No. 2D15-1035

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

RRY, INC. d/b/a YOHO'S AUTOMOTIVE AND TOWING,

Appellant,

v.

EUGENE CHISLER, Guardian of JAN DRIMAL,

Appellee.

On Appeal from the Circuit Court of the Sixth Judicial Circuit
in and for Pinellas County, State of Florida
L.T. No. 13-7200-CI-21, Hon. Jack R. St. Arnold

ANSWER BRIEF OF EUGENE CHISLER

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STATEMENT OF THE CASE AND FACTS

Statement Of The Case

Appellee, Eugene Chisler, Guardian of Jan Drimal, sued Appellant, RRY, Inc. d/b/a Yoho's Automotive and Towing ("Yoho's Towing"), for wrongful possession and disposition of a Corvette in violation of § 713.78, *Fla. Stat.* R. 1-7. In a *pro se* answer, Yoho's Towing generally denied the allegations and asserted no affirmative defenses. R. 12-15. Mr. Drimal moved to strike Yoho's Towing's *pro se* answer because Yoho's Towing is a corporate entity. R. 17-18; *Szteinbaum* v. *Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 248 (Fla. 3d DCA 1985) ("a corporation, unlike a natural person, cannot represent itself and cannot appear in a court of law without an attorney"). The trial court never ruled on that motion. Mr. Chisler also moved to substitute himself as Mr. Drimal's guardian and to amend the case caption accordingly. R. 19-26. The trial court granted that motion. R. 28-29.

The trial court then entered an order setting an evidentiary hearing on liability. R. 30-31. Before the evidentiary hearing, the parties entered into a joint stipulation of facts. R. 36-41. The parties did not submit any legal memoranda, and the evidentiary hearing was not transcribed. Thereafter, the trial court entered the Order of July 30, 2014, which found Yoho's Towing liable for wrongful possession and disposition of a Corvette in violation of § 713.78, *Fla. Stat.* R. 48-49. In particular, the trial court ruled (1) Yoho's Towing "knew or should have known in

light of all other circumstances that the vehicle was not 'unclaimed'" within the meaning of § 713.78(6), *Fla. Stat.*, and (2) the sale was "unreasonable" because Yoho's Towing refused to accept a "tender of payment for the charges then due." R. 49.

Yoho's Towing timely filed a motion for rehearing directed exclusively to factual arguments, not legal arguments, and set it for a motion hearing. R. 61-63. That motion hearing was not transcribed. Thereafter, the trial court entered the Order of September 22, 2014, which amended the facts from its prior order, but still found in that Yoho's Towing was liable for wrongful possession and disposition of a Corvette in violation of § 713.78, *Fla. Stat.*, for the same reasons. R. 64-65.

Several months later, the trial court then entered a final judgment in Mr. Drimal's favor. R. 83-84. This final judgment found Yoho's Towing liable for $28,270 in damages and $16,291.50 in attorney fees. R. 83-84. Yoho's Towing filed a notice of appeal that designated and attached the final judgment. R. 85-87.

On appeal, Yoho's Towing now contends the trial court misinterpreted the notice provisions of § 713.78, *Fla. Stat.* Yoho's Towing Br. at 5-10. Yoho's Towing does not, however, address the trial court's actual rulings that the Corvette was not "unclaimed" within the meaning of § 713.78(6), *Fla. Stat.*, or that any sale as a "claimed" vehicle was "unreasonable" because Yoho's Towing refused to accept a "tender of payment for the charges then due." R. 65.

Statement Of The Facts

A. The Complaint

The complaint alleged the following facts:

Yoho's Towing towed and impounded Mr. Drimal's 2008 Corvette on May 5, 2013. R. 2. While under arrest, Mr. Drimal, who suffers from bipolar disorder, was found to be incompetent and was immediately admitted to a hospital on May 17, 2013. R. 2.

