

WALTER H. GIVHAN & ESTATE OF JANIS  
J. GIVHAN,  
Plaintiffs

v.

OKALOOSA COUNTY PROPERTY  
APPRAISER, OKALOOSA COUNTY TAX  
COLLECTOR, EXECUTIVE DIRECTOR OF  
THE FLORIDA DEPARTMENT OF  
REVENUE  
Defendants.

IN THE CIRCUIT COURT OF THE FIRST  
JUDICIAL CIRCUIT IN AND FOR  
OKALOOSA COUNTY, FLORIDA

Case Number: 2013-CA-003686

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**COMPLAINT, SECOND AMENDED**

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COME NOW, Plaintiff WALTER H. GIVHAN ("W GIVHAN") and Plaintiff ESTATE OF JANIS J. GIVHAN ("J GIVHAN") (W GIVHAN & J GIVHAN are, together, "W & J GIVHAN"), in suit of Defendant OKALOOSA COUNTY PROPERTY APPRAISER ("PA"), Defendant OKALOOSA COUNTY TAX COLLECTOR ("TC"), and EXECUTIVE DIRECTOR OF THE FLORIDA DEPARTMENT OF REVENUE ("DOR"), and states as follows:

1. This action involves certain real property (the "Homestead"), identified as 324 Gulf Shore Dr., Destin, FL 32541 by the federal postal service; identified as Parcel ID Number 00-2S-24-0000-0032-0020 by Defendant PA; and legally described as:

COMMENCE AT THE NORTHERNMOST CORNER OF LOT 124, BLOCK F, HOLIDAY ISLE RESIDENTIAL SECTION NO. 5, DESTIN, OKALOOSA COUNTY, FLORIDA, AS RECORDED IN PLAT BOOK 4, PAGE 39 OF THE PUBLIC RECORDS OF OKALOOSA COUNTY, FLORIDA; THENCE SOUTH 30° 34' WEST 724.75 FEET; THENCE NORTH 66° 29' WEST 1677.26 FEET; THENCE NORTH 23 ° 31' EAST 96.77 FEET TO THE SOUTH RIGHT-OF-WAY LINE OF GULF SHORE DRIVE; THENCE NORTH 88° 27' 54" WEST 64.70 FEET TO THE POINT OF BEGINNING; THENCE CONTINUE NORTH 88° 27' 54" WEST ALONG THE SOUTH LINE OF GULF SHORE DRIVE 86.27 FEET; THENCE SOUTH 23° 31' WEST 103.64 FEET; THENCE SOUTH 60° 26'

29" EAST 80.45 FEET; THENCE NORTH 23° 31' EAST 144.40 FEET TO  
THE POINT OF BEGINNING.

2. Plaintiff W GIVHAN is a natural person residing in Okaloosa County, Florida.
3. Plaintiff J GIVHAN is the estate of Janis J. Givhan who died in 2012. When stating events or conditions that occurred prior to the death of Janis J. Givhan, this complaint will refer to Janis J. Givhan as Plaintiff J GIVHAN.
4. Defendant PA is a county officer for and acts as the property appraiser for Okaloosa County, Florida. Defendant PA is the property appraiser responsible for the exercise of the Clawback set forth herein and for the imposition of charges in relation to the Homestead and is joined pursuant to Section 194.181, F.S.
5. Defendant TC is a county officer for and acts as the tax collector for Okaloosa County, Florida. Defendant TC is the tax collector responsible for taxes upon the property at issue and is joined pursuant to Section 194.181, F.S.
6. Defendant DOR is the official of the State of Florida responsible for the overall supervision of the assessment and collection of ad valorem taxes and is joined pursuant to Section 194.181, F.S.
7. This action involves the imposition of charges by Defendant PA in relation to the Homestead, owned now and at the time of such charges by Plaintiff W GIVHAN and previously also owned by Plaintiff J GIVHAN until the time of her death.
8. Herein, "Homestead Tax Benefits" include both: (1) the "Homestead Tax Exemption", an exemption of certain value of homestead property from taxation, established by Fla. Const. Art. 7, Section 6(a) and (2) for those years during which it has existed, the "SOHA Value Cap", a limit upon the taxable value of homestead property by the restriction of the increase in taxable value to three-percent (3%) over the prior year's taxable valuation, established by

Fla. Const. Art. 7, Section 4(d).

9. Herein, "Widower's Tax Benefits", an exemption of certain value of property of a widower who is a bona fide resident of the State of Florida from taxation, established by Section 196.202, F.S.
10. Herein, the "Clawback" is an exercise of any of Sections 196.011(9)(a), 196.161(1)(b), and 193.155(10), F.S. to take all or any number of the following actions: (1) to retroactively remove any of a taxpayer's Homestead Tax Benefits or other tax benefits; (2) to charge upon the taxpayer the value of those benefits, penalties of 50% thereon, and 15% retroactive interest thereon; (3) to impose those charges upon the Real Property; (4) to demand payment therefore under threat that a notice of lien will be recorded in the official records as to the Real Property; and (5) to prepare, execute, and record a notice of lien in the official records stating the existence of a lien upon the Real Property arising from those charges.
11. Plaintiff W GIVHAN and Plaintiff J GIVHAN were husband and wife continuously from a time prior to 1991 until the death of Plaintiff J GIVHAN in 2012.
12. Plaintiff J GIVHAN was legally or naturally dependent upon Plaintiff W GIVHAN from a time prior to 1991 until the death of Plaintiff J GIVHAN in 2012.
13. Plaintiff W GIVHAN and Plaintiff J GIVHAN, as husband and wife, obtained title to the Homestead as tenants by the entirety in 1991 and maintained such title until 2012, when title vested solely in Plaintiff W GIVHAN upon the death of Plaintiff J GIVHAN. A true and correct copy of the deed by which Plaintiff W GIVHAN and Plaintiff J GIVHAN obtained title is attached hereto as **Exhibit A**.
14. Plaintiff W GIVHAN made the Real Property his permanent residence in 1991, has maintained the Real Property as his permanent residence continuously until the present, and

continues to maintain the Real Property as his permanent residence.

