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

CASE NO. 1D15-2962

VALLEYCREST LANDSCAPE MAINTENANCE, INC. and ARI FLEET LT,
Appellants,
v.

L.T. Case No. 16-2012-CA-010176-XX

SAMANTHA M. JUSTYN,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellants' statement of the case and facts is inadequate and incomplete, and thus Appellee is compelled to restate the case and facts in their entirety.

Statement of the Case

Appellee, Dr. Samantha Justyn, sued Appellants, ValleyCrest Landscape Maintenance, Inc. and ARI Fleet LT, for negligence. (R. 1-18.) Dr. Justyn alleged Appellants were vicariously liable when Marvin Golden negligently ran her over with a Ford F-250 and caused serious personal injuries.[1] (R. 1-18.) ValleyCrest Landscape admitted it employed Mr. Golden as its driver, but denied he was negligent. (R. 34.) ARI Fleet LT denied it was the beneficial owner of the Ford F-250 or that Mr. Golden drove it with its knowledge and consent. (R. 36.)

Before trial, Appellants filed a motion in limine to prevent introduction of one aspect of Community Service Officer ("CSO") Robert Jackson's expected testimony. (R. 1105-08.) Specifically, CSO Jackson was expected to testify that Mr. Golden had told him he saw Dr. Justyn as he approached the intersection, but thought he could clear her during his righthand turn. (R. 1105-08.) Dr. Justyn opposed the motion (R. 1125-55), and Appellants replied (R. 1156-69). After hearing argument, the trial court orally denied the motion. (Tr. 7-26, 52-63.)

[1] Before trial, Dr. Justyn dismissed her claims against Mr. Golden and ValleyCrest Golf Course Maintenance, Inc. without prejudice. (R. 24-25, 1093-94.)

The case was tried to a jury over eight days. (Tr. 1-1781.) During the trial, Appellants attempted to goad Linda Weseman, Dr. Justyn's biomechanical engineering and accident reconstruction expert, into testifying outside her area of expertise about bicycle safety. (Tr. 1098-99.) Dr. Justyn's objection on that basis was sustained. (Tr. 1099.) After only ninety minutes of deliberations, the jury rendered a verdict in favor of Dr. Justyn, found Appellants 100 percent liable, and awarded $1,728,500 in damages. (Tr. 1776-77.) Appellants appealed. (R. 1531-662.)

Statement of the Facts

Appellants imply the trial turned solely on the factual issue whether Dr. Justyn or Mr. Golden arrived at the intersection first. (*See* Br. at 4-5, 26-27.) But that was merely a subsidiary issue. In reality, the central question at trial concerned whether (1) Dr. Justyn stopped her bicycle in Mr. Golden's blind spot, or (2) Mr. Golden either saw or should have seen Dr. Justyn when he made his righthand turn. In any event, many witnesses testified, but only the following witnesses testified about the accident itself.

A. Marvin Golden

Marvin Golden had been driving trucks in the landscaping business for over 15 years. (Tr. 1251.) He was familiar with his F-250 truck. (Tr. 1252.) Mr. Golden

admitted he was trained to adjust the F-250 truck's planar and convex mirrors so it had no blind spots:

> Q. Okay. So you're telling us you didn't have a blind spot?
>
> A. No, sir, I didn't have a blind spot. I seen everything.
>
> Q. You're not saying you missed this bicyclist because of a blind spot?
>
> A. Exactly.

(Tr. 1264-65.) Furthermore, he admitted he was looking at the mirrors and out the window the entire time he was making the right-hand turn. (Tr. 1268; *see also* Tr. 1287 ("My attention was mainly on the right side, using my mirrors.")). Finally, Mr. Golden admitted that if Dr. Justyn had been between his truck and the pedestrian (i.e., Matthew Stevens), he definitely "would have seen her." (Tr. 1273.) Mr. Golden simply testified he never saw Dr. Justyn. (Tr. 1256.)

B. Dr. Jeremy Cummings

Dr. Jeremy Cummings was a defense biomedical engineer. (Tr. 947.) Dr. Cummings reconstructed the accident and opined, contrary to Mr. Golden's admissions, that Dr. Justyn was most likely in Mr. Golden's blind spot. (Tr. 946-82.) But on cross-examination, Dr. Cummings admitted that, if Mr. Golden had seen Dr. Justyn, then he was negligent. (Tr. 985-86, 1008-09.) He also admitted that, if Dr. Justyn had been wearing a hot pink tank top (which, in fact, she was wearing (Tr. 483-84)), then she would have been more visible. (Tr. 1002.)

