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

**PREMIUM SHOPPES, LLC**,

Appellant,

v.

**ORANGE COUNTY**, **FLORIDA**,

Appellee.
_____/

**CASE NO.: 2012-CV-50** [1]
Lower Case No.: SM2012-188423OFSS

Appeal from the decision of the
Special Magistrate, Orange County, Florida.
Yvette Rodriguez Brown, Special Magistrate.

Scott A. Glass, Esquire, for Appellant.

Scott Shevenell, Assistant County Attorney,
for Appellee.

Before WALLIS, HIGBEE, MURPHY, J. J.

**PER CURIAM**.

**FINAL ORDER REVERSING FINAL ADMINISTRATIVE ORDER**

Appellant, Premium Shoppes, LLC ("Premium") appeals the Special Magistrate's Findings of Fact, Conclusions of Law, and Order rendered April 23, 2012 in favor of Appellee, Orange County, Florida ("County"), which found Premium in violation of section 31.5-14 of the Orange County Code. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1). We dispense with oral argument. Fla. R. App. P. 9.320.

[1] Premium initially filed a Petition for Writ of Certiorari, case no. 2012-CA-8053, writ 12-30. Subsequently, by agreement of the parties, and in accordance with Rule 9.040(c), Fla. R. App. P., the Court deemed the Petition for Writ of Certiorari to be a Notice of Appeal and it was transferred and re-assigned as case no. 2012-CV-50.

*Facts and Procedural History*

Premium is the owner of a commercial shopping center located on Vineland Avenue in the unincorporated section of Orange County and leases space in its shopping center to various retail stores, restaurants, and service providers. Two of Premium's tenants, Sunglass Gallery and Luggage Depot ("Sunglass and Luggage"), periodically hire people to stand beside the road holding signs advertising their respective businesses that is permitted under section 31.5-13(19) of the Orange County Code. However, if the sign holders leave the sign unattended in the public right-of-way, for example, when they take a break, it is considered a violation of section 31.5-14 (1) of the Orange County Code ("Ordinance 31.5-14(1)") which prohibits private individuals or entities from erecting signs in the public right-of-way.

During the second half of 2011, the owners of Sunglass and Luggage were collectively warned, cited and/or fined five times by Orange County Code Enforcement for violating Ordinance 31.5-14(1) when their signs were left unattended in the landscaped public right-of-way adjacent to Vineland Avenue. Despite the numerous warnings, citations and fines, Sunglass and Luggage continued to periodically leave their signs unattended on the public right-of-way. Also, in each case, Code Enforcement Officer Steven Marconi confronted the owners of Luggage and Sunglass who both admitted that they owned the respective signs in the right-of-way. Due to their continued non-compliance with Ordinance 31.5-14(1), Orange County Code Enforcement issued a Statement of Violation and a Notice of Hearing, not to the admitted violators, but instead to their landlord, Premium.

On April 2, 2012, a hearing was held on the Statement of Violation before the Special Magistrate who entered an order on April 23, 2012. In the order, the Special Magistrate found that Premium was in violation of Ordinance 31.5-14(1) and ordered that Premium was

currently in compliance, but any violation after May 2, 2012 would result in a fine of $250.00 per day, per sign. This appeal followed.

*Standard of Review*

When conducting appellate review of an administrative action, the circuit court must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982).

*Arguments on Appeal*

On appeal, Premium argues that the Special Magistrate's order was not supported by competent substantial evidence to support her finding that Premium was in violation of Ordinance 31.5-14(1). Premium also argues that the Special Magistrate departed from the essential requirements of law when she ascribed the off-premises actions of Sunglass and Luggage to Premium when there was no master/servant, principal/agent or other relationship between them that would support imposition of vicarious liability.

Conversely, the County argues that the Special Magistrate's order is supported by competent substantial evidence and the Special Magistrate did not depart from the essential requirements of law in making a finding that Premium was liable for the violations committed by Sunglass and Luggage.

*Analysis and Findings*

From review of the record and the briefs, Premium does not argue nor does it appear that Premium was deprived of due process. The issue in this appeal is whether competent substantial evidence existed in support of the Special Magistrate's findings and ruling that

Premium violated Ordinance 31.5-14(1) and whether the Special Magistrate followed the essential requirements of the law. Ordinance 31.5-14(1) provides that except as may be expressly allowed or exempted elsewhere in this chapter, any sign erected on public property by a private entity or individual, including on a public right-of-way is prohibited.

