FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4984

FLORIDA DEPARTMENT OF TRANSPORTATION and KEVIN J. THIBAULT, in his official capacity as Secretary of Florida Department of Transportation,

Appellants/Cross-Appellees,

v.

TROPICAL TRAILER LEASING, LLC, et al.,

Appellees/Cross-Appellants.

On appeal from the Circuit Court for Leon County.
Karen Gievers, Judge.

November 30, 2020

B.L. THOMAS, J.

The Florida Department of Transportation appeals a final order which granted Appellee/Cross-Appellant Tropical Trailer Leasing a permanent injunction and ordered the Department to refund tolls paid by Tropical Trailer. In its cross-appeal, Tropical Trailer appeals the trial court's decision to strike the class allegations from the second amended complaint.

Tropical Trailer leases trailers to third parties. It sued to invalidate the Department's method of assessing tolls for towed trailers under Florida's "Toll-By-Plate" system. Tropical Trailer asserted that the Department erroneously assessed tolls against the trailer owner instead of the owner of the vehicle towing the trailer. Tropical Trailer also asserted a purported class of approximately forty other trailer-leasing companies subject to the same unauthorized billing procedures. Tropical Trailer moved to certify four classes, three of which included all trailer owners who were charged a highway toll.

The trial court granted Tropical Trailer's motion for class certification, and the Department appealed. *Dep't of Transp. v. Tropical Trailer Leasing, LLC*, 229 So. 3d 1251, 1252 (Fla. 1st DCA 2017). This Court reversed and remanded, holding that where Tropical Trailer's class definition excluded trailer owners that also owned the vehicle pulling the trailer, but its proposed classes included *all* trailer owners, "Tropical Trailer improperly sought to expand the scope of the class through its motion for class certification and, instead, should have further moved to amend its complaint. Fla. R. Civ. P. 1.220(d)(1)." *Id.* at 1256. This Court also held that "the trial court abused its discretion by expanding the scope of the class beyond the class definition proposed in the amended complaint." *Id.*

On remand, Tropical Trailer did not move to certify a class, but filed a second amended complaint which included class-action allegations. Tropical Trailer also sought declaratory, injunctive, and monetary relief. The trial court struck the class-action allegations in the second amended complaint as internally inconsistent but allowed Tropical Trailer to continue to trial without the class-action claims. Tropical Trailer moved for reconsideration, which the trial court denied. Tropical Trailer also filed a motion for leave to file a third amended complaint to cure the internal inconsistencies in the class allegations and to add a new count for common-law refund. The trial court denied the motion.

After a three-day bench trial, the trial court entered a final judgment for Tropical Trailer, finding the trailers were under the control of their lessees at the time the tolls were charged and that

owners of a vehicle should not be responsible for tolls if the vehicle was in another's custody, care, or control. The trial court also held that from October 13, 2010, to June 30, 2012, the Department "had no lawful authority" to charge a toll to Tropical Trailer because the trailers were not "self-propelled." For tolls assessed since July 1, 2012, the trial court found that because Tropical Trailer was not the operator of the trucks and did not use the Turnpike, Tropical Trailer was entitled to a refund of all tolls and citation payments.

The trial court ordered the Department to refund $53,628.62 in toll charges and permanently enjoined the Department from charging Tropical Trailer for tolls in the future where Tropical Trailer's trailers were in the custody of another person, unless (1) the Department first provided all "pertinent information"; and (2) Tropical Trailer did not demonstrate its trailer was in the custody, care, or control of another person. Lastly, the trial court's order enjoined the Department "from any conduct which results in the plaintiffs being charged any tolls or citations or subjected to any penalties including registration holds for non-payment by those with the care, custody or control of the plaintiffs' trailers/chassis involved in alleged violations."

The Department argues the trial court erred by enjoining the Department from charging tolls to Tropical Trailer because the injunction is facially defective. We agree. We reverse and remand with directions to vacate the injunction and the award of common-law refund.

The Department's arguments that the order is facially defective are preserved on appeal, as the Department presented the same arguments to the trial court. *See Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.")

