IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

Case No. 4D18-1220
consolidated with
4D18-1519 & 4D18-2124

L.T. Case No. 2017-1098-CA

EVERGLADES LAW CENTER INC., et al.,

Appellants,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, et al.,

Appellees.

BRIEF OF AMICUS CURIAE FIRST AMENDMENT FOUNDATION, INC. IN SUPPORT OF APPELLANTS

On Appeal from a Final Order of the Nineteenth Judicial Circuit,
In and For Martin County, Florida

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INTEREST OF AMICUS CURIAE

The First Amendment Foundation is a 501(c)(3) tax-exempt, non-profit organization established in 1984 by other non-profits – the Florida Press Association, the Florida Society of News Editors and the Florida Association of Broadcasters – to ensure government openness and transparency. The Foundation was created to advocate the public interest in free speech, free press and open government, and to provide training and legal advocacy.

The Foundation has filed numerous amicus curiae briefs in the Florida courts relating to First Amendment access rights issues, Chapter 286, Florida's Public Meetings Law (the "Public Meetings Law"), and Chapter 119, Florida's Public Records Act (the "Public Records Act") (collectively, the "Sunshine Laws"). The Foundation provides education and training, monitors open records and meetings laws, and assists citizens and journalists in obtaining access to government.

The protection of the constitutional right of access to open government serves fundamental constitutional values and the public interest. The Foundation regularly investigates and reports to the public on government activity. To fully realize its constitutionally protected watchdog role, the Foundation frequently relies on free speech and open government laws across the country to shine the light on the conduct of public officials and their activities.

To that end, the Foundation has an ongoing stake in ensuring such laws

remain robust and are not abused by governmental entities.

SUMMARY OF THE ARGUMENT

According to the trial court's ruling, the mediation privilege renders secret, in perpetuity, all communications related to a mediation from the moment mediation is ordered to the moment the mediation ends, irrespective of the subsequent circumstances in which they might be discussed. Thus, for that entire period of time—here, 11 months—Florida's constitutionally and statutorily mandated Sunshine Laws are wholly displaced, and Florida's citizens are completely in the dark as to the basis for the government's actions in reaching a resolution of the public's litigation. Such a result is antithetical to the most basic principles of openness and transparency on which Florida's system of government is based.

The trial court also misconstrued the reach of Florida's Mediation Confidentiality and Privilege Act, as well as the interplay between the Mediation Act and the Sunshine Laws. In doing so, the trial court ignored the statutory mandate which expressly requires public disclosure of shade meeting transcripts. The transcript from a shade meeting is simply not a "written communication" in a "mediation proceeding" subject to the Mediation Act's confidentiality privilege.

A shade meeting may address only settlement negotiations and litigation expenditures, must be transcribed by a certified court reporter, and no part of the

meeting may be off the record. Most importantly, the statute governing shade meetings expressly requires public disclosure of the meeting transcript after the litigation has concluded. The trial court's all-encompassing definition of a "mediation proceeding" conflicts with this provision and would largely eviscerate it since it would be difficult and unusual to discuss settlement without reference to the prior mediation.

If allowed to stand, the lower court's interpretation would allow all governmental entities to operate entirely in the dark simply by initiating a mediation and delaying its conclusion. Neither the Sunshine Laws nor the Mediation Act allow for this result.

ARGUMENT

The Mediation Confidentiality And Privilege Act Does Not Nullify The Express Requirements Of The Sunshine Laws

An open and transparent government is so critical to the core values of Florida governance that those principles are expressly imbedded in the Florida Constitution. Art. I, § 24(a), Fla. Const. ("Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state[.]"); § 119.01(1), Fla. Stat. ("It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency."); § 286.011(2), Fla. Stat. ("The minutes of a meeting of

any [board or commission of any state agency] shall be promptly recorded, and such records shall be open to public inspection.").

The Public Meetings Law "aims to prevent '[t]he evil of closed door operation of government without permitting public scrutiny and participation,' and if any two or more public officials meet in secret to transact public business, they violate the Sunshine Law." *Transparency for Florida v. City of Port St. Lucie*, 240 So. 3d 780, 784 (Fla. 4th DCA 2018) (*quoting City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971)).