On June 6, 2013, Romana Fauvel, Mr. Drimal's daughter, learned that Yoho's Towing had towed and impounded the Corvette. R. 2. Ms. Fauvel called Yoho's Towing and spoke with Danielle Yoho. R. 2. Ms. Yoho confirmed Yoho's Towing still possessed the Corvette. R. 2. Ms. Fauvel told Ms. Yoho that Mr. Drimal had been in jail or in the hospital since Yoho's Towing had towed the Corvette and would not be able to retrieve the Corvette due to his present health condition. R. 2. Ms. Fauvel asked Ms. Yoho if somebody else could pick up the Corvette. R. 2. Ms. Yoho told Ms. Fauvel that Yoho's Towing would not release the Corvette without a vehicle release form issued by the Sheriff, which would be issued only to Mr. Drimal. R. 3. Ms. Fauvel asked Ms. Yoho how much Mr. Drimal owed for towing and impoundment, and Ms. Yoho responded the present amount was $800 accruing at $20 per day. R. 3. Ms. Fauvel told Ms. Yoho that Mr. Drimal would not be released from the hospital for another two or three weeks. R. 3. Ms. Fauvel

also offered to pay the present amount due and any future storage fees until Mr. Drimal was released from the hospital. R. 3. Ms. Yoho refused. R. 3. Instead, despite Ms. Fauvel beseeching Ms. Yoho for her assistance, Ms. Yoho responded, "Get a lawyer." R. 3. During this conversation, Ms. Yoho never informed Ms. Fauvel that the Corvette may be sold or when it would be sold. R. 3. In fact, when Ms. Fauvel asked if there was a time limit for getting the Corvette from Yoho's Towing, Ms. Yoho responded she did not know because the paperwork was not in front of her. R. 3.

After her conversation with Ms. Yoho, Ms. Fauvel shared this information with Mr. Drimal. R. 3. Mr. Drimal made numerous attempts to contact Ms. Yoho, but was unable to do so. R. 3. On June 14, 2013, Mr. Drimal asked Ms. Fauvel to contact Ms. Yoho. R. 3.

When Ms. Fauvel called Ms. Yoho again, Ms. Yoho told Ms. Fauvel that Yoho's Towing had attempted to sell the Corvette on June 12, 2013, but was unable to find a buyer. R. 3. Ms. Fauvel again explained Mr. Drimal's health situation to Ms. Yoho and that Mr. Drimal was likely to be released soon. R. 3. Ms. Yoho, however, responded that Yoho's Towing was in the process of taking ownership of the Corvette and that she did not think there was anything that could be done to stop it. R. 4.

Ms. Fauvel relayed this conversation to Mr. Drimal, who also called Ms. Yoho. R. 3. When they spoke, Ms. Yoho told Mr. Drimal to call back on June 17, 2013. R. 4. When Mr. Drimal called back on June 17, he spoke with the owner of Yoho's Towing, Robert Yoho. R. 4. Mr. Yoho told Mr. Drimal the Corvette was already sold and that there was nothing he could do to recover it. R. 4.

On June 18, 2013, Mr. Drimal was released from the hospital. R. 4. After his release, he found a notice of missed delivery of certified mail from Yoho's Towing. R. 4. The notice stated the missed delivery occurred on May 21, 2013 and that if Mr. Drimal did not retrieve it from the U.S. Post Office by May 31, 2013, it would be returned to sender. R. 4. The U.S. Post Office tracking indicated it was returned to Yoho's Towing, the sender, on June 5, 2013. R. 4. Mr. Drimal received no other notice from Yoho's Towing about the amount he owed or the disposition of the Corvette. R. 4-5.

Based on these allegations, the complaint alleged a cause of action for wrongful possession and disposition of a Corvette in violation of § 713.78, *Fla. Stat.*, and sought damages, attorney fees, and costs. R. 5-6.

B. The *Pro Se* Answer

The *pro se* answer admitted that venue was proper, that Mr. Drimal had owned a 2008 Corvette, and that Mr. Yoho told Mr. Drimal the Corvette had already been sold and that there was nothing he could do to recover it. R. 12, 14.