C. Dr. Samantha Justyn

Dr. Samantha Justyn testified she was an experienced cyclist. (Tr. 483.) On the day of the accident, she was wearing a hot pink tank top and teal shorts. (Tr. 483-84.) She explained how she came to the stoplight:

> Q. Okay. And can you tell us where you pulled up to when you—or what you did do when you approached this intersection?
>
> A. Well, I came to a stoplight, so as I approached I stopped and put my foot up on the curb.
>
> Q. Okay. And what happened after you stopped and put your foot up on the curb?
>
> A. Well, probably about five or ten seconds later, a landscaping truck pulled up next to me.
>
> Q. Okay. And did you look to see the truck when it pulled up beside you?
>
> A. I did briefly.
>
> Q. And what did you see?
>
> A. That it was loaded up with workers.
>
> Q. And what did you do then?
>
> A. I looked straight ahead again to avoid making any eye contact with them.
>
> . . . .
>
> Q. Okay. And so do you recall how long you had to wait there before the lights changed?
>
> A. Probably at least 30 seconds.

Q. Did you notice anyone to your right, any pedestrians, as you waited there?

A. I saw a gentleman on a skateboard approaching me.

Q. Okay. Now, did you ever notice, did you ever see any indication from that truck as you were there that he was intending or signaling to turn right?

A. No, not at all. He looked like he was going to proceed straight.

Q. And so did the light then turn green?

A. Yes, it did.

. . . .

Q. And tell me what you did at that point when the light turned green.

A. Well, I stood up and went to proceed straight.

Q. And what did the truck do?

A. It started out to do the same.

Q. Okay. Did the truck pull out ahead of you?

A. Yes.

Q. And were you headed straight?

A. Yes.

Q. And did the—what direction did the truck proceed?

A. Well, it started to proceed straight, and then he started to turn in on me to the right.

Q. And then what happened? What did you do when the truck started to turn in on you?

A. I panicked and I immediately tried to stop and back up and get out of his way.

Q. And so did you stop and try to back up?

A. Yes.

Q. And did you turn your bike around some?

A. Yeah, I definitely wasn't angled the way I originally started out.

Q. Okay. Where were you trying to get to?

A. Back up to the safety of the curb.

Q. Okay. And did you see, was the truck pulling a trailer?

A. Yes.

Q. And what were you worried about as you stopped and saw that truck turning in front of you?

A. Getting crushed by that truck.

Q. And so tell us what happened then. First of all, how close did you get to the sidewalk?

A. Close enough to get my foot back up on the curb.

Q. And what happened then?

A. I just felt multiple impacts on my, on my back side.

Q. Okay. Can you tell me how many impacts there were on your back side?

A. It's hard to say, but probably three or four.

Q. Do you have a clear recollection as to what happened in the seconds following that impact?

A. It's hard to say exactly what happened.

(Tr. 487-90.)

D. Matthew Stevens

Matthew Stevens was a pedestrian who witnessed the accident. (Tr. 1213-14.) He recalled that the F-250 truck approached the light first, and Dr. Justyn followed behind. (Tr. 1214-15.) Nevertheless, Mr. Stevens clarified it all happened "very fast" (Tr. 1220), and it was "not like the truck was stopped and then Dr. Justyn came up after a few seconds" (Tr. 1223). Instead, they both arrived at the intersection "roughly around the same time." (Tr. 1223.)

E. Linda Weseman

Linda Weseman was Dr. Justyn's biomechanical engineer and accident reconstructionist. (Tr. 1038-39.) She reviewed Dr. Cummings's reconstruction of the accident, but opined his analysis was incorrect because he did not properly adjust the F-250 truck's planar and convex mirrors. (Tr. 1051-62.) She further opined, consistent with Mr. Golden's admissions, that had Dr. Cummings properly adjusted the planar and convex mirrors, there should not have been any blind spot alongside the F-250 truck. (Tr. 1062.) And, even if there were a blind spot, Ms. Weseman opined drivers should "always double-check" by "turning your head." (Tr. 1062.)

After 30 transcript pages of cross-examination, Appellants' counsel asked Ms. Weseman to opine about bicycle safety. (Tr. 1098.) Dr. Justyn's counsel objected because, at deposition, Ms. Weseman had testified bicycle safety fell outside her area of expertise. (Tr. 1098-1100.) After reviewing Ms. Weseman's deposition testimony, the trial court sustained the objection. (Tr. 1100-01.)

F. Von Zimmerman

Von Zimmerman was Mr. Golden's supervisor. (Tr. 908.) When the accident occurred, he was driving the truck ahead of Mr. Golden. (Tr. 899.) Mr. Zimmerman testified that Mr. Golden's F-250 truck was equipped with side mirrors, including a convex mirror, which were designed to help drivers "see a lot better" "beside and behind the truck." (Tr. 901.) But Mr. Zimmerman did not know whether those mirrors were "designed to eliminate blind spots or not." (Tr. 901.) Although Mr. Zimmerman did not witness the accident (Tr. 913, 925-26), he understood the concept of off-tracking and agreed Mr. Golden should have been looking in all directions when he turned right. (Tr. 907-08.) Additionally, he agreed the accident occurred at a busy intersection with many pedestrians and bicycles, which meant drivers should use heightened care. (Tr. 911-12.)