"[T]he law must be broadly construed to effect its remedial and protective purpose. The breadth of such right is virtually unfettered." *Pinellas County Sch. Bd. v. Suncam, Inc.*, 829 So. 2d 989, 990 (Fla. 2d DCA 2002) (quotations and marks omitted); *see also Sarasota Citizens For Responsible Gov't v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010).

"Caution should be taken to comply with the Sunshine Law, and compliance should be the default rather than the exception." *Brown v. Denton*, 152 So. 3d 8, 12 (Fla. 1st DCA 2014). As the Florida Supreme Court recognized decades ago, "[t]he principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).

"The Sunshine Law provides a right of access to government. It was enacted in the public interest to protect the public from 'closed door' politics. The Sunshine Law is to be liberally construed to give effect to its public purpose, and exemptions should be narrowly construed." *Brown*, 152 So. 3d at 11 (citation omitted); *see also Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521, 525 (Fla. 2d DCA 2014) ("We resolve any doubt in favor of disclosure.").

Of particular relevance here, "[o]ne purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. ***The statute should be construed so as to frustrate all evasive devices***." *Town of Palm Beach,* 296 So. 2d at 477 (emphasis added).

Florida courts have uniformly followed this directive in construing the Public Meetings Law. *E.g., Sarasota Citizens For Responsible Gov't*, 48 So. 3d at 762 (*quoting Town of Palm Beach*); *Wood v. Marston*, 442 So. 2d 934, 940 (Fla. 1983) (same); *Transparency for Florida*, 240 So. 3d at 784 (same); *Citizens for Sunshine, Inc. v. Sch. Bd. of Martin County*, 125 So. 3d 184, 188 (Fla. 4th DCA 2013) (same); *Zorc v. City of Vero Beach*, 722 So. 2d 891, 902 (Fla. 4th DCA 1998); *Florida Parole & Prob. Comm'n v. Thomas*, 364 So. 2d 480, 481 (Fla. 1st

DCA 1978) ("it is obvious that the spirit, intent and purpose of the statute requires a liberal judicial construction in favor of the public and a construction which frustrates all evasive devices").

Here, the trial court failed to heed this directive. Instead, it broadly interpreted the scope of a "mediation proceeding" in a way that not only evades the Sunshine Laws, but eviscerates it with respect to resolving governmental litigation. This is directly contrary to the express purpose of the Sunshine Laws, and the decades of settled Florida jurisprudence cited above.

The particular issue below was whether the transcript of a shade meeting was the subject of a mediation privilege, such that the transcript may ***never*** be disclosed to the public. A shade meeting is a temporary and limited exception to the requirement that meetings of public bodies be open to the public. *See Anderson v. City of St. Pete Beach*, 161 So. 3d 548, 552–53 (Fla. 2d DCA 2014).

Section 286.011(8) delineates the parameters of a shade meeting, and states:

> Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:
>
> (a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

> (b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.
>
> (c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.
>
> (d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.
>
> (e) ***The transcript shall be made part of the public record upon conclusion of the litigation***.

§ 286.011(8), Fla. Stat. (emphasis added).

It is undisputed that, here, the underlying litigation has been concluded. Nonetheless, both the South Florida Water Management District and the trial court refused to disclose the transcript of the shade meeting pursuant to Appellants' timely public records request.

According to the trial court, this issue is governed wholly by section 44.102(3), Florida Statutes. R.448 at ¶ 2. The trial court ruled that "[t]he sole substantive issue that remains for adjudication is whether the transcripts remain exempt from disclosure under Sec. 44.102(3), *Florida Statutes*." That provision,

which is part of the Mediation Confidentiality And Privilege Act, states, in whole: "***All written communications in a mediation proceeding***, other than an executed settlement agreement, ***shall be exempt from the requirements of chapter 119***." § 44.102(3), Fla. Stat. (emphasis added).

