

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

**THOMAS BRAZIL,**

Appellant,

v.

**BILLYE BARKLEY,**

Appellee.

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**CASE NO.: 2011-CV-000039-A-O**

Lower Case No.: 2011-CC-002804-O

Appeal from the County Court, for Orange County,  
Florida, Heather L. Higbee, County Judge.

Michael L. Resnick, Esquire, for Appellant.

Michael J. Gasdick, Esquire,  
and Tara C. Early, Esquire, for Appellee.

Before KOMANSKI, GRINCEWICZ, and TURNER, J.J.

**PER CURIAM.**

**FINAL ORDER AFFIRMING TRIAL COURT**

Appellant, Thomas Brazil (“Brazil”), timely appeals the Trial Court’s entry of Default entered on March 4, 2011 and Final Judgment for Possession entered March 10, 2011 in favor of Appellee, Billye Barkley (“Barkley”). This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

### *Summary of Facts and Procedural History*

This appeal arose from an eviction action brought by Barkley against Brazil. On February 16, 2011 Barkley filed her Complaint for possession against Brazil. On March 2, 2011 Brazil filed his Answer and Affirmative Defenses, Motion to Dismiss, Motion to Determine Rent to be Paid into Registry of Court, Motion to Declare Statute Unconstitutional, and Request for Jury Trial. On March 7, 2011, the Trial Court issued its Default against Tenant with respect to the Complaint and on March 10, 2011 issued its Final Judgment for Possession against Brazil. Also, in the Final judgment the Trial Court certified questions to the Fifth District Court of Appeal addressing the requirement to tender rent into the court registry under section 83.60(2), Florida Statutes. Brazil then filed his Notice of Appeal to the Fifth District on April 6, 2011. However, on May 2, 2011, the Fifth District in *Brazil v. Barkley*, 5D11-1192, declined to accept jurisdiction and transferred the appeal to this Court for review.<sup>1</sup>

### *Arguments on Appeal*

The crux of Brazil's arguments center on section 83.60(2), Florida Statutes. First, Brazil points out that in this case the three-day notice to pay rent was defective because it was posted on February 16, 2011, but required that the rent be paid by February 8, 2011 and thus, he was not required to tender rent into the court registry as set forth in the statute in order to defend the action. Second, Barkley claims that because he requested a rent deposit hearing in compliance with the summons served on him that allows for a rent deposit hearing, he has the right to such

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<sup>1</sup> Specifically, the certified questions that the Fifth District declined to review were:

(1) WHETHER A TENANT CLAIMING A DEFECTIVE THREE-DAY NOTICE TO PAY RENT IN A RESIDENTIAL EVICTION IS REQUIRED TO TENDER RENT INTO THE COURT REGISTRY AS SET FORTH IN SECTION 83.60(2), FLORIDA STATUTES IN ORDER TO DEFEND THE ACTION BASED ON THE DEFECTIVE THREE-DAY NOTICE TO PAY RENT.

(2) WHETHER, UNDER SECTION 83.60(2), FLORIDA STATUTES, A TENANT WHO HAS REQUESTED A RENT DEPOSIT HEARING HAS THE RIGHT TO A RENT DEPOSIT HEARING WHEN THE TENANT HAS NOT TENDERED RENT MONEY INTO THE COURT REGISTRY.

hearing per the statute. Third, he claims that the mandatory rent deposit provision of section 83.60(2), Florida Statutes, is unconstitutional as it violates his due process rights under the Fourteenth Amendment of the U.S. Constitution and denies his right of access to the courts as guaranteed by Article 1, Section 21 of the Florida Constitution. Fourth, Brazil claims that the controlling case law governing these issues is *Investment and Income Realty, Inc. v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985) and this Circuit's decision in *Brooks v. Narine*, 17 Fla. L. Weekly Supp. 72a (Fla. 9th Cir. Ct. 2009). Lastly, Brazil argues that the Trial Court erred by applying the case, *Stanley v. Quest International Investment, Inc.*, 50 So. 3d 672 (Fla. 4th DCA 2010), *review denied*, 76 So. 3d 938 (Fla. 2011), because Stanley incorrectly held that a tenant must deposit rent into the court registry even when a landlord has failed to state a cause of action for eviction and overlooked a tenant's statutory right to file a motion to determine rent and avoid an automatic default and final judgment.