Otherwise, the *pro se* answer denied every other allegation. R. 12-16. The *pro se* answer did not raise any affirmative defenses. *See* R. 12-16.

C. The Joint Stipulation Of Facts

Before the evidentiary hearing on liability, the parties submitted a joint stipulation of facts. R. 36-47. For the most part, the joint stipulation confirmed the complaint's allegations. *Compare* R. 1-7, *with* R. 36-41.

Notably, the parties agreed that, on June 6, 2013, Ms. Fauvel notified Yoho's Towing that Mr. Drimal wished to claim the Corvette and offered to pay Yoho's Towing the amount due up to that date. R. 39. Nevertheless, although Ms. Fauvel contended she offered to pay future storage fees, Ms. Yoho contended Ms. Fauvel made no such offer. R. 39.

In paragraphs 47 and 48, the joint stipulation indicated as follows:

> 47. Yoho's Towing believed that it was not obligated to locate and serve Drimal after learning that he had been hospitalized because Yoho's Towing was certain that it complied with the requirements of Florida Statute 713.78. Yoho's Towing contends that the statute only required it to send the certified mail sent on May 5, 2014 [*sic*].
>
> 48. Yoho's Towing contends that other than sending the initial letter, even though the May 5, 2014 [*sic*] was returned undeliverable, it did not have a duty to locate and serve Drimal.

R. 40. Other than addressing the notice provisions of § 713.78, *Fla. Stat.*, Yoho's Towing did not make any other statutory-interpretation arguments. *See* R. 36-41.

Finally, Yoho's Towing acknowledged that, after it obtained title, it sold the Corvette at auction for $30,200 (R. 41), which resulted in a windfall to it of approximately $29,000.

D. The Order Of July 30, 2014

The trial court convened an evidentiary hearing on July 30, 2014, which was not transcribed. R. 30-31. After the evidentiary hearing, the trial court entered the Order of July 30, 2014. R. 48-49. According to the trial court, "[t]he evidence shows that [Yoho's Towing] attempted to comply with the notice requirements of subsection (4) of the statute and further that [Mr. Drimal] had actual notice of the vehicle[']s location and its status." R. 48. Additionally, the trial court noted that, although Ms. Fauvel "presented herself at the premises of [Yoho's Towing] and asked to pick up the vehicle," Yoho's Towing "properly refused to deliver the vehicle to her." R. 49. Nevertheless, Ms. Fauvel's actions were "sufficient to put [Yoho's Towing] on notice that a claim for the vehicle was being made and that a sale as an 'unclaimed vehicle' [within the meaning of § 713.78(6), *Fla. Stat.*] would not be proper." R. 49. Although § 713.78(6), *Fla. Stat.*, "is silent as to who can make a 'claim' sufficient to stop a sale for unpaid towing/storage charges," the trial court concluded Yoho's Towing "knew or should have known in light of all other circumstances that the vehicle was not 'unclaimed'" within the meaning of § 713.78(6), *Fla. Stat.* R. 49.

The trial court then proceeded to analyze whether a sale of the Corvette as a "claimed" vehicle might still have been proper. *See* R. 49. But the evidence showed "there was a tender of payment for the charges then due, which [Yoho's Towing] refused to accept." R. 49. For that reason, the trial court found the sale of the Corvette as a claimed vehicle violated the statute:

> The purpose of the statute is to protect the towing companies [from] reasonable fees incurred in storage and recovery of vehicles. To refuse payment and then later sell the vehicle at public sale claiming such a sale to be necessary to recover the fees is unreasonable. [Yoho's Towing] could have been made whole by accepting payment even without releasing the vehicle. Accordingly, the Court finds the sale to have been improper and [Yoho's Towing] liable to [Mr. Drimal] for damages, attorney's fees and costs in an amount to be determined either by the parties or at a future evidentiary hearing.

