CITY OF TAMPA. The CITY OF TAMPA simply has been following the edict/Order of the County Court for Hillsborough County **for the past twenty (20) years**, as have been the other law enforcement agencies/governmental entities in Hillsborough County.

Dr. ORBAN has further declared that the CITY OF TAMPA has a "quota" or "de facto quota" system in place in furtherance of this implied conspiracy to benefit the pension system. Nothing could be further from the truth, and other than making *conclusory arguments* ORBAN has shown nothing. The CITY OF TAMPA (1) does not have a quota system of any kind; (2) does not have any written policy or unwritten custom or practice of falsely accusing individuals of violating Florida Statutes; (3) assures that its Officers are Certified by the State of Florida and are trained in traffic accident/crash investigation; (4) assures that upon their graduating from the Police Academy each recruit Officer is further trained by a Field Training Officer ("F.T.O"); and (5) that each officer receives a copy of the Standard Operating Procedures, is trained on them and these Procedures are strictly

enforced.[41] Even if this was not the case, how does this alleged process, on the Plaintiff's facts establish a 42 U.S.C. § 1983 cause of action? It doesn't. Additionally, the CITY OF TAMPA is not responsible for the Florida Legislature's enactment of Chapter 185, *Florida Statutes*.

Issue III

THE DISTRICT COURT DID NOT ERR IN GRANTING FINAL SUMMARY JUDGMENT TO THE CITY OF TAMPA AS TO COUNT IV.

Judge Merryday, in the court below, gave Dr. ORBAN every possible chance to show a viable claim in "Count IV", which has proved to be *the* enigmatic Count of ORBAN'S "1st AMENDED COMPLAINT." By *enigmatic*, the CITY OF TAMPA would show unto this Honorable Court that Count IV in its entirety states:

> "COUNT IV
>
> 93 Plaintiff hereby realleges paragraphs 1 through 82 as though more fully set forth herein.
>
> 94 The Defendant violated the Plaintiff's right to due process of law guaranteed by the United States Constitution.

[41] See: Affidavits of City of Tampa Police Chief Steven Hogue, with additional exhibits [DE#5-8]; Also See: Affidavit of Captain (now Major) John Bennett, ¶ 5 and 6, [DE#5-9].

> 95 As a proximate result of the aforementioned actions of the defendants, Dr. Orban was unreasonably detained and seized, seized pending hearing, and wrongfully charged and prosecuted for the traffic offense of careless driving. In addition, she suffered violations of her constitutional rights; financial expense of her legal defense in traffic court; emotional distress; mental anguish; resulting pain, suffering and loss of the capacity for the enjoyment of life; an undeserved public record of a traffic charge against her, increased insurance premiums, legal fees and costs."

Thus, Count IV simply alleges *"The Defendant violated the Plaintiff's right to due process of law guaranteed by the United States Constitution."* However, during the twists and turns of this case, Count IV, through the efforts of Dr. ORBAN's most capable counsel, has appeared to have morphed from an unspecified *due process* to embrace *malicious prosecution* to including both *substantive* and *procedural due process* to its most recently averred *bad faith prosecution* mode. But, notwithstanding the imaginative and rigorous argument of Dr. ORBAN's counsel, at the end of the day, there was no *bad faith prosecution* in this case and there was no violation of her constitutional rights procedurally or substantively.

After giving fair warning in his July 31, 2006 ORDER [DE#83] that Dr. ORBAN *"...must show cause why count four should not be dismissed for* ***lack of standing, failure to allege a case of controversy,*** *<u>and</u>* ***failure to state a claim for relief,*** (emphasis added) Judge Merryday Granted the CITY OF TAMPA'S Motion for Summary Judgment [DE#83] as to <u>Count IV</u>. It should not have come as a surprise to ORBAN since she has not shown: *standing, a case of controversy,*

