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

Case No. 5D17-0287

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On Appeal from a Final Order of
The Fifth Judicial Circuit Court
(Lower Tribunal Case No. 2017–CA–000010)

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GEORGE ROSARIO,

Appellant,

v.

GLEN C. WILSON AND CITY OF GROVELAND, FLORIDA,

Appellees.

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# REPLY BRIEF OF APPELLANT GEORGE ROSARIO

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Appellant, George Rosario ("Mayor Rosario"), hereby files this Reply Brief presenting arguments in response and rebuttal to the arguments presented in the Answer Brief filed by Appellee Glen C. Wilson ("Wilson").

## ARGUMENT

In his Answer Brief, Wilson misstates the standard of review and fails to address the failures of the process that violated Florida Rule of Civil Procedure 1.610 and Mayor Rosario's due process, opting instead to argue that those protections do not apply—but does so without regard for the clear precedent to the contrary cited in the Initial Brief.

### I. WILSON MISSTATES THE STANDARD OF REVIEW.

When a temporary injunction is issued without notice, the target party of that injunction may either take an interlocutory appeal from that order *or* file a motion to dissolve the injunction (and, if denied, may take an appeal from the order denying the motion to dissolve the injunction). It is well-established Florida law that in the former case—which is *this* case—"the appellate court is constrained to review only the legal sufficiency of the order, the complaint, and any supporting documents. *Thomas v. Osler Med., Inc.*, 963 So. 2d 896, 900 (Fla. 5th DCA 2007) (citing *Hotel–Motel, Rest. Employees & Bartenders Union, Local 339 v. Black Angus of Lauderhill, Inc.*, 290 So. 2d 479, 482 (Fla. 1974); *Lewis v. Sunbelt Rentals, Inc.*, 949 So.2d 1114, 1115 (Fla. 2d DCA 2007); *Kailin Hu v. Haitian*

*Hu*, 942 So. 2d 992 (Fla. 5th DCA 2006); and *Orange County v. Webster*, 503 So. 2d 988 (Fla. 5th DCA 1987)). The appellate court will also review the order itself for compliance with the law. *See Bieda v. Bieda*, 42 So. 3d 859, 861–62 (Fla. 3d DCA 2010). And this Court "may not address the merits of the issuance of the injunction." *Id.* at 861. *See also Thomas*, 963 So. 2d at 900 ("the appellate court may not address the factual basis for issuance of the injunction"; noting that "[a] trial court may not conduct an evidentiary hearing if the request for temporary injunction is made without notice to the other party. Fla. R. Civ. P. 1.610(a)(2).").

Wilson incorrectly sets out the standard of review that applies when (unlike this case) the appellant actually participated in the process that resulted in the entry of the temporary injunction and then files an appeal challenging the injunction. Ans. Br. at 7. That standard is plainly inapplicable here.

As a result of this error, the arguments that follow—which seek to attack Mayor Rosario's appeal under that standard—are also inappropriate and extraneous to the issues presented in this appeal.

## II. WILSON MISSES THE MARK AND FAILS TO ESTABLISH THE CONDITIONS REQUIRED FOR THE ENTRY OF A TEMPORARY INJUNCTION WITHOUT NOTICE TO MAYOR ROSARIO UNDER RULE 1.610.

Wilson's argument that Rule 1.610 does not apply to this case has no merit. Wilson proposes that because he chose not to include Mayor Rosario as a defendant in the case (at least not until after the temporary injunction was issued),

Wilson "was not required to address Mr. Rosario as an adverse party," and he could circumvent Rule 1.610. Ans. Br. at 9. That position is untenable.

Florida law is clear that a non-party adversely affected by the entry of an injunction has standing to challenge that order. *See Trans Health Mgmt. Inc. v. Nunziata,* 159 So. 3d 850 (Fla. 2d DCA 2014) (finding that even though the appellants, nonparties, were not specifically named in the injunction, they nevertheless had standing to seek review where the injunction specifically referenced their actions as being the conduct that the plaintiff was seeking to enjoin). *Cf. Mem'l Health Sys., Inc. v. Halifax Hospice, Inc.*, 689 So. 2d 373, 376 (Fla. 1st DCA 1997) (concluding that non-party MHS had standing to challenge an injunction because, "[w]hile nominally running against AHCA only, the injunction [that] MHS seeks to dissolve has MHS as an unmistakable target"); *Metropolitan Cas. Ins. Co. v. Tepper*, 969 So. 2d 403 (Fla. 5th DCA 2007), *review granted,* 980 So. 2d 490 (Fla. 2008), and *decision approved,* 2 So. 3d 209 (Fla. 2009) ("[A] party has standing to challenge a trial court's order when it has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation."); *Soud v. Kendale, Inc.*, 788 So. 2d 1051, 1052 (Fla. 1st DCA 2001) (reversing a preliminary injunction for failure to comply with Rule 1.610 where the preliminary injunction stated that, "[t]he members of the Jacksonville City Council and each of them individually are hereby enjoined from participating in the 'Shade

Meeting' of the City Council scheduled for May 9, 2000 at 3:00 p.m.," and "[n]one of those documents [filed by plaintiff] mention any effort on [plaintiff's] part to notify *the Council members* or why notice was not required." (Emphasis added.)).