From review of the hearing transcript and DVD video of the hearing on April 2, 2012, Code Enforcement Officer Marconi testified that he knew the signs in question did not belong to Premium. He also testified that efforts were made to handle the noncompliance with the tenants, but when those efforts didn't work, Code Enforcement had to take the next step to hold Premium as the property owner responsible for its tenants. Officer Marconi also testified that he had no evidence that Premium was guilty of or had participated in the violation of Ordinance 31.5-14(1). Likewise, he conceded that the charged violation did not, and by definition could not, occur on Premium's property because it only involves signs placed on public, not private, property. Moreover, when asked to explain why he cited Premium for a violation which he knew it had not committed, Officer Marconi testified that the County's policy was to try to hold landlords responsible if the County cannot get the tenants to comply. He further pointed out that in this case, Premium would be liable for such a violation committed by its tenants occurring on any public right-of-way in Orange County.

In addition to Officer Marconi, Premium's property manager, Debbie Younglove, testified at the hearing. Ms. Younglove testified that she had spoken with Officer Marconi about the ongoing violations and had contacted Sunglass and Luggage asking them several times to stop violating the ordinance. She further testified that Sunglass and Luggage told her they would comply with the sign ordinance and would stop leaving their signs unattended in the public right-of-way. Daniel Cho, owner of Luggage and Amrita Lamba, owner of

Sunglass testified and provided information as to the efforts made by them to get into compliance with the sign ordinance as to the prior citations. Officer Marconi also concurred that Sunglass and Luggage were currently in compliance with Ordinance 31.5-14(1), but he requested a finding that if they were to come out of compliance within or after the next fifteen days, that a $250.00 per day fine be imposed.

Upon completion of the testimony, Premium's counsel argued that the County failed to prove that Premium erected a sign or that they controlled or directed Sunglass and Luggage to do so. Instead, as Premium's counsel argued, the evidence showed the opposite, that Premium tried to prevent Sunglass and Luggage from erecting their signs and cooperated with Code Enforcement. In response, the Assistant County Attorney argued that the Special Magistrate had seen several cases like this, unfortunately, where there are tenants who are doing the wrong, but because they are tenants, the owner is going to have to take the onus of that. The Assistant County Attorney then requested that Premium be found in violation, even though they were currently in compliance with Ordinance 31.5-14(1).

At the conclusion of the hearing, the Special Magistrate determined that Premium was in violation stating:

> Similar to cases where we have private property, personal property, tenants and non-tenants, commercial follows the same realm. The commercial owner is responsible for the actions of their tenants. While I can appreciate difficulties of controlling your tenants, you do have a contractual relationship with them.
>
> And some commercial owners have taken steps above and beyond and prepared clauses in their contracts to help them protect themselves against this kind of action by their tenants. And so, if that's not already in your lease agreement, that's something that might want to be looked into to protect the owner of the property from the actions of their tenants.

> But as it is right now, the tenant is in compliance. We don't anticipate that these two tenants will come out of compliance. However, there are a lot of shops out there that could, potentially.
>
> So everyone needs to be put on notice that if the property fails to remain in compliance or if Premium Shoppes, LLC does not make sure that their other tenants go out of stock [sic] or out of compliance, after April -- I'm going to give you 30 days. So maybe you can notify all your tenants of the situation, if they don't already know.
>
> So we have that the property is currently in compliance. Any violation after May 2, 2012 will result in a fine of $250 per day, per sign.

*Premium's Relationship with Sunglass and Luggage*

It appears that the Special Magistrate based her ruling solely on Premium's contractual relationship with Sunglass and Luggage, but she did not include any legal authority in support of her ruling. The County, in its Answer Brief, argues that Premium is in a better position to rein-in the activities of its tenants based on its contractual relationship between it and Sunglass and Luggage and thus, it is permissible to hold Premium liable for the illegal placement of the signs in the public right-of–way.