15. Plaintiff W GIVHAN made the Real Property the permanent residence of and maintained the Real Property as the permanent residence of Plaintiff J GIVHAN, who was legally or naturally dependent upon Plaintiff W GIVHAN, from 1991 until Plaintiff J GIVHAN's death in 2012.
16. Plaintiff J GIVHAN made the Real Property her permanent residence in 1991 and maintained the Real Property as her permanent residence continuously until her death in 2012.
17. On 01/29/1992, Plaintiff W GIVHAN filed an application for Homestead Tax Benefits in relation to the Homestead (the "01/29/1992 Application"). A true and correct copy of the 01/29/1992 Application is attached hereto as **Exhibit B**.
18. By the 01/29/1992 Application both Plaintiff W GIVHAN and Plaintiff J GIVHAN applied for Homestead Tax Benefits upon the Homestead. Even the application had not listed Plaintiff J GIVHAN as an applicant, the 01/29/1992 Application would inure to the benefit of Plaintiff J GIVHAN and act as an application therefore. *Kelley v. Spain*, 160 So.3d 78, 84 (Fla. 4<sup>th</sup> DCA 2015).
19. Defendant PA granted the 01/29/1992 Application and Plaintiff W GIVHAN and Plaintiff J GIVHAN were provided with Homestead Tax Benefits in relation to the Homestead for tax year 1992.
20. In each tax year following 1992, Plaintiff W GIVHAN and Plaintiff J GIVHAN were provided Homestead Tax Benefits in relation to the Homestead.
21. In each tax year following 1992, the application requirement for Homestead Tax Benefits was waived pursuant to Section 196.011(9)(a), F.S. and because of the grant of such Homestead Tax Benefits in the immediately preceeding year of such requirement.

22. For each tax year from and including 1992 to the present, Plaintiff W GIVHAN has been entitled to Homestead Tax Benefits pursuant to Fla. Const. Art. 7, Section 6, due to his owning the Homestead and his making and maintaining the Homestead as his permanent residence.
23. For each tax year from and including 1992 to and including 2012, Plaintiff W GIVHAN was entitled to Homestead Tax Benefits pursuant to Fla. Const. Art. 7, Section 6, due to his owning the Homestead and his making and maintaining the Homestead as the permanent residence of Plaintiff J GIVHAN.
24. For each tax year from and including 1992 to and including 2012, Plaintiff J GIVHAN was entitled to Homestead Tax Benefits pursuant to Fla. Const. Art. 7, Section 6, due to her owning the Homestead and her making and maintaining the Homestead as her permanent residence.
25. In 2012, Defendant J GIVHAN died.
26. On 08/20/2012 and following the death of Defendant J GIVHAN, Defendant PA invited Plaintiff W GIVHAN to file an application for Widower's Tax Benefits upon the Homestead for tax year 2013. A true and correct copy of the letter stating such invitation is attached hereto as **Exhibit C**.
27. On 11/28/2012, Plaintiff W GIVHAN filed a timely application for Widower's Tax Benefits upon the Homestead for tax year 2013. A true and correct copy of such application is attached hereto as **Exhibit D**.
28. At some time prior to 06/21/2013, Defendant PA made a decision to exercise the Clawback as to those Homestead Tax Benefits previously granted in relation to the Homestead to Plaintiff W GIVHAN and Plaintiff J GIVHAN for tax years 2003-2012.

29. Defendant PA made this decision on the stated basis that it had determined that Plaintiff W GIVHAN was not entitled to Homestead Tax Benefits in relation to the Homestead during tax years 2003-2012.
30. On information and belief, Defendant PA ignored the entitlement of Plaintiff J GIVHAN, as an owner and a permanent resident of the Homestead, in deciding to exercise the Clawback to take away the Homestead Tax Exemptions previously granted to Plaintiff W GIVHAN and Plaintiff J GIVHAN in relation to the Homestead for tax years 2003-2012.
31. On information and belief, Defendant PA ignored the entitlement of Plaintiff W GIVHAN, as an owner of the Homestead who made and maintained the Homestead as the permanent residence of Plaintiff J GIVHAN, in deciding to exercise the Clawback to take away the Homestead Tax Exemptions previously granted to Plaintiff W GIVHAN and Plaintiff J GIVHAN in relation to the Homestead for tax years 2003-2012.
32. On 06/21/2013, Defendant PA sent Plaintiff W GIVHAN a *NOTICE OF INTENT TO LIEN* together with proposed notices of liens. A true and correct copy of the 06/21/2013 *NOTICE OF INTENT TO LIEN* and those proposed notices of liens are attached hereto as **Exhibit E**.
33. The sending of the 06/21/2013 *NOTICE OF INTENT TO LIEN* reflects a decision by Defendant PA to exercise the Clawback.
34. The 06/21/2013 *NOTICE OF INTENT TO LIEN* threatened that Defendant PA would file notices of liens in the official records in relation to the Homestead unless Plaintiff W GIVHAN paid the sum the Homestead Tax Benefits for tax years 2003-2012, plus a penalty of 50%, plus 15% retroactive interest within 30 days of the *NOTICE OF INTENT TO LIEN*.
35. On 06/21/2013, Defendant PA sent Plaintiff W GIVHAN a *NOTICE OF DISAPPROVAL OF APPLICATION FOR PROPERTY TAX EXEMPTION* denying the Widower's Tax

Benefits upon the Homestead for tax year 2013. A true and correct copy of the 06/21/2013 *NOTICE OF DISAPPROVAL OF APPLICATION FOR PROPERTY TAX EXEMPTION* is attached hereto as **Exhibit F**.