nor has she *stated a claim* upon which relief can be granted. Instead Dr. ORBAN railed on in a *curious document*, as she does in this Honorable Court, about how her claim in Count IV is not about *malicious prosecution* as would seem to be indicated by Count IV's lack of specificity on its face coupled with its adoption or realleging of paragraphs 1 – 82 of the "1st AMENDED COMPLAINT", but rather is about *bad faith prosecution.* In fact, the argument offered by Dr. ORBAN to the District Court and here to this Court, while imaginative, is fantastical, lacks factual basis, and is legally untenable. In fact, as this Honorable Court no doubt has noticed the ORBAN's "RESPONSE [DE#85] to Judge Merryday's *show cause* ORDER [DE#83] is all most word-for-word *exactly* the same verbiage/documented inserted into the "APPELLANT'S BRIEF" from page 39 – 54. So, it is crystal clear to this Court *exactly* what Judge Merryday reviewed in reaching his decision to **Grant** the CITY OF TAMPA **Summary Judgment** as to Count IV. While Judge Merryday's ORDER speaks for itself in its excellent analysis of the issues, the CITY OF TAMPA would add the additional argument in support of that decision.

The *policy* that the Dr. ORBAN alleges to be unconstitutional is not implicated until a traffic citation is issued. Hence, it is axiomatic that the determination that *probable cause* existed for the issuance of the ticket, regardless of the policy and without regard to the officer's subjective motivations as alleged

by the ORBAN, ends all inquiries about the processes that occurred subsequent to March 27, 2000. The Court's finding is legally conclusive of why and how the subsequent processes were initiated. Dr. ORBAN's response [42] merely rehashed her contention that there was no *probable cause* for the issuance of the Uniform Traffic Citation in order to convince the Court that Count IV is still a viable claim. Yet, ORBAN's argument on page 2 of her "RESPONSE [DE#85] that *"a determination by the court as to whether or not there was probable cause for issuing a traffic citation for careless driving is irrelevant."* This logic, however, is flawed because the Court's ruling on the issue of *probable cause* dictated that it was the Plaintiff's careless driving actions which caused the citation to be lawfully issued by the Tampa police officers. This ruling establishes that the *traffic citation* ("UTC"), rather than the *policy*[43], led her to traffic court.

Dr. ORBAN also asserts that a substantive due process violation is also implicated by the alleged unconstitutional policy of the CITY OF TAMPA. The lower court has also correctly determined that the policy itself is not unconstitutional [See DE#83, FN 1]. Even if his Honorable Court were to analyze the legal process without regard to the traffic citation that started the process, the Dr. ORBAN has still failed to cite a real case or controversy. Dr. ORBAN's

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[42] [DE#85].

[43] Which requires a supervisor's approval to not issue a citation when someone has been determined to be at fault in a traffic crash.

conviction for *careless driving* **was dismissed on January 9, 2002** more than two (2) years before this lawsuit was initiated. The dismissal of the *careless driving* citation conviction was a termination in her favor[44], therefore her alleged "injury" was, and is, moot. The adequacy of the underlying process is evidenced by the very dismissal obtained by the ORBAN in the underlying case. Moreover, notwithstanding all the flaws that Dr. ORBAN alleges with the process she received in the underlying case, she does not have a constitutional right to perfect process, only adequate process. Matthew v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct 893 (1976). Further, it is clear that ORBAN cannot state a claim upon which relief can be granted because the ORBAN seeks to attack a City policy [45], that is , as argued above, undeniably derived from a judicial directive/policy/custom. Count IV of the "1st AMENDED COMPLAINT" is an effort to do indirectly, through this lawsuit, what she is otherwise prohibited from doing directly due to the doctrine of Judicial Immunity.

Dr. ORBAN argues to this Court that the CITY OF TAMPA's *illegal system* contains the following *illegal elements:*

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[44] The validity of the Dismissal is *questionable* since it was before a different Judge, almost two years later, who did not have the benefit of a transcript of the original proceeding or the testimony of traffic accident victim Matthew Collins, who would have refuted Plaintiff's contention for why she rear-ended Collins, when the Judge Dismissed the traffic citation.

