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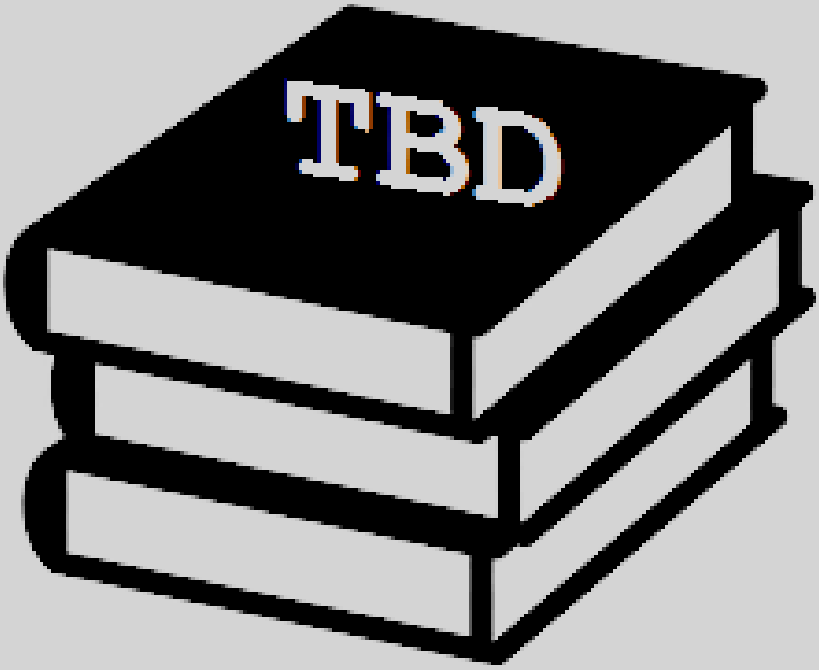

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA, FIFTH DISTRICT

JENNIFER M. FOSTER-GARVEY

Appellant,

Case No.5D-172831

v.

MCDONALD'S BAM-B ENTERPRISES
d/b/a MCDONALD'S

Appellee.

_____/

On Appeal from a Final Order of the State of Florida
Division of Administrative Hearings
Appellant's Reply Brief

INDEX

ISSUE I. WHETHER THE FINDINGS OF FACT "THERE WAS NO REASONABLE CAUSE TO BELIEVE THAT UNLAWFUL DISCRIMINATION HAD OCCURRED,'' WAS CLEARLY ERRONEOUSLY

ISSUE II. WHETHER A DESTRUCTION OF EVIDENCE ARGUMENT WAS PRESERVED AND SUPPORT BY THE UNDERLYING RECORD ON APPEAL" IF YES, WHETHER ALJ MCARTHUR ERRED BY NOT IMPOSING SANCTIONS PER RULE 1.380, FLA. R. CIV. P. (RESTATED)

ISSUE III. WHETHER THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT ALJ MCARTHUR'S FINDINGS? (RESTATED)

ISSUE IV. WHETHER THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT ALJ MCARTHUR'S FINDINGS? (RESTATED)

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ISSUE X. WHETHER THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT ALJ MCARTHUR'S FINDINGS? (RESTATED).

ISSUE XI. WHETHER THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT ALJ MCARTHUR'S FINDINGS? (RESTATED)
XI. THE ADMINISTRATVE LAW JUDGE DISPLAYED "CONFIRMATION BIAS

ISSUE XII: WHETHER THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT ALJ MCARTHUR'S FINDINGS? (RESTATED)

SUMMARY OF ARGUMENT

The Appellant is appealing the decision of the Administrative Law Judge of the Division of Administrative Hearings, as the Appellant has pled a proper cause of action/complaint regarding public accommodation discrimination, breach of due process, spoliation of evidence, confirmation bias, lack of impartiality, and proof that the hearing officer's finding of no discrimination should be set aside on the finding that it is clearly erroneous,or is based on clearly erroneous findings of fact. Whereas, under the statutory requirements of Section §120.68(7)(c) it states that the court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds the agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57.