36. On 07/16/2013, Plaintiff W GIVHAN filed an amended application for Homestead Tax Benefits and Widower's Tax Benefits upon the Homestead for tax year 2013.
37. On 07/18/2013, Plaintiff W GIVHAN filed a timely petition with the VAB to contest the actions of Defendant PA in exercising the Clawback, in denying Plaintiff W GIVHAN's Homestead Tax Benefits for tax year 2013, in denying Plaintiff W GIVHAN's Widower's Tax Benefits for 2013 (the "2013 VAB Petition"). A true and correct copy of the 2013 VAB Petition, the cover letter therefore, and filing fee therefore is attached hereto as **Exhibit G**.
38. Defendant PA granted the amended application for 2013 Homestead Tax Benefits and 2013 Widower's Tax Benefits in relation to the Homestead.
39. Plaintiff W GIVHAN has been provided with 2013 Homestead Tax Benefits and 2013 Widower's Tax Benefits in relation to the Homestead.
40. Plaintiff W GIVHAN maintained his permanent residence upon the Homestead at all times during tax year 2013.
41. The VAB, without hearing, decided to return Plaintiffs' 2013 VAB Petition to Plaintiffs. A true and correct copy of the letter the undersigned counsel recieved from the VAB's Attorney is attached hereto as **Exhibit H**.
42. Defendant PA filed, in the Okaloosa County Official Records, notices of liens (which identified the Homestead) arising from Defendant PA's exercise of the Clawback upon those Homestead Tax Benefits previously granted to Plaintiff W GIVHAN and Plaintiff J GIVHAN in relation to the Homestead. A true and correct copy of the notices of liens filed

by Defendant PA is attached hereto as **Exhibit I**.

43. Defendant PA has exercised the Clawback and, thereby, taken the following actions ("Defendant PA's Actions"):
- a. removed the Homestead Tax Benefits related to the Homestead for the years 2003-2012 previously granted to Plaintiff W GIVHAN and Plaintiff J GIVHAN;
  - b. imposed charges upon Plaintiff W GIVHAN and the Homestead for the sum of those Homestead Tax Benefits;
  - c. imposed charges upon Plaintiff W GIVHAN and the Homestead for retroactive interest at the penalty-level rate of 15% upon those sums;
  - d. imposed charged upon Plaintiff W GIVHAN and the Homestead for a penalty of 50% upon those sums;
  - e. filed notices of liens in the Official Records of Okaloosa County, Florida, reflecting all the foregoing amounts, identifying Plaintiff W GIVHAN, and identifying the Homestead.
44. Plaintiffs have paid and continue to pay the amount of taxes they believe, in good faith, that they owe.
45. Plaintiffs, by Plaintiff W GIVHAN, have paid to Defendant TC all sums charged in relation to the Clawback and, hereby, seek a refund of those sums. A true and correct copy of the receipt for all sums paid and the cover letter provided with such payment is attached hereto as **Exhibit J**.
46. Plaintiffs were required to exhaust no administrative remedies prior to bringing this action. However, insofar as Plaintiffs were so required, Plaintiffs have so exhausted.
47. Plaintiffs have a bone fide, present, practical need for the Court to determine their rights with

regard to the Homestead Tax Benefits for 2003-2012 and Defendant PA's Actions.

48. The rights of the Plaintiffs are dependent upon a determination by the Court.
49. Defendant PA and Defendant TC have an actual adverse interest in the determination by the Court.
50. Defendant PA and Defendant TC are properly before the Court.

Discussion of Assessment Processes vs. Clawback

51. Prospective-Year Assessment Process: In order to convey the constitutionally and procedurally-peculiar nature of this matter, Plaintiffs believe it necessary to provide an understanding of the context under which it arises by, first, explainint the usual procedure for granting or denying prospective Homestead Tax Benefits (benefits which apply to reduce taxes which have not yet been assessed as of the time of the grant or denial of such benefits).

- a. Fla. Const. art VII, Section 6(a) provides:

Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon ... upon establishment of right thereto in the manner prescribed by law.

- i. *See also* Garcia v. Andonie, 101 So.3d 339, 343-345 (Fla. 2012)(also stating "We have held that, although the Legislature is permitted to enact laws regulating 'the manner' of establishing the right to the constitutional homestead tax exemption, it cannot substantively alter or materially limit the class of individuals entitled to the exemption under the plain language of the constitution.").
- b. In prescribing 'the manner' in which a taxpayer 'establishes' the right to a tax exemption for the current-year, the Florida Legislature has set forth the following

process:

i. Pursuant to Section 196.011(1)(a), F.S., a taxpayer files an exemption application by March 1 of the given year with the county property appraiser, or later as set forth therein.

(1) Pursuant to Section 196.011(9)(a), F.S., the application requirement to obtain such exemption in a year following a granted application are waived if county has so provided. Such waiver of the application requirement is only ended by sending a 'notice of intent to deny' pursuant to Section 196.011(9)(e), F.S. Otherwise, a valid and effective 'denial' of the current-year Homestead Tax Benefits must be made pursuant to 196.011(6)(a), F.S and 196.193 or the taxpayer is entitled to Homestead Tax Benefits for that year. If the County has not so-waived, the property appraiser must send a renewal application to such taxpayer pursuant to Section 196.011(6)(a), F.S.

ii. Pursuant to Section 196.151, F.S., the property appraiser must then, on or before July 1 of that year, grant or deny such application for tax exemption.

(1) Pursuant to Sections 196.193(5) & 196.151, F.S., if the property appraiser determines that the taxpayer does not qualify, they must notify the taxpayer in writing, served by personal delivery or registered mail, and such writing must:

[S]tate in clear and unambiguous language the specific requirements of the state statutes which the property appraiser relied upon to deny the applicant the exemption with respect to the subject property. The notification must be drafted in such a way that a reasonable person can understand the specific

attributes of the applicant or applicant's use of the subject property which formed the basis for the denial. The notice must also include the specific facts the property appraiser used to determine that the applicant failed to meet the statutory requirements.

Section 196.193(5)(b), F.S.

