

**IN THE CIRCUIT COURT OF
THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY,
FLORIDA**

Appellants/Plaintiffs

DAVID W. FOLEY, JR., and
JENNIFER T. FOLEY

v.

Appellees/Defendants

ORANGE COUNTY, *a political subdivision of
the State of Florida, and,*

ASIMA AZAM, TIM BOLDIG, FRED
BRUMMER, RICHARD CROTTY, FRANK
DETOMA, MILDRED FERNANDEZ,
MITCH GORDON, TARA GOULD, CAROL
HOSSFELD, TERESA JACOBS,
RODERICK LOVE, ROCCO RELVINI,
SCOTT RICHMAN, JOE ROBERTS,
MARCUS ROBINSON, TIFFANY
RUSSELL, BILL SEGAL, PHIL SMITH, *and*
LINDA STEWART,
*individually and together,
in their personal capacities.*

2016-CA-007634-O

NOTICE OF APPEAL

RECEIVED, 01/20/2021 08:40:39 AM, Clerk, Fifth District Court of Appeal

NOTICE IS GIVEN that plaintiffs/appellants David W. Foley, Jr., and Jennifer T. Foley, appeal to the Fifth District Court of Appeal, the final order of this court filed November 10, 2020, and rendered December 18, 2020, dismissing with prejudice plaintiffs'/appellants' amended complaint as to defendant Orange County.

Conformed copies of the orders designated in this notice of appeal are attached in accordance with Fla. R. App. P. 9.110(d).

This notice is timely per Fla. R. Jud. Admin. 2.514(a)(1)(C), as the notice filing date specified by Fla. R. App. P. 9.110(b), is Monday, January 18, 2021.

CERTIFICATE OF SERVICE

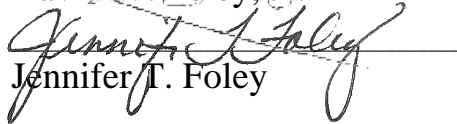
Plaintiffs certify that on January 18, 2021, the foregoing was electronically filed with the Clerk of the Court and served to the following:

Linda S. Brehmer Lanosa, Assistant County Attorney,
201 S. Rosalind Av., 3rd Floor, Orlando FL, 32802, linda.lanosa@ocfl.net;

Ronald L. Harrop, O'Connor & O'Connor LLC,
800 N. Magnolia Av. Ste 1350, Orlando FL, 32789, rharrop@oconlaw.com;

Gail C. Bradford, Dean, Ringers, Morgan & Lawton PA,
PO 2928, Orlando FL 32802, gbradford@drml-law.com

David W. Foley, Jr.


Jennifer T. Foley

Date: January 18, 2021

Plaintiffs/Appellants

1015 N. Solandra Dr.

Orlando FL 32807-1931

PH: 407 721-6132

e-mail: david@pocketprogram.org

e-mail: jtfoley60@hotmail.com

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NUMBER: 2016-CA-007634-O

DAVID W FOLEY, JR; JENNIFER
T FOLEY

Plaintiff(s),

vs.

ORANGE COUNTY, et alia, Defendants

_____ /

ORDER ON MOTION FOR REHEARING AND MOTION TO AMEND

THIS CAUSE having come on to be heard by the Court and the Court being otherwise duly advised in the premises it is hereby **ORDERED and ADJUDGED** that:

1. The Motion For Rehearing And Motion To Amend is hereby denied.

DONE AND ORDERED on this 18 day of December, 2020.



Heather L. Higbee
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 18 day of December, 2020 by using the Florida Courts E-Filing Portal System.

Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

I HEREBY CERTIFY that a copy of the foregoing was furnished on this 18th day of December, 20 20 by U.S. Mail to:

David W Foley, Jr	1015 N Solandra Dr Orlando, Fl 32807-1931
Ronald Harrop, Esq.	800 N. Magnolia Avenue. Ste 1350, Orlando, FL 32789
William C. Turner, Jr. Assistant County Attorney	PO Box 2687, Orlando, FL 32802
Derek Angell, Esquire	840 S. Denning Drive. 200, Winter Park FL 32789
Lamar D. Oxford, Esquire	PO Box 2828, Orlando FL 32802
Linda Sue Brehmer-Ianosa, Esq.	Orange County Attorney.s Office 201 S Rosalind Ave Fl 3 Orlando Fl 32801
Eric J Netcher, Esquire	189 S Orange Ave Ste 1830 Orlando Fl 32801
Jessica Christy Conner, Esquire	Dean Ringers Morgan & Lawton P A Po Box 2928 Orlando Fl 32802

Judicial Asst. to Heather L.
Higbee

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

DAVID W. FOLEY and JENNIFER
T. FOLEY,

CASE NO.: 2016-CA-007634-O

Plaintiffs,

v.

ORANGE COUNTY, PHIL SMITH, CAROL
HOSSFELD, MITCH GORDON, ROCCO
RELVINI, TARA GOULD, TIM BOLDIG,
FRANK DETOMA, ASIMA AZAM,
RODERICK LOVE, SCOTT RICHMAN,
JOE ROBERTS, MARCUS ROBINSON,
RICHARD CROTTY, TERESA JACOBS,
FRED BRUMMER, MILDRED FERNANDEZ,
LINDA STEWART, BILL SEGAL, and
TIFFANY RUSSELL,

Defendants.