TABLE OF CASES AND AUTHORITIES

CASES **PAGES**

Other Sources on Evidence

Internet Sources

Black's Law Dictionary (6th ed 1990)

Dictionary Sources

STANDARD OF REVIEW

Factual findings made by an ALJ ("ALJ") is governed by the Florida Administrative Procedure Act (APA), F.S. 120.68, as such Florida Statutes are reviewed under a competent, substantial evidence standard, whereas conclusions of law in such proceeding are reviewed de novo.

ARGUMMENT

REGARDING ISSUE I: It's true that "Credibility of the witnesses is a matter that is within the province of the [ALJ], as is the weight to be given the evidence."[1] However, the appellees' testimony were not "reliable"[2], and credible, or "one who is trustworthy and have a disinterested relation to the matter in question." [3],[4] Moreover, "[a] prior inconsistent statement is admissible to raise the suggestion that if a witness makes inconsistent statements, then ***his entire testimony may not be credible.***" [5] Thus, the Appellant has properly preserved Issue I and has cited numerous record evidence, which was "to spell out its arguments squarely and distinctly,"[6] Appellant did establish a "race[7] claim."[8] As the facts prove "clearly she is a member of a protected class if for no other reason her race."[9] Moreover, Section 120.57(1)(1), F.S., also sets forth the standard for exceptions to findings of fact and provides that an agency (in

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[1] Page 16, Appellee's Answer Brief
[2] *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957)
[3] *Burleson v. State,* 131 Tex.Cr.R. 576, 100 S.W. 2d 1019,1020
[4] "disinterested witness" is one who has no interest in the cause or matter in issue, and who is lawfully competent to testify." Black's Law Dictionary (6th ed. 1990)
[5] *United States v. Bao*, 189 F.3d 860, 865-66 (9th Cir. 1999)
[6] *Schneider v. Kissinger*, 412 F. 3d 190 - Court of Appeals, Dist. of Columbia Circuit 2005
[7] "a group of people of common ancestry, distinguished from others by physical characteristics, such as hair type, color of eyes and skin, stature, etc. Principal *races* are Caucasoid, Mongoloid, and Negroid. 2. the human ***race***, human beings collectively. www.dictionary.com/browse/race
[8] Page 20, Appellee's Answer Brief
[9] Page 25, D-TRX, Line 2-3

this case the Appellate Court) reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines ***from a review of the entire record***, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence" or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(1), F.S.

REGARDING ISSUE II: Appellee alleges that "cases in which evidence cannot be produced because inadvertent loss or intentional destruction involve the application of Rule 1.380, Fla. R. Civ. P. because they are essentially, discovery violations." However "it is not only a discovery issue it is also a cause of action which holds someone liable for *negligently or intentionally destroying* material which is needed as evidence in litigation."[10] "The existence of a duty to preserve evidence was presumed to exist without any discussion of the legal basis for the duty."[11] It has been recognized that

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[10] *Hagopian v. Publix Supermarkets, Inc.,* 788 So. 2d 1088 (Fla. 4th DCA 2001) The court determined that an adverse party's duty to preserve evidence is created when that party recognizes that an adverse suit is imminent. (in this case, the phone call to Robert Allegroe, on week after the incident, in which appellant's common law spouse contacted the owner of this franchise McDonald's and refusing the $50.00 gift certificate, or accept its apology; those two facts evidenced McDonald's anticipation of litigation)

[11] *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996)

"an appellate court may take judicial notice of matters of public record, including a "**transcript of proceedings before a county court judge.**" [12] Thus, the testimony by Mr. Vidler regarding the destroyed tape has 'preserved the issue' in the lower tribunal and is 'record evidence'; and is *not* a 'matter outside the record'. Appellee alleged that the "QB never asked Ms. Owensby the race of the gentleman or whether he had food or drink," Unfortunately, the QR had to engage in a strategic approach in cross-examining Appellees' witnesses. Mr. Vidler, Appellee's witness was declared a 'corporate representative', notwithstanding he was also the 'star' witness', *and* the accused. The purpose of sequestration was described by the U.S. Supreme Court: "The aim of imposing the rule on witnesses, as the practice of sequestering witnesses is twofold. It exercises a restraint on witnesses tailoring their testimony to that of earlier witnesses, and it aids in detecting testimony that is less than candid"[13] (Ref. 1, p 86).

