

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

THE LEAGUE OF WOMEN VOTERS OF FLORIDA;
THE NATIONAL COUNCIL OF LA RAZA;
COMMON CAUSE; JOAN ERWIN; ROLAND
SANCHEZ-MEDINA, JR.; J. STEELE OLMSTEAD
CHARLES PETERS; OLIVER D. FINNIGAN;
SERENA CATHERINA BALDACCHINO; AND
DUDLEY BATES,

PLAINTIFFS,

v.

KENNETH W. DETZNER, in his official
capacity as Florida Secretary of State; THE
FLORIDA SENATE; DON GAETZ,
in his official capacity as President of the
Florida State Senate; THE FLORIDA HOUSE OF
REPRESENTATIVES; and
WILL WEATHERFORD, in his official
capacity as Speaker of the Florida House
of Representatives,

DEFENDANTS.

CASE No.: 2012-CA-2842

**COALITION PLAINTIFFS' REPLY TO NON-PARTIES' RESPONSE TO ORDER TO
SHOW CAUSE REGARDING MOTION FOR REHEARING**

The Non-Parties fail to offer any substantive reason to deny the motion for rehearing, and there are no such reasons. Instead, they rely on four procedural/jurisdictional arguments in the hopes of securing unwarranted relief based on technicalities. All their arguments depend on the untenable notion that the Coalition Plaintiffs can be prevented from obtaining rehearing of an adverse ruling. None of their four arguments support the forfeiture of such a basic right.

First, the Non-Parties' contention that the motion for rehearing was untimely rests on the faulty premise that the Court's May 2, 2014 order was a final order. An order is final only when it "constitutes an end to the judicial labor in the cause, and nothing further remains to be done by

the court to effectuate a termination of the cause as between the parties directly affected.” *LaFave v. State*, 149 So. 3d 662, 670 (Fla. 2014) (quoting *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974)). While an order that finally disposes of a discovery dispute with a non-party and leaves no additional judicial labor is a final order, the May 2 Order (**Exhibit A**) expressly left open part of the discovery dispute – specifically, how the court would balance the Non-Parties’ asserted right to confidentiality when the subject documents are used at trial. It expressly contemplated a further order, and the order resolving this last aspect of the dispute came nearly two weeks later on May 15. (**Exhibit B.**) It was at that point that the Coalition Plaintiffs’ discovery dispute with the Non-Parties was finally resolved by this Court, so that is the day the 15-day period for seeking rehearing under Rule 1.530(a) began to run. Indeed, in their notice of appeal, the Non-Parties recognized that this Court’s rulings were final and therefore subject to appeal (as opposed to a petition for writ of certiorari) only because “[n]o further opportunity exists before the Circuit Court for Non-Parties to object to the use or admissibility of this ... information.” (**Exhibit C** at 2.) The May 2 order, again, had reserved on that issue. In short, the May 2 Order was not final because it did not complete the judicial labor on the discovery dispute. The final order that triggered the time for a motion for rehearing under Rule 1.530 was the May 15 order resolving the Non-Parties’ claims about how the documents would be used at trial.

In the case on which the Non-Parties rely, the reason the order compelling production from the non-parties was held to be a final order was because “there is no ongoing proceeding between the parties to the lawsuit and the individuals who have been ordered to provide discovery.” *Fla. House of Reps. v. Expedia, Inc.*, 85 So. 3d 517, 521 (Fla. 1st DCA 2012). The First District emphasized that the discovery order “adjudicates the legal rights of nonparties and

. . . **otherwise meets the general test of finality.**” *Id.* at 520 (emphasis added). Here, by contrast, there was an ongoing dispute involving continued judicial labor until the May 15 Order. Because the Coalition Plaintiffs served their motion for rehearing within 15 days of that order, the motion was timely under Rule 1.530(a).

Second, the Non-Parties’ claim that the Coalition Plaintiffs should have filed a notice of cross-appeal ignores the fact that the time for filing a notice of cross-appeal has still not expired. As the Non-Parties recognize on page 5 of their response, a notice of cross-appeal is due “within 10 days of service of the appellant’s timely filed notice of appeal **or within the time prescribed for filing [their own] notice of appeal.**” Fla. R. App. P. 9.110(g) (emphasis added). The Non-Parties correctly point out that the Coalition Plaintiffs have not filed a notice of appeal and, of course, more than ten days have passed since the Non-Parties filed their notice of appeal, but they ignore the second half of the rule. The time for the Coalition Plaintiffs to file their own notice of appeal is 30 days from “rendition” of the order being appealed. Fla. R. App. P. 9.110(b).

