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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BARBARA ORBAN,

Plaintiff,

CASE NO.:8:04-CV-1904-T23MA

This is a dispositive Motion.

v.

CITY OF TAMPA FLORIDA,

Defendants.

DEFENDANT, CITY OF TAMPA'S, MOTION
FOR FINAL SUMMARY JUDGMENT

COMES NOW, the Defendant City of Tampa ("City") pursuant to Federal Rule 56(e), and hereby moves this Honorable Court for **Final Summary Judgment as to Counts Two and Three of Plaintiff's First Amended Complaint and Demand for Jury Trial [DE#45]** (hereinafter "Complaint"). In support thereof, the City would show unto this Court that there exists no genuine issue as to any material fact that would entitle the Plaintiff to any relief and that the City is entitled to entry of judgment in its favor as a matter of law as to these counts. Specifically, the City, states as follows:

I. Undisputed Facts

1. On March 27, 2000, Barbara Orban was driving southbound on Howard Avenue in a white Mercedes Benz. (See attached Exhibit A: composite exhibit deposition of Barbara Orban)

2. On March 27, 2000, the front end of the white Mercedes Benz driven by Barbara Orban collided with the rear of a BMW. (See attached Exhibit A: composite exhibit deposition of Barbara Orban)

3. The BMW was at a complete stop at the time it was hit by the Mercedes Benz. (See attached exhibit A: composite Exhibit deposition of Barbara Orban)

4. The driver of the BMW was Matthew Collins. (See attached Exhibit A: composite exhibit deposition of Barbara Orban)

5. 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. (See attached Exhibit B: composite deposition of Matthew Collins, Page 4, lines 22-25; page 5, Lines 1-2 and 15-20).

6. Matthew Collins did not contribute to, or cause, the rear-end collision in any manner. (See attached Exhibit B: composite deposition of Matthew Collins, page 6, lines 1-10)

7. There was visible damage to the front end of the Mercedes Benz¹. (See attached Exhibit B: composite deposition of Matthew Collins, page 9, Lines 7-13)

8. There was visible damage to the rear bumper of the BMW. (See attached Exhibit B: composite deposition of Matthew Collins, page 9, Lines 7-13)

9. Tampa Police Department was called to the scene at the request of the Plaintiff to investigate the traffic accident². (See attached Exhibit A: composite deposition of Barbara Orban, page 19, lines 4-14)

¹ Deposition of Matthew Collins, page 9, Lines 7-13

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?

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.

² Deposition of Barbara Orban, page 19, Lines 4-14

"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

10. On March 27, 2000, Officer Edward Bowden and Officer David Duncan of the Tampa Police Department arrived on the scene to investigate the traffic crash.

11. Barbara Orban spoke to the police about the accident³. (See attached Exhibit A: composite deposition of Barbara Orban, page 24, lines 11-20)

12. Matthew Collins spoke to the police about the accident. (See attached Exhibit A: composite deposition of Barbara Orban, page 24, lines 11-20)

13. After the interviews with each driver were concluded Barbara 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.

14. At a traffic hearing on August 30, 2000, Judge Gaston Fernandez found Barbara Orban **guilty** of Careless Driving.

15. The traffic ticket (“UTC”) issued to the Plaintiff on March 27, 2000 for Careless Driving was ultimately dismissed by Judge Eric Myers on January 9, 2002.

16. On September 23, 2005, Barbara Orban filed her First Amended Complaint and Demand for Jury Trial [DE#45] alleging three counts of Malicious Prosecution pursuant to 42 U.S.C. §1983.

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.”

³ **Deposition of Barbara Orban, page 24, lines 11-20**

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.

17. Count One of the First Amended Complaint [DE#45] alleges Malicious Prosecution for a Fourth Amendment Constitutional violation and Counts Two and Three allege Malicious Prosecution for Fourteenth Amendment constitutional violations.

18. Count One of the First Amended Complaint was **dismissed with Prejudice** by this Honorable Court in its Order [DE #74] rendered on April 5, 2006.

II. Leal Argument

As is discussed below, Counts Two and Three of the First Amended Complaint [DE#45] should be dismissed as a matter of law because there was *probable cause* for the issuance of Careless Driving citation (“UTC”) the Plaintiff received on March 27, 2000.

Probable Cause as Matter of Law

The determination on the issue of *probable cause* is one for the Court and not a jury when the material facts are not in dispute. The Eleventh Circuit in *Martinez v. Brink's, Inc.* 2006 WL 551239 (11th Cir. Mar. 08, 2006), found:

To shoulder the “onerous burden” of demonstrating an absence of probable cause, the plaintiff must show that the original criminal proceeding was initiated “without a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged.” *Burns v. GCC Beverages, Inc.*, 502 So.2d 1217, 1219 (Fla.1986). Under this standard, one need not be certain of the outcome of the criminal proceeding to have probable cause for initiating it. *Goldstein v. Sabella*, 88 So.2d 910, 911 (Fla.1956). Moreover, while probable cause is a matter for the jury where the facts are in dispute, probable cause is purely a matter of law for the court where the material facts are undisputed. *Endacott v. Int'l Hospitality, Inc.*, 910 So.2d 915, 922 (Fla. Dist. Ct. App. 2005); *Beizer v. Judge*, 743 So.2d 134, 137 (Fla. Dist. Ct. App. 1999).

