IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D18-1220
CONSOLIDATED WITH
4D18-1519 & 4D18-2124

EVERGLADES LAW CENTER, INC., et. al.,

Appellants,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, et. al.

Appellees.

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

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PRELIMINARY STATEMENT

This amicus curiae brief is submitted by the Florida Defense Lawyers Association (FDLA) in support of Appellee South Florida Water Management District.

STATEMENT OF IDENTITY AND INTEREST

The FDLA is a statewide organization of defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to "bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties." The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort issues.

The FDLA is fervent in its desire to protect legally recognized privileges, including the mediation privilege for all litigants, including entities subject to the Sunshine Law. Its members represent many public entities and are involved in shade meetings and advising the entities of their duties under Florida law.

SUMMARY OF THE ARGUMENT

Although the business of a public entity is generally conducted in the sunshine, Florida law recognizes various instances in which documents that would otherwise be public records are exempt from disclosure. Among these instances is an exemption for mediation communications found in section 44.102(3), Florida Statutes.

In addition to the exemption found in section 44.102(3), section 44.405, Florida Statutes, designates all mediation communications as confidential. The confidentiality invoked by this section provides an additional basis to withhold the transcript. Further, in defining the scope of confidentiality for mediation communications, the Legislature included several exceptions to the general rule that mediation communications are confidential. Compliance with section 119.07(1), Florida Statutes, is not among the exceptions provided for by the Legislature.

Finally, the public policy behind the decision to protect communications made during the course of mediation applies equally to private and public entities and should not be eroded to create an unfair advantage to any party.

ARGUMENT

At issue in the present appeal is the right of a public entity, like any other litigant before a Florida court, to protect confidential and privileged communications made in the course of a court-ordered mediation. Specifically, this appeal involves a public entity's ability to maintain written statements made during a mediation as confidential and exempt from discovery by third parties.

I. SECTION 44.102(3) IS A STATUTORY EXEMPTION TO THE TRANSPARENCY OTHERWISE REQUIRED BY SECTION 119.01(7).

This appeal exposes the conflict between the confidentiality afforded to mediation proceedings and the transparency otherwise required of local government. Indeed, Appellants and their amicus devote significant time to emphasizing that the only exemptions to the Public Records Act are statutory and urging that such exemptions cannot be judicially created. This argument ignores the exemption found in section 44.102(3), Florida Statutes.

This section specifically exempts all written communications, other than the executed settlement agreement, from public inspection and copying. "Only public records provided by statute to be confidential or which are expressly exempted by general or special law from disclosure under the Pubic Records Act are exempt." Miami Herald Publ'g Co. v. City of North Miami, 452 So. 2d 572, 573 (Fla. 3d DCA 1984). Section 44.102(3) expressly exempts all written communications other than the executed settlement agreement from section 119.01(1), Florida Statutes. The

transcript of the shade meeting clearly fits within this statute as the transcript is the written documentation of statements made about settlement of pending litigation during court-ordered mediation.

As this exemption is not a temporary exemption, prohibiting disclosure only until the conclusion of the litigation, it can only be assumed that the Legislature intended to protect the parties' negotiations and the reasoning that led to a settlement by both sides. It makes little sense that the Legislature would craft a perpetual exemption which covers mediation statements and other written communications occurring prior to the actual mediation, but not cover the strategy that led the parties to their ultimate settlement positions. Inherent in a public entity's decision to settle could certainly be facts unknown to the opposing party or admissions against interest made by one or more individuals comprising the decision-making board. Understandably, the executed settlement agreement is subject to public review, so as to document the final disposition of the matter for all to see. However, failure to protect written communications contributing to the settlement would render this exemption useless and frustrate that public policy of full disclosure that led to enactment of this exemption to begin with.

In challenging the application of section 44.102(3), Appellants and their supporting amicus allege that the communications at issue were not "mediation communications" made during the course of mediation. Section 44.404(1), Florida

Statutes, states that a court ordered mediation begins when an order is issued by the court and ends when:

> (a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;
>
> (b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;
>
> (c) The mediation is terminated by court order, court rule, or applicable law; or
>
> (d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:
>
> 1. Agreement of the parties; or
> 2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

§ 44.404(1), Fla. Stat.

The attorney-client discussion at issue took place before the case was settled and indeed was a precursor to the public meeting at which the board voted to adopt the proposed settlement tentatively reached during the court-ordered mediation. The transcript of this meeting was thus made during mediation so as to render it a "mediation communication."

