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SUPREME COURT OF FLORIDA
No. SC14-1200

Lower Tribunal Case Nos. 1D14-2163
2012-CA-00412 / 2012-CA-00490 / 2012-CA-002842

PAT BAINTER, MATT MITCHELL,
MICHAEL SHEEHAN, AND DATA TARGETING, INC.,
Appellants,

v.

THE LEAGUE OF WOMEN VOTERS OF FLORIDA, *et al.*,
Plaintiffs – Appellees.

SUPPLEMENTAL BRIEF OF PAT BAINTER, MATT MITCHELL, MICHAEL SHEEHAN, AND DATA TARGETING, INC.

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Dated: July 9, 2014

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BACKGROUND

This is an appeal from two discovery orders issued by the trial court in a case that "explicitly places legislative intent at the center of litigation" – not the intent, internal deliberations and strategy, or protected speech of Pat Bainter, Matt Mitchell, Michael Sheehan, and Data Targeting, Inc. (collectively "Non-Parties"). *League of Women Voters of Fla. v. Fla. House of Representatives,* 132 So. 3d 135, 147 (Fla. 2013) (internal quotation marks omitted). The first discovery order issued on May 2, 2014 required the disclosure of 538 pages of documents (from a total of 1,833 pages of documents) the Non-Parties sought to protect under the First Amendment's associational privilege and Florida's trade secrets laws. The second discovery order issued on May 15, 2014 gave "confidential" status for purposes of Rule 2.420 of the Florida Rules of Judicial Administration to the 538 pages, but denied the Non-Parties' request to permanently seal the trial proceedings when the parties used or discussed these 538 pages. The Non-Parties filed a timely notice of appeal of both orders. The Plaintiffs did not.[1]

[1] "Plaintiffs" refers collectively to two groups of plaintiffs in the underlying case. The first is the League of Women Voters of Florida, Common Cause, Robert Allen Schaeffer, Brenda Ann Holt, Roland Sanchez-Medina, Jr., and John Steele Olmstead. The second is a comprised of Rene Romo, Benjamin Weaver, William Everett Warinner, Jessica Barrett, June Keener, Richard Quinn Boylan, and Bonita Agan. The National Council of La Raza, which had been aligned with the first group, voluntarily dismissed its claims against all Defendants on May 14, 2013.

ISSUES ON APPEAL

On *de novo* review, the issues on appeal are narrow. At issue is whether the trial court's May 2, 2014 and May 15, 2014 Orders may require the disclosure of protected, anonymous associational materials absent the "closest scrutiny" required by *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), and subsequent cases. Also at issue is whether the trial court may depart from Florida's well-established procedural mechanisms for protecting trade secrets – namely the requirement for an *in camera* review, and an evidentiary hearing *before* disclosing materials one claims are trade secrets.

Judge Marstiller agreed that the issues on appeal are narrow. *Non-Parties, Pat Bainter v. League of Women Voters of Florida,* No. 1D14-2163, 9-10, 19 (Fla. 1st DCA June 19, 2014). In what would have been the First District's panel opinion, *id.* at 12, Judge Marstiller specially noted that the Plaintiffs cannot argue on appeal whether the trial court erred by holding that the Non-Parties' documents are constitutionally-protected in the first instance. *Id.* at 9-10, 10 n.2, 19. The Plaintiffs "did not appeal or cross-appeal [the] ruling by the trial court" that the documents are protected, and Plaintiffs cannot, now, untimely challenge that ruling made on March 20, 2014. *Id.* at 10, n. 2 (citing Fla. R. App. P. 9.110(g) and Philip J. Padovano, *Florida Appellate Practice,* § 23.9, at 494 (2011-12 ed.) ("[T]he filing of a notice of cross-appeal is a prerequisite to a claim of error by the

appellee.”)); *see also El Paso Natural Gas Co. v. Neztsosie,* 526 U.S. 473, 479-81 (1999) (explaining that an appellate court may not “take up the unappealed portions of [] orders . . . *sua sponte*” and that the U.S. Supreme Court has never recognized an exception to that rule); *Holliman v. State,* 232 So. 2d 394, 396-97 (Fla. 1970) (holding that a single notice of appeal is sufficient to confer appellate jurisdiction of more than one judgment of the lower court only when that notice is directed to every judgment intended to be challenged); *Bove v. Ocwen Financial Corp.,* 763 So. 2d 347, 347-48 (Fla. 4th DCA 1998).