The May 15 Order has not yet been rendered because rendition was suspended by the Coalition Plaintiffs’ timely motion for rehearing, which has not yet been ruled upon. *See* Fla. R. App. P. 9.020(i). Thus, the Coalition Plaintiffs’ notice of appeal will not be due until 30 days from disposition of this motion for rehearing, if it is denied. *See* Fla. R. App. P. 9.020(i)(1).

An appeal invoked by one party’s timely notice of appeal does not prevent the opposing party from subsequently (but still timely) seeking rehearing, and the appellate court is free to process that party’s appeal without relinquishing jurisdiction for the trial court to rule on the other party’s motion for rehearing; both the appeal and proceedings on the post-trial motion can continue independently. *See Romano v. Mechaia Invs., LLC*, No. 3D09-1736, 2009 WL 2764130

(Fla. 3d DCA Sept. 2, 2009); *see also* Philip J. Padovano, *Fla. Appellate Practice* § 2:4 (2014 ed.) (“Of course, the filing of a notice of appeal by one party will have **no effect** on pending post-judgment motions filed by another party.” (emphasis added)). Whether this Court had jurisdiction to rule on the motion for rehearing while the appeal was pending is a moot point because the appeal is now over, and the appellate court has no jurisdiction at this point over the matter. The Non-Parties’ reliance on *Raynor v. Florida State Lodge*, 987 So. 2d 152 (Fla. 1st DCA 2008), is therefore unavailing.

Third, the Coalition Plaintiffs’ notice of appeal of the final judgment entered between them and the Legislative Defendants in this case did not constitute an abandonment of their motion for rehearing as to the Non-Parties. A notice of appeal of an order finally disposing of a case as to one set of parties has no effect on a trial court’s jurisdiction over the case as to a different set of parties. *See, e.g., Harris v. Aberdeen Golf & Country Club, Inc.*, 1234 So. 3d 1097, 1098 (Fla. 4th DCA 2014). The Coalition Plaintiffs’ motion for rehearing directed to the Non-Parties had no effect on the finality of the judgment as between the Plaintiffs and Defendants. Rule 9.020(i) makes clear that the motions that toll rendition and can be abandoned by filing a notice of appeal are only those motions directed to final orders as to the same parties. Otherwise, the Coalition Plaintiffs would have been forced to choose to either (a) abandon their meritorious motion for rehearing as to the Non-Parties or (b) appeal the merits judgment between the actual parties to this lawsuit. Rule 9.020(i) cannot reasonably be interpreted to require such a Hobson’s choice. Indeed, it would abridge the Coalition Plaintiffs’ constitutional right of access to the courts to interpret the rule as the Non-Parties suggest.

And, of course, the Coalition Plaintiffs’ claims regarding the state Senate map are still pending in case number 2012-CA-2842. There, this identical issue is pending in an identical

motion for rehearing. Since that case is awaiting trial on the merits, there has been no final judgment; consequently, there could be no appeal or abandonment, rendering the Non-Parties' arguments on that front completely inapt as to the production of the documents in the Senate case.

Finally, the Non-Parties' claim that the Coalition Plaintiffs should have sought rehearing from the supreme court ignores that the question of whether the additional documents should have been produced was not before the Florida Supreme Court, and it therefore had no jurisdiction to resolve that dispute. Regardless, nothing in the Supreme Court's opinion casts any doubt on the Coalition Plaintiffs' claim in their motion for rehearing that the privilege on which this Court relied in denying this discovery had been waived. To the contrary, the Supreme Court's opinion makes it crystal clear that those privileges were waived. The Non-Parties have failed to offer any substantive reason why their claim of privilege was any less waived as to the documents this Court did not order produced than as to the documents it compelled them to produce. Regardless, the Supreme Court's opinion cannot be interpreted to limit its waiver finding to only a subset of documents that were withheld based on the waived claim of privilege.