The relationship of a landlord and tenant alone does not render the landlord liable for illegal or injurious actions of the tenants. *See Fla. Jur. 2d, Landlord & Tenant*, §§ 2 & 132; *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661 (Fla. 5th DCA 1987). Also, as Premium correctly points out in its Initial and Reply Briefs, there was no evidence presented in this case showing that a master/servant or principal/agent relationship existed between it and Sunglass and Luggage. Nor was there any evidence of an express or implied agency agreement legal or de facto showing that Premium controlled the actions of Sunglass and Luggage. The existence of an agency relationship may be established expressly, or by estoppel, apparent authority, or ratification. The party who seeks to establish the existence of such a relationship carries the

burden of proof. A key element in establishing an agency relationship is that of control. *Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A. and Nagle,* 694 So. 2d 827, 832 (Fla. 4th DCA 1997); *See Dorse v. Armstrong World Industries, Inc.*, 513 So. 2d 1265, 1268 n.4 (Fla. 1987) (noting that in a true agency relationship, the principal must control the means used to achieve the outcome, and not just the outcome itself). In the instant, there was no evidence in the record that Premium ever controlled Sunglass and Luggage in the way that a principal controls an agent. Therefore, the Special Magistrate's ruling lacked legal authority to hold Premium liable for the off-premises activities of Sunglass and Luggage over which it had no control.

*Lien Theory*

The County also argues that Premium should be held liable under a lien theory because Premium may have benefited from Sunglass' and Luggage's illegal advertising. Again, there is no evidence in the record of a lease or other agreement that included provisions that Premium was entitled to, for example, a percentage of sales or other evidence that placement of the signs resulted in increased sales. The County also points out that provisions can be included in leases to require that tenants follow the law and can include indemnification clauses and the authority to evict tenants for non-compliance. Upon review of the record, the lease between Premium and Sunglass and Luggage was not included in the record evidence. Therefore, this Court would have to speculate as to whether such provisions and clauses existed. This Court's review is limited to the record. *Dusseau v. Metropolitan Dade County Bd. of County Comm'rs*, 794 So. 2d 1270, 1275 (Fla. 2001). Therefore, the County's argument as it pertains to lease provisions and clauses cannot be addressed further by this Court.

Also in support of lien theory argument, the County cites *Chatham v. Jackson*, 613 F.2d 73 (5th Cir. 1980) which involved a lien against the landlord for the tenant's unpaid water bills pertaining to the landlord's property. This Court finds that *Chatham* is not applicable to the instant case. *Chatham* involved a city ordinance in Georgia and the assessment of a lien for unpaid water bills. So not only is *Chatham* not controlling as it arose under Georgia law, it also involved a benefit to the landlord's property i.e. water service. In the instant case, unlike in *Chatham*, there was no evidence that Premium's property derived a benefit or service from the County to allow for the assessment of a lien against it. As Premium points out, the lien theory would possibly have merit if the County, for example, constructed a sidewalk or roadway adjacent to Premium's property which provided a special benefit to the property entitling the County to place a special assessment lien against the property. Therefore, the County has not shown a direct and tangible benefit to Premium's property nor any pre-existing statutory lien comparable to the lien in *Chatham*.

Further, Premium stresses that the lien that the County would ultimately seek to impose on Premium's property if the fines were not paid differs from the Georgia utility service lien in *Chatham*. A code enforcement lien in Florida can only be levied in very specific circumstances prescribed by the Legislature. Specifically, section 162.09(3), Florida Statutes (2012), provides that, "[a] certified copy of an order imposing a fine, or a fine plus repair costs, may be recorded in the public records and thereafter shall constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator. In the instant case, the County, via Officer Marconi's testimony, admitted that the violation did not occur, and by definition could not occur, on Premium's property. Likewise, the County admitted that the tenants, not Premium, violated the sign ordinance.

Thus, Premium's property was not "the land on which the violation existed," and is not "real or personal property owned by the violator." Therefore, this Court concurs with Premium that the lien theory is not applicable to the instant case.

*Nuisance/Strict Liability Theory*

Lastly, the County argues a nuisance/strict liability theory applies in this case to hold Premium liable for the violation. The County contends that while signs along the roadway do not constitute toxic waste, they certainly detract from the aesthetics of the right-of-way and create a potential hazard to motorists. Thus, the County concludes that the nuisance theory has allowed for strict liability against owners regardless of knowledge or fault. The County asserts that signs along the roadway have long been recognized as a nuisance in Florida, citing section 479.105, Florida Statutes (2012), providing, in relevant part, that:

> Any sign which is located adjacent to the right-of-way of any highway on the State Highway System outside an incorporated area or adjacent to the right-of-way of any portion of the interstate or federal-aid primary highway system, which sign was erected, operated, or maintained without the permit required by s. 479.07(1) having been issued by the department, is declared a public nuisance and a private nuisance and shall be removed as provided in this section.