The material facts in this case are simple and straightforward. The Plaintiff rear-ended a stopped car. The Plaintiff cannot show that the officers in this case were not warranted in their reasonable belief that she was at fault in this accident and thus was the correct person to be cited

for the traffic offense of careless driving.⁴ (See Exhibit C: Affidavit of Officer Edward Bowden and Exhibit D: Affidavit of Officer David Duncan) Plaintiff, Barbara Orban was the party solely and most responsible for her car coming into contact with Mr. Collins' vehicle on March 27, 2000 and as such, the City is entitled to judgment as a matter of law.

Rear End Collision Presumption in Florida

Florida law presumes the rear/following driver is solely at fault in a rear-end collision. This has become known as the *rear-end presumption*. The presumption is a rebuttal one that recognizes a "sudden stop" exception. The "sudden stop" exception to the rear end presumption is only available to rebut the presumption when the sudden stop occurs at a time or place which is unexpected or unreasonable. Although a sudden stop is a recognized exception, no exception has necessarily been carved out for a "sudden turn"; however, the premise of a sudden turn to rebut the presumption is comparable to the premise of a sudden stop. *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570 at 572 (Fla. 2001) Based on the circumstances which confronted the investigating Officers in this accident investigation, Officers Bowden and Duncan were justified in reasonably presuming that the Plaintiff was likely at fault for this accident⁵.

⁴ **Deposition of Edward Bowden, Page 102, Lines 5-7:**

Q: What does at fault mean to you?

A: "At fault" would be the party more responsible for the two parties coming together in a crash

⁵ **Deposition of Edward Bowden Page 30, Lines 15-18**

Q: Okay is there always a ticket issued when the front of somebody's car bumps the rear of the someone else's car

A: Generally, yes.

Officer Bowden, Page 34, Lines 20 -25 & page 35, line 1-2

Q: Dr. Orban recalls you telling her that night that you had contacted the supervisor about this accident

A: I can't contradict her recollection. I don't recall if I did or not in that case. **I don't know why in this case I would have because generally, if you run into the rear end of somebody, it's a fairly straightforward issuance of a citation to the trailing vehicle.** So in this case why I would've notified my supervisor I really don't know.... {emphasis added}

It is clear from the discovery in this case⁶, that the Plaintiff believes that the reason that she ran into the back of the BMW driven by Mr. Collins was solely due to an abrupt or “sudden” left turn by an SUV that was directly in front of her prior to her collision with Mr. Collins. In, Moran v. Florida Security Electronics, Inc., 861 So.2d 57 (Fla. 3rd DCA 2003), three cars were traveling in the same direction when the lead car made a sudden left turn into a business that was located on the road. The second car stopped as a result of this sudden left turn by the first car and the third car, driven by Mr. Fraga, ran into the back of the second car. The case was submitted to the jury who returned a defense verdict and the plaintiff appealed. The District Court ruled that a directed verdict should have been granted for the plaintiff because the facts of the case did not meet the “sudden stop” exception from Clampitt. The Court reasoned “the street passed through an area with businesses on each side. It could certainly be reasonably expected that a driver may make a left turn into one of the businesses located on that side of the street. Fraga's own self-serving and subjective testimony that he personally did not expect anyone to make a left turn at that point is immaterial”.

The same is true for the instant case; Barbara Orban was traveling on South Howard Avenue during evening rush hour traffic. Howard Avenue is a mixed residential and business district, and the portion of Howard Avenue where this collision occurred was lined with businesses. It was reasonable to expect that a driver might make a left hand turn on this road either leading to a residential area or a business, and it is irrelevant that Barbara Orban did not expect/anticipate that the SUV would make such a turn. The Florida Rear End Collision

⁶

Deposition of Barbara Orban Page 13, Lines 5-13

A: I was driving northbound south on Howard Avenue behind an SUV and the SUV made what was a late turn that was –made a left turn, you know, it was very abrupt, in front of it was stopped traffic. And it was the first rain of many months, and I immediately stepped on the brake as soon as I saw stopped traffic, but the brakes didn’t immediately engage, and then they engaged in the antilock mode and—but I still didn’t stop in time such that **I bumped into Mr. Collins’ car.** (emphasis added).

presumption establishes that the City of Tampa through its officers had probable cause to believe that the Plaintiff was “at fault” and deserving of the traffic citation she received in this case, and therefore summary judgment for the City is appropriate.