R. 49. In making this ruling, at no time did the trial court rule that Yoho's Towing had not complied with the notice provisions of § 713.78, *Fla. Stat. See* R. 48-49.

E. The Motion For Rehearing

Yoho's Towing timely filed a motion for rehearing. R. 61-62. In the motion, Yoho's Towing contended Ms. Fauvel had never "presented herself at the premises." R. 61-62. Additionally, Yoho's Towing contended Ms. Fauvel never asked to pick up the Corvette; rather, she had asked if somebody else could pick up the Corvette. R. 62. Other than these two factual points, Yoho's Towing raised no legal arguments against the Order of July 30, 2014. *See* R. 61-62. Yoho's Towing then noticed the motion for a hearing. R. 63.

F. The Order Of September 22, 2014

After the motion hearing, which was not transcribed, the trial court entered the Order of September 22, 2014. R. 64-65. This amended order was identical in all respects to the Order of July 30, 2014, except that it corrected the two factual quibbles Yoho's Towing had raised. *Compare* R. 48-49, *with* R. 64-65.

G. The Final Judgment And Notice Of Appeal

Several months later, the trial court then entered a final judgment, which found Yoho's Towing liable for $28,270 in damages and $16,291.50 in attorney fees. R. 83-84. Yoho's Towing filed a notice of appeal that designated and attached the final judgment. R. 85-87.

SUMMARY OF ARGUMENT

1. Yoho's Towing failed in the trial court to preserve for appellate review and abandoned in this Court any argument that the trial court erred when it ruled any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. In the trial court, Yoho's Towing failed to file any legal memoranda or arrange for any hearings to be transcribed by a court reporter, which means the record on appeal does not show it raised such arguments below, and it may in fact have invited any such error. And, in this Court, Yoho's Towing abandoned such arguments when it failed to address them in its initial brief.

2. Contrary to Yoho's Towing's suggestions, the trial court never ruled Yoho's Towing violated the notice provisions of § 713.78, *Fla. Stat.* Instead, given Yoho's Towing's refusal to accept Ms. Fauvel's offer to pay towing charges, the trial court correctly ruled Yoho's Towing's sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. Notice is a red herring.

ARGUMENT

I. ISSUE 1: DID YOHO'S TOWING PRESERVE FOR APPELLATE REVIEW OR ABANDON ON APPEAL ANY ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT RULED ANY SALE OF THE VEHICLE AS "UNCLAIMED" WAS IMPROPER OR AS "CLAIMED" WAS UNREASONABLE?

Yoho's Towing failed in the trial court to preserve for appellate review and abandoned in this Court any argument that the trial court erred when it ruled any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. In the trial court, Yoho's Towing failed to file any legal memoranda or arrange for any hearings to be transcribed by a court reporter, which means the record on appeal does not show it raised such arguments below, and it may in fact have invited any such error. And, in this Court, Yoho's Towing abandoned such arguments when it failed to address them in its initial brief.

Standard Of Review

Whether an error has been "preserved for appellate review" is "a question of law arising from undisputed facts," so "the standard of review is de novo." *Aills* v. *Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) (citations omitted). "Proper preservation

of error for appellate review generally requires three components." *Id.* "First, the party must make a timely, contemporaneous objection at the time of the alleged error." *Id.* (citations omitted). "Second, the party must state a legal ground for that objection." *Id.* (citations and punctuation omitted). "Third, [i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *Id.* (citations and punctuation omitted). "While no magic words are required to make a proper objection, we reiterate here that the concern articulated in the objection must be sufficiently specific to inform the court of the perceived error." *Id.* at 1109. Abandonment of appellate issues during appellate briefing is reviewed de novo. *See J.A.B. Enters.* v. *Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992).

