IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

CASE NO. 4D12-4325

SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County, Florida,

Appellant,

V.

TOWN OF GULF STREAM, et al.,
Appellees.

Appeal of an Order, which is final as to the Appellant, of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

REPLY BRIEF OF APPELLANT, SHERYL STECKLER, in her official capacity as Inspector General of Palm Beach County, Florida

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I. THE TRIAL COURT ERRED IN DENYING THE INSPECTOR GENERAL'S MOTION TO INTERVENE

Standard of Appellate Review

The IG stands by its position that a *de novo* standard of review applies, based on the authority cited in the IG's initial brief. (p. 12) The Appellees assert that an abuse of discretion standard applies. BOCC further asserts that the motion involved disputed material facts. Both assertions are incorrect. However, even under an abuse of discretion standard, the circuit court erred.

General Statement

The BOCC, the Municipalities, and the Clerk each filed separate answer briefs which did not completely track the IG's order of presentation or each other. The majority of their arguments are identical or similar. To avoid redundancy, the IG will reply to all in one brief, addressing the issues in the order set out in the IG's initial brief. The BOCC's answer brief generally follows this order.

A. The Inspector General Has the Capacity to Sue

In the initial brief, the IG explained two bases which establish her capacity to sue. First, the IG is a natural person who is *sui juris* with no legal disability. Even without specific ordinance language providing capacity to sue, this suffices. No Appellee has produced any legal authority to the contrary.

Second, the IG's capacity to sue is in the IG Ordinance, which states:

a. "In the case of a refusal to obey a subpoena served to any person, the inspector general may make application to any circuit court of this state..." § 2-423(3),

b. "This article is enforceable by all means provided by law, including seeking injunctive relief in the Fifteenth Judicial Circuit Court in and for Palm Beach County" § 2-431, and

c. "The inspector general may exercise any of the powers contained in this article upon his or her own initiative." § 2-423(7).

These duties require the capacity to sue, which is therefore necessarily implied.

The only response to the IG's first argument is the BOCC's assertion that the IG is not actually a party to this case, and that the real party must be the OIG. The BOCC's stated rationale is that neither the filing fee for this appeal nor the IG's counsel are being paid for by the IG personally, and the IG would not have expended "public funds to assert an individual claim." (pp. 14-15)

This argument ignores the actual pleadings, the Clerk's own appearance as an individual in her official capacity, and the fact that the IG Ordinance provides this authority to the IG, not the OIG. To the extent that this argument implies that the IG, by appearing individually, in her official capacity, is using public funds on purely personal matters, the argument is transparently false in view of the subject matter involved, and is disrespectful of the IG and the citizens. Many members of this community worked hard to have ethics reform requirements placed in the Charter and Ordinances, and the IG provisions are key components. Over 72% of the voters supported these reforms. The case below jeopardizes some of those

provisions, which have yet to be fully implemented. The citizens who worked to obtain these reforms and the voters who overwhelmingly enacted them have no say in this litigation other than through the IG. These individuals each have the capacity to sue, but lack the "special injury" required for standing. It would be irresponsible for the IG, who is specifically authorized to enforce the entire Ordinance, and who as the prime beneficiary of these Charter and Ordinance provisions has standing to defend them even without specific authorization, to merely watch from the sidelines as parties which are subject to these reforms attempt to invalidate key provisions.

The Appellees allege that the above Ordinance provisions conflict with §125.01(1)(b), Fla. Stat., which provides the BOCC the power to "prosecute or defend legal causes in behalf of **the county or state**..." (Bold added) However, a plain reading of §125.01(1)(b), Fla. Stat. shows that it does not give the BOCC the *exclusive* authority to prosecute or defend legal causes which may involve the county, any more than it gives the BOCC exclusive authority as to the state. There is no conflict between these Ordinance provisions and this law.