G. CSO Robert Jackson

CSO Robert Jackson was employed as a civilian community service officer, not a police officer, on May 17, 2011, the date of the accident. (Tr. 164.) In fact,

CSO Jackson explained he wore a different uniform than a police officer. (Tr. 181.)

In pertinent part, CSO Jackson testified Mr. Golden

> said as he approached the intersection, he observed the plaintiff on her bicycle on the far right-hand side of Main Street. He stated to me that he thought he could clear her and he had made his right turn and then he said, "Obviously I didn't see her," or "I didn't clear her."

(Tr. 170.) On cross-examination, CSO Jackson admitted he had not written Mr. Golden's statement down in his crash report. (Tr. 171-73.) But Appellants did not inquire whether Mr. Golden had spontaneously volunteered the statement, whether CSO Jackson had compelled it, or whether CSO Jackson had simply overheard Mr. Golden say it to another witness.

CSO Jackson also explained that, even though he had not reduced Mr. Golden's statement to writing in his crash report, he remembered this accident vividly because he had been trying to impress two school-board officers who were present at the scene in order to advance his career. (Tr. 181-82.)

H. The Motion in Limine

Before trial, Appellants moved to exclude one part of CSO Jackson's expected testimony. (R. 1105-08.) Specifically, CSO Jackson was expected to testify that Mr. Golden had told him he saw Dr. Justyn as he approached the intersection, but thought he could clear her during his right-hand turn. (R. 1105-08.) In the motion, Appellants asserted Mr. Golden's statement was protected by

the accident report privilege of section 316.066(5), Florida Statutes (2010). (R. 1105-08.) Additionally, Appellants claimed, "Any conversations had with both [Dr. Justyn] and/or [Mr. Golden] were conducted for the purposes of Mr. Jackson's investigation." (R. 1107.) The motion, however, did not lay a factual predicate for this claim. (*See* R. 1107.) Appellants never had deposed CSO Jackson. (*See* R. 1106.)

Dr. Justyn opposed the motion. (R. 1125-55.) In her response, Dr. Justyn explained that Appellants' position contravened the statute's plain language because community service officers did not qualify as law enforcement officers. (R. 1126.) Additionally, Dr. Justyn argued that Mr. Golden had testified at deposition that he knew community service officers were "'not actually cops.'" (R. 1126, 1144.)

Appellants replied and the trial court heard argument. (R. 1156-69; Tr. 7-26, 52-63.) During argument, the trial court clarified that community service officers are paid civilian employees, not police officers. (Tr. 9-10.) As such, community service officers have no arrest authority and are not authorized to carry weapons. (Tr. 10.) Moreover, the Jacksonville Sheriff Office's community service officer program "was meant to be kind of an introduction and then eventually be a feeder into being an actual law enforcement officer." (Tr. 17.) Additionally, community

service officers, unlike law enforcement officers, "didn't have anywhere [near] the same amount of training." (Tr. 17.)

When Appellants argued the legislative intent animating the statute was to preserve the constitutional privilege against self-incrimination and to ensure completion of crash reports, the trial court pointed out that Mr. Golden knew CSO Jackson was not a regular cop, and inquired whether CSO Jackson compelled Mr. Golden to answer his questions. (Tr. 21-22.) In making this argument, Appellants expressly disclaimed reliance on the plain language of the statute: "I don't necessarily think that the decision on the case turns on the definition of law enforcement officer or community service officer." (Tr. 56.) In fact, Dr. Justyn seized on this omission: "I think it's real important to note that I don't think the defendant has once claimed or argued that the CSO constitutes a law enforcement officer. What they're actually arguing is to expand the privilege beyond the statutory boundaries." (Tr. 59.) In any event, Appellants never established a factual basis for concluding CSO Jackson compelled Mr. Golden's answers.

Ultimately, the trial court rejected Appellants' argument and orally denied the motion: "The statute establishing the privilege protects only those statements that are made to a law enforcement officer. And had the legislature intended to expand that category to other categories of individuals such as community service officers, it certainly could have done so, but it did not." (Tr. 61.) The trial court

therefore considered itself bound by *City of Hollywood v. Litteral*, 446 So. 2d 1152 (Fla. 4th DCA 1984), which it concluded was "the only Florida appellate case on point." (Tr. 62.)

SUMMARY OF ARGUMENT

1. The trial court did not abuse its discretion when it denied the motion in limine because it correctly construed section 316.066(5), Florida Statutes, as protecting only crash reports and statements made to "law enforcement officers," not civilian "community service officers." The trial court's interpretation is correct under the statute's unambiguous language, because it is compelled by the statutory, dictionary, and case law definitions of "law enforcement officer." And it is still correct even if the statute's language had been ambiguous.