Merits

The *Applegate* rule renders it impossible for Yoho's Towing to demonstrate any error on appeal given this scant record. Because there exists no written legal memoranda or hearing transcripts, it would be impossible on this record to demonstrate any error on appeal. *See 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."); *Harrison* v. *Harrison*, 909 So. 2d 318, 319 (Fla. 2d DCA 2004) ("It is an elementary principle of appellate review that an appellate court must presume that

a trial court's decision is correct unless the appellant provides the appellate court with a record that is sufficient to evaluate the appellant's contentions of error.").

There is no showing on this record that Yoho's Towing timely preserved any argument that the trial court erred when it ruled any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. R. 65. "It is difficult to overemphasize the importance, absent fundamental error, of preserving issues and arguments before asking an appellate court to reverse a trial court's final judgment. The importance of this principle is too often not appreciated, and appellate courts are constrained, as we are here, to affirm orders which otherwise might have been reversed." *Pensacola Beach Pier, Inc.* v. *King*, 66 So. 3d 321, 323-26 (Fla. 1st DCA 2011) (affirming despite otherwise meritorious appellate arguments because they were not preserved). Indeed, Yoho's Towing made no such statutory-interpretation arguments in the trial court whatsoever.

And even if the trial court had committed any error in interpreting the statute, Yoho's Towing could have invited it if it had conceded at the hearings that the trial court's interpretation of the statute was correct. "[U]nder the invited error rule a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make." *Tate* v. *Tate*, 91 So. 3d 199, 204 (Fla. 2d DCA 2012) (punctuation omitted). Without hearing transcripts, it is impossible to know whether Yoho's Towing invited error.

Finally, "an issue not raised in an initial brief is deemed abandoned and may not be raised for the first time in a reply brief." *J.A.B. Enters.*, 596 So. 2d at 1250. "An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue—essentially conceding that [the ruling] was correct." *Prince* v. *State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010). On appeal, Yoho's Towing does not argue the trial court erred when it ruled any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. R. 65. Thus, Yoho's Towing abandoned any such argument and conceded those rulings were correct.

For all these reasons, the appeal of the final judgment must be affirmed. The basis for the Order of July 30, 2014 and Order of September 22, 2014 was the trial court's conclusion that any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. R. 65. But Yoho's Towing neither preserved any contrary argument in the trial court, nor made any contrary argument in this Court. Instead, it chose to brief the notice provisions of § 713.78, *Fla. Stat.*, which were irrelevant to the trial court's ruling. In such circumstances, affirmance is appropriate. *See, e.g.*, *McClain* v. *Fla. Parole & Probation Comm'n*, 416 So. 2d 1209, 1211 (Fla. 1st DCA 1982) ("motion to quash as frivolous is appropriate when the court can determine from a cursory examination of the record that the issues on appeal are wholly without merit"); *Harrison*, 909 So. 2d at 319 ("Counsel for the appellant has prosecuted enough appeals before this court that he either knew or

should have known that the record was inadequate and that this appeal had no chance of success.").

Because Yoho's Towing failed to preserve for appellate review and abandoned on appeal any argument that the trial court erred when it ruled any sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable, this Court should affirm the appeal.

II. ISSUE 2: DID THE TRIAL COURT CORRECTLY INTERPRET § 713.78, *FLA. STAT.*, WHEN IT RULED ANY SALE OF THE VEHICLE AS "UNCLAIMED" WAS IMPROPER OR AS "CLAIMED" WAS UNREASONABLE?

Contrary to Yoho's Towing's suggestions, the trial court never ruled Yoho's Towing violated the notice provisions of § 713.78, *Fla. Stat.* Instead, the trial court correctly ruled Yoho's Towing's sale of the vehicle as "unclaimed" was improper or as "claimed" was unreasonable. Notice is a red herring.