- (2) Further, "[i]f a property appraiser fails to provide notice that complies with this subsection, any denial of an exemption or an attempted denial of an exemption is invalid." Section 196.193(5)(b), F.S.

iii. The decision of a property appraiser to deny a current-year homestead tax exemption:

- (1) serves to increase the amount of tax assessed upon a taxpayer;
- (2) is based upon a determination individualized as to the taxpayer and is, therefore, judicial in nature;
- (3) therefore, such a denial requires that a taxpayer be provided various due process rights. *See Jackson v. McCrimmon*, 164 F. 759 (N.D. Fla. 1908); *Hollywood Jaycees v. DOR*, 306 So.2d 109 (Fla. 1975).

iv. As a result, our system has developed the value adjustment board process:

- (1) As described in Section 196.151, F.S., upon a denial by the property appraiser, a taxpayer may petition the county value adjustment board to obtain those required due process rights, including:

The right, in value adjustment board proceedings, to have all evidence presented and considered at a public hearing at the scheduled time, to be represented by an attorney or agent, to have witnesses sworn and cross-examined, and to examine property appraiser or evaluators employed by the board who present testimony.

See Section 192.0105(2)(f), F.S.; and

The right to be sent a timely written decision by the value adjustment board containing findings of fact and conclusions of law and reasons for upholding or overturning the determination of the property appraiser, and the right to advertise notice of all board actions, including appropriate narrative and column descriptions, in brief and nontechnical language.

See Section 192.0105(2)(g), F.S.

- (2) Upon a decision by a value adjustment board awarding Homestead Tax Benefits, the property appraiser may initiate a circuit court action only in certain, limited, circumstances and, in doing so, bears the burden of proof. Section 194.036, F.S.
- (3) Alternative to or after the value adjustment board process, a taxpayer has the option to file a de novo circuit court action and, in such a circumstance, bears the burden of proof. Section 194.171 & 194.036, F.S.

52. Retrospective-Year Assessment Process Not By Clawback Exercise: Having explained the procedure provided in the granting or denying of prospective Homestead Tax Benefits (benefits which apply to reduce taxes which have not yet been assessed as of the time of the grant or denial of such benefits), it is necessary to now explain how (I) retroactive assessments were handled prior to the enactment of the Clawback exercise statutes and (II) how they are currently handled for retroactive assessments other than the Clawback exercise. Such non-Clawback procedures allow three categories of permissible retrospective-year assessments:

- a. The first is pursuant to Section 193.092, F.S., whereby a property appraiser could

assess property which had 'escaped taxation' for up to the preceding three (3) years. See also Fla. Admin Code R. 12D-8.006. The caselaw interpreted this section to exclude situations which involve a 'change in judgment' by the property appraiser. *Korash v. Mills*, 263 So.2d 579 (Fla. 1972). The caselaw also interpreted a retroactive decision to remove a tax exemption as a 'change in judgment' and denied the property appraiser the ability to do so under Section 193.092, F.S. *Underhill v. Edwards*, 400 So.2d 129 (Fla. 4 DCA 1981). Even where Section 193.092, F.S. applies, the property appraiser cannot utilize it unilaterally, but must instead petition the value adjustment board to make such change in taxes, and the taxpayer is provided their opportunity to be heard at that value adjustment board hearing. *Randall v. Wilkinson*, 563 So.2d 771 (Fla. 2 DCA 1990)(citing what is now Fla. Admin. Code r. 12D-8.021(2)(d)).

- b. The second is pursuant to Section 197.122(3), F.S., whereby a property appraiser could, within one (1) year, reduce an assessment (charge less taxes) under certain circumstances for the correction of 'material mistake of fact relating to an essential condition of the subject property'. Fla. Admin, Code r. 12-8.021(2)(a)(24). Where applicable, the property appraiser cannot utilize it unilaterally, but must instead petition the value adjustment board to make such change in taxes, and the taxpayer is provided their opportunity to be heard at that value adjustment board hearing. Fla. Admin. Code r. 12D-8.021(2)(d).
- c. In summary, no ability to retroactively take-away a tax exemption existed at all and, as to charging taxes applicable to retrospective years, no ability to do so without prior notice and opportunity to be heard (provided before the value adjustment board)

existed.

53. Retrospective-Year Assessment By Clawback Exercise: Having explained the procedures provided in the granting or denying of prospective-year Homestead Tax Benefits and in assessing taxes upon retrospective-years prior to or alternative to the Clawback exercise, it is now necessary to explain the Clawback and the procedure necessarily required for its exercise under Florida and Federal Law.

a. After *Korash & Underhill* (discussed above) had prevented property appraisers from reaching back into retrospective years to take-away tax exemptions, the Florida Legislature enacted the Clawback statutes to provide counties an ability to retain taxes lost associated with exemptions which had been improperly granted. The following are the Clawback statutes:

- i. Section 196.161(b), F.S. (providing "upon determination by the property appraiser that for any year or years within the prior 10 years a person who was not entitled to a homestead exemption was granted a homestead exemption from ad valorem taxes, it shall be the duty of the property appraiser making such determination to serve a notice of intent to record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property shall be identified in the notice of tax lien. Such property which is situated in this state shall be subject to the taxes exempted thereby, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum.");
- ii. Section 193.155(10), F.S. (providing "If the property appraiser determines that for any year or years within the prior 10 years a person who was not

entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum.”); and

- iii. Section 196.011(9)(a), F.S. (providing, in part, “If . . . the property appraiser determines that for any year within the prior 10 years the owner was not entitled to receive such exemption, the owner of the property is subject to the taxes exempted as a result of such failure plus 15 percent interest per annum and a penalty of 50 percent of the taxes exempted.”).
- b. Each of the Clawback statutes provide a property appraiser an ability to take-away Homestead Tax Benefits which have already been granted, assess a charge for the sum of the taxes on the value of those Homestead Tax Benefits for up to ten (10) years, plus charge retroactive penalty-level interest (15% per annum) thereon, plus penalties (50%) thereon, and to file liens in the public record for those amounts.
- c. Unfortunately, those Clawback statutes, themselves, fail to fully detail the complete due process procedural requirements for undertaking the Clawback exercise except to the extent of providing that the taxpayer must receive notice of the impending tax liens and be provided an ability to pay off all of the sums charged within thirty-days to prevent the filing of liens in the public records.