Review of a trial court's grant of an injunction is a mixed standard of review. "An injunction resting on factual findings must be reviewed for abuse of discretion. An injunction predicated on purely legal matters, however, is reviewed *de novo*." *McIntosh v.*

Myers, 271 So. 3d 159, 160–61 (Fla. 1st DCA 2019) (internal citations omitted).

To obtain a permanent injunction, the petitioner must "establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." *Liberty Counsel v. Fla. Bar Bd. of Governors*, 12 So. 3d 183, 186 n.7 (Fla. 2009) (internal citations omitted). Where the trial court fails "to make specific findings regarding irreparable harm and an unavailable remedy at law, the order is facially defective under Florida Rule of Civil Procedure 1.610(c) " and requires reversal and remand for the trial court to enter an appropriate order based on the evidence received at trial. *Kirkland v. PeoplesSouth Bank*, 70 So. 3d 662, 664 (Fla. 1st DCA 2011) (holding order permanently enjoining vendor was facially defective).

The only factor the trial court considered was whether Tropical Trailer established a clear legal right to avoid the payment of tolls if its trailer was in the care, custody, or control of another person. Tropical Trailer argues that the assessment of tolls is illegal under section 316.1001, Florida Statutes. We disagree.

Just as in *Tropical Trailer Leasing, LLC v. Miami-Dade Expressway Authority (MDX)*, in which Tropical Trailer sought the same injunction and declaratory relief it now seeks before this Court, Tropical Trailer and the trial court failed to make the distinction between the mere assessment of tolls and receiving a citation for failure to pay tolls. 278 So. 3d 198, 203 (Fla. 3d DCA 2019). Tolls are assessed under rule 14-100.005, and the mere assessment of tolls does not trigger section 316.1001, Florida Statutes.

Florida Administrative Code Rule 14-100.005 establishes the process of assessing tolls through video billing on the Florida Turnpike System and states in part that "[i]f a *vehicle* passes through a toll collection facility . . . a photographic image of the vehicle's license plate will be captured at the toll lane and the first-listed registered owner of that vehicle, except as provided below, will be considered the TOLL-BY-PLATE customer." Fla. Admin. Code R. 14-100.005(3) (2017) (emphasis added). An invoice of the accumulated toll amounts and an administrative charge is then

mailed to the customer for payment. Fla. Admin. Code R. 14-100.005(8). If the customer fails to pay the toll after twenty days, a second invoice is sent. *Id.* If after the second invoice, the toll has still not been paid, the rule states:

> [T]he Department will pursue the amounts owed to collection to include: issuance of a Uniform Traffic Citation for each individual unpaid toll transaction associated with the original invoice, initiation of a motor vehicle license plate or revalidation sticker registration hold or stop process pursuant to Section 316.1001(4), F.S., or referral of the total unpaid amounts owed to a collection agency or attorney for collection.

Id.

Thus, the Department can issue a Uniform Traffic Citation or take other enforcement actions only after a customer fails to pay the second toll invoice. Therefore, section 316.1001, Florida Statutes, and its administrative remedy is "only available to owners of motor vehicles that have incurred 'a citation issued for failure to pay a toll.' This administrative remedy is not for those who merely receive a bill for a toll through the Toll-by-Plate system." *MDX*, 278 So. 3d at 202 (citing § 316.1001(2)(c), Fla. Stat.).

Furthermore, the tolls were properly assessed under rule 14-100.005, which provides that tolls may be assessed on "a vehicle [that] passes through a toll collection facility." *See* Fla. Admin. Code R. 14-100.005(3). The definition of "vehicle" is "[e]very device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices used exclusively upon stationary rails or tracks." § 316.003(75), Florida Statutes (2010). This definition has remained unchanged since 2010, and clearly includes trailers that are drawn upon a highway. *See id.* Therefore, the trial court erred by holding that the Department's current method of assessing tolls on trailer owners was illegal.

The trial court also erred by holding that Tropical Trailer did not have an adequate remedy at law. Tropical Trailer had an adequate remedy in contract law with their customers or drivers.