Conversely, Barkley first argues that the plain and unambiguous language of section 83.60(2), Florida Statutes, specifically states that the failure to tender the rent into the court registry operates as an absolute waiver of the tenant's right to raise a defective notice in defense of an eviction action. Second, Barkley claims that Brazil failed to comply with the statute's required procedure for a rent deposit hearing because he failed to provide supporting documentation with his Motion to Determine Rent showing that the rent as alleged in the complaint was in error; thus, Brazil's failure to pay rent into the court registry or his failure to file supporting documentation with the Motion to Determine Rent operates as an absolute waiver. Third, Barkley claims that the Court in *Karsteter v. Graham Companies*, 521 So. 2d 298 (Fla. 3d DCA 1988), already ruled that the statute is constitutional; thus, there is no showing that the statute violates a tenant's due process rights or denies a tenant free access to the court as it

does not prevent a tenant from instituting his own action against the landlord; the landlord-tenant relationship is treated differently because of the importance of the landlord's property interests; and it would be inequitable to allow litigation to proceed while the landlord carries the full load of all rent payments in contravention of any contractual obligation by the tenant.

### *Standard of Review*

When an appeal involves a purely legal matter such as the judicial interpretation of a statute, the standard of review is de novo. *Racetrac Petroleum, Inc. v. Delco Oil, Inc.*, 721 So. 2d 376, 377 (Fla. 5th DCA 1998). Also, it is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979); *Wright v. Wright*, 431 So. 2d 177, 178 (Fla. 5th DCA 1983).

### *Analysis*

Section 83.60(2), Florida Statutes (2011) states:

In an action by the landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment, the tenant shall pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due. The clerk shall notify the tenant of such requirement in the summons. Failure of the tenant to pay the rent into the registry of the court or to file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of service of process constitutes an absolute waiver of the tenant's defenses other than payment, and the landlord is entitled to an immediate default judgment for removal of the tenant with a writ of possession to issue without further notice or hearing thereon. In the event a motion to determine rent is filed, documentation in support of the allegation that the rent as alleged in the complaint is in error is required. Public housing tenants or tenants receiving rent subsidies shall be required to deposit only that portion of the full rent for which the tenant is responsible pursuant to federal, state, or local program in which they are participating.

First, from the plain meaning of this statute, in an action by a landlord for possession of a dwelling unit, if the tenant interposes any defense other than payment, the tenant is required to pay into the registry of the court the accrued rent as alleged in the complaint or as determined by the court and the rent which accrues during the pendency of the proceeding, when due. Also, the clerk must notify the tenant of such requirement in the summons. Further, this statute provides that in lieu of paying the rent into the registry of the court, the tenant may file a motion to determine the amount of rent to be paid into the registry within 5 days, excluding Saturdays, Sundays, and legal holidays, after the date of service of process and also requires that a motion to determine rent include documentation in support of the allegation that the rent as alleged in the complaint is in error. Further, as Barkley correctly argues, this statutory requirement was held constitutional in *Karsteter v. Graham Companies*, 521 So. 2d 298 (Fla. 3d DCA 1988); *see* 34 Fla. Jur. 2d *Landlord and Tenant* § 283 (2013); *see Barfield v. Busby*, 11 Fla. L. Weekly Supp. 396b (Fla. 9th Cir. Ct. 2004) (noting that the Third District, already addressed the issue of the constitutionality of section 83.60, Florida Statutes in *Karsteter*).

Next, upon review of the record in this case, this Court finds that the Fourth District Court of Appeal's decision in *Stanley v. Quest International Investment, Inc.*, 50 So. 3d 672 (Fla. 4th DCA 2010) is controlling as it involved very similar facts and issues addressing section 83.60(2), Florida Statutes, as is in the instant action. In *Stanley*, as in the instant case, the tenant was sued by the landlord for possession of the rented premises and the three-day notice was defective. The tenant filed a timely motion to dismiss, or in the alternative, a motion to determine rent, but did not deposit the rent into the court registry. The tenant contended that he did not pay the rent into the court registry contending that a proper three-day notice was a condition

precedent to landlord's removal action. The county court entered a default against the tenant and certified to the Fourth District the question:

WHETHER A TENANT CLAIMING A DEFECTIVE OR NON-EXISTENT THREE DAY NOTICE IN A RESIDENTIAL EVICTION IS REQUIRED TO RENDER UNDISPUTED RENT INTO THE COURT REGISTRY AS SET FORTH IN FLORIDA STATUTE §83.60(2) IN ORDER TO DEFEND THE ACTION BASED ON THE DEFECTIVE OR NON-EXISTENT THREE-DAY NOTICE.