The BOCC also argues that § 4.3 of the County Charter, relating to the County Attorney, deprives the IG of the capacity to sue. A natural person cannot be deprived of the capacity to sue by a County Charter. Furthermore, § 4.3 addresses only legal representation, not the capacity to sue, and even as to legal

representation it doesn't apply to the IG. A more complete explanation is in the IG's initial brief. (pp. 18-19)

In its capacity to sue argument the BOCC states:

> "Alternatively, even if one were to conclude that the OIG had the capacity to proceed to court independent of the County Attorney, such capacity could only be read as applying to the functions specifically implicated in the conduct of investigations, audits, and reports." (p. 26)

This argument reflects a misunderstanding of capacity to sue. One either has the capacity to sue or one does not.

The BOCC makes a similar error when it argues that if the head of each county department had the capacity to sue, that "would undo long-standing principles of law and turn local government on its head." (p. 26). This argument is misplaced. The heads of county departments, as natural persons, have capacity to sue. County departments do not. More significantly, county departments and their officials lack the standing to be parties in cases of this nature. In litigation the BOCC speaks for them. The IG has never disputed this. The differences between county departments and officials and the IG are addressed in more detail in Standing.

The BOCC also argues that the IG lacks capacity to sue because there is no specific statute authorizing the BOCC to create a completely separate legal entity. This argument is flawed for a number of reasons:

1. It is flawed because a completely separate legal entity is not required to have the capacity to sue. In *Lederer v. Orlando Utilities Commission*, 981 So. 2d 521,

524-525 (Fla. 2d DCA 2008), the Court noted that "the interconnected relationship between the City and the OUC is both unique and strange" and that "While the OUC is part of the City for some purposes, it is independent and beyond the control of City as to the powers granted to it under the special act." The Court ultimately held that the OUC had the capacity to sue and be sued because of its "substantial autonomy to operate independently from the city government." This is similar to the IG.

2. It is flawed because the public voted to require an "independent" IG and an "independent" Commission on Ethics. The Charter and Ordinances reflect that. Article I, §1 Fla. Const. states: "All political power is inherent in the people." The vitality of this constitutional provision was recently reaffirmed in *Telli v. Broward County*, 94 So. 3d 504 (Fla. 2012). Additional support is found in *Metro-Dade Fire Rescue.* There, the citizens voted to establish in their charter a Metro Dade Fire-Rescue District. Years later the citizens amended the charter to specify that the BOCC "shall not be the governing body of the Metro-Dade Fire and Rescue Service District." When the BOCC attempted to ignore this mandate, the Florida Supreme Court stated:

> "we reject the Commission's argument that the District and the Fire Board possess only those powers conferred by the Commission....The instant case involves the Commission's attempt to pass an ordinance that contravenes the constitution of Dade County, the Charter." *Metro-Dade Fire Rescue Serv. Dist. v. Metro. Dade County*, 616 So. 2d 966, 970 (Fla. 1993).

3. It is flawed because Art. VIII, §1(g), Fla. Const. states: "The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law," and no one has pointed to any general law which conflicts with these provisions in the IG Ordinance.

Throughout this appeal the IG has noted that, without the capacity to sue, the mandatory provisions of the IG Ordinance would become voluntary. In response, the BOCC asserts that it, with the County Attorney, will assume authority to enforce the Ordinance's provisions. (p. 20) However, this would still render the provisions of the Ordinance voluntary instead of mandatory. Whenever the BOCC objects to any IG investigation or audit, it could obstruct it by refusing (or permitting its employees to refuse) to provide documents and testimony. The issuance of an IG subpoena to enforce compliance would be a futile exercise, as the BOCC would surely not sue itself to enforce such a subpoena, nor would the County Attorney argue both sides of the case.

This would also violate the confidentiality of ongoing IG investigations and audits which is provided by §2-423(10) of the IG Ordinance and §§112.3188(2) and 119.0713(2), Fla. Stat.

Finally, this suggestion would require a judicial rewriting of the Charter and Ordinance. The citizens voted for an "independent inspector general" (R 55) and a Charter requiring "independent oversight." (R 52) They did not vote for the

BOCC to exercise this authority over itself and over the municipal governments.