**ORDER DISMISSING THE AMENDED COMPLAINT WITH PREJUDICE AS TO
ORANGE COUNTY**

THIS MATTER came before the Court for a hearing on December 11, 2017¹ upon the “Orange County’s Amended Motion to Dismiss Plaintiffs’ Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense,” filed on November 20, 2017. The Court, having considered the Motion, case law, and arguments of counsel from both parties, and otherwise being duly advised in the premises, finds as follows:

¹ The Court would like to explain why this Order is so delayed. Plaintiffs filed an appeal on another final order entered in this case, and the Court was without jurisdiction to enter this order until the Fifth District recently entered its mandate. Additionally, the undersigned rotated out of this general civil division at the end of 2017, and only recently became aware that this Order was still outstanding.

After carefully reviewing the Amended Complaint, the Court finds that Plaintiffs fail to state a cause of action as to every claim, and the Amended Complaint must be dismissed with prejudice, as Plaintiffs cannot cure these deficiencies for the reasons discussed below. Counts I and II attempt to make out claims of declaratory relief and injunctive relief for portions of the Orange County Code that have since been amended. However, a court only has jurisdiction over a declaratory judgment action where there is a valid or existing case or controversy between the litigants. *See Rhea v. Dist. Bd. of Trustees of Santa Fe College*, 109 So. 3d 851, 859 (Fla. 1st DCA 2013). Because Orange County has amended the relevant portions of the zoning ordinance, such action rendered these counts moot. To the extent that Plaintiffs attempt to state a cause of action under the amended zoning ordinance, any such declaration from the Court would be an improper advisory opinion, as the amended zoning ordinances serve as no ripe dispute between the parties. *See Aphrop v. Detzner*, 162 So. 3d 236, 242 (Fla. 1st DCA 2015) (“A court will not issue a declaratory judgment that is in essence an advisory opinion based on hypothetical facts that may arise in the future.”).

Plaintiffs simply title Count III “Tort”, with a subtitle of “Negligence Unjust Enrichment and Conversion.” Any attempt to state a cause of action for negligence is belied by the fact that Plaintiffs fail to allege any duty recognized under Florida negligence law on the part of Orange County, as well as the breach of such duty. More importantly, even if they had, Defendant owes Plaintiffs no duty of care in how it carries out its governmental functions. *See Trianon Park Condo. Ass’n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Similarly, Plaintiffs fail to state a claim for unjust enrichment, as the fees at issue were paid by Plaintiffs in 2008 and were all connected with a process that Plaintiffs themselves initiated. Plaintiffs’ conversion claim likewise fails because Plaintiffs fail to plead that Defendant ever took possession of items

belonging to them. *See DePrince v. Starboard Cruise Svs.*, 163 So. 3d 586, 598 (Fla. 3d DCA 2015).

Count IV purports to state a cause of action for inverse condemnation, as well as damages associated with lost business revenue. Plaintiffs' inverse condemnation claim automatically fails because they did not allege and they cannot allege that Defendant's action prevented them from all beneficial uses of their property. *Pinellas Cty. v. Ashley*, 464 So. 2d 176 (Fla. 2d DCA 1985).² Instead, the only "right" that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a property right. *Hernandez v. Dept. of State, Div. of Licensing*, 629 So. 2d 205, 206 (Fla. 3d DCA 1993). As to any associated damages, Plaintiffs failed to plead, and moreover fail to meet, the necessary statutory requirements. §127.01, Fla. Stat. (2016); *Sys. Component Corp. v. Fla. Dept. of Transp.*, 14 So. 3d 967, 975–76 (Fla. 2009). Plaintiffs therefore cannot state a cause of action as to Count IV.

Count VII attempts to state a cause of action for due process. This is not a recognized cause of action under Florida law. *Fernez v. Calabrese*, 760 So. 2d 1144 (Fla. 5th DCA 2000); *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997). This Count therefore must be dismissed.³

Based on the foregoing, the Court has carefully reviewed and considered each Count lodged against Defendant, Orange County, in the Amended Complaint, and finds each of them must be dismissed for failure to state a cause of action. For reasons explained above, each attempted cause of action could not be cured by filing another amended complaint; the Court therefore dismisses Plaintiffs' Amended Complaint with prejudice.

² Even if Plaintiffs could successfully prove that Defendant did deprive them of the use of their property, inverse condemnation is not the proper remedy—rather, a court would have to determine if the ordinance is unenforceable and should be stricken. *Ashley*, 464 So. 2d at 176. Because the ordinance has since changed, this remedy is not available to Plaintiffs either.

³ Plaintiffs also seek money damages for an alleged violation of 42 U.S.C. § 1983 for violation of their due process. This allegation must be similarly dismissed with prejudice for failure to state a cause of action because they do not allege and cannot prove that they were deprived of life, liberty or property (i.e., substantive due process) under the facts of this case.

Accordingly, the following is hereby **ORDERED AND ADJUDGED**:

1. "Orange County's Amended Motion to Dismiss Plaintiffs' Amended Complaint Pursuant to Florida Rules of Civil Procedure 1.140(b)(1) and (6), Amended as to Raise Statute of Limitations Defense" is **GRANTED**.
2. The Plaintiffs' Amended Complaint, filed February 25, 2017, is **DISMISSED with prejudice as to Defendant, Orange County**.
3. Therefore, **final judgment** is hereby entered in favor of Defendant, Orange County. The Plaintiffs, David W. Foley and Jennifer T. Foley, shall take nothing by this action against said Defendant, and said Defendant shall go hence without day.
4. The Court reserves jurisdiction over any claims made or to be made by said Defendant for an award of costs and attorney's fees against the Plaintiffs.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 10th day of November, 2020.



HEATHER L. HIGBEE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 10, 2020, a true and accurate copy of the foregoing was e-filed using the Court's ECF filing system, which will send notice to all counsel of record.



Judicial Assistant