- d. Defendant PA has taken the following positions regarding their ability to exercise the Clawback:
- i. Defendant has taken the position that Defendant PA need not file a petition with the VAB to modify a retrospective-year's taxes;
  - ii. Defendant PA has taken the position that Defendant PA may unilaterally take-away the Homestead Tax Benefits which have been previously granted to a taxpayer upon their Homestead;
  - iii. Defendant PA has taken the position that a taxpayer may not receive a hearing before the value adjustment board or any other hearing either before or after the Clawback - except an action filed by the taxpayer in the Circuit Court;
  - iv. Defendant PA has taken the position that a taxpayer may only retain their Homestead Tax Benefits and remove the liens related to the Clawback by filing and winning a collateral judicial action to 'establish' the right to those tax exemptions;
  - v. Defendant PA has taken the position that Defendant PA need not prove any factual predicate before an objective decision-maker to establish their ability to take-away the retrospective-year Homestead Tax Benefits upon the Claimed Homestead, charge the value thereof, charge penalties and interest thereon, or file liens in the public records regarding such amounts;
  - vi. Defendant PA has taken the position that, in addition to the charging of taxes and filing of liens, their exercise of those statutes also served to 'unwaive' the application requirement in all years for which the application deadline has

already passed (including prior-years);

- vii. Defendant PA has taken the position that, as a result, Defendant PA can wait until after the application filing deadline of the current year, then retroactively take-away prior-year tax exemptions and, by operation thereof, claim that the taxpayer did not have an application for those prior years or for the current-year (despite the fact that they had not sent a 'notice of intent to deny pursuant to Section 196.011(9)(e), F.S.).

54. The Due Process Requirements For Exercising The Clawback: Having explained the prospective-year process, the non-Clawback retrospective-year process, and introduced the Clawback, it is now necessary to detail the actual due process requirements which apply to the exercise of the Clawback:

- a. The right to notice and opportunity to be heard upon the exercise of the Clawback is already clearly provided by various statutes which describe the role of the county value adjustment board and in Florida caselaw:
  - i. Section 197.603, F.S., entitled 'Declaration of legislative findings and intent', states: "The Legislature finds that the state has a strong interest in ensuring due process and public confidence in ensuring uniform, fair, efficient, and accountable collection of property taxes . . . ."
  - ii. "Tax equalization boards [now VABs] are agencies 'established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions.' Their main purpose is review and correction of tax assessments made by the county assessor of taxes." See *Jackson v. McCrimmon*, 164 F. 759, 764 (N.D. Fla. 1908)(also defining

“assessments” to include prior-year tax impositions).

- iii. Section 196.194(1), F.S., in part, provides: “The [VAB] shall hear disputed or appealed applications for exemption . . .” (Thus, the Clawback represents a dispute of the previous grant of an application for tax exemption).
- iv. Section 194.032(3), F.S., in part, provides: The [VAB] shall meet for the following purposes: ... 3. Hearing appeals from exemptions denied, or disputes arising from exemptions granted, upon the filing of exemption applications under s. 196.011.” (Thus, the Clawback represents a dispute arising from an exemption which has been previously granted as applied for under 196.011).
- v. Section 194.032(2), F.S., stating: “the [VAB] shall meet for the following purposes: ... 2. Hearing complaints relating to homestead exemptions as provided for under s. 196.151”. (Thus, the Clawback represents a complaint relating to the homestead exemption which was previously granted under 196.151).
- vi. Section 194.032(1), F.S., stating: “the [VAB] shall meet for the following purposes: ... 1. Hearing petitions relating to assessments filed pursuant to s. 194.011(3).” (Thus, the Clawback represents an assessment and the petition was filed pursuant to Section 194.011(3), F.S.).
- vii. Section 197.122, F.S., provides: “An act or omission or commission on the part of the property appraiser ... may be corrected at any time by the party responsible in the same manner as provided by law for performing acts in the first place.” *See also* Fla. Opp. Atty. Gen 061-1 applying this language to

require "any correction made in assessment after the equalization of the tax roll should be with consent of the [VAB]... [and] [C]are should be taken that the taxpayer have an opportunity to be heard upon the question of his claim [for Homestead] before the tax assessor and the board of county commissioners".

- viii. Section 192.0105(2)(b), F.S., provides: "The right to petition the [VAB] over objection to assessments...." (Thus, the Clawback is the imposition of an assessment and the petition to the VAB is an objection thereto).
- ix. Article I, Section 9 of the Florida Constitution (See *Hollywood Jaycees v. Dept. of Revenue*, 306 So.2d 109 (Fla. 1974) & *Jackson Lumber Co. v. McCrimmon*, 164 F. 759 (N.D. Fla, 1908);
- x. Article X, Section 6 of the Florida Constitution;
- xi. The 14<sup>th</sup> Amendment to the U.S. Constitution (See *Hollywood Jaycees v. Dept. of Revenue*, 306 So.2d 109 (Fla. 1974) & *Jackson Lumber Co. v. McCrimmon*, 164 F. 759 (N.D. Fla, 1908)); and
- xii. The 5<sup>th</sup> Amendment to the U.S. Constitution, as applied to the State of Florida by the 14<sup>th</sup> Amendment to the U.S. Constitution.

b. Further, the exercise of the Clawback statutes requires the same or greater due process protection for the following reasons:

- i. The system developed to provide due process for prospective-year tax assessments and exemptions provides opportunity to be heard.
- ii. The system developed to provide due process for other retrospective-year tax assessments provides opportunity to be heard.