Moreover, the presence of the entire decision-making body and not just the designated representative, does not make the transcript any less a part of a mediation proceeding. A public entity is required to designate a representative for purposes of

attending the mediation. See Fla. R. Civ. P. 1.720(b) ("If a party to mediation is a public entity required to conduct its business pursuant to 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."). This section speaks only to whom must appear on behalf of a public entity at the mediation itself in order to avoid sanctions for failure to appear. There is no requirement or suggestion that the designated representative can be the only participant in all mediation proceedings.

To the contrary, this rule acknowledges that the designated party physically attending the mediation, will be recommending settlement to the entire decisions-making body of the entity. Id. Further, the Mediation Confidentiality and Privilege Act extends beyond the "mediation participant" to a "mediation party." See § 44.405(1), (2), Fla. Stat. Section 44.403(2) defines "mediation participant" as "a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means," while section 44.403(3) defines "mediation party" or "party" as a "person participating directly, or through a designated representative, in a mediation . . . ."

Any concern that all settlement discussions would be transformed into "mediation sessions" obscured from public view is improbable, as there are numerous

requirements that have to be met before the mediation privilege would apply, including pending litigation and a referral to mediation. Following issuance of an order referring the case to mediation, the scheduling of that mediation rests with the parties. Mediation could be scheduled quickly to determine whether or not an agreement can be reached and if not, the mediation is impassed so that any further settlement discussions would not be subject to the confidentiality provisions associated with mediation. Section 44.102(3) provides a statutory exemption from the public disclosure of written mediation communications that would otherwise be required by section 119.07, Florida Statutes. Even construing this exemption narrowly as required to accomplish its stated purpose, see Seminole County v. Wood, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), this exemption supports permanent withholding of the transcript.

II. THE TRANSCRIPT IS ALSO PROPERLY WITHHELD BASED ON THE CONFIDENTIALITY PROVIDED BY SECTION 44.405.

Although the parties agreed that only the exemption afforded by section 44.102(3), Florida Statutes, was at issue in this appeal, the confidentiality afforded to mediation proceedings by section 44.405, Florida Statutes, also protects the transcript from public disclosure.

Section 44.405(1) provides that all "mediation communications" shall be confidential and undisclosed to any person other than a mediation participant or a

participant's counsel. The Public Records Act exempts from public disclosure "only those public records that are provided by statutory law to be confidential *or* which are expressly exempted by general or special law." Palm Beach Cty. Sheriff's Office v. Sun-Sentinel Co., LLC, 226 So. 3d 969, 972 (Fla. 4th DCA 2017) (quoting Wait v. Fla. Power & Light Co., 372 So. 2d 420, 425 (Fla. 1979)) (emphasis added). See also, 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, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.").

"There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential." WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48, 53 (Fla. 5th DCA 2004). If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information. Id. at 54. See WFTV, 874 So. 2d 48 (Fla. 5th DCA 2004) (upholding television station's denial of access to student records maintained by the School Board of Seminole County where by statute, such records were confidential and exempt from public disclosure and thus could not be produced to third parties, even with redactions); Palm Beach Cty.

Sheriff's Office v. Sun-Sentinel Co., LLC, 226 So. 3d 969 (Fla. 4th DCA 2017) (retroactively applying amendment to chapter 119 which provided that the identity of any witness to a murder is both exempt from disclosure and confidential for two years after the date on which the murder is observed by the witness so as to prevent disclosure of information requested by the newspaper). Where the transcript sought by Appellants is not only exempt from public disclosure pursuant to section 44.102(3), but confidential as set forth in section 44.405(1) and (2), the trial court correctly concluded that the transcript is not subject to disclosure.

In addition to the confidentiality afforded by section 44.405(1), section 44.405(2) provides that each party in a court-ordered mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing mediation communications. Notably, these sections do not say that the confidentiality and/or privilege are applicable to all mediation participants *except public entities or those subject to 119.07*. Instead, these sections impart the confidentiality of mediation and privileged communications made during the course of same on all parties - public and private alike.

Section 44.405 acknowledges several exceptions to mediation confidentiality. Among the enumerated exceptions is one for any mandatory reporting of abuse or neglect of children or vulnerable adults required by chapter 39 or chapter 415.

Notably, this section does not list compliance with Florida's Public Records Act as an exception to the confidentiality of mediation.