Standard Of Review

Statutory interpretation is reviewed de novo. *Zivitz* v. *Zivitz*, 16 So. 3d 841, 847 (Fla. 2d DCA 2009) (collecting cases). Factual findings are reviewed for clear error. *Buxton* v. *Buxton*, 963 So. 2d 950, 953 (Fla. 2d DCA 2007). The towing statute, § 713.78, *Fla. Stat.*, should be strictly construed against towing companies and in favor of Mr. Drimal's common law property rights. *E.g.*, *Carlile* v. *Game & Fresh Water Fish Comn'n,* 354 So. 2d 362, 364 (Fla. 1977).

Merits

A. Yoho's Towing's Misplaced Appellate Arguments Are Incorrect

On appeal, Yoho's Towing raises two arguments. First, it contends its sale of the Corvette complied with § 713.78, *Fla. Stat.*, because it followed the applicable notice provisions. Yoho's Towing Br. at 5-7. Second, it contends the trial court "departed from the essential requirements of law"[1] when it (supposedly) fashioned an equitable remedy and "essentially ignored" § 713.78, *Fla. Stat.* Yoho's Towing Br. at 6-9. Both arguments are incorrect.

The first argument is easily dispatched, because the trial court actually ruled in Yoho's Towing's favor on the notice question. Specifically, the trial court ruled, "[t]he evidence shows that [Yoho's Towing] attempted to comply with the notice requirements of subsection (4) of the statute and further that [Mr. Drimal] had actual notice of the vehicle[']s location and its status." R. 48, 64. At no point did the trial court conclude Yoho's Towing had violated the notice provisions of § 713.78, *Fla. Stat. See* R. 48-49, 64-65. In other words, Yoho's Towing's complaints about notice are misplaced: notice had nothing to do with the trial court's ruling.

The second argument is difficult to understand. It appears that Yoho's Towing contends § 713.78, *Fla. Stat.*, must be "strictly construed" because it is "in der-

[1] This term of art applies to certiorari review of trial court orders, not appellate review of trial court orders. *E.g.*, *Parkway Bank* v. *Fort Myers Armature Works*, 658 So. 2d 646, 648 (Fla. 2d DCA 1995).

ogation of the common law." Yoho's Towing Br. at 8. Perhaps that is true, but it is unclear why Yoho's Towing thinks that is a point in its favor because it never explains precisely how it thinks the statute should be construed or how the trial court misconstrued it. Indeed, at common law, Yoho's Towing could not have sold Mr. Drimal's property on these facts. Yoho's Towing claims (Yoho's Towing Br. at 8) that § 713.78(4)(a) and (b), *Fla. Stat.*, provided procedures for it to follow, but those provisions concern notice only. Yoho's Towing also seems to claim (Yoho's Towing Br. at 8) that the exclusive mechanism through which Mr. Drimal should have sought refuge was under § 713.78(5)(a) and (b), *Fla. Stat.* But there is no showing on this record that Yoho's Towing preserved such arguments in the trial court. *See Pensacola Beach Pier, Inc.*, 66 So. 3d at 323-26. And even if it had preserved this argument, § 713.78(5)(a), *Fla. Stat.*, provides only that Mr. Drimal "*may* file a complaint in the county court of the county in which the vehicle or vessel is stored to determine if her or his property was wrongfully taken or withheld from her or him." § 713.78(5)(a), *Fla. Stat.* (emphasis added). Of course, "when given its ordinary meaning, the word 'may' denotes a permissive term rather than the mandatory connotation of the word 'shall.'" *Leghorn* v. *Wieland*, 289 So. 2d 745, 747 (Fla. 2d DCA 1974). For that reason, § 713.78(5)(a), *Fla. Stat.*, did not provide the exclusive remedy for Mr. Drimal.[2]

[2] Yoho's Towing claims the trial court ruled it needed to "work with" Ms.

B. The Trial Court Correctly Interpreted § 713.78, *Fla. Stat.*

Finally, it is time to address what the trial court actually ruled and why those rulings are correct. Specifically, the trial court made two rulings. First, it made a factual finding that the Corvette was not "unclaimed" within the meaning of § 713.78(6), *Fla. Stat.* Second, it ruled that any sale as a "claimed" vehicle was "unreasonable" because Yoho's Towing refused to accept a "tender of payment for the charges then due." R. 65. Both of those rulings were correct.