- iii. The taxpayer will have already 'established' the right to and received the tax exemptions in the prospective-years.
- iv. *Hollywood Jaycees v. DOR*, 306 So.2d 109, 111-113 (Fla. 1975) clearly provides that:
  - (1) Tax exemptions, once granted, are 'valuable rights' held by the taxpayer which may not be taken away without due process;
  - (2) Because the authority exercised by the government in taking away the exemption is the same or greater than what it would have been in denying the exemption at the time it was granted, at minimum, the same hearing is required;
  - (3) Whether or not the statutes describe the right to a hearing, the statutes must be applied to provide the hearing; and
  - (4) A taxpayer's right to bring a collateral judicial action is insufficient to provide the due process which should be been provided administratively.
- v. *Jackson v. McCrimmon*, 164 F. 759, 761-764 (N.D. Fla. 1908)(concerning the back assessment of property in Walton County):

All that due process implies when applied to tax proceedings may not be readily defined, but enough have been said on the subject by judges and text-writers to leave no uncertainty that the 'door of opportunity' must be open to the taxpayer to at least importune and plead with the powers who would 'lade him with burdens grievous to be borne.' .... the Supreme Court has settled the law that the assessment of a tax is action judicial in nature, requiring for the legal exertion of that power that opportunity to appear and be heard is indispensable; that somewhere during the process of assessment the taxpayer must have notice and opportunity to be heard; that it must be provided as an essential part of the statutory provisions, and not awarded as a mere matter of grace to the taxpayer. .... The word

'assessment' as used in tax statutes, does not mean merely the valuation of property for taxation. It includes the whole statutory mode of imposing the tax. It embraces all the proceedings for raising money by the exercise of the power of taxation from the inception to the conclusion of the proceedings.

vi. Lankheim v. Fla. Atlantic, 992 So.2d 828, 834 (2008):

Even where a state is not required to extend a certain benefit to its people, after having chosen to extend it, the state may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct occurred.

vii. In the Clawback exercise, the authority exercised by the property appraiser, and the impact upon a taxpayer is significantly greater than a current-year tax exemption grant or denial in the following ways:

- (1) This exercise involves multiple years of tax exemptions;
- (2) This exercise involves an onerous penalty of 50% of the taxes claimed (which also, even further, violates the constitutional requirement of uniformity in local taxation);
- (3) This exercise involves an onerous assessment of 15% interest upon the taxes claimed (15% interest is a penalty pursuant to *Adler-Built v. Metro Dade*, 231 So.2d 197, 200 (Fla. 1970) );
- (4) This exercise involves the deprivation of tax benefits which have already been granted to the taxpayer and, thus, have been established;
- (5) This exercise involves the filing of liens upon the residential property of a taxpayer in the public records.

#### COUNT I - Violation of Plaintiffs Due Process Rights

55. Plaintiffs hereby incorporate and reallege the contents of paragraphs 1 through 54 as if fully

set forth herein.

56. In 2013, Defendant PA made a decision to exercise the Clawback and to take Defendant PA's Actions.
57. It appears that, in 2013, Defendant PA made a decision that Plaintiff W GIVHAN had not maintained the permanent residence of Plaintiff J GIVHAN upon the Homestead during those times pertinent for tax years 2003 through 2012.
58. It appears that, in 2013, Defendant PA also made a decision that Plaintiff J GIVHAN had not maintained her permanent residence upon the Homestead during those times pertinent for tax years 2003 through 2012.
59. Plaintiffs' Homestead Tax Benefits for 2003 through 2012 cannot be taken without due process of law.
60. Additionally, Plaintiffs have been assessed with charges, interests, and penalties which cannot be imposed without due process of law.
61. Plaintiffs' were entitled to a pre-deprivation hearing as a part of the process by which Defendant PA took Defendant PA's Actions.
62. In the alternative, Plaintiffs were entitled to a hearing at some point in the process by which Defendant PA took Defendant PA's Actions.
63. Plaintiffs were entitled to require all evidence by which Defendant PA claimed the right to take Defendant PA's Actions be presented at a hearing.
64. Plaintiffs were entitled to cross-examine all witnesses of Defendant PA at a hearing;
65. Plaintiffs were entitled to a written opinion from such hearing as to any final decision concerning Defendant PA's Actions.
66. Plaintiffs were entitled to notice of such a hearing.

67. Plaintiffs were entitled to instruction on how to obtain such a hearing.
68. Plaintiffs were provided no notice of the ability to obtain such hearing.
69. The rights of Plaintiffs to file this judicial proceeding does not fulfill the requirements of due process. *Hollywood Jaycees v. DOR*, 306 So. 109, 112 (Fla. 1975).
70. Even if it were possible for due process to be provided by this judicial proceeding, Section 194.036, F.S., if applied, would cause this judicial proceeding to be insufficient to provide the required due process as Section 194.036, F.S. provides, in pertinent part:

(2) A taxpayer may bring an action to contest a tax assessment pursuant to s. 194.171.

(3) The circuit court proceeding shall be de novo, and the burden of proof shall be upon the party initiating the action”

and thereby appears to impermissibly shift the burden of proof onto Plaintiffs to prove their right to retain those valuable rights which they already held at the time of Defendant PA's Actions.

71. Defendant PA has, under color of state law, deprived Plaintiffs of valuable property interests in the Homestead Tax Benefits and in their right to be free from liability (upon both themselves and their real property) in relation to the exercise of the Clawback (the sum of the Homestead Tax Benefits, a penalty of 50% thereon, and 15% retroactive penalty-level interest thereon), without pre-deprivation or post-deprivation hearing, without such other required due process rights, and without compensation.
72. Plaintiffs' petitioned the VAB to obtain a post-deprivation hearing, but the VAB has failed and refused to provide the same and made the decision to refuse to provide the same without hearing.
73. The VAB made such refusal without hearing based upon the insistence of Defendant PA in prior years that the VAB should not hear such petitions.