See MDX, 278 So. 3d at 200 ("[R]elief is through their contractual relations with their customers or drivers, or with the legislature, but not this Court."). In the present case, the record indicates Tropical Trailer conceded that it had recouped from its customers a significant amount of the tolls paid to the Department. The record also indicates that Tropical Trailer's lease states that where a lessee fails to pay a toll, the lessee is to reimburse Tropical Trailer for the amount incurred and pay Tropical Trailer an administration fee. Accordingly, the trial court erred in concluding Tropical Trailer did not have an adequate remedy at law.

The trial court further erred by finding Tropical Trailer established irreparable harm where Tropical Trailer alleged that it would have to pay the tolls the Department assessed and litigate the issue "in perpetuity." The assessment of tolls does not constitute irreparable harm because it was compensable by a monetary award. *See Bautista REO U.S., LLC v. ARR Invs., Inc.*, 229 So. 3d 362, 365 (Fla. 4th DCA 2017) ("Irreparable harm is not established if the harm can be adequately compensated by a monetary award."); *see also State Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173, 175 (Fla. 2d DCA 1995) (holding trial court erred by finding irreparable injury where Continental Car only alleged money damages and loss of business to a competitor). Therefore, the trial court erred by granting the permanent injunction where Appellant failed to establish a clear legal right, an inadequate remedy at law, and that irreparable harm would arise absent injunctive relief. *See Liberty Counsel*, 12 So. 3d at 186 n.7.

After the trial court incorrectly determined that the tolls were improperly assessed, the trial court ordered the Department to refund tolls paid by Tropical. We review the trial court's ruling de novo. *Fortune v. Gulf Coast Tree Care Inc.*, 148 So. 3d 827, 828 (Fla. 1st DCA 2014) (citing *Lombardi v. S. Wine & Spirits,* 890 So. 2d 1128, 1129 (Fla. 1st DCA 2004)) ("To the extent resolution of an issue requires statutory interpretation, review is de novo."). Because the tolls were assessed pursuant to law, as discussed above, the trial court erred by ordering the Department refund the tolls paid by Tropical.

Lastly, the Department argues the trial court erred by denying the Department's request to proffer testimony by Mr. Holland regarding the Department's decision to use front-facing cameras and how the cameras capture the front license plates. We disagree because this testimony was already in evidence. *See Taylor v. Dep't. of Transp.*, 701 So. 2d 610, 612 (Fla. 2d DCA 1997) (holding "proffer" is preservation for record purposes of excluded evidence, and requires only sufficient offer of proof of excluded testimony purposes). Mr. Holland had previously testified and submitted an affidavit as to the evolution of video billing, the installation, and the use of the cameras. Therefore, the trial court did not err by denying the Department's request to proffer testimony that was already in evidence. *Id.*

Cross-Appeal

First, Tropical Trailer argues the trial court erred by granting the Department's motion to strike the class allegations from its second amended complaint without granting Tropical Trailer leave to amend.

"[T]he standard of review for an order granting a motion to strike is abuse of discretion." *Wildflower, LLC v. St. Johns River Water Mgmt. Dist.*, 179 So. 3d 369, 373 (Fla. 5th DCA 2015) (citing *Upland Dev. of Cent. Fla., Inc. v. Bridge,* 910 So. 2d 942, 944 (Fla. 5th DCA 2005)). Florida Rule of Civil Procedure 1.140(f) states, "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." However, where a complaint states a cause of action but is not maintainable as a class action, the portions of the complaint relating to a class action should be stricken. *See Harrell v. Hess Oil & Chem. Corp.*, 287 So. 2d 291, 294 (Fla. 1973) (citing *Balbontin v. Porias*, 215 So. 2d 732 (Fla. 1968)) (noting that where a complaint as a whole states a cause of action the remaining parts could be considered as surplusage); *see Equitable Life Assurance Soc'y of U.S. v. Fulleri*, 275 So. 2d 568, 569 (Fla. 3d DCA 1973) ("A more appropriate motion to have been filed by the defendant would have been one to strike from the complaint the matter relating to the class action.").