Moreover, no matter how this Court interprets the statute, this Court still must affirm because Appellants failed to demonstrate Mr. Golden made his statements to CSO Jackson "for the purpose of completing a crash report." Instead, the record merely reflects that CSO Jackson spoke with the witnesses; it does not support the notion that he compelled any of their answers. For that reason, Mr. Golden's statements may have been spontaneous and voluntary. Such statements are not protected by the accident report privilege.

Finally, any alleged error in admitting CSO Jackson's testimony was harmless. The central issue at trial was whether Dr. Justyn was in Mr. Golden's

blind spot, and Mr. Golden himself repeatedly and emphatically testified he had no blind spots. The subsidiary issue about who arrived at the intersection first was a mere sideshow.

2. The trial court did not abuse its discretion when it prevented Appellants from cross-examining Ms. Weseman outside her area of expertise (i.e., biomechanical engineering and accident reconstruction) regarding bicycle safety.

Moreover, any alleged error with regard to the cross-examination of Ms. Weseman was harmless. Appellants asked the same question to Dr. Cummings, their own biomechanical engineer and accident reconstructionist. Accordingly, the jury heard precisely the same expert opinion Appellants wanted it to hear.

Finally to the extent Ms. Weseman would have given some different answer other than Dr. Cummings provided, it was Appellants' obligation to proffer that testimony. When Appellants failed to do so, they failed to preserve appellate error.

ARGUMENT

I. Issue 1: Did the trial court abuse its discretion and cause harmful error when it denied a motion in limine on the basis that a "community service officer" did not qualify as a "law enforcement officer"?

The trial court's ruling on the first issue must be affirmed on any one or all of three alternative grounds. First, the trial court correctly construed subsection 316.066(5), Florida Statutes, as protecting only crash reports and statements made to "law enforcement officers," not civilian "community service officers." *Infra*

Argument I.A, at 15. Second, Appellants failed to meet their burden of establishing that Mr. Golden's statement to CSO Jackson was "for the purpose of completing a crash report." *Infra* Argument I.B, at 24. Third, any error was harmless because: the central issue at trial was whether Dr. Justyn was in Mr. Golden's blind spot; Mr. Golden repeatedly and emphatically testified he had no blind spots; and the subsidiary issue about who arrived at the intersection first was a mere sideshow. *Infra* Argument I.C, at 26. In their brief, Appellants have not addressed the second or third bases for affirming the trial court's ruling.

Standard of Review

"We review the trial court's ruling on the motion in limine for abuse of discretion. '[A] trial court abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Bass v. State*, 147 So. 3d 1033, 1035 (Fla. 1st DCA 2014), *reh'g denied* (Oct. 6, 2014), *review denied*, 163 So. 3d 507 (Fla. 2015) (citations omitted). Statutory interpretation is reviewed de novo. *Borden v. E.-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).

Merits

A. The trial court correctly interpreted section 316.066(5), Florida Statutes (2010).

In denying the motion in limine, the trial court correctly interpreted section 316.066, Florida Statutes, the statute upon which the accident report privilege is based. That statute provides in pertinent part:

> (5) Except as specified in this subsection, *each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting*. No such report or statement shall be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated. . . .
>
> (6) *A law enforcement officer, as defined in s. 943.10(1)*, may enforce this section.

§ 316.066, Fla. Stat. (2010) (emphasis added).[2] In turn, the cross-referenced statute, section 943.10(1), defines a "law enforcement officer" in relevant part as "any person . . . who is vested with authority to bear arms and make arrests." § 943.10(1), Fla. Stat. (2010).

[2] Appellants cite the 2015 version of the statute. (*See* Br. at 11.) But the accident occurred on May 17, 2011, so the controlling statute was the 2010 version, which was in effect from September 1, 2010 to June 30, 2011. *See* Ch. 2010-223, §2, Laws of Fla.; Ch. 2011-66, § 7, Laws of Fla. The two versions of the statute are not materially different, but the subsection numbering of the versions differs. Subsections (5) and (6) in the 2010 version are materially the same subsections (4) and (5) of the 2015 version, respectively.

In this section, we address whether a civilian community service officer qualifies as a "law enforcement officer." *Infra* Argument I.A.1-2. In the next section, we address the separate ground of whether Appellants established that Mr. Golden made his statements to CSO Jackson "for the purpose of completing a crash report." *Infra* Argument I.B., at 24.

1. Under the plain language of the statute, a community service officer is not a "law enforcement officer."

Statutes are interpreted according to their plain language. *E.g.*, *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004) ("[T]he statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent"). Under the precedent of the Supreme Court of Florida, another settled axiom of statutory construction is "that statutes must be read together to ascertain their meaning, and that the same meaning should be given to the same term within subsections of the same statute." *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000) (emphasis added) (internal citations omitted); *accord Anderson Columbia v. Brewer*, 994 So. 2d 419, 423 (Fla. 1st DCA 2008). This axiom directly applies to this case.