Mr. Brannon, Appellee's counsel also alleged that his opening statement is "not testimony because he is not a witness." In Michigan National Bank v. Oakland, 89 N.Y.2d 94 (1996), the Court of Appeals held that "[i [nformal judicial

[12] *People v. Post Standard Co.*, 13 NY2d 185, 191, 245 N.Y.S.2d 377 (1963)
[13] *Geders v. United States*, 425 U.S. 80, 87 (1976)

admissions are recognized as 'facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness or contained in a deposition." In *Oscanyan*,[14] the Supreme Court held that, "in the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. Indeed, any fact, bearing upon the issues involved or admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Thus, the testimony of the Appellee's counsel of record Mr. Brannon is an "[a]dmissions by counsel against a party provided that the statements had been made by the attorney while acting in his authorized capacity." Appellee's counsel of record under footnote 27, in Appellee's answer, is trying to allude or mislead[15] the court that the Appellant FCHR charge

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[14] *Oscanyan v. Arms Company,* 103 U.S. 261 (1880). "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced." The question in either case must be whether the facts upon which it is called to instruct the jury be clearly established."

[15] "be dishonest, befool, beguile, cause error, create a false impression, deceive, defraud, dissemble, distort, dupe, ensnare, falsify, fib, fool, give a false idea, give a false impression, lead astray, guide into error, guidewrongly, in errorem inducere, lie, misdescribe, misdirect, misrepresent, misstate, misteach, practice deception, prevaricate, seduce, sn are, sophisticate, swindle, take advantage of https://legal-dictionary.thefreedictionary.com/misled

which was date stamped on May 10, 2016, was commencement of the action. The "*Amended Complaint of Discrimination*" letter was *sent* to the Appellant was dated April 27, 2016. The letter sent was an '*enclosed copy of the* ***amended complaint***', ***not*** as alluded by the appellee's counsel of record, as the first correspondence, and in violation of Model Rules of Professional Conduct 4.04 Ethical Considerations 3.4 (e)(1): A lawyer *may not* "allude to any matter that the lawyer does not reasonably believe is relevant or that will *not be supported* by admissible evidence." Counsel of Record Mr. Brannon has shown a propensity in providing misleading[16] evidence and testimony throughout this litigation process. In his opening statement he ***alluded*** that the Appellant's Common Law Spouse spoke to Eric Allegroe, who "is the guest services manager. He is the one that handles issues, complaints with the various stores that the franchise owns." This is contrary to the truth, as Mr. Vidler[17] stated

[16]Whoever "in a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury; Knowingly making a false statement; intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement; with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity; with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or knowingly using a trick, scheme, or device with intent to mislead" is in violation of 18 U.S. Code § 1515 - Definitions for certain provisions; general provision

[17] Appellee's Corporate Representative

"that he informed the owner, Mr. Allegroe, that Mr. Robert Millan, the Appellant's spouse was going to call him."[18] Mr. Brannon,[19] asks Appellant's common law spouse "Did the owner tell you that he was sorry and offer a gift certificate and offer to call Ms. Foster-Garvey himself to speak with her?"[20] Mr. Brannon again misleads the cout by saying, "Your Honor, I'd like to show the witness Respondent's Exhibit 2, which states at the top, ***employee pay/department***." Mr. Brannon (Hands document to witness.) Mr. Vidler, do you recognize that document."[21] "Mr. Vidler responds and says (after reviewing it.) "I do." Mr. Brannon asks: What is that document? Mr. Vidler states, *"What it does is it gives the employee's name, their date of hire and then the department and whether they're crew or manager*." [22] Mr. Vidler acknowledged that Exhibit 2 *does not indicate employee pay* as alluded to by Counsel for Respondent. Appellee's Counsel alleges that "Appellants Amended Brief presents the unsubstantiated argument that Appellee (Mr. Robert Allegroe, owner of franchise) was contacted by the QR via phone, and via First Class Mail to not destroy/delete, and to