The IG has the capacity to sue.

B. Standing to Intervene

Both the Charter and the Ordinance set a minimum level of funding for the IG. In the case below, the Municipalities allege that requiring them to bear part of the cost of the IG's funding is unlawful. (R 21-27) The BOCC's position throughout has been that, even if this is so, it is not required to make up the difference. As a result, the IG's minimum funding is at risk notwithstanding the fact that no one has directly challenged the Charter requirement that it be no less than "an amount equal to one quarter of one percent of contracts of the County and all other governmental entities subject to the authority of the Inspector General." Charter Article VIII, sec. 8.3.

The Municipalities also allege that the Ordinance's formula for setting the IG's minimum funding results in too much IG funding. They also challenge the Ordinance's procedures for increasing the IG's minimum funding and for approving supplemental funding. If they prevail with any of these claims, both the plaintiff and the defendant will pay less, and the IG's funding will be reduced, resulting in less capability and less oversight for the public welfare. These facts are indisputable and undisputed. They disprove the BOCC's assertion that "the OIG does not stand to gain or lose by the underlying action, the County

does." (p. 33). When these facts are applied to the law relating to standing and intervention, the IG meets the required criteria and is a "necessary party."

> "No declaration shall prejudice the rights of persons not parties to the proceedings..." §86.091, Fla. Stat. (Bold added)

> "'[a]ll persons materially interested in the subject matter of a suit and who would be directly affected by an adjudication of the controversy are necessary parties.'"..."Necessary parties must be made parties in a legal action."
> *Everette v. Fla. Dep't of Children & Families*, 961 So. 2d 270 (Fla. 2007).

> "The proposition that a court cannot properly adjudicate matters involved in a suit when it appears that necessary and indispensable parties to the proceedings are not before the court is well settled." (citations omitted)
> *Fain v. Adams*, 121 So. 562, 563 (Fla. 1929).

Without the IG as a party to the case below, the circuit court may even lack the power to address the issues before it:

> "Parties who seek declaratory relief must show that
> '...there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation... *These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.*'" (citations omitted) (emphasis original)
> *Santa Rosa County v. Admin. Commission*, 661 So. 2d 1190, 1192-1193 (Fla. 1995).

In the instant case, unless the IG is a party, "the antagonistic interests" are not all before the circuit court, and as to some of the Municipalities' claims, the current parties may not even have adverse or antagonistic interests.

The BOCC also argues that the IG lacks standing to intervene and to be a

party to the lawsuit because "there is no legal authority for the proposition that any County department whose funding base or budget may be affected by litigation will have an interest that confers standing." But the IG has never asserted such a proposition. County departments do not have standing. They are subject to the control of the BOCC, which sets policy for them, speaks for them, has total discretion over their funding, and may abolish them at its pleasure. County departments do not oversee the BOCC. The BOCC oversees them.

In contrast to county departments, the Charter requires an IG position and OIG which cannot be abolished by the BOCC, are not subject to the BOCC's control, and which must oversee the actions of the BOCC and its departments, employees, and vendors. Further in contrast, the Charter and Ordinance also establish a minimum level of funding for the IG, and specify that the OIG must be "adequately funded." Finally and as specifically relates to the IG's standing, the IG Ordinance provides:

> "This article is enforceable by all means provided by law, including seeking injunctive relief in the Fifteenth Judicial Circuit Court in and for Palm Beach County." § 2-431
>
> "The inspector general may exercise any of the powers contained **in this article** upon his or her own initiative." § 2-423(7) (Bold added)

These provisions provide the IG standing in the case below. In addition, even without these Ordinance provisions, the IG would have standing to

intervene. Any person whose rights result from an ordinance has the right to defend their rights, and in the process defend the ordinance that afforded those rights. In the initial brief the IG cites to several precedents where this has occurred. (p. 25)

The Appellees assert that the IG is deprived of standing because of the sentence in § 2-429(7) of the IG Ordinance, which states:

> "In the event payment is not timely received, the county or any municipality in compliance with this section may pursue any available legal remedy."