Subsection (6) of the statute expressly defines the term "law enforcement officer" when it incorporates by reference the definition of that term in section 943.10(1), Florida Statutes. § 316.066(6), Fla. Stat. (2010). Accordingly, under *Rollins*' binding guidance, this Court must construe "law enforcement officer," as

that term is used in subsection (5) of the statute, with the same definition used in subsection (6). And subsection (6), by incorporating section 943.10(1), defines a "law enforcement officer" as "any person . . . who is vested with authority to bear arms and make arrests." § 943.10(1), Fla. Stat. (2010). The record is undisputed that CSO Jackson did not have the authority to bear arms or make arrests. *See supra* at 9-11; (Appellants' Br. 3-4).

Attempting to avoid this construction dictated by the statute's plain language and supreme court precedent, Appellants first argue (Br. at 15) it does not make sense to interpret section 316.066(5) as applying all of section 316.066, Florida Statutes. But that argument is incorrect because the plain language of subsection (6) does not refer to any piecemeal subsections. Instead, it refers to the entirety of "this section." § 316.066(6), Fla. Stat. (2010).[3]

Next, Appellants argue (Br. at 16-17) that subsection (6) is permissive rather than mandatory because it uses the word "may" rather than "shall" or "must." But that argument is neither here nor there, because either way, subsection (6) incorporates by reference section 943.10(1)'s definition of law enforcement officer

[3] "The preface to Florida Statutes provides that 'a cross-reference to a specific statute incorporates the language of the referenced statute as it existed at the time the reference was enacted.'" *Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000) (quoting Preface at VIII, Fla. Stat. (1995), and citing *Van Pelt v. Hilliard*, 78 So. 693, 698 (Fla. 1918)). Additionally, that preface also "explains that the subdivisions are chapter, section, subsection, paragraph, and subparagraph." *Id.* at 565 (citing Preface at vii, Fla. Stat. (1995)). Thus, the relevant subdivisions here are chapter 316, section 316.066, and subsections 316.066(5)&(6). *See id.*

for the whole section.[4] In sum, if a "law enforcement officer" within the meaning of section 316.066 is someone "who is vested with authority to bear arms and make arrests," § 943.10(1), Fla. Stat. (2010), then community service officers clearly do not qualify because they are merely civilians who are not allowed to arrest citizens or carry weapons. (Tr. 10.)

Assuming *arguendo* section 316.066 does not expressly define law enforcement officer (which it does by the cross-reference to section 943.10(1)), then the Court must resort to dictionary definitions and case law.[5] According to Black's Law Dictionary, a "law enforcement officer" is "a person whose duty is to enforce the laws *and preserve the peace*." BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Appellants overlook the most important part of the dictionary definition (i.e., "preserve the peace") when they contend community service officers qualify as law enforcement officers simply because "they have a duty to enforce the traffic laws of the state." (Br. at 12.) That is not enough,

[4] In fact, if subsection (6) is permissive, that merely provides an additional explanation why crash reports can be prepared by community service officers, while statements are protected by the accident report privilege only if they are made to law enforcement officers.

[5] When a term is undefined by statute, '[o]ne of the most fundamental tenets of statutory construction' requires that we give a statutory term 'its plain and ordinary meaning.'" *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000) (quoting *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992)). "One such dictionary upon which courts may rely is Black's Law Dictionary. *Id.* "Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law." *Id.*

because the dictionary definition imposes two requirements when it uses the word "and" instead of "or." Although community service officers may "enforce" traffic laws, they have no authority to "preserve the peace," as they are merely civilians who are not allowed to arrest citizens or bear arms. (Tr. 10.) Additionally, they are not authorized to enforce criminal or other civil laws. (Operational Order 15.15.01(III)(A); R. 1138.) Accordingly, community service officers do not fall within the dictionary definition of law enforcement officers.

Moreover, this dictionary definition is buttressed by the most analogous Florida case law. In *City of Hollywood v. Litteral*, 446 So. 2d 1152, 1154 (Fla. 4th DCA 1984), the court held that a community service officer did not qualify as a law enforcement officer within the meaning of section 112.531, Florida Statutes. §112.531, Fla. Stat. (1979). As with the dictionary definition, community service officers do not qualify as law enforcement officers under the case law. Accordingly, the phrase "law enforcement officer" had an established meaning in Florida law when the Legislature amended section 316.066(5) in 1989 to make clear that the accident report privilege also protected "any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section." (*See* Ch. 89-271, § 2, Laws of Fla.; Fla. S. Comm. On Transp., Open government Sunset Review Accident Reports 1 (1989) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla.)) In enacting laws, the

Legislature is presumed to understand the meaning of phrases, like "law enforcement officer," as established by Florida case law. *E.g.*, *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000).