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[18] Page 155, D-TRX
[19] Counsel for Appellee
[20] Page 115, D- TRX
[21] Page 143, Lines 14-23 D-TR

[22] Page 144, Lines 1-5, D-TRX

preserve that tape...."[23] "The Appellate court is likely to take judicial notice where it 'would help to speed resolution of the situation."[24] In *Crawford v. Merrill, Lynch, Pierce, Fenner & Smith*,[25] the Court of Appeals explained that it had departed from the "general rule that it may not consider matters de hors the record, because if it were followed in this case it would prolong the appeal and accomplish little else." "Under these circumstances we believe a narrow exception to the general rule should be recognized.." Hence, the ALJ's finding of fact and (FCHR's adoption) were not supported by competent substantial evidence in the record of the proceeding, thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE III: Those allegations have been addressed in Appellant's rebuttal *supra.* Hence, the ALJ's finding of fact and (FCHR's adoption) were not supported by competent substantial evidence in the record of the proceeding, thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE IV: Appellee alleges that "Appellant Brief page 17 presents the following facts/argument outside the record on

[23] Page 24, Appellee's Answer Brief
[24] *Matter of Hartman*, 47 AD2d 624, 365 N.Y.S.2d 182 (1st Dept. 1975). In
[25] *Crawford v. Merrill Lynch, Pierce, Fenner & Smith* (35 NY2d 291 [1974]

appeal that must be stricken: - Regarding the tossing of the chair, Appellant argues “as it is less than the average size of a “female hand size.” Appellant argues “during ‘discovery’ the ‘QR’ measured the “half wall” which measured from the base to the top to be exactly “37 inches which equal 939.8000mm”, and 'these are facts outside the record."[26] It is universally understood that "judicial notice is a rule in the law of evidence that allows a fact to be introduced into evidence if the truth of that fact is so notorious or well known, or so authoritatively attested, that it cannot reasonably be doubted." [citation omitted] Under Rule 201. Judicial Notice of Adjudicative Facts(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact. (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. (c)Taking Notice. The court:(1) *may take judicial notice on its own.* [Emphasis Added] Thus, the aforementioned facts fall within the scope of Rule 201. Judicial Notice of Adjudicative Facts. With respect to the 'after acquired evidence rule' the

[26] Page 33, Appellee’s answer brief

Eleventh Circuit determined that "after-acquired evidence is relevant to the available relief and remedies, which should be determined on a case-by-case basis. Courts need to balance the employer's right to make business decisions for lawful reasons with the need to make the plaintiff whole after discrimination."[27] In applying that 'rule', evidence acquired after the fact shows that Mr. Vidler *misspoke*[28] about the tossing of the chair, when he claimed it went up in the air "4 to 6 inches"[29], as it is contrary to the newly acquired evidence as the wall measured 37 inches which equal 939.8000mm."[30] The QR after the hearing, went to double check his initial measurements, stated above, which were correct. Now regarding the 4 to 6 inches in which Mr. Vidler claimed how high the chair 'went up in the air" is less than "the average size of a female hand size,"[31] which measures 6.66 inches. In *Hunter*, the

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[27] *Wallace v. Dunn Const. Co., Inc., 968 F.2d 1174, 1181 (*11th Cir. 1992), vacated, 32 F.3d 1489 (11th Cir. 1994)
[28] express oneself insufficiently clearly or accurately. https://www.thefreedictionary.com/misspoke
[29] Page 66, D-TRX
[30] Page 33, Appellee's answer brief
[31] http://www.theaveragebody.com/average_hand_size.php

Appellate court held "while all reasonable intendments should be indulged in to support a judgment, the court is not called upon to assume the existence of a fact which is contrary to the ordinary course of nature, *solely because the party raising the question did not give oral testimony upon it at trial*." Here the finding which must exist to support the judgment, is so far contrary to our general knowledge, and so far outside of common occurrence, that it may, in the absence of further proof, be regarded as contrary to nature, and hence, untrue, and substantial justice will be done by reversing the judgment and granting a new trial."[32] Hence, the ALJ's findings of fact (and FCHR's adoption) were not supported by competent substantial evidence in the record of the proceeding, thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE V: The main contention of the Appellee is "the testimony presented regarding a 'four letter word' being uttered was not inconsistent nor did it amount to perjury."[33]

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[32] *Hunter v. New York, O. & W.* Ry. Co.1 (Court of Appeals of New York, Second Division. Dec. 3, 1889.