But this provision does not deprive anyone of standing. It only clarifies that payors who are "in compliance with" the payment requirements have standing to compel timely payment from others. As to the IG, this language must be read *in pari materia* with §§ 2-423(7) and 2-431. Listing the IG in § 2-429(7) would have been an unnecessary redundancy. Any other construction would produce an absurd result. For example, if the BOCC and the municipalities all refused to pay, under the BOCC's theory no one would have standing to enforce the payment provisions because no one would be "in compliance with this section."

Furthermore, the language in § 2-429(7) applies only to the receipt of timely payment. The case below involves a challenge to the underlying IG funding requirements in the Charter and Ordinance, not the receipt of timely payment. No party has filed any pleading in the circuit court to compel any other party to make

a timely payment. The IG has standing to intervene and is a necessary party.

II. UPON INTERVENTION THE IG SHOULD HAVE FULL PARTY RIGHTS IN THE CASE.

The IG maintains that she should have full party rights. The Clerk took the same position in her own motion to intervene:

> "Intervenor Clerk & Comptroller ...should be granted full participation in the proceedings. See *Greenhut Const. Co v. Knott*, 247 So. 2d 517, 519-520 (Fla. 1st DCA 1971) ('an intervenor is a party for all purposes with the same rights and privileges of other parties to the cause.' " (R 90, par. 22).

The parties agreed to the Clerk's request, even though she was a "neutral party" who "takes no position on the merits of the complaint." (R 85, par. 3).

However, upon the filing of the IG's Motion to Intervene both the Clerk and the Municipalities vigorously contested the IG's request to file any counterclaim or motion to dismiss based on the ongoing failure to fund the IG, an issue previously inserted into the case by BOCC's own counterclaim, and an issue necessarily related to the underlying case. Had the IG been named as a party to the case at the outset of the litigation, she would have had the unquestionable right to file those pleadings.

All Appellees continue to argue that, even if permitted to intervene, the IG's rights should be strictly limited. They repeatedly cite dicta stating that an intervenor must take the case as he or she finds it. However, the BOCC's answer

brief was filed approximately 2 months after the filing of the IG's Motion to Intervene. Through no fault of the IG, it took over six months to obtain a circuit court ruling on the IG's Motion. During this period the municipalities filed a motion for partial summary judgment, a hearing was conducted on November 29, 2012, and on January 31, 2013 an order entered denying the motion.

This raises the issue of the permissible level of IG participation if intervention is granted. Specifically, the IG wishes to file an answer denying the Municipalities' claim that their obligation to pay is not a lawful "user fee," which in its answer the BOCC erroneously (in the IG's opinion) admitted. See *City of Miami v. Quik Cash Jewelry & Pawn*, 811 So. 2d 756, 758-759 (Fla. 3rd DCA 2002). The IG also wishes to file either an affirmative defense or motion to dismiss the Municipalities claims that are based on "merely the *possibility* of legal injury on the basis of a hypothetical 'state of facts which have not arisen' and are only 'contingent, uncertain, [and] rest in the future,'" as such claims are inappropriate for a declaratory judgment action. *Santa Rosa County v. Admin. Commission*, 661 So. 2d 1190, 1193 (Fla. 1995). (emphasis original) Depending on this Court's ultimate decision in the related mandamus case, the IG may also need to file pleadings relating to the ongoing failure to fund.

The IG's position is that, as a necessary party, she may file all of these pleadings, just as if she had been properly named as a defendant at the outset. Any

other ruling would encourage the practice of excluding a necessary party defendant at the outset of litigation, in order to impede that party in its defense of the cause.