Appellants attempt to distinguish *Litteral* on the basis that section 112.531, Florida Statutes, unlike section 316.066(5), Florida Statutes, expressly defined the phrase, "law enforcement officer." (Br. at 17-18.) But Appellants miss the point. The definition of "law enforcement officer" in section 112.531, Florida Statutes, was actually much broader than Black's Law Dictionary's definition of "law enforcement officer." Specifically, section 112.531, Florida Statutes, defined a law enforcement officer broadly as "'any person . . . employed full time by any municipality . . . whose primary responsibility is the prevention and detection of crime *or* the enforcement of the penal, traffic, *or* highway laws of this state." *Litteral*, 446 So. 2d at 1153-54 (quoting § 112.531, Fla. Stat. (1979)). In contrast, Black's Law Dictionary defines a "law enforcement officer" more narrowly as "a person whose duty is to enforce the laws *and* preserve the peace." BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Contrary to Appellants' suggested distinction, despite the fact that *Litteral* addressed a statutory definition that was broader than the dictionary definition, it still concluded a community service officer did not qualify as a law enforcement officer.

For these reasons, the plain language of section 316.066(5) is unambiguous. Simply put, as defined by the statute itself, Black's Law Dictionary, and the most analogous Florida case law, community service officers do not qualify as law enforcement officers. The analysis need go no further. *See, e.g.*, *State v. Sousa*, 903 So. 2d 923, 928 (Fla. 2005) ("The fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature. Courts are not to change the plain meaning of a statute by turning to legislative history if the meaning of the statute can be discerned from the language in the statute.").

2. Even if the statute were ambiguous, a community service officer still is not a "law enforcement officer."

In attempting to sidestep the statutory definition, the dictionary definition, and the case law definition, Appellants incorrectly contend the statute is ambiguous and leap headlong into analysis of what they suggest the legislative intent was, despite the statute's actual words. (Br. at 10-18.)

Appellants' first argument is that this Court must give effect to all statutory provisions and read them in harmony with each other. Specifically, Appellants ask this Court to read section 316.640, Florida Statutes, harmoniously with section 316.066, Florida Statutes. The most obvious problem with this argument is that, although Appellants cited section 316.640 in the trial court, they did not actually preserve this precise argument. (*See* R. 1105-08, 1156-69; Tr. 7-26, 52-

63.) Arguments not preserved in the trial court are waived. *E.g.*, *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 324-26 (Fla. 1st DCA 2011) (holding meritorious arguments were waived). But even if this argument were not waived, it still lacks merit because it is pure bootstrapping.

Specifically, Appellants are arguing that because the Legislature allowed municipalities to employ traffic crash investigation officers in section 316.640(3)(b), it therefore meant to (but did not) amend section 316.066's repeated references to "law enforcement officers." To state Appellants' argument is to refute it, because the fact that the Legislature enacts one statute does not mean it meant to amend another. *See Fla. Dep't of Children & Family Serv. v. McKim*, 869 So. 2d 760, 762 (Fla. 1st DCA 2004) ("'We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity.'" (citation omitted)).

In any event, the two statutes are easily harmonized. Section 316.640 authorizes municipalities to employ "traffic crash investigation officer[s]" "who do[] not otherwise meet the uniform minimum standards established by the commission for law enforcement officers or auxiliary law enforcement officers under chapter 943." § 316.640(3)(b), Fla. Stat. (2010). This is the authority upon which the Jacksonville Sheriff's Office based its community service officer program. *See* Operational Order 15.15.01. But the fact that traffic crash

investigation officers may investigate crashes does not transform them into law enforcement officers for purposes of the crash reporting requirements of section 316.066, because nowhere does that section impose a requirement that *only* law enforcement officers can prepare crash reports.[6] To the contrary, that section merely requires, often in the passive voice, that crash reports be prepared. *E.g.*, § 316.066(1)(a), Fla. Stat. (2010) (long form crash report "is required to be completed and submitted to the department"). Accordingly, section 316.640 and section 316.066 can be read harmoniously without superimposing section 316.640(3)(b)'s phrase "traffic crash investigation officer" onto section 316.066's use of the phrase "law enforcement officer."

Appellants also contend (Br. at 17-18) it is impossible to reconcile the trial court's ruling that the crash report was inadmissible with its ruling that Mr. Golden's statement to the community service officer was admissible. Appellants are mistaken again. For many decades, the statute and its predecessors have provided that crash reports are inadmissible, no matter who made them. It is only the 1989 amendment that expressly provides that statements to law enforcement officers are also inadmissible. In that regard, Appellants misplace their reliance on *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949). That case involved a law enforcement officer (not a community service officer) who "interrogated" a driver. *Id.* at 361.

[6] Indeed, Appellants themselves make this very argument when interpreting section 316.066(6). *See supra* note 4.

The Florida Supreme Court held both the oral statements and the report itself were privileged. *Id.* at 362. But *Stevens* is distinguishable. Here, Mr. Golden's statements were made to CSO Jackson, who was not a law enforcement officer, and there is no factual basis for concluding that CSO Jackson "interrogated" Mr. Golden. *See infra* Argument I.B.