Tropical Trailer filed a second amended complaint, which amended the class allegations. The Department moved to dismiss

the complaint and separately moved to strike the class allegation because the class definitions were internally inconsistent, which Tropical concedes. The trial court denied the Department's motion to dismiss the complaint for failure to state a cause of action but granted the Department's separate motion to strike the class allegation because the class allegations were internally inconsistent. In granting the Department's motion, the trial court stated, "[t]he allegations of the complaint themselves state a cause of action, and that's what the Court reflected in its order. But, the Court is going to . . . grant the motion to strike the allegations regarding class action, and we're going to go forward with respect to getting this case on the trial docket." Thus, the trial court did not abuse its discretion in striking the class allegation where the complaint as a whole stated a cause of action. *See Harrell*, 287 So. 2d at 294.

In addition, the trial court did not err by denying leave to amend the class allegations. In general, "leave to amend a complaint 'shall be given freely when justice so requires.'" *Fla. Nat'l Org. for Women, Inc. v. State*, 832 So. 2d 911, 915 (Fla. 1st DCA 2002) (quoting Fla. R. Civ. P. 1.190(a)). However, a trial court may "deny any party the right to amend his pleadings if the proposed amendments will change or introduce new issues or materially vary the grounds for relief . . . ." *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817, 819 (Fla. 1st DCA 1971) (footnotes omitted) (holding trial court did not abuse its discretion in denying appellant right to file amended complaint two weeks before scheduled trial pending several years in the court). And, a trial court may "deny further amendments where a case has progressed to a point that liberality ordinarily to be indulged has diminished." *Pangea Produce Distribs., Inc. v. Franco's Produce, Inc.*, 275 So. 3d 240, 242 (Fla. 3d DCA 2019) (quoting *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981)).

Here, Tropical Trailer moved for leave to file a third amended complaint on March 19, 2018, stating the primary purpose of the amendment was to correct the internal inconsistency between the proposed class definitions and to add a count for common-law refund. The trial court denied the motion, noting that nearly three and a half years had passed since the case was filed, citing the

Florida Supreme Court's time standards for civil trials, and noting that the case was set for trial on May 11, 2018.

The trial court did not abuse its discretion in denying Tropical Trailer leave to file a third amended complaint which introduced a new count for common-law refund so late in the litigation. *See Brown*, 252 So. 2d at 819.* For these same reasons, we also affirm the trial court's denial of Tropical Trailer's "Motion for Reconsideration," in which Tropical Trailer argued it should have been allowed to either amend its complaint or strike only paragraph 70 of the second amended complaint.

Second, Tropical Trailer argues the trial court violated its right to due process by granting the Department's motion to strike, denying Tropical Trailer's motion for reconsideration, and denying Tropical Trailer's motion for leave to file a third amended complaint. On appeal, Tropical Trailer asserts that "the trial court relied on a procedural technicality to strike the class allegations in the Second Amended Complaint and then denied Tropical's request to file a Third Amended Complaint, solely because the case had been pending too long. By doing so, the trial court effectively denied Tropical a meaningful opportunity to be heard on its request for class certification."

However, Tropical Trailer had notice and a meaningful opportunity to be heard. *Williams v. Salem Free Will Baptist Church*, 784 So. 2d 1232, 1234 (Fla. 1st DCA 2001) ("The benchmarks of procedural due process are notice of hearing and meaningful opportunity to be heard."). During case management conferences, a trial court may "schedule other conferences or determine other matters that may aid in the disposition of the action." Fla. R. Civ. P. 1.200. The record indicates that Tropical

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* Although the trial court's denial for leave to file a third amended complaint only referenced the age of the case, we affirm because the record reflects that the age of the case and the addition of a new count supports the trial court's decision. *See Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002) (holding the "tipsy coachman" doctrine allows an appellate court to affirm a trial court that reaches the right result, but for the wrong reasons if there is any basis which would support the judgment in the record).

Trailer had notice that the trial court might discuss the Department's motion to strike where Tropical Trailer attached a copy of the Department's motion to its request for a case management conference. And during the case management conference, the trial court afforded Tropical Trailer an opportunity to be heard before the trial court granted the motion to strike. Accordingly, Tropical Trailer had notice and a reasonable opportunity to be heard, and the trial court did not deny due process by granting the motion to strike or denying Tropical Trailer's motion for reconsideration.

REVERSED in part, AFFIRMED in part, and REMANDED.

WINOKUR and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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