This Court concurs with Premium that the County cannot now argue that the Special Magistrate's decision was supported by a nuisance/strict liability theory when the County did not bring a nuisance action against Premium nor find Premium guilty of maintaining a nuisance on Premium's property under either the County Code or common law nuisance. In the instant case, the notice of violation was only for a violation of Ordinance 31.5-14(1) and made no mention that the County would seek to hold Premium responsible under common law nuisance. Nor did the County cite to any Orange County Code provision purporting to

mandate that property owners should patrol rights-of-way adjacent to their property and remove unpermitted signs posted by other persons or businesses.

This Court further concurs with Premium that the County's nuisance/strict liability argument is flawed as follows: Section 479.105, Florida Statutes, is not applicable in the instant case because the signs involved in this case were not adjacent to public right-of-way, but instead were placed within the public right-of-way. Also, the right-of-way in the instant case was a local road, not part of the State Highway System, interstate highway system or federal aid primary highway.

Lastly, the County cites *Courtney Enterprises, Inc. v. Publix Super Markets, Inc.*, 788 So. 2d 1045 (Fla. 2d DCA 2001) and *Seaboard System Railroad, Inc. v. Clemente*, 467 So. 2d 348 (Fla. 3d DCA 1985) that are not supportive in this case. *Courtney* involved environmental protection statutes holding past and present owners of property strictly liable for dry cleaning contamination to the property and adjoining property regardless of fault or knowledge of the violation. *Seaboard* involved toxic waste pollution from a wood-treating plant where the court found both the present owner and a previous owner in indirect civil contempt for failure to comply with the injunction per the Dade County ordinances that provided strict liability for causing or allowing the existence of environmental contamination. Unlike *Courtney* and *Seaboard*, the sign ordinance in the instant case did not state that it shall be a violation by a property owner to allow a sign to remain on public right-of-way adjacent to such owner's property.

*Plain Meaning of Ordinance 31.5-14(1)*

Further, based on the plain reading of Ordinance 31.5-14(1), there is no language in it nor in the definitions and other related sections under chapter 31.5 of the Orange County

Code that provide that a landlord may be cited for sign violations committed by its tenants on property not owned by the landlord. For this Court to determine that such a provision exists would be outside the scope of this Court's review when the plain meaning of the ordinance is clear. "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) *(quoting A.R. Douglass, Inc. v. McRainey,* 137 So. 157, 159 (Fla. 1931). Courts should not depart from the plain language employed by the Legislature. *Citizens of State v. Public Service Commission,* 425 So. 2d 534, 542 (Fla. 1982). A second controlling principle of statutory construction is the rule that words of common usage should be construed in their plain and ordinary sense. *Citizens at 542; St. Petersburg Bank & Trust Co. v. Hamm,* 414 So. 2d 1071, 1073 (Fla. 1982) (applying the plain meaning of the language in the Dade County ordinances).

*Conclusion*

The Special Magistrate's assessment of liability to Premium for the violation of the sign ordinance based on the landlord/tenant relationship may have had merit if the violation pertained to Premium's property. However, in this case, the violation pertained to signage on public property and the evidence showed that the signs were owned and placed on the public right-of-way by Sunglass and Luggage, not by or under the direction of Premium.

While due process was provided to Premium, the Special Magistrate's findings and ruling that Premium violated Ordinance 31.5-14(1) departed from the essential requirements of the law and was not based on competent substantial evidence.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Special Magistrate's Findings of Fact, Conclusion of Law, and Order entered on April 23, 2012 is **REVERSED** and the case is **REMANDED** for further proceedings consistent with this opinion.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this 7th day of November, 2012.

/S/_____
**F. RAND WALLIS**
Circuit Judge

/S/_____
**HEATHER L. HIGBEE**
Circuit Judge

/S/_____
**MIKE MURPHY**
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Scott A. Glass, Esquire**, Shutts & Bowen LLP, 300 S. Orange Avenue, Suite 1000, Orlando, Florida 32801, sglass@shutts.com, ymckay@shutts.com and **Scott Shevenell, Assistant County Attorney**, Orange County Attorney's Office, P.O. Box 1393, Orlando, FL 32802-1393, Scott.Shevenell@ocfl.net, Adrienne.Gordon@ocfl.net on the 8th day of November, 2012.

/S/_____
Judicial Assistant