Finally, Appellants invite the Court to disclaim giving the statute a "literal interpretation" altogether (Br. at 23) and just do whatever feels right. That, however, is not how courts operate. To the contrary, courts cannot rewrite statutes to fit their own policy proclivities. *E.g., Thrivent Fin. for Lutherans v. State, Dept. of Fin. Serv.*, 145 So. 3d 178, 182 (Fla. 1st DCA 2014) ("'[T]his Court may not rewrite statutes contrary to their plain language,' and 'policy concerns . . . must be addressed by the Legislature'" (citation omitted)). For that reason, Appellants misplace their reliance on *Dep't of Hwy. Safety & Motor Veh. v. Corbin*, 527 So. 2d 868 (Fla. 1st DCA 1988). In that case, this Court ruled that the word "trial" included contested administrative proceedings before a hearing officer. Here, however, the phrase "law enforcement officer" is unambiguous. *See supra* Argument I.A.1, at 16-21.

B. Appellants failed to demonstrate Mr. Golden made his statements to CSO Jackson "for the purpose of completing a crash report."

Without any factual basis in the record, Appellants contend (Br. at 20) CSO Jackson "compelled" Mr. Golden to make his statements in violation of his

privilege against self-incrimination. To the contrary, the record merely reflects that CSO Jackson spoke with the witnesses; it does not support the notion that he compelled any of their answers. Indeed, in criminal law, many incriminating statements are admissible without raising any self-incrimination concerns, even when a defendant has not been given *Miranda* warnings, so long as those statements are spontaneous and voluntary. *E.g.*, *State v. Binion*, 637 So. 2d 952, 953 (Fla. 4th DCA 1994) ("Since the trial court found that defendant was not questioned while in the police car, but rather that his statements were spontaneous, 'neither the letter nor spirit of *Miranda* has been violated.'").

Here, the record sheds no light on whether Mr. Golden made his statements spontaneously and voluntarily. Relatedly, the record also sheds no light whether Mr. Golden made his statements "for the purpose of completing a crash report." § 316.066(5), Fla. Stat. (2010). And it was Appellants' burden to preserve their record and establish a factual basis for entitlement to the accident report privilege. *E.g.*, *First Union Nat. Bank v. Turney*, 824 So. 2d 172, 183 (Fla. 1st DCA 2001) ("[T]he proponent of the privilege has the burden of proof as to facts which give rise to the privilege"). Because Appellants failed to preserve their record, this Court has ample reason to affirm on this alternative basis. *See Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) ("[I]f a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any

basis which would support the judgment in the record"); *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150, 1152 (1979) ("The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error.").

C. Any error was harmless.

Finally, the trial court's alleged error was harmless. The central issue at trial did not concern who arrived at the intersection first. Indeed, Dr. Justyn's counsel said so during closing argument. (Tr. 1652.) Rather, the main issue at trial was whether (1) Dr. Justyn stopped her bicycle in Mr. Golden's blind spot, or (2) Mr. Golden either saw or should have seen Dr. Justyn when he made his right-hand turn.

At trial, the jury heard from Mr. Golden himself, and he admitted his F-250 truck had no blind spots. (Tr. 1264-65.) Furthermore, he admitted he was looking at the mirrors and out the window the entire time he was making the right-hand turn. (Tr. 1268; *see also* Tr. 1287 ("My attention was mainly on the right side, using my mirrors.").) Finally, he admitted that if Dr. Justyn had been between his truck and Mr. Stevens, he definitely "would have seen her." (Tr. 1273.)

In light of these astonishing admissions, there was no "reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014), *reh'g denied* (Mar. 26, 2015). Either way, Mr. Golden

made clear to the jury that he should have seen Dr. Justyn when he made his right-hand turn. Therefore, he was negligent when he failed to do so. Mr. Golden's admissions at trial, as opposed to those made to CSO Jackson, are what made this an easy case, and they probably explain why deliberations lasted only 90 minutes.

II. Issue 2: Did the trial court abuse its discretion and cause harmful error when it prevented Appellants from cross-examining an expert outside her area of expertise?

The trial court's ruling on the second issue also can be affirmed on any one or all of three alternative grounds. First, the trial court did not abuse its discretion when it prevented Appellants from cross-examining Ms. Weseman outside her area of expertise (i.e., biomechanical engineering and accident reconstruction) regarding bicycle safety. *Infra* Argument II.A, at 28. Second, the alleged error was harmless, as Appellants asked the same question to Dr. Cummings, their own biomechanical engineer and accident reconstructionist. *Infra* Argument II.B, at 29. Third, Appellants did not preserve this error as they failed to proffer Ms. Weseman's testimony had they been allowed to cross examine her further. *Infra* Argument II.C, at 31. The initial brief fails to address the second and third grounds for affirming.