Judge Makar reiterated this point in his opinion. He observed that “Judge Terry Lewis, Special Master Major Harding, and the [First District’s] three-judge panel all unequivocally agreed that a [First Amendment] constitutional privilege existed [and applied to the Non-Parties’ documents].” *Non-Parties, Pat Bainter,* No. 1D14-2163 at 29-30. But Judge Makar explained that “[t]he only relevant issue presented to the panel was whether Judge Terry Lewis, an exceptionally well-regarded jurist, correctly applied [the First Amendment’s] stringent test in determining whether the [First Amendment’s] constitutional privilege had been overcome by the [P]laintiffs.” *Id.*

RECORD ON APPEAL

It is axiomatic that the record on appeal consists of the material before the trial court up to and including the moment that the notice of appeal is filed, which

in this case was May 15, 2014. *Rosenberg v. Rosenberg*, 511 So.2d 593, n.3 (Fla. 3d DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988) (explaining that the record on appeal consists only of material "before the trial court at the time of the entry of a final judgment or orders complained of."); *see also* Fla. R. App. P. 9.110(h) ("The court may review any ruling or matter occurring before filing of the notice."); *Pakonis v. Clark*, 39 Fla. L. Weekly D297, *5-6 (Fla. 3d DCA February 5, 2014); *Forney v. Crews,* 112 So. 3d 741, 743-44 (Fla. 1st DCA 2013) *review denied* SC13-1600 (Fla. 2014); *Reena v. State,* 96 So. 3d 1039, 1039 (Fla. 4th DCA 2012).[2]

"It is a well-established principle of law that appellate review is limited to the record on appeal." *State v. Stang,* 41 So. 3d 206, 206 (Fla. 2010) (per curiam) (Lewis, J., concurring). The record "is the *only legal evidence* of such proceedings." *Woods-Hoskins-Young Co. v. Taylor Dev. Co.,* 122 So. 224, 225 (Fla. 1929) (emphasis added); *see also Bryant v. Kuhn,* 73 So. 2d 675, 676 (Fla. 1954); *Branch Banking & Trust Co. v. Kraz, LLC*, 114 So. 3d 273, 275 n.3 (Fla. 2d DCA 2013); *Bowers v. State*, 6 So. 3d 79, 80 (Fla. 1st DCA 2009); *Dep't of Transp. v. Baird*, 992 So. 2d 378, 382 (Fla. 5th DCA 2008).

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[2] The Non-Parties filed their Notice of Appeal and Emergency Motion for Stay on May 14, 2014 because they were relying on the trial court's oral ruling on the confidential nature of the 538 pages of documents ordered disclosed, and waiting for the trial court to issue a written order to this effect. The trial court issued its written order on May 15, 2014. Thus, it is appropriate to treat the notice of appeal as being filed on May 15, 2014.

It is equally well-established that "[w]hen a party includes . . . matters outside the record . . . in its brief, it is proper for the [C]ourt to strike the same." *Altchiler v. Dep't of Prof'l Regulation,* 442 So. 2d 349, 350 (Fla. 1st DCA 1983); *see also Forney,* 112 So. 3d at 743-44; *Dep't of Transp.*, 992 So. 2d at 382; *Gilman v. Dozier,* 388 So. 2d 294, 296 (Fla. 1st DCA 1980); *Finchum v. Vogel,* 194 So. 2d 49, 51 (Fla. 4th DCA 1966); *Sheldon v. Tiernan,* 147 So. 2d 593, 593 (Fla. 2d DCA 1962) (per curiam).