Based on that provision, the trial court ruled that the transcript of the shade meeting is exempt from disclosure for all time. R.361-365, 447-449. In reaching that conclusion, the trial court determined that a transcript of the oral communications between the board and its attorneys during the shade meeting constituted a "written communication in a mediation proceeding." *Id.* Such discussions in a shade meeting are neither written communications nor do they take place in a mediation proceeding.

The trial court did not address that its ruling is directly contrary to the express intent of the Sunshine Laws. Nor did the trial court consider or address the specific statutory mandate directing that "[t]he transcript [of a shade meeting] shall be made part of the public record upon conclusion of the litigation." § 286.011(8)(e), Fla. Stat.

Though not expressly stating as much, the trial court appears to have determined that section 44.102(3) of the Mediation Confidentiality And Privilege Act is in conflict with and governs over section 286.011(8)(e) of the Public Meetings Law. There is, however, no conflict. Section 286.011(8)(e) specifically

and expressly mandates the public disclosure of the transcript of the shade meeting at issue here. Section 44.102(3) does not alter this result.

At the outset, even if there were a conflict between these two statutes—with one militating disclosure and the other suggesting non-disclosure—section 286.011(8)(e), which requires disclosure, would trump. Section 286.011(8) applies to this exact set of facts and it could not be more specific in its directive: a transcript of a shade meeting must be made, with no portion off the record, and that transcript must be made part of the public record once the litigation concludes.

Section 44.102(3), on the other hand, is a general provision relating to written communications in a mediation proceeding. Section 286.011(8)(e), as the more specific statute applicable here, must be followed and applied here. *1321 Whitfield, LLC v. Silverman*, 67 So. 3d 435, 436 (Fla. 2d DCA 2011) (recognizing "the principle of statutory construction that a specific statute controls over a general statute concerning the same subject"); *R.C. v. State*, 948 So. 2d 48, 51 (Fla. 1st DCA 2007) ("a more specific statutory provision governs over a more general provision").

Nonetheless, section 286.011(8)(e) and section 44.102(3) can and should be reconciled. "Where statutory provisions appear contradictory, it is the duty of the judiciary to adopt, if possible, a construction which harmonizes and reconciles those provisions." *G.W.M. v. State*, 391 So. 2d 738, 739 (Fla. 4th DCA 1980)

(citing *Woodgate Development Corp. v. Hamilton Investment Trust*, 351 So. 2d 14 (Fla. 1977)); *see also 1321 Whitfield*, 67 So. 3d at 436 (acknowledging and applying "well-accepted precept of statutory construction which requires reconciliation among seemingly disparate provisions of a statute so as to give effect to all its parts"); *see also Woodgate Dev. Corp. v. Hamilton Inv. Tr.*, 351 So. 2d 14, 16 (Fla. 1977).

In accordance with these principles—and the unwavering directive for disclosure in the Sunshine Laws—section 44.102(3) can and should be interpreted so as not to vitiate section 286.011(8)(e)'s express requirement for public disclosure of shade meeting transcripts. Here, the trial court's error arose from its failure to follow these tenets of Florida law and, in doing so, interpreting a "written communication" in a "mediation proceeding" so broadly that it completely eviscerates section 286.011(8)(e)'s public disclosure requirement.

At the outset, the transcript of oral communications at a meeting is not a "written communication" under any interpretation of the plain meaning of that term. The transcript does no more than memorialize oral statements. The transcript is not itself a written communication, be it in the mediation context or otherwise. The history of section 44.102(3) supports this result.

Before the statute was amended in 2004, the exemption covered "***oral or*** written communications in a mediation proceeding." *See* 2004 Fla. Sess. Law

Serv. Ch. 2004-291 (C.S.S.B. 1970) (emphasis added). The amendment deleted "oral or" from the statute, leaving only written communications subject to section 44.102(3). *Id.* If the Legislature intended for section 44.102(3) to remain so broad as to cover oral communications reduced to writing, then there would have been no need to specifically eliminate oral communications from the statute.