1. A citation was issued even though the investigating officer determined that there was no probable cause to issue a citation. The proof of this statement is lacking. While Dr. ORBAN attests that she was *told* this by Ofc. BOWDEN, and of course we have her husband Dr. Orban's affidavit [46] that he overheard her talking to someone and that he spoke with Ofc. Bowden, but Bowden would not talk to him, but nowhere does Ofc. Bowden state he ever said that. In fact, a careful review of all of the Deposition reveals that Bowden was not told by anyone to write a citation and that *he* thought *Carless Driving* was more appropriate than *following too closely* on the day of the issuance of the traffic citation.

2. A crash report was prepared and submitted to the court as evidence which the investigating officer knew or should have known was false or misleading. The record is before this Court. The Officer(s) made small mistakes in the traffic citation and the accident report. While all *mistakes* tend to be *misleading*, ORBAN has <u>not</u> shown any intentional falsifying of anything in this case.

3. Rather than appear in court, the investigating officer was directed by the City not to go to court but to submit <u>ex parte</u> the crash report to the court

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[45] Allowing for the submission of a report to the Court in lieu of an appearance if the Officer did not witness the traffic crash.
[46] See: Affidavit of Dr. David Orban [DE#12-3].

which the City knew the court would consider in violation of state law and which the court relied on in finding Dr. Orban guilty. CITY OF TAMPA SOP #634 (II)(D)(2)(a) directs officers, in pertinent part, to: *"...determine if the case is a civil infraction arising from a traffic crash, which the officer did not witness. (a.) If so, the officer will not have to appear in court...."* "Will not have to appear" is different from being *"directed by the City not to go to court"*, which both Bowden and Duncan were free to do, but did not have to do and did not do. Under (b) of this same SOP, consistent with the direction of the court's system, the Officers *in order to be relieved of the responsibility of appearing in court* must submit their subpoena and a copy of the crash report to be forwarded to the court. [47] As stated, SOP # 634 resulted *from* the Traffic Court Order of Judge Stringer.[48]

4. The investigating officer acted as a quasi-judicial official or officer of the court and had the direct personal financial interest in the issuance and prosecution of the citation. In a case of imaginative and fantastic claims, this one surely tops them all. As an initial matter, since *most* of the municipal police departments pension funds in the State of Florida are funded, at least partially, through F.S. 185, which was enacted by the Florida legislature, the argument that officers have a *financial interest* in the prosecution of traffic citations, is like

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[47] See: Exb "2" of Exb "B" of [DE#5-7].
[48] See: Exb "1" of Exb "B" of [DE#5-7].

saying that state judges have a *remote financial interest* in fines they enforce vis-à-vis their salaries. This argument is simply absurd. The CITY OF TAMPA did not create F.S. 185 and does not control the pension funding process. Once again, if Dr. ORBAN feels that the F.S. 185 process is inherently flawed or violative of her Constitutional rights she should seek a remedy from whence this process emanates, i.e. the State of Florida.

As to the ***quasi-judicial official / officer of the court*** argument, this is equally fantastical. Since most of the time, Officers, if anyone at all (at least in traffic accident cases in Hillsborough County), prosecute their traffic citations in traffic court, there might appear be some logic to arguing that Officers so engaged are functioning in a *quasi-prosecutorial* role, but that is not an entirely complete characterization *since* the Officer is also *testifying* as a witness, so it is doubtful that Dr. ORBAN's theory works. Moreover it is doubtful, actually inconceivable to the undersigned, that the Officer clothed in his *quasi-prosecutorial* role would be shielded by *prosecutorial Immunity*. As for the *quasi-judicial / officer of the court* argument, it is quite preposterous and the justice of the peace and mayoral cases cites are without day as to the issue and facts of this case. The Officer is *not* the Judge and he is not the *hearing officer*. The Officer writes the citation, comes to court (or not), puts forth his case (or not), the *actual* Judge or other appointed

Hearing Officer hears the case and then the Judge make the holding, not the Officer!