The rule that "an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court." *Thornber v. City of Fort Walton Beach,* 534 So. 2d 754, 755 (Fla. 1st DCA 1988). Doing so "will subject the [attorney] to sanctions." *Id.*; *see also Altchiler,* 442 So. 2d at 350-51; *Rosenberg*, 511 So.2d at n.3 ("It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court.").[3]

[3] Federal courts agree with these well-established principles. *E.g., Allen v. Minnstar, Inc.,* 8 F.3d 1470, 1474 (10th Cir. 1993) ("[T]he district court is not authorized . . . to augment the record on appeal with deposition transcripts that were not on the record before it at the time its final decision was rendered.") (citations omitted) (internal quotation marks omitted); *Kirshner v. Uniden Corp. of America,* 842 F.2d 1074, 1077 (9th Cir. 1988) ("Papers submitted to the district court *after* the ruling that is challenged on appeal should be stricken.") (emphasis in original); *United States v. Walker,* 601 F.2d 1051, 1055 (9th Cir. 1979) ("We are here concerned only with the record before the trial judge when his decision was made.").

Departing from these well-established principles would violate the Non-Parties' rights to due process. *Cf. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,* 560 U.S. 702, 734-42 (2010) (Kennedy, J., concurring).[4] This is especially true because after May 15, 2014 the Non-Parties had no opportunity to examine, cross-examine, or even object to the inclusion of the confidential documents admitted into evidence by the Plaintiffs, or the testimony surrounding these documents elicited by the Plaintiffs. In fact, the trial court precluded the Non-Parties from objecting when one of the Non-Parties, Pat Bainter, testified before the trial court on May 29, 2014. In adjudicating the Non-Parties' First Amendment rights, it would be fundamentally unfair for this Court to consider material in a record the Non-Parties had absolutely no opportunity to shape. To be sure, this would violate the Non-Parties' right to due process of law under the Fourteenth Amendment to the U.S. Constitution. *See Mathews v. Eldridge*, 424 U.S. 319 (1976) (establishing framework for evaluating due process claims).

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[4] There, in an opinion joined by Justice Sotomayor, Justice Kennedy explained that a court may deprive a party of due process of law through a sudden, unpredictable change in the law. Sudden and unpredictable changes depart from the common law tradition of gradual, incremental changes to judge-made law. *E.g.,* Judge Learned Hand, *Book Review: The Nature of Judicial Process*, 35 Harv. L. Rev. 479, 479 (1922) (explaining that the common law "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work").

Accordingly, the Court should strike the reference on page 23, footnote 6 in the Plaintiffs' Corrected Answer Brief to trial testimony that occurred *after* May 15, 2014. Any references to material provided to the trial court after May 15, 2014 should similarly be stricken from the Supplemental Brief the Plaintiffs will file on July 21, 2014, and sanctions imposed for intentionally relying on extra-record evidence. *See Thornber,* 534 So. 2d at 755; *Altchiler,* 442 So. 2d at 350-51.

ARGUMENT

With respect to whether the trial court's May 2, 2014 and May 15, 2014 Orders may require the disclosure of protected, anonymous associational materials absent the "closest scrutiny" required by binding federal precedent, the Non-Parties incorporate by reference: (1) the argument in their Initial Brief and Reply Brief filed before the First District; (2) their filings before Justice Harding and the trial court; and (3) the opinions filed by Judges Wetherell, Marstiller, and Makar in the First District. With respect to whether the trial court may depart from Florida's well-established procedural mechanisms for protecting trade secrets, the Non-Parties incorporate by reference: (1) the argument in their Initial Brief and Reply Brief filed before the First District; and (2) their filings before Justice Harding and the trial court. Should the Court so desire, the Non-Parties remain willing and able to provide additional written or oral argument on the issues now before the Court.

CONCLUSION

The Court should reverse the trial court's May 2, 2014 and May 15, 2014 Orders; permanently seal the material already disclosed in the trial court, and in these appellate proceedings; and otherwise allow the Non-Parties' privileged and confidential information to remain privileged and confidential consistent with the requirements of the First Amendment, and Florida's trade secret laws.

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Dated: July 9, 2014

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been generated with Times New Roman 14 point font and thus complies with Rule 9.100, Florida Rules of Appellate Procedure.

/s/ D. Kent Safriet
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and all appendices has been furnished by electronic mail to counsel of record identified on the attached service list on this 9th day of July, 2014.

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