The Fourth District in reviewing the certified question applied the plain meaning of section 83.60(2), Florida Statutes, and affirmed the county court's ruling finding that the statute requires the deposit of rent into the court registry if the tenant chooses to assert any defense other than payment of rent, and the failure to make the necessary deposit constitutes an absolute waiver allowing for an immediate default judgment in favor of the landlord. Further, the Fourth District noted that it has previously held that the notice requirement was unnecessary to establish subject matter jurisdiction. *Stanley* at 673-674; *see K.D. Lewis Enterprises Corporation, Inc. v. Smith*, 445 So. 2d 1032, 1035 (Fla. 5th DCA 1984) (holding that the filing of a counterclaim does not relieve a tenant of the obligation to pay rent into the registry of the court and such failure to do so prevents a tenant from filing a defense, including the defense of a defective three day notice); *see also* 34 Fla. Jur. 2d *Landlord and Tenant* § 274 (2013); 19 Fla. Prac., *Florida Real Estate* § 27:4 (2012-2013 ed.).

Brazil also argues that the court in *Stanley* overlooked a tenant's statutory right to file a motion to determine rent and avoid an automatic default and final judgment. From what this Court can discern from the record, the summons was ultimately served via posted service on February 23, 2011. Brazil timely filed his Motion to Determine Rent on March 2, 2011. However, Brazil's Motion did not include any supporting documentation showing that the rent alleged in the complaint was in error. Thus, notwithstanding whether the Court in *Stanley*

overlooked the timely filed motion to determine rent, this Court finds that from the plain meaning of the statute, Brazil's filing of the Motion to Determine Rent, but without supporting documentation, did not negate the requirement to pay the rent into the registry of the court.

Lastly, this Court concurs with Barkley that the case Brazil cites in support of most of his arguments, *Investment and Income Realty, Inc. v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985), is distinguishable from the instant case. First, when the *Bentley* decision was rendered in 1985, the pertinent section of the statute providing a tenant the opportunity to file a motion to determine rent was not in effect; thus, *Bentley* did not involve a motion to determine rent. Second, in *Bentley* the tenant's compliance with section 83.60(2), Florida Statutes, including the requirement to deposit rent into the court registry, was not at issue, unlike in the instant case where Brazil's compliance and the constitutionality of said statute are the principal issues on appeal. Also, this Court notes that the other case Brazil relies on, *Brooks v. Narine*, 17 Fla. L. Weekly Supp. 72a (Fla. 9th Cir. Ct. 2009), was ruled on prior to the ruling in *Stanley*.

Further, in the instant case, the Fifth District Court of Appeal declined to review the certified questions addressing section 83.60(2), Florida Statutes. Thus, in the absence of a ruling directly on point from the Fifth District, the Trial Court properly applied *Stanley* as a basis for the ruling as *Stanley* involved very similar facts and issues. *Dawkins, Inc. v. Huff*, 836 So. 2d 1062, 1064 (Fla. 5th DCA 2003) (holding that when there is no binding precedent from the Florida Supreme Court or an appellate court for the district in which a trial court sits, the trial judge is bound to follow the decisions of other appellate courts that are on point).

Accordingly, this Court finds that the Trial Court did not err in the application and interpretation of section 83.60(2), Florida Statutes, nor in applying the *Stanley* case, in entering the Default and Final Judgment for Possession against Brazil.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Trial Court's entry of a Default entered on March 4, 2011 and Final Judgment for Possession entered March 10, 2011 are **AFFIRMED**. Also, Barkley's Motion for appellate attorneys' fees entitled "Appellee's Motion Attorneys' Fees" filed December 16, 2011 is **GRANTED** per section 83.48, Florida Statutes, and "Appellant's Motion for Attorney's Fees" filed December 21, 2011 is **DENIED**.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this 19th day of November, 2013.

/S/  
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**WALTER KOMANSKI**  
**Presiding Circuit Judge**

GRINCEWICZ and TURNER, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Michael L. Resnick, Esquire**, Legal Aid Society of the Orange County Bar Association, Inc., 100 E. Robinson Street, Orlando, Florida 32801, [mresnick@legalaidocba.org](mailto:mresnick@legalaidocba.org) and **Michael J. Gasdick, Esquire and Tara C. Early, Esquire**, Stanton & Gasdick, P.A., [mick@sg-law.us](mailto:mick@sg-law.us), [tara@sg-law.us](mailto:tara@sg-law.us), 390 North Orange Avenue, Suite 260, Orlando, Florida 32801, on the 19th day of November, 2013.

/S/  
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Judicial Assistant