The IG's position is supported by *Greenhut Const. Co v. Knott*, 247 So. 2d 517, 519-520 (Fla 1st DCA 1971), and even a case relied on by the Appellees for their own assertions in this regard:

> "We conceive this to mean that the intervenor may not assert matters extraneous to his own interests, but that he may avail himself of any and all arguments which relate to derivation and extent of his own interests, **whether or not these matters have been previously asserted by one of the original parties."** *Williams v. Nussbaum*, 419 So. 2d 715, footnote 1 (Fla. 1st DCA 1982). (Bold added) See also *Gray v. Standard Dredging*, 149 So. 733 (Fla. 1933).

The BOCC maintains that this issue must be addressed by the trial court. The IG submits that, as a matter of law, a trial court does not have the discretion to deny a necessary party the right to fully defend its interests, irrespective of the state of the proceeding at which intervention is finally permitted, and respectfully requests a ruling on this issue.

One other issue remains. The Appellees continue to argue that a circuit court may deny intervention to even a "necessary party" merely because that party requests permission to introduce "new and complex issues" into the litigation. They argue that the circuit court was justified in denying the IG's motion to intervene for this reason. This argument is incorrect as to fact and as to law.

The pleadings which the IG requested permission to file were not new and

complex. They all related to the parties' actions during the suit involving the failure to fund this office, which itself was already an issue in the case as a result of the BOCC's counterclaim. Any "complex" issues relating to the IG's capacity to sue and standing not issues the IG sought to introduce, but were the product of the Appellees' challenge to the IG's motion to intervene.

Furthermore, even if the IG had requested authorization to introduce new issues into the case, the circuit court could have simply denied that request. The circuit court had no authority to deny intervention to a necessary party simply because of that request. Appellees' premise is based on pure dicta unsupported by legal precedent.

In one case advanced by Appellees, the court affirmed the denial of a motion to intervene which involved the introduction of new issues. But the court observed that "The appellants do not have the "interest" required to support an intervention in this litigation." Therefore, they were not a necessary party. *Oster v. Cay Consr. Co*, 204 So. 2d 539, 542 (Fla 4th DCA 1967).

In the only other case advanced to support this premise the Court stated:

> "An insurer, Allstate, appeals an order denying its motion to intervene in a wrongful death action in which the estate of the decedent alleges that Allstate's insured negligently shot and killed the decedent. The insurer's petition for intervention in effect seeks to have an adjudication that (1) the insured was late in filing a notice of claim, (2) the insurer was substantially prejudiced by the late notice of claim, (3) the insured's action in killing plaintiff's decedent was intentional and willful rather than negligent, and (4) [by implication] that the insurer is not liable to defend or pay under

> its policy because of the prejudicial late notice of claim and because the insured's actions were intentional rather than negligent."
> *Allstate Ins. Co. v. Johnson*, 483 So. 2d 524, 524-525 (Fla. 5th DCA 1986).

This shows that the only basis for Allstate's motion to intervene was to obtain an adjudication of non-coverage. Also, §627.7262, Fla. Stat. specifically prohibited naming the company as a party in a liability case. See *Canadian Home Ins. Co. v. Norris*, 471 So. 2d 217 (Fla. 4th DCA 1985). Allstate was not a necessary party.

Conclusion

The IG has the capacity to sue. She would be directly affected by the dispute in the court below, and therefore has standing and in fact is a necessary party to the case. Under any applicable standard, the decision of the circuit court was erroneous and should be reversed, with instructions to allow the IG to intervene with full party rights in the case below so that she:

> "may avail [herself] of any and all arguments which relate to derivation and extent of his own interests, whether or not these matters have been previously asserted by one of the original parties." *Williams v. Nussbaum*, 419 So. 2d 715, footnote 1 (Fla. 1st DCA 1982).

Respectfully submitted this 7th day of February, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant Inspector General has been provided by email this 7th day of February, 2013, to those on the attached service list.

CERTIFICATE OF E-FILING

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant Inspector General has been e-filed this 7th day of February, 2013, pursuant to the requirements of Administrative Order No. 2011-1.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Initial Brief is Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

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