[33] Appellee's answer brief page 36, Florida Statute 837.02 enumerates what constitutes perjury in an official proceeding: (1) Except as provided in subsection (2) Whoever makes a false statement, which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter, commits a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084, (3) Knowledge of the materiality of the statement is not an element of the crime of perjury under subsection (1) or subsection (2), and the defendant's mistaken belief that the statement was not material is not a defense. 837.021 proscribes perjury by contradictory statements: (1) Except as provided in subsection (2) Whoever, in one or more official proceedings, willfully makes two or more material statements under

Mr. Vidler stated numerous contradictory statements."[34] Hence, the ALJ's finding of fact and (FCHR's adoption) were not supported by competent substantial evidence in the record of the proceeding," thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE VI: Appellant had answered and addressed this issue in Appellant's answer in **"REGARDING ISSUE II."**

REGARDING ISSUE VII: Appellee alleges that McDonald's witnesses and Appellant's boyfriend statements was consistent, though he doesn't cite where. The statement made by Appellant's boyfriend, was a statement made to him by his girlfriend, while not under oath, thus is hearsay.[35] The ALJ over-ruled Mr. Brannon's hearsay objection. "The theory of the rule excluding hearsay is that assertions made by human beings are often unreliable; such statements are often insincere, *subject to flaws in memory and perception*, or infected with errors in

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oath which contradict each other, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

[34] Mr. Vidler stated, "*My recollection was a four-letter curse word,*" *then questioned if he knew the word now*, (Page 5, D-TRX) Mr. Vidler stated, "*No,* I said my recollection,"(Page 5,D-TRX) then Appellant QR asked if he was not sure, he subsequently stated, *"No, I know it wasn't nice"*, (Page 5, D-TRX then Mr. Vidler stated with respect to the curse word *"There was loud utterings, I assume or presume of not nice nature."* Page 149, D-TRX

[35] F.R.E. 801: states "Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers that statement in evidence to prove the truth of the matter asserted in the statement. (F.R.E. refers to the Federal Rules of Evidence.

narration at the time they are given. Furthermore, someone testifying in court regarding another's out-of-court statement may have misheard or *misremembered that statement."*[36] Hence, the ALJ's finding of fact and (FCHR's adoption) were not supported by competent substantial evidence in the record of the proceeding, thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE VIII: Appellee's Issue VIII, is without merit, and has been addressed in Appellant's answers in Issues I, II, IV, V, VII.

REGARDING ISSUE IX: Appellee alleges Mr. Vidler did not violate McDonald's policy is without merit, and contrary to the facts. The ALJ alleges "Respondent's witnesses testified, credibly and consistently, that these policies are enforced uniformly and strictly, with the goal being to avoid the problems they have had with persons improperly using the restaurant's facilities. As part of the enforcement procedure, if someone is observed seated at a table without any apparent McDonald's food or drink items, after a few minutes a manager or other staff member will approach that person and politely inquire whether the person intends to make a purchase.[37] Page 5, ALJ's RO." After a few

[36] Wigmore on Evidence §1360
[37] Page 5, ALJ's RO.

minutes, consistent with the restaurant's policies and procedures, Mr. Vidler approached Petitioner and politely inquired whether she intended to make a purchase. She did not answer him," ALJ's RO[38] However, the evidence does not support this."[39]"[40] So the facts show that he did not wait a few minutes as required by McDonald's Enforcement/No Loitering Policy, thus a breach of duty, aka, negligence. Appellant has properly preserved this issue of negligence, as "an appellate court may take judicial notice of matters of public record, including a "***transcript of proceedings before a county court judge.***" [41] Hence, ALJ's finding of fact and (FCHR's adoption) were not

[38] Page 11, ALJ's RO.