The CITY OF TAMPA would also point out the following *mischaracterizations* or *errors* presented by Dr. ORBAN:

- The statement that state law disallows traffic accident reports to be used as evidence in a trial (F.S. 316.066) *but still directed its officers to submit them to the court.* The CITY OF TAMPA does not control *what* the traffic court decides to review or admit as evidence. The CITY simply follows the procedure set by the Traffic Court, and as argued supra.
- Dr. ORBAN's cite to Tumey v. State of Ohio, 273 U.S. 510 (1927) is so far off the mark from the instant case at bar, that it is hard to believe it is even being presented by Dr. ORBAN.
- Connally v. Georgia, 429 U.S. 245 (1977) and Ganger v. Payton, 379 F.2d 709 (4th Cir. 1967) are equally far afield and bear no relation to the instant case, as the remainder of the cases on page 43.
- While Dr. ORBAN presents a plethora of *bad faith prosecution* cases, they do not relate to the instant case since the entire premise of Dr. ORBAN's claims is ludicrous. No where has Dr. ORBAN shown that any of these Officers have any direct knowledge of how the citations they write *might* benefit their pension system, and even if they did, they did not devise the

system. While Dr. ORBAN works with theories, if we follow this one to its logical conclusion this is where it leads: The funds collected by the State of Florida are from automobile policies, that are in turn, to some degree, controlled upward by the amount of losses from traffic accidents. The losses from the traffic accidents are reported whether or not Officers write traffic citations, because most people report their accident and *use* their policies to effect repairs, so even if the CITY OF TAMPA stopped writing traffic citations at accidents/crashes, the reporting and funding would go on. As a matter of fact the increased traffic enforcement by the CITY OF TAMPA, which is alluded to in Dr. ORBAN's pleadings would ultimately be counter productive to *the scheme* alleged by Dr. ORBAN, for *theoretically* where more intense traffic enforcement is conducted *less* accidents occur! That is the entire premise behind directed traffic enforcement such as FHP Wolf Packs working the interstate. So, IF Officers do *more* traffic enforcement (as Dr. ORBAN is alleging TAMPA is doing) then the numbers of traffic accidents *should* per capita *go down!* And, thus the insurance premiums would (in theory) do down and consequently so would the revenues passed on back down to the municipal pensions systems. So, it would be ultimately counter productive for

municipal officers to participate in such a *scheme* if their purpose was to increase the funding of their pensions!

Declaratory / Injunctive Relief

Dr. ORBAN requests relief in the form of Declaratory Judgment and/ or an Injunction. In the case of **City of Los Angeles v. Lyons, 103 S.Ct. 1660, 1665 (1983)** the United States Supreme Court ruled that: *"those who seek to invoke the jurisdiction of the federal courts* ***must satisfy the threshold requirement*** *imposed by Article III of the Constitution by alleging an actual case or controversy."* (emphasis added). Further, that the ***"past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...."*** Id. In the instant case Dr ORBAN has not shown in any way why this equitable relief should be granted to her. Simply because she lives and work in an around Tampa and drives a car? Presumably, if she does not skid into another car, speed, or otherwise violate the law, she has not show how she has not shown a *present case or controversy*. However, the Court will recognize the CITY OF TAMPA Police Officers or other Law Enforcement Officers might be called upon to investigate any traffic accident/crash that Dr. ORBAN or any other person might be involved in, and thus should not be *enjoined* from performing their sworn, legal duties. Moreover, it should be noted by this Honorable Court that as argued supra, ALL the Law Enforcement Agencies in the Thirteenth Judicial Circuit in and for

Hillsborough County operate under the *same* Order of the Traffic Court and therefore, EVEN if this Court were to enjoin the CITY OF TAMPA from following the traffic court's system as now functioning, that would not protect Dr. ORBAN from having exactly the same thing happen to her tomorrow as the result of being at fault in a traffic accident, to wit: being ticketed by: The Florida Highway Patrol, the Hillsborough County Sheriff's Office, the Temple Terrace Police Department, the Tampa International Airport Police, University of South Florida Police Department, Florida Fish & Wildlife Officers, or other agencies and then fighting the "UTC" in Traffic Court (1) *without* the Officer present; and *with* the (2) the traffic citation ("UTC") and (3) the traffic accident/crash report in the hands of the presiding Magistrate, thereby thwarting Dr. ORBAN's alleged efforts herein. Thus the argument that the undersigned has made before in the lower court both orally and in writing has been, if the *system* is flawed, *then* Dr. ORBAN needs to direct her efforts towards the source of the *system* i.e. the County Traffic Court of the Thirteenth Judicial Circuit in and for Hillsborough County, for that is where the current system emanates from and not from the CITY OF TAMPA.