Standard of Review

Trial courts have "wide discretion to impose reasonable limits on cross-examination." *Geralds v. State*, 674 So. 2d 96, 100 (Fla. 1996). Accordingly, such

decisions are reviewed for a clear abuse of discretion. *Gosciminski v. State*, 132 So. 3d 678, 697 (Fla. 2013).

Merits

A. The trial court did not abuse its discretion when it limited Appellants' cross-examination.

"[I]t is apodictic that expert testimony is not admissible at all unless the witness has expertise in the area in which his opinion is sought." *Husky Indus., Inc. v. Black*, 434 So. 2d 988, 992 (Fla. 4th DCA 1983) (citing *Kelly v. Kinsey*, 362 So. 2d 402 (Fla. 1st DCA 1978)). "Cross-examination of a witness is limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in its discretion, permit inquiry into additional matters." § 90.612, Fla. Stat. (2015).

The trial court acted well within its discretion when it forbade Appellants from asking Ms. Weseman about bicycle safety. At no point during Ms. Weseman's testimony did she opine about best practices for bicycle safety. Instead, she had opined solely about her areas of expertise: biomechanics and accident reconstruction. Accordingly, the trial court acted well within its discretion when it concluded Ms. Weseman's direct testimony about biomechanics and accident reconstruction did not open the door to the quite different subject matter (outside her area of expertise) of bicycle safety.

In this regard, Appellants' reliance (Br. at 28-29) on *Poland v. Zaccheo*, 82 So. 3d 133 (Fla. 4th DCA 2012), is misplaced. *Poland* involved a medical doctor who opined a plaintiff's "automobile accident had caused only a temporary cervical strain" and that the "majority of [her] injuries were attributable to preexistent disc bulges and degeneration associated with her morbid obesity." *Id.* at 134-35. On cross-examination, the plaintiff attempted, but was not allowed, to inquire whether her surgeries were related to the automobile accident. *Id.* at 135.

Accordingly, *Poland* involved a quite different situation where the testimony sought from the expertise was both within his field of expertise (i.e., medicine) and had been opened during direct testimony (i.e., that her injuries were temporary and associated with morbid obesity, not the car accident). *Id.* at 134-35. It is for that reason that *Poland* reversed. *Id.* at 135. Here, however, unlike *Poland*, Appellants sought to have Ms. Weseman testify both outside her area of expertise (i.e., about bicycle safety) and about a topic her direct testimony had not addressed. *Poland* is therefore inapposite.

B. Any abuse of discretion in limiting Appellants' cross-examination was harmless.

The error alleged by Appellants was harmless. Appellants asked Dr. Cummings, their own biomechanical engineer and accident reconstructionist, about bicycle safety, and he offered precisely the same answer they apparently sought from Ms. Weseman:

> Q. And have we covered all of your opinions here today?
>
> A. Just one other item that I would say. As far as a bicyclist in this narrow of a lane, cutting in between a big truck and trailer like this is certainly an open and obvious hazardous condition.

(Tr. 981-82.)

Accordingly, as Appellants desired, the jury heard expert testimony that Dr. Justyn was not riding her bicycle safely. It simply rejected it. When a jury hears but rejects virtually identical evidence and testimony, an appellant cannot demonstrate harmful error. *See Edwards v. Shanley*, 580 Fed. App'x 816, 825-26 (11th Cir. 2014) (holding exclusion of expert caused no substantial influence on the jury's verdict because the same testimony and evidence came out at trial through other means). For that reason, any limitation of Ms. Weseman's cross-examination was harmless.

Appellants also contend the trial court's limitation of Ms. Weseman's cross-examination was harmful because "the jury returned a verdict finding ValleyCrest 100% at fault." (Br. at 30.) That is not how harmless-error review works. Rather, the question is whether there is any "reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014), *reh'g denied* (Mar. 26, 2015). Here, there is no reasonable possibility, because the jury heard the same testimony anyway. (Tr. 981-82.)

C. Appellants failed to preserve the alleged error because they did not proffer what Ms. Weseman's testimony would have been.

Finally to the extent Ms. Weseman would have given some different answer other than Dr. Cummings provided, it was Appellants' obligation to proffer that testimony. *Finney v. State*, 660 So. 2d 674, 684 (Fla. 1995) ("Without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result."). Accordingly, Appellants failed to preserve any error when they failed to proffer Ms. Weseman's likely answer.

It was too late for Appellants to proffer Ms. Weseman's deposition testimony in their motion for new trial. (*See* R. 1339-467.) "If a party wants the critical nature of the excluded testimony to be a factor in measuring whether the trial court abused its discretion, then it is incumbent upon the party to make an in-trial proffer." *Barclay v. Rivero*, 388 So. 2d 321, 322 n.7 (Fla. 3d DCA 1980) (citation omitted). "The only function which the post-trial proffer can serve is to demonstrate that appellants were harmed by the trial court's ruling." *Id.* (citation omitted). "[B]ut in the absence of a threshold showing of error, harm is irrelevant." *Id.*

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment.

Respectfully submitted,

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