Standard for Probable Cause

The Plaintiff received a traffic citation on March 27, 2000 for careless driving. Careless driving is defined under F.S. 316.1925 as follows:

- (1) Any person operating a vehicle upon the streets or highways with 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 a manner shall constitute careless driving and a violation of this section (emphasis added)

The standard for determining the existence of probable cause to arrest is the same under both Florida and Federal law; whether a reasonable person would have believed probable cause existed had he know all facts known by the officer. *Rankin v. Evans*, 133 F.3d 1425 (11th Cir Fla. 1998)

Barbara Orban was not arrested in this case, but the evaluation of whether there was *probable cause* for the traffic citation she received is still whether a reasonable person would believe that Barbara Orban was deserving of the ticket for careless driving if he/she knew all the facts available to Officers Bowden and Duncan on March 27, 2000. The facts which were known to the officers were: (1) two cars were involved in a collision; (2) Barbara Orban was driving the car that struck the rear of Mr. Collins’ vehicle, (3) the Plaintiff and Mr. Collins agreed that Collins was at a complete stop at the time of this rear-end collision, (4) there was visible damage to the rear of Mr. Collins’ car, (5) there was visible damage to the front end of

the Plaintiff's car, (6) Plaintiff admitted that she ran into the back of Mr. Collins, and (7) there were no identifiable independent witnesses to the collision. Based on the facts and the presumption of fault in a rear end collision in Florida; no reasonable person could disagree that it was probable that Barbara Orban was at fault for this accident.

The Plaintiff contends that because she offered an explanation to the officers about the SUV's sudden turn; that should have mitigated her fault for the accident. The fact that the Plaintiff offered a justification for *why* she rear ended Mr. Collins does not negate the fact that she *did* "bump" a stopped car. The Plaintiff's justification for this collision also does not negate the *probable cause* for issuance of the Uniform Traffic Citation she received. It was probable and reasonable to believe that the Plaintiff was not giving due care and attention to the traffic conditions and all other attendant circumstances on March 27, 2000, and was therefore careless with her driving. Had the Plaintiff been more careful she would likely have been able to adjust her driving to compensate for any abrupt or sudden change in the traffic patterns of that day and avoid hitting Mr. Collins⁷. Police officers are not expected to conduct, mini roadside trials before making arrests. *Esposito v. Williamson*, 854 So.2d 694, 696 (Fla. 2nd DCA 2003) citing to *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996), cert. denied, 519 U.S. 867, 117 S.Ct 179 (1996). Even assuming, the plaintiff's explanation was true; the determination, of whether to accept her explanation as mitigation for her fault in the accident or, of her guilt or innocence for the cited traffic offense was one for the court and not the officers on the street.

⁷ **Deposition of Officer David Duncan Page 43, lines 1-8**

Because regardless of what another driver does on the road as far as you saying that drive in front of her, she as another driver, still has to leave enough room in order to avoid things like that. So it would be irrelevant whether or not there was a driver in front of her or not that did that, what you said. Because she would still need to leave enough room to where if somebody did do what you said, she would still be able to stop in time.

Subsequent Dismissal or Acquittal
does not affect Original PC

Although the Uniform Traffic Citation for careless driving was ultimately dismissed in this case against Barbara Orban, the ultimate resolution of the case is irrelevant to a determination about probable cause. The fact that a criminal defendant is acquitted or that charges are dropped against a defendant has no impact in the determination of whether the arrest of defendant was valid. *Smith v. Vaughn*, 946 F. Supp 95, 961 (M.D. Fla. 1996) Again, this was not a physical arrest scenario, nevertheless the logic is still sound that the result in a subsequent traffic hearing would not control whether there was probable cause for the issuance of the citation. To determine otherwise would require omniscience of every police officer prior to issuing any citation; which realistically means that no laws would or could ever be enforced for fear of civil reprisal. As the United States District Court ruled in *Mills v. Town of Davie*, 48 F. Supp.2d 1378, 1380 (S.D. Fla. 1999):

It is important to note at this point that the level of certainty necessary for a finding of probable cause is much lower than that needed for a conviction on the underlying crime. As one court has commented, “officers [a]re not required to conduct a mini trial before arrest[.]” [FN16] **An officer need not have “convincing proof at the time of the arrest,”** [FN17] **and courts should be wary of scrutinizing the circumstances of the arrest through the 20/20 hindsight that comes after charges are dropped or the suspect is acquitted.** [FN18] **“Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part.”** [FN19]

In the instant case, the City of Tampa Officers investigated a traffic accident, to which they responded at the Plaintiff’s request. The Officers made their determination of probable cause that Barbara Orban was at fault for rear-ending another vehicle. This was a reasonable determination under the facts as known to the Officers at the time that they had to make their determination out on the street. Even if there is now, in 20/20 hindsight, some debate as to some of the more esoteric legal concepts, it does not change the fact that the Officers had the

reasonable belief that they had *probable cause* to believe that Barbara Orban was at fault for careless driving, given the information they had available to them.

III. Conclusion

For all of the foregoing reasons, it is respectfully requested that this Honorable Court **grant** the within Motion; enter judgment in favor of the Defendant, City of Tampa and against Plaintiff; and grant such further relief as the Court deems appropriate.

Respectfully submitted,

**DAVID L. SMITH
CITY ATTORNEY, CITY OF TAMPA**

/s/ Ursula D. Richardson
URSULA D. RICHARDSON
Attorney for Defendant, City of Tampa

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 15th day of June, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a Notice of Electronic Filing to the following: Joseph D. Magri, Esquire, Merkle & Magri, P.A., 550 North Reo Street, Suite 301, Tampa, Florida 33609.

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