As in the case of Lyons , Dr. ORBAN has *"failed, moreover to establish the basic requirements of the issuance of equitable relief in these circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies as law."* Id. at 1666. With regards to "Declaratory Relief", the Supreme

Court in Ashcroft v. Mattis, 97 S.Ct. 1739, 1740 (1977), held that *"[f]or a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'"* (citing to Aetna Life Ins. v. Haworth, 300 U.S. 227, 242 (1937). In this current action, Dr. ORBAN's request for Injunctive and/or Declaratory Relief are at best *"hypothetical"* and she has not shown any reason to believe there will be anymore contact between her and/or her family members and Officers of the CITY OF TAMPA Police Department *assuming* they obey the law. Further, while the Dr. ORBAN may be upset about being issued a citation and having to go to court to contest the charge, that *"emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement, were the rule otherwise, few cases could ever become moot."* Ashcroft at 1740. The fact that the Dr. ORBAN ultimately was able to get the *careless driving* charge dropped during the second court hearing, where the victim Mr. Collins was not in attendance, does not in any way controvert the fact that there was *probable cause* for the issuance of the "UTC" for *careless driving* under the circumstances investigated by the CITY OF TAMPA Officers. While it is not clear what exactly what type of *declaratory relief* Dr. ORBAN is seeking, a *declaration* that the Plaintiff was *"falsely issued a traffic citation for careless driving"* is inappropriate to say the least.

Dr. ORBAN here is requesting Federal intervention to "enjoin" members of a municipal police department essentially, from contacting her (and presumably her husband and other family members who have gotten tickets) in the future. In essence she is requesting a special dispensation, a shield if you will from prospective police investigations/enforcement in the future. In **Rizzo v. Goode, 423 U.S. 561, 607 (1976)**, the Supreme Court, in a case wherein the respondents requested *injunctive relief* and were for all intents and purposes looking to direct the actions of the police department, ruled that they would not fashion a prophylactic procedure to oversee local law enforcement. The CITY OF TAMPA would here respectfully request that this Honorable Court follow the ruling of the Supreme Court, since Dr. ORBAN's request for *declaratory* and/or *injunctive relief* are equally unjustified in this case, at least as to the CITY OF TAMPA as singled out in a county-wide traffic court system.

CONCLUSION

Based on the reasons argued above, and the authorities cited herein, the Appellee/Defendant, CITY OF TAMPA respectfully requests that this Honorable Court **Affirm** the Orders of the U.S. District Court for the Middle District of Florida **Granting** the Appellee/Defendant, CITY OF TAMPA's Motions for **Summary Judgment** as to all Counts, and for such other relief as the Court may deem appropriate.

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Florida Bar: # 463302

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 22, 2007**, I electronically filed the foregoing ANSWER BRIEF on behalf of Appellee/Defendant, CITY OF TAMPA with the Clerk of the Court of the 11th Circuit Court of Appeals using the CM/EMF system, which will send a notice of electronic filing to the following to: **Joseph D. Magri, Esquire**, **Ward A. Meythaler, Esquire,** and **Gerard J. Roble, Esquire** (Co-counsels for the Appellant/Plaintiff), *Merkel & Magri, P.A.*, 5415 Mariner Street, Suite 301, Tampa, Florida 33609, and to: **Ursula D. Richardson, Esquire**, (Assistant City Attorney for the City of Tampa), City of Tampa City Hall, 315 E. Kennedy Boulevard, 5th floor Tampa, Florida 33602

s/ John A. Makholm
JOHN A. MAKHOLM, ESQ.
Attorney for Appellee/Defendant
City of Tampa, Florida