Indeed, Rule 1.610 establishes that a temporary injunction may not be granted without notice to the "adverse party" if the conditions of the rule are not satisfied. Fla. R. Civ. P. 1.610(a). Because Rule 1.610 was fashioned after Federal Rule of Civil Procedure 65, appellate courts in Florida look to the interpretation of Rule 65 to interpret Rule 1.610 in accordance with the Florida Supreme Court's objective to harmonize Florida rules with the federal rules. *Lingelbach's Bavarian Restaurants, Inc. v. Del Bello,* 467 So. 2d 476, 478 (Fla. 2d DCA 1985). Like Rule 1.610, Federal Rule of Civil Procedure 65(b) also states, in relevant part: "The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if [certain conditions are met]."[1] Courts have consistently held that "adverse party" in this rule means the party adversely affected by the injunction, not the opponent in the underlying action. *Parker v. Ryan,* 960 F.2d 543, 545 (5th Cir. 1992) ("When dealing with a preliminary injunction, the 'adverse party' means the party adversely affected by the injunction, not the opponent in the underlying action."). Thus, a plaintiff, like Wilson, cannot circumvent a party's right to challenge a temporary injunction

[1] Indeed, "the rules are virtually a mirror image of each other." *Lingelbach's Bavarian Restaurants, Inc.*, 467 So. 2d at 478.

without notice by choosing not to include the target of the injunction as a defendant. Rather, consistent with well-established Florida law granting Mayor Rosario standing to challenge the temporary injunction, Rule 1.610 is properly interpreted to expressly apply to bar preliminary injunctions without notice to persons adversely affected by the injunction in the absence of strict compliance with its requirements.

Moreover, Mayor Rosario was *clearly* adversely affected by the injunction. Both the Complaint and the temporary injunction make evident that Mayor Rosario is the target of the injunction. The Complaint specifically singles out Mayor Rosario's authority as Mayor and Council Member as the target of the temporary and permanent injunctions sought by Wilson. *See* App. B at 1–4 (¶¶ 2, 3, 4, 11, 12, 13, 17).[2] Indeed, as relief, Wilson specifically asked that the Court "grant a temporary injunction, without notice if necessary, and thereafter a permanent injunction enjoining the City from recognizing *the authority of George Rosario as Mayor or Council Member . . . .*" *Id.* at 3 (emphasis added). Similarly, the temporary injunction references the actions of Mayor Rosario—and, in fact, names him specifically as the target of the injunction. App. D.

For all these reasons, the temporary injunction could not be properly issued under the law without satisfying each of the requirements of Rule 1.610. Yet,

[2] The appendix references in this brief are to the Appendix to the Initial Brief.

having improperly concluded that Rule 1.610 does not apply, Wilson fails to even attempt to argue compliance with the rule.[3]

Nevertheless, any such attempt would have been futile. As fully expounded in the Initial Brief, Rule 1.610(a)'s strict requirements include that: (1) specific facts averred by affidavit or verified pleading must show that immediate and irreparable injury, loss, or damage will result to the movant *before the adverse party can be heard in opposition*; (2) the movant's attorney must certify in writing the efforts that have been made to give notice *and* the reasons why notice should not be required; (3) the court must consider no evidence except the affidavit or verified pleading unless the adverse party appears at the hearing or has received reasonable notice of the hearing; and (4) the temporary injunction must define the injury, must state findings by the court why the injury may be irreparable, *and* must give the reasons why the order was granted without notice if notice was not given. *Each* of these conditions was violated in this case.

First, the Complaint sets forth *no facts* to show that immediate and irreparable injury, loss, or damage will result to Wilson *before Mayor Rosario can be heard in opposition*. Second, Wilson's attorney failed to certify in writing any efforts made to give notice to Mayor Rosario. Rather, counsel only "notified the

[3] As explained in section I of the Argument, Wilson's remaining straw-man arguments as to the merits of the issuance of the injunction based on a defective and incomplete proceeding are improper and extraneous to the issues presented in this appeal.

City Attorney of the request for injunctive relief and our efforts to obtain a temporary injunction immediately." App. B at 3. Third, despite the lack of notice to Mayor Rosario and the fact that he did not participate in the hearing, in circumvention of Rule 1.610, the trial court considered additional evidence at the hearing. Finally, the temporary injunction fails to define the injury to Wilson or to state why any such injury to Wilson is immediate and irreparable,[4] and fails to give the reasons why the order was granted without notice.

Each of these failures is fatal and requires reversal of the temporary injunction.

## III. WILSON IMPROPERLY IGNORES MAYOR ROSARIO'S INDIVIDUAL DUE PROCESS RIGHTS IN ARGUING THAT THE LIMITED NOTICE TO THE CITY WAS SOMEHOW SUFFICIENT TO COMPORT WITH DUE PROCESS TO MAYOR ROSARIO.