1. The Corvette Could Not Be Sold As An "Unclaimed" Vehicle Because Yoho's Towing Knew Or Should Have Known Of Mr. Drimal's Claim

The trial court correctly ruled the Corvette could not be sold as an "unclaimed" vehicle because Yoho's Towing knew or should have known of Mr. Drimal's claim.

"Any vehicle or vessel which is stored pursuant to subsection (2) *and which remains unclaimed* . . . may be sold by the owner or operator of the storage space for such towing or storage charge." § 713.78(6), *Fla. Stat.* (emphasis added). Given this language, the trial court ruled that although § 713.78(6), *Fla. Stat.*, "is silent as to who can make a 'claim' sufficient to stop a sale for unpaid towing/storage charges," Yoho's Towing "knew or should have known in light of all other cir-

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Fauvel "without any payment of charges due." Yoho's Towing Br. at 8. But Yoho's Towing had already conceded that Ms. Fauvel offered to pay the charges due. R. 39. Accordingly, the record refutes the position Yoho's Towing now belatedly wishes to take.

cumstances that the vehicle was not 'unclaimed'" within the meaning of § 713.78(6), *Fla. Stat.* R. 65. In other words, the trial court made a factual finding that the Corvette was claimed.[3]

Yoho's Towing did not argue in the trial court that the trial court lacked authority to make that factual finding, nor does it so argue here. *See Pensacola Beach Pier, Inc.*, 66 So. 3d at 323-26 (failure to preserve appellate arguments in trial court); *J.A.B. Enters.*, 596 So. 2d at 1250 (abandonment of appellate arguments); *Prince* v. *State*, 40 So. 3d at 13 (same). By the same token, Yoho's Towing did not argue in the trial court that the trial court lacked a factual basis to make that factual finding, nor does it so argue here. *See Pensacola Beach Pier, Inc.*, 66 So. 3d at 323-26 (failure to preserve appellate arguments in trial court); *J.A.B. Enters.*, 596 So. 2d at 1250 (abandonment of appellate arguments); *Prince* v. *State*, 40 So. 3d at 13 (same). Accordingly, all those appellate arguments have been waived and abandoned.

Moreover, even if Yoho's Towing had not waived and abandoned those arguments, they are wrong. There is quite obviously a sound factual basis for the trial court's ruling, because Mr. Drimal made his claim known through Ms. Fauvel. R. 38-40. And the statute itself gave the trial court legal authority to make that factual

[3] Because this was a factual finding rather than a legal ruling, this Court's appellate review is not de novo, but rather for clear error. *Buxton*, 963 So. 2d at 953.

finding, because it directed the trial court to determine whether a vehicle "remains unclaimed." § 713.78(6), *Fla. Stat.* Importantly, the statute used the passive voice without identifying the actor, rather than the active voice, when it described who was claiming the vehicle and how it was claimed. "When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *State* v. *Burris*, 875 So. 2d 408, 410 (Fla. 2004). Here, the Legislature's use of the passive voice indicated its intention that not all claims would be pursued directly by a vehicle's owner; otherwise, the Legislature would have used the active voice or specified the actor. *E.g.*, *Shockley* v. *Comm'r of IRS*, 686 F.3d 1228, 1236 (11th Cir. 2012) (interpreting use of passive voice).

Accordingly, the trial court properly concluded the Corvette was not factually or legally "unclaimed" within the meaning of § 713.78(6), *Fla. Stat.*, and that it could not be sold as such. R. 65.

2. The Corvette Could Not Be Sold As A "Claimed" Vehicle Because Yoho's Towing Refused To Accept A Tender Of Payment For The Charges Then Due

The trial court correctly ruled the Corvette could not be sold as a "claimed" vehicle because Yoho's Towing refused to accept a tender of payment for the charges then due.