[39] Page 71, D-TRX However, the evidence does not support this, as the Appellant testified to the following; "Two people came out from the McDonald's door and they were talking to each other. They said, I looked like I'm loitering and trespassing. A heavy-set woman (Shahanna) and a man (Mr. Vidler) that she was speaking to. So, suddenly, the woman said, yeah, you are loitering there. The man says -- I said to the man, I'm waiting on my boyfriend for the food. And he said you better get out. Out of here. Or else I will call the police. He said I was just sitting in there and I'm trespass and loitering."

[40] Page 46-47, D-TRX Moreover, the facts show the Mr. Vidler, Appellee's employee stated after "Mr. Millan, QR of the Appellant, asked Mr. Vidler. "Okay. And then after you saw her, what did you do?" Mr. Vidler, then testified under oath "So as I walked out of the door we turned left, and we were going down the aisle way. I noticed her sitting in the -- just looking out the window. So, it just seemed very odd apparent. Also, with the feet up on the windowsill is kind of a -- I don't want to say disrespectful, but it just – it's not a normal seating position for a restaurant. ***So, I walked over to her and I did ask her, ma'am, would you be purchasing something today***."

[41] *People v. Post Standard Co.*, 13 NY2d 185, 191, 245 N.Y.S.2d 377 (1963).

supported by competent substantial evidence in the record of the proceeding, thus it is clearly erroneous or is based on clearly erroneous findings of fact.

REGARDING ISSUE X: This issue has already been addressed by Appellant's in Issues I, II, IV, V, VII.

REGARDING ISSUE XI: Appellant nor the QR had a crystal ball with respect to the unforeseeable bias of the judge. We assume that she would adhere to the following "Code of Judicial Conduct for State Administrative Law Judges" which are Rule 2.2: Impartiality and Fairness,[42] Rule 2.3: Bias, Prejudice and Harassment.[43] Rule 2.4: External Influences on Judicial Conduct.[44] Rule 2.5 Competence, Diligence, and Cooperation.[45] "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, ….."[46] Appellant

[42] An ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially.
[43](A) An ALJ shall perform the duties of office, including administrative duties, without bias or prejudice. (B) An ALJ shall not, in the performance of official duties, by words or conduct manifest bias or prejudice, or engage in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit support staff, or others subject to the ALJ's direction and control to do so. (C) An ALJ shall require lawyers in proceedings before the ALJ to refrain from manifesting bias or prejudice, or engaging in harassment, based on attributes or factors enumerated in (B) above, against parties, witnesses, lawyers, or others.
[44] (B) An ALJ shall not permit family, social, political, financial, or other interests or relationships to influence the ALJ's judicial conduct or judgment.
[45] (A) An ALJ shall perform judicial and administrative duties competently and diligently.
[46] www.floridasupremecourt.org/decisions/ethics/canon3.shtml

never nor is now attempting to file a motion/writ to disqualify (recusal) the judge, so that issue is moot point; as Appellant simply outlined facts to support the position of bias or prejudicial behavior. Moreover, now the Appellee's counsel is acting as the ALJ's attorney, is perplexing. Mr. Brannon, Appellee's counsel again attempting to mislead the court by stating that "Appellant's argument that McArthur's comment to Mr. Vidler that McDonald's opening statement was not evidence, so Mr. Vidler should keep that in mind."[47] That is *not* what the judge stated.[48] Appellee has also taken issue when Appellant stated "there are "probable links"[49] between ALJ McArthur and opposing counsel is outlandish.[50]"[51] The fact is that there is a *reasonable* assumption, thus not strange or unusual.[52] Mr.