74. Therefore, Defendant PA has violated:

a. The U.S. Constitution:

- i. The 5<sup>th</sup> Amendment, prohibiting the deprivation of property without due process of law, as applied to the States via the 14<sup>th</sup> Amendment to the U.S. Constitution;
- ii. The 14<sup>th</sup> Amendment to the U.S. Constitution, prohibiting the deprivation of property without due process of law; and
- iii. The 5<sup>th</sup> Amendment, prohibiting the taking of private property without compensation, as applied to the States by the 14<sup>th</sup> Amendment to the U.S. Constitution;

b. The Florida Constitution:

- i. Article 1, Section 9, prohibiting the deprivation of property without due process of law;
- ii. Article 10, Section 6, prohibiting the taking of private property without compensation; and
- iii. Article 1, Section 25, entitled the 'Taxpayers' Bill of Rights' as further enacted in Section 192.0105, F.S., and in statutes cited therein; and

c. The Florida Statutes including, without limitation:

- i. Section 196.194(1), F.S.;
- ii. Section 194.032, F.S.;
- iii. Section 192.0105, F.S.; and
- iv. Section 197.122, F.S.

75. This action is brought pursuant to:

- a. Section 194.171, F.S.;
  - b. The self-execution of the foregoing Constitutional and Statutory Provisions; and
  - c. 42 U.S.C. 1983 (subjecting persons acting under color of State law to liability for deprivations of federally guaranteed rights, including the foregoing U.S. Constitutional rights.).
76. Plaintiff BRIGGS has retained the undersigned attorney and firm to represent him in this action and is obligated to pay reasonable attorney fees for their services.
77. Plaintiff BRIGGS is entitled to recover his attorney's fees, expenses, and costs pursuant to:
- a. 42 U.S.C. 1988; and
  - b. Article I, Section 25 of the Florida Constitution as further enacted in Section 192.0105(3)(g), Florida Statutes.
78. WHEREFORE, Plaintiffs pray this Court enter an order:
- i. reinstating the 2003-2012 Homestead Tax Benefits related to the Homestead;
  - ii. invalidating and striking any and all notices of lien filed in relation to the Homestead by Defendant PA;
  - iii. directing Defendant TC to refund all sums paid by Plaintiffs in relation to the exercise of the Clawback;
  - iv. restraining Defendant PA from any subsequent attempt to exercise the Clawback in relation to the tax years 2003-2012 as to the Homestead;
  - v. awarding Plaintiffs their reasonable attorneys' fees, expenses, and costs in pursuing this action; and
  - vi. providing such other and further relief as this Court finds just and proper.

COUNT II - Declaratory Judgment - Entitlement To Retain  
Homestead Tax Benefits Asserted As Removed By Clawback Exercise  
And Entitlement to Refund Of Sums Paid To Defendant Tax Collector

79. Plaintiffs hereby incorporate and reallege the contents of paragraphs 1 through 54 as if fully set forth herein.
80. This is an action for declaratory judgment pursuant to Section 194.171, F.S.
81. During all times pertinent to tax years 2003 through 2012, Plaintiff W GIVHAN and Plaintiff

J GIVHAN held a waiver of the requirement that they file any application for Homestead Tax Benefits in relation to the Homestead.

82. During all times pertinent to tax years 2003 through 2012, Plaintiff W GIVHAN owned the Homestead, made the Homestead his permanent residence, and maintained the Homestead as his permanent residence. Therefore, those Homestead Tax Benefits granted in relation to the Homestead for tax years 2003 through 2012 should not have been removed by the exercise of the Clawback.
83. During all times pertinent to tax years 2003 through 2012, Plaintiff W GIVHAN owned the Homestead, made the Homestead the permanent residence of Plaintiff J GIVHAN, and maintained the Homestead as the permanent residence of Plaintiff J GIVHAN. Therefore, those Homestead Tax Benefits granted in relation to the Homestead for tax years 2003 through 2012 should not have been removed by the exercise of the Clawback.
84. During all times pertinent to tax years 2003 through 2012, Plaintiff J GIVHAN owned the Homestead, made the Homestead her permanent residence, and maintained the Homestead as her permanent residence. Therefore, those Homestead Tax Benefits granted in relation to the Homestead for tax years 2003 through 2012 should not have been removed by the exercise of the Clawback.
85. Plaintiff W GIVHAN and Plaintiff J GIVHAN were, each, entitled to Homestead Tax Benefits in relation to the Homestead for tax years 2003 through 2012.
86. Plaintiff W GIVHAN, being the present owner of the Homestead by reason of the death of Plaintiff J GIVHAN and the extinguishment of her interest as a tenant by the entirety with Plaintiff W GIVHAN, is entitled to retain those Homestead Tax Benefits granted in relation to the Homestead for tax years 2003 through 2012.

87. Furthermore, the burden of proof must be placed upon Defendant PA to prove that Plaintiffs were not so entitled as Plaintiffs have never been provided with due process in the exercise of the Clawback such that the burden may have become shifted to Plaintiffs.
88. WHEREFORE, Plaintiffs pray this Court enter an order:
- i. reinstating the 2003-2012 Homestead Tax Benefits related to the Homestead;
  - ii. invalidating and striking any and all notices of lien filed in relation to the Homestead by Defendant PA;
  - iii. directing Defendant TC to refund all sums paid by Plaintiffs in relation to the exercise of the Clawback;
  - iv. restraining Defendant PA from any subsequent attempt to exercise the Clawback in relation to the tax years 2003-2012 as to the Homestead;
  - v. awarding Plaintiffs their reasonable attorneys' fees, expenses, and costs in pursuing this action; and
  - vi. providing such other and further relief as this Court finds just and proper.

COUNT III - Section 196.031(5), F.S., If It Would Otherwise Be Applied To Disentitle

Any Plaintiff, Should Be Declared Unconstitutional-As-Applied And Not Be Applied

89. Plaintiffs hereby incorporate and reallege the contents of paragraphs 1 through 54 as if fully set forth herein.
90. Plaintiffs' *PETITION & AMENDED COMPLAINT* asserted that Plaintiff W GIVHAN and Plaintiff J GIVHAN were entitled to retain all of those Homestead Tax Benefits upon the Homestead for which the Clawback was exercised because:
- a. Plaintiff W GIVHAN was entitled thereto by reason of his owning the Homestead and his making and maintaining his permanent residence upon the Homestead during those years;
  - b. Plaintiff W GIVHAN was entitled thereto by reason of his owning the Homestead and making and maintaining the permanent residence of Plaintiff J GIVHAN, who was then legally or naturally dependent upon Plaintiff W GIVHAN, upon the Homestead during those years; and

c. Plaintiff J GIVHAN was entitled thereto by reason of her owning the Homestead and making and maintaining her permanent residence upon the Homestead during those years.