Wilson's suggestion that the eleventh-hour notice to the City was sufficient to comport with due process to Mayor Rosario lacks any merit. It is widely-recognized that, "'Liberty' and 'property' are broad and majestic terms . . . purposely left to gather meaning from experience." *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972). While the liberty guaranteed under the Constitution has not

[4] All it says is that "[i]rreparable harm will likely result absent entry of this injunction because the City intends to rely on the authority of George Rosario as a public office holder in making *significant municipal decisions in the future*, including settlement of lawsuits and termination of the City Manager." App. D at 3. That finding is so vague as to render it insignificant in testing the immediacy and irreparable nature of the alleged injury.

been defined with exactness, "Without doubt, [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the *common occupations of life* . . . and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men." *Roth*, 408 U.S. at 572. *See also Bradsheer v. Florida Dept. of Highway Safety & Motor Vehicles*, 20 So. 3d 915, 927 n.15 (Fla. 1st DCA 2009) (same). Certainly, Mayor Rosario's right to retain an *elected* office—one which is closely entwined with the City residents' fundamental right to vote, *cf. Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977); *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 31 L. Ed. 2d 92 (1972)—requires adherence to due process.

None of the cases cited by Wilson hold to the contrary. In fact, the cases Wilson relies on are inapposite to the question of whether the entry of a temporary injunction without notice violates due process. None of the cases that Wilson cites involve a challenge to the issuance of the temporary injunction. Thus, for instance, Wilson discusses and attempts to rely on *Channell v. Applied Research, Inc.*, 472 So. 2d 1260, 1262 (Fla. 4th DCA 1985). But *Channell* involved a challenge to an order of contempt, and the party charged with contempt did *not* claim a violation of due process in the issuance of the injunction, but rather claimed that it was not afforded due process in the determination that it was in contempt of the order. *Id.* at 1262–63. The question here is not whether an injunction entered against a party

is binding on that party's officers, but whether due process must be given to an officer, like Mayor Rosario, when a party seeks to deprive that officer of the right to retain elected office. On this subject, Wilson presents no discernible argument.

The rest of Wilson's argument about due process rests on the illusory proposition that, "At the time of the injunction, Mr. Wilson did not seek to enjoin Mr. Rosario. Mr. Wilson only sought to enjoin the named party, the City." Ans. Br. at 16. It is on this basis that Wilson simply dismisses, without any serious evaluation, the cases presented in the Initial Brief—including *Trans Health Mgmt. Inc. v. Nunziata*, 159 So. 3d 850 (Fla. 2d DCA 2014), in which the Second District confronted virtually the same situation presented here. However, as explained in the preceding section of the argument, and as is obvious from the Complaint and from the temporary injunction, Mayor Rosario *was the target* of the injunction and *was the adversely affected party*. Indeed, *after* the temporary injunction was issued, Wilson filed an Amended Complaint, adding for the first time Mayor Rosario as a defendant and requesting *the same injunctive relief* which Wilson sought "against the City." App. E. Wilson's argument on that he did not "at the time" seek to enjoin Mayor Rosario fails the most generous analytical trial.

Finally, Wilson's argument that Mayor Rosario has no interest outside of his capacity as an officer of the City (Ans. Br. at 17) fails any scrutiny as well. As explained above, Mayor Rosario has an individual and personal right to retain an

*elected* office. The constitutional guarantee of due process requires that *each* person be given a full and fair opportunity to be heard. *County of Pasco v. Riehl*, 635 So.2d 17, 18 (Fla. 1994); *Edelman v. Breed*, 836 So. 2d 1092, 1094 (Fla. 5th DCA 2003). Thus, this Court has clearly established that, "a court is without jurisdiction to issue an injunction which would interfere with the rights of those who are not parties to the action." *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579, 583 (Fla. 5th DCA 2003). It was Mayor Rosario's individual rights that were targeted by the Complaint and affected by the injunction.[5] Thus, the trial court was required to comport with due process in issuing a temporary injunction that targeted Mayor Rosario and effectively stripped him of his ability to retain elected office. Yet, Wilson purposely excluded Mayor Rosario from the proceedings leading to the entry of the temporary injunction without issuance of process on Mayor Rosario, without notice to him, and without the opportunity to be heard, in violation of his due process rights.

Accordingly, the Temporary Injunction must be reversed or quashed.

## CONCLUSION

For each of these reasons, the Temporary Injunction must be reversed, or quashed.

[5] Moreover, the import of Wilson's argument is that if the City had interests adverse to Mayor Rosario, then the Mayor would be left without recourse. This cannot be true.

Respectfully submitted this 13th day of April, 2017.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with all the requirements set forth in Florida Rule of Appellate Procedure 9.210.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief has been e-filed via eDCA and furnished via e-mail, pursuant to Fla. R. Jud. Admin. Rule 2.516(b)(1), this 13th day of April, 2017, upon the following:

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