In short, the transcript of the oral communications that took place at the shade meeting at issue here are not a "written communication" encompassed within section 44.102(3). There is, therefore, no conflict with section 286.011(8)(e)'s public disclosure requirement, and the shade meeting transcript must be disclosed.

The more disturbing aspect of the trial court's ruling is its interpretation of the scope of a "mediation proceeding" subject to section 44.102(3)'s exemption from disclosure. According to the trial court, from the moment mediation is ordered to the moment a settlement is approved and executed (or an impasse is declared), all written communications relating to settlement—including transcripts of oral conversations—are privileged and ***never*** subject to disclosure. Here, that period lasted 11 months.

Pursuant to the trial court's interpretation, a governmental entity could completely avoid the disclosure requirements of the Sunshine Laws under the guise on an ongoing mediation. The government need only initiate a mediation—as

occurs in nearly all cases—and decline to formally conclude the mediation. All business during shade meetings would be completely out of the public view for all time.

It is inconceivable that the Legislature intended the vast citizen protections of the Sunshine Laws to be so easily avoided. In *Chmielewski v. City of St. Pete Beach*, 161 So. 3d 521, 524 (Fla. 2d DCA 2014), for example, the City conceded that the transcript of the shade meeting was to be made public at the conclusion of the litigation. Nonetheless, even after a final judgment had been entered, the City argued that it need not disclose the transcript pursuant to 286.011(8)(e) because postjudgment proceedings were ongoing.

The First District disagreed with the City's position, stating: "What is remarkable about the City's posture is that the mere potential for postjudgment enforcement proceedings could indefinitely shield a shade meeting transcript from public eyes, long after the underlying lawsuit ends." *Id.*; *see also Brown v. Denton*, 152 So. 3d 8, 12 (Fla. 1st DCA 2014) ("We cannot condone hiding behind federal mediation, whether intentionally or unintentionally, in an effort to thwart the requirements of the Sunshine Law.").

Consideration must also be given to the fact that the impact of the trial court's interpretation is not limited to this case. Indeed, it would affect nearly every case brought by or against a governmental entity, and essentially write

286.011(8)(e)'s directive out of existence. A governmental entity rarely, if ever, has a representative in attendance who can fully execute a settlement agreement during the mediation. *See* Fla. R. Civ. P. 1.720(d) ("If a party to mediation is a public entity required to operate in compliance with chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.").

As a result, a tentative settlement agreement will usually be brought to the decision-making authority for consideration through a shade meeting. According to the trial court's rationale, that shade meeting is a mediation proceeding, and the transcript of that meeting is forever exempt from public disclosure. Given that the limited purpose of a shade meeting is "confined to settlement negotiations or strategy sessions related to litigation expenditures," nearly all shade meetings will now be completely out of the public view for all time. § 286.011(8)(b), Fla. Stat. The statute's directive that "[t]he transcript shall be made part of the public record upon conclusion of the litigation" will be nullified. § 286.011(8)(e), Fla. Stat.

The consequences of the trial court's interpretation are directly counter to the constitutional and statutory directive for open and transparent government, not to mention the plain language of section 286.011(8)(e). By the same token, the

trial court interpreted the reach of section 44.102(3) far too broadly, particularly given that the litigation underlying the shade meeting resulted in a settlement.

As this Court recognized, "the reason for confidentiality as to statements made during mediation where a settlement agreement is not reached is obvious. Mediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached. Once the parties in mediation have signed an agreement, however, the reasons for confidentiality are not as compelling." *DR Lakes Inc. v. Brandsmart U.S.A. of W. Palm Beach*, 819 So. 2d 971, 973-74 (Fla. 4th DCA 2002). Having reached a settlement, there is no legitimate reason for South Florida Water Management District to refuse to disclose the shade meeting transcript.

CONCLUSION

The deleterious impact of the lower court's decision on an open and transparent government in Florida cannot be overstated. The First Amendment Foundation, Inc. respectfully requests that the Court reverse the orders under review and hold that the transcript of the shade meeting at issue here be disclosed pursuant to Florida's Sunshine Laws.

Respectfully Submitted,

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The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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