91. Defendant PA, by its *ANSWER OF DEFENDANT OKALOOSA COUNTY PROPERTY APPRAISER*, asserted no defense to Plaintiff's *PETITION & AMENDED COMPLAINT* and no affirmative allegations of fact concerning the receipt by Plaintiff W GIVHAN of a tax exemption that requires permanent residency in any other state. Black's Law Dictionary (10<sup>th</sup> ed. 2014) ("defense ... 1. A defendant's stated reason why the plaintiff or prosecutor has no valid case. .... 'Defense is defined to be that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover that which he seeks by his complaint or petition.'). Having failed to allege and assert such an affirmative set of facts which Defendant PA asserts as a defense to Plaintiffs' recovery, Defendant PA has waived the same Fla. R. Civ. P. 1.140(b) ("[e]very defense in law or fact ... shall be asserted in a responsive pleading .... Any ground not stated shall be deemed to be waived...."); Fla. R. Civ. P. 1.140(h) ("A party waives all defenses ... that the party does not present either by motion ... or, ... in a responsive pleading ....").

92. Defendant PA, by its *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT* and in response to Plaintiffs' *PETITION & AMENDED COMPLAINT*, has asserted that:

...Plaintiff received a homestead exemption based on permanent residency in Dallas County, Alabama, for the 2001-2012 tax years. Therefore, based upon Sections 196.031(5), Florida Statutes, the Plaintiff became disentitled to a homestead exemption in Florida. .... Plaintiff was required to report the change to Defendant's office.

Filed contemporaneously with *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT* was that *AFFIDAVIT OF WEIDA F. SHEEHAN* stating only that Plaintiff W GIVHAN

recieved a homestead exemption based on permanent residency in Dallas County, Alabama during the years 2001-2012.

93. As set forth above, the foregoing defense was waived and Plaintiffs object to the assertion thereof in *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*.

94. Section 196.031(5), F.S. provides:

A person who is receiving or claiming the benefit of an ad valorem tax exemption or a tax credit in another state where permanent residency is required as a basis for the granting of that ad valorem tax exemption or tax credit is not entitled to the homestead exemption provided by this section. This subsection does not apply to a person who has the legal or equitable title to real estate in Florida and maintains thereon the permanent residence of another legally or naturally dependent upon the owner.

95. *DEFENDANT'S MOTION FOR SUMMARY JUDGMENT* states that "... Defendant, Smith moved for final summary judgment of Plaintiff Amended Complaint and all Counts thereof."

96. Section 196.031(5), F.S. has no application upon Plaintiffs as (1) Plaintiff W GIVHAN owned the Homestead and made and maintained the Homestead as the permanent residence of Plaintiff J GIVHAN during the pertinent years and (2) Plaintiff J GIVHAN owned the Homestead and Plaintiff J GIVHAN made and maintained the Homestead as her permanent residence during the pertinent tax years.

97. Therefore, Defendant PA's argument that Section 196.031(5), F.S. applies is wholly without merit.

98. To the extent that the Court would otherwise apply Section 196.031(5), F.S. to conclude that Plaintiff W GIVHAN was disentitled to Homestead Tax Benefits during the pertinent years, this would represent an unconstitutional application of Section 196.031(5), F.S. in that it would alter the class of individuals who are entitled to Homestead Tax Benefits (which includes Plaintiff W GIVHAN) under the provisions of the Florida Constitution through the

application of a statute. *Garcia v. Andonie*, 101 So.3d 339 (Fla. 2012)(“...although the Legislature is permitted to enact laws regulating ‘the manner’ of establishing the right to the constitutional homestead tax exemption, it cannot substantively alter or materially limit the class of individuals entitled to the exemption under the plain language of the constitution.”).

99. Fla. Const. Art. 7, Sec. 6, in pertinent part, provides:

- (a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt ....
- (b) Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit.

100. Fla. Const. Art. 7, Sec. 6(b) refers to Fla. Const. Art. 7, Sec. 6(a), which provides only for a Florida homestead exemption upon Florida real property. Therefore, Fla. Const. Art. 7, Sec. 6(b) does not disentitle a person who receives an exemption in another state. *Vallier v. Wells*, Pasco County Circuit Court Case No. 98-6248 (Fla. Cir. Ct., June 10, 1999)(e.s.); *Wells v. Valier*, 773 So.2d 1197 (Fla. 2<sup>nd</sup> DCA 2000); *See also DECISION OF THE VALUE ADJUSTMENT BOARD*, re: Murray Clifton Briggs, Jr., 2013 Okaloosa County Value Adjustment Board petition #52; *In re Sanders*, 72 B.R. 124 (M.D. Fla. 1987); *See also* Section 196.031(5), second sentence, F.S.

101. Section 196.031(5), F.S., if applied here, would represent an impermissible attempt by the Florida Legislature to alter the grant provided by Fla. Const. Art. 7, Sec 6 without amending the constitutional provision itself. *Garcia v. Andonie*, 101 So.3d 339 (Fla. 2012); *Sparkman v. Scott*, 58 So.2d 431 (Fla. 1952).

102. Therefore, if the Court determines that the language of Section 196.031(5), F.S. would apply to disentitle Plaintiffs of Homestead Tax Benefits upon the Homestead, this Court must declare the same to be unconstitutional as applied to Plaintiffs and refuse to apply the same.

103. WHEREFORE, Plaintiffs pray this Court enter an order:

- i. in the event that the Court would otherwise apply Section 196.031(5), F.S. to determined that either of the Plaintiffs were not entitled to Homestead Tax Benefits upon the Homestead at any time, that Section 196.031(5), F.S. is unconstitutional-as-applied to Plaintiffs and to refuse to apply the same; and
- ii. providing such other and further relief as this Court finds just and proper.

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