"Any vehicle or vessel which is stored pursuant to subsection (2) . . . for which reasonable charges for recovery, towing, or storing remain unpaid . . . may be sold by the owner or operator of the storage space for such towing or storage charge." § 713.78(6), *Fla. Stat.* Given this language, the trial court made a factual finding that "there was a tender of payment for the charges then due, which [Yoho's Towing] refused to accept."[4] R. 65. For that reason, the trial court found the sale of the Corvette as a claimed vehicle violated the statute:

> The purpose of the statute is to protect the towing companies [from] reasonable fees incurred in storage and recovery of vehicles. To refuse payment and then later sell the vehicle at public sale claiming such a sale to be necessary to recover the fees is unreasonable. [Yoho's Towing] could have been made whole by accepting payment even without releasing the vehicle. Accordingly, the Court finds the sale to have been improper . . . .

R. 65. In other words, the trial court ruled "reasonable charges for recovery, towing, or storing" did not "remain unpaid" when there had been "a tender of payment for the charges then due, which [Yoho's Towing] refused to accept." § 713.78(6), *Fla. Stat.*; R. 65. For that reason, the Corvette's sale was "unreasonable." R. 65.

Courts "should not interpret a statute in a manner resulting in unreasonable, harsh, or absurd consequences." *Fla. Dep't of Envtl. Prot.* v. *ContractPoint Fla. Parks, L.L.C.*, 986 So. 2d 1260, 1270 (Fla. 2008). The interpretation of the statute that Yoho's Towing desires—i.e., that towing companies can refuse tenders of

[4] *See supra* note 3.

payment for all charges then due while proceeding to sell those claimed vehicles—is unreasonable, harsh, and absurd. As the trial court ruled, the purpose of the statute is not to provide windfalls to towing companies when fees happen to remain unpaid, but rather to compensate them for "reasonable fees incurred in storage and recovery of vehicles." R. 65. Indeed, here the windfall to Yoho's Towing was approximately $29,000—i.e., more than 2,900 percent return on its investment by way of then-unpaid towing charges. The trial court recognized this and adopted a practical interpretation of the statute. That is what trial courts are supposed to do.[5]

Accordingly, the trial court properly concluded the Corvette could not be sold as a "claimed" vehicle because Yoho's Towing refused to accept a tender of payment for the charges then due.

* * *

This is a routine appeal primarily about failure to preserve error for appellate review and abandonment of appellate issues. Simply put, the record on appeal does not reflect that Yoho's Towing made any "timely, contemporaneous objection at the time of the alleged error," "state[d] a legal ground for that objection," and on appeal presented it as "the specific contention asserted as legal ground for the objection, exception, or motion below." *Aills*, 29 So. 3d at 1108-09. And even if

[5] Contrary to Yoho's Towing's suggestion, this is not a situation in which Ms. Fauvel "made a telephonic and vague mercy plea." Yoho's Towing Br. at 7. Rather, as even Yoho's Towing conceded, Ms. Fauvel "offered to pay the amount due." R. 39. There is nothing vague about that.

Yoho's Towing had preserved such arguments in the trial court, it abandoned them in this Court when it failed to raise them in its initial brief. Accordingly, Yoho's Towing preserved no error for appeal, it abandoned its only possible arguments in this Court, and the Court must affirm the entire appeal.

And even if Yoho's Towing had preserved and made the required statutory-interpretation argument, its statutory interpretation would still be wrong: Yoho's Towing asks this Court to interpret the statute in a manner that is both contrary to Mr. Drimal's common law property rights and unreasonable, harsh, and absurd.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 5, 2015, I electronically served the following via the Florida e-portal: C. Bryant Boydstun, Jr. (bboydstun@maronelaw.com and wwhitt@maronelaw.com), Marone Law Group, P.O. Box 3042, St. Petersburg, FL 33731.

August 5, 2015

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

August 5, 2015

/s/ Liben M. Amedie
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