"The Legislature, in passing [a] later statute, is presumed to know the earlier law. And, unless an explicit exception is made for an earlier statute, the later statute controls." State v. Ross, 447 So. 2d 1380, 1382 (Fla. 4th DCA 1984). As section 44.405 was not enacted until 2004, well after section 119.01, the Legislature was presumed to know the existence of the prior law, and yet knowingly chose not to make section 119.01 an exception to the confidentiality of mediation. The Legislature's actions not to include compliance with public records as an exception to mediation confidentiality can only be recognized as an express intent to provide public entities with the same confidentiality provided to private litigants in connection with mediation. As noted by the trial court in its Order, "[t]he Court finds that if the legislature wanted to provide an exclusion from the mediation exemption for mediation communications transmitted in shade sessions, the legislature would have so provided."

III. PUBLIC POLICY IS SERVED BY UPHOLDING THE EXEMPTIONS FOR MEDIATION COMMUNICATIONS FOR PUBLIC AGENCIES.

Appellants' amicus concludes that the reasons for confidentiality generally associated with mediation are not as compelling when a settlement is reached. This overgeneralization ignores that the public agencies involved are often subject to

multiple lawsuits arising out of the same or similar conduct. Indeed, they seek to use the prior mediation as a sword against the District in other litigated claims.

During mediation, the parties are often confronted with a truncated version of what the case would look like at trial, including the opening and closing statements to be given by counsel and a summary of the documentary evidence and testimony that would be presented. Things said or presented during mediation are often much more candid because of the confidentiality associated with mediation. By presenting a summary of what occurred at mediation and what information provided during that proceeding that motivated the public entity to settle the claims against it, the public entity would be providing subsequent litigants with a virtual "play book" of a subsequent case against that entity. That "play book" likely includes witnesses, documents, and experts that subsequent parties may well never have thought to ask about. Instead, the work is done for them with little to no recourse to the public entity than to settle the subsequent suits against it. The candor of communications in a court-ordered mediation and the accompanying confidentiality provided by statute renders these communications different than those made in other settings, including pre-suit mediations or informal settlement discussions.

It cannot be overstated how this would impact all claims and cases against public entities. For instance, plaintiffs will be less likely to want to engage in mediation because of the threat that details about their case, negotiations, and the

plaintiffs themselves would become public. Similarly, public entities would be hesitant to engage in mediation due the threat it would be used against them as a sword in the future. This is wholly contrary to Florida's public policy of encouraging settlements. See Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1084 (Fla. 2009); Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985). Scarce judicial resources would be wasted because virtually every case would be required to be tried in order to be resolved.

In any event, Florida law is replete with cases recognizing the important public policy advanced by mediation confidentiality. See, e.g., Enterprise Leasing Co. v. Jones, 789 So. 2d 964, 967 (Fla. 2001). In fact, courts have considered the confidentiality of mediation so important as to severely sanction parties for violating this confidentiality. This very Court has previously upheld a trial court's decision to dismiss a plaintiff's complaint with prejudice, the harshest of all sanctions available, for violating mediation confidentiality. See Paranzino v. Barnett Bank of S. Fla., N.A., 690 So. 2d 725, 726 (Fla. 4th DCA 1997).

The public policy argument that mediation confidentiality should apply equally to all parties, public and private, is reinforced by the Legislature's decision to exempt all mediation communications from public disclosure. In creating this exemption, the Legislature was clearly indicating its intention to place public entities on equal footing with private litigants to resolve pending litigation through the

mediation process without fear of public reprise. It seems highly unlikely that the Legislature would create an exemption, only to have those same privileged and confidential communications revealed to everyone based on disclosure resulting from a closed meeting.

Despite repeated recognition and enforcement of the sanctity of the confidentiality and privilege associated with mediation by the courts of this state, Appellants and their amicus ask the Court, by way of this appeal, to turn a blind eye to recognition of those same benefits to public entities. Public entities, like their private counterparts, are entitled to the confidentiality associated with mediation and should not lose such protection simply by presenting the case to the entire decision-making board. See Op. Att'y Gen. Fla. 03-09 (2003) (recognizing that although Florida statutes do not directly address the dissemination of information that may be obtained at a closed meeting, the nature of the proceedings shows a "clear intent" that matters discussed during closed meetings are not to be open to public disclosure). Notably, this opinion, which came several years after the Attorney General's Opinion relied upon by Appellants, recognizes that what is said in a closed meeting should remain confidential and is not subject to disclosure simply because the disclosure comes in a different form.

CONCLUSION

This appeal does not require the Court to create judicial exemptions where one does not exist in statute. Rather, this Court should uphold the existing statutory exemption found in section 44.102(3), Florida Statutes, and the confidentiality provided for by section 44.405, Florida Statutes, both of which preclude disclosure of the transcript.

WHEREFORE, the FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to affirm the judgment and ruling of the trial court.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Fla. R. App. P. 9.210 in that is uses Times New Roman 14-point font.

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