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[47] Page 47, Appellee's Reply Brief

[48] So, I walked over to her and I did ask her, ma'am, would you be purchasing something today." (Page 46, and Page 47, D-TRX). ***ALJ McArthur, then admonished the witness by saying, "Mr. Vidler, let me just interject. You were here and listened to counsel's opening statement, but that wasn't testimony that I can consider." Mr. Vidler then stated "Okay." Then the ALJ McArthur stated, "So, don't assume that what he said – that you are building on what he said." (evidence of bias)*** Mr. Vidler then stated, "Yes, ma'am." (Page 47, D-TRX)"

[49] reasonably so, as on the basis of evidence, ***but not proved https://www.collinsdictionary.com/us/dictionary/english/probable***

[50] strange and unusual: https://dictionary.cambridge.org/us/dictionary/english/outlandish

[51] Page 47, Appellees Reply Brief

[52] The ALJ "Elizabeth McArthur "is a founding ***shareholder*** of the law firm Radey Thomas Yon & Clark, in Tallahassee, Florida. This firm specializes in ***labor and employment law***." www.radeylaw.com

Dixie Daimwood, counsel for appellee "is a ***shareholder*** in the law firm Carr Allison, in Tallahassee, Florida office, and Dixie's extensive practice includes ***labor and employment defense***." www.carrallison.com

Brannon, stated "Appellant argues ALJ McArthur should not have accepted Mr. Millan's testimony (Appellant's Common Law Spouse) because he suffered from PTSD."[53] The Appellant never alleged this nor did Appellee cite where he culled this excerpt from, as this a disingenuous[54] claim.

CONCLUSION

Therefore, the ALJ's findings of facts are not supported by competent substantial evidence as her conclusion was based on solely unreliable evidence. Wherefore, pursuant to Florida Statute 120.68, Appellant is seeking that the court "set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding."

[53] Page 48, Appellee's Reply Brief
[54] The definition of disingenuous is ***deceptive or misleading. http://law.yourdictionary.com/disingenuous***

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that this REPLY BRIEF of Appellant is submitted in Courier New, 12-point font, and complies with the font requirements of Rule 9.210(a), Fla. R. App. P.

/s/Jennifer M. Foster-Garvey

Jennifer M. Foster-Garvey *Pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 3, 2018, that this Reply Brief of Appellant has been furnished via electronic mail (e-mail) to Dixie Daimwood and Paul Brannon at the below listed e-mail addresses.

/s/Jennifer M. Foster-Garvey

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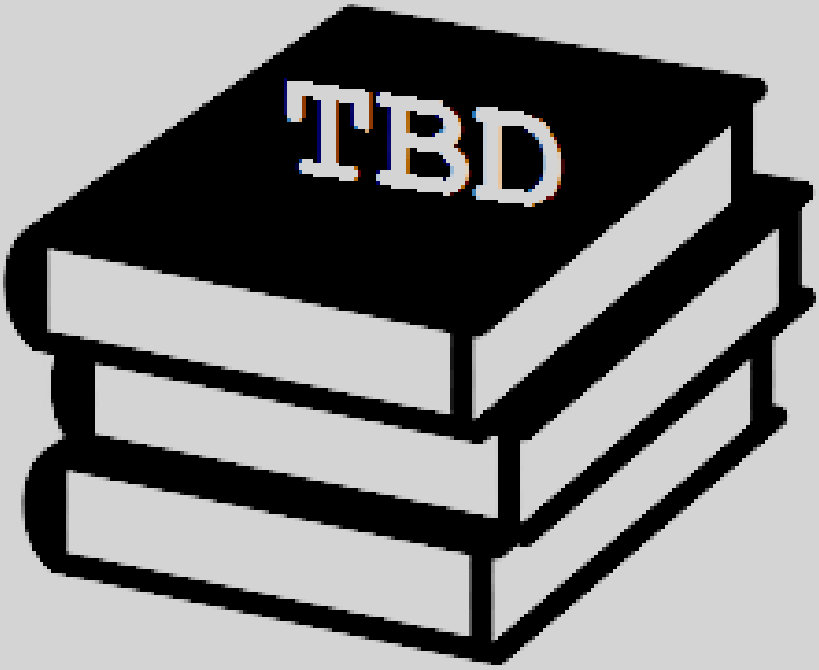

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