Alternatively to all of the foregoing, even if the requested relief were not available under Rule 1.530, it is clearly available under Rule 1.540 and the motion should be construed as seeking relief under that rule in that alternative. *See Howard v. McAuley*, 436 So. 2d 392, 396 (Fla. 2d DCA 1983) (treating "petition for rehearing" as a motion for relief from judgment under Rule 1.540); *see also Ohio Cas. Grp. v. Parrish*, 350 So. 2d 466, 468-69 (Fla. 1977) (holding that appellate court leave is not required for trial court to consider a Rule 1.540 motion after judgment affirmed on appeal). If the Court finds merit to the underlying substance of the rehearing motion, which was entirely unaddressed by the Non-Parties' response, yet also finds

merit to the Non-Parties' procedural arguments, it should grant the relief the Coalition Plaintiffs seek under Rule 1.540.

Relief from a judgment is available under Rule 1.540 when an appeal results in “a substantive change in the judgment.” *Molinos Del S.A. v. E.I. DuPont de Nemours & Co.*, 947 So. 2d 521, 525 (Fla. 4th DCA 2006) (internal quotation marks and citation omitted). A “substantive change” triggering the right to seek relief under Rule 1.540 occurs when the appellate court “has disturbed or revised legal rights and obligations which, by the prior judgment, had been plainly and properly settled with finality.’ ” *Id.* (internal quotation marks and alterations omitted).

Here, although the Florida Supreme Court affirmed this Court's decision to order the 538 pages of documents produced, it did so after concluding that the Non-Parties waived their First Amendment arguments, a clear revision of the legal rights this Court had found the Non-Parties' possessed. The Florida Supreme Court's decision thereby effected a substantive change in the underlying order and decision regarding the 538 pages of documents (and, more to the point, the remaining 1295 pages), and this change would warrant relief under Rule 1.540 to whatever extent that relief might be unavailable under Rule 1.530.

The Non-Parties having put forward no substantive reason why the remaining 1295 pages of documents should not be produced in this case and their jurisdictional arguments having no merit, this Court should grant rehearing or, alternatively, relief from judgment and require the Non-Parties to produce immediately all withheld documents.

/s/ Thomas A. Zehnder

David B. King

Florida Bar No.: 0093426

Thomas A. Zehnder

Florida Bar No.: 0063274

Frederick S. Wermuth

Florida Bar No.: 0184111
Vincent Falcone III
Florida Bar No.: 0058553
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
Telephone: (407) 422-2472
Facsimile: (407) 648-0161
dking@kbzwlaw.com (Primary)
tzehnder@kbzwlaw.com (Primary)
fwermuth@kbzwlaw.com (Primary)
vfalcone@kbzwlaw.com (Primary)
aprice@kbzwlaw.com (Secondary)
courtfilings@kbzwlaw.com (Secondary)

and

Gerald E. Greenberg
Florida Bar No.: 0440094
ggreenberg@gsgpa.com
Adam M. Schachter
Florida Bar No.: 647101
aschachter@gsgpa.com
GELBER SCHACHTER & GREENBERG, P.A.
1441 Brickell Avenue, Suite 1420
Miami, FL 33131
Telephone: (305) 728-0950
Facsimile: (305) 728-0951

Counsel for the Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2015 I filed the foregoing using the State of Florida ePortal Filing System. I further certify that a copy of the foregoing has been served via email on all counsel of record listed on the Service List below.

/s/ Thomas A. Zehnder
Thomas A. Zehnder
Florida Bar No.: 0063274

Counsel for Plaintiffs

SERVICE LIST

David B. King
Thomas A. Zehnder
Frederick S. Wermuth
Vincent Falcone, III
KING, BLACKWELL, ZEHNDER & WERMUTH, P.A.
P.O. Box 1631
Orlando, FL 32802-1631
dking@kbzwlaw.com
tzehnder@kbzwlaw.com
fwermuth@kbzwlaw.com
vfalcone@kbzwlaw.com

Ronald G. Meyer
Lynn Hearn
MEYER, BROOKS, DEMMA and BLOHM,
P.A.
131 North Gadsden Street
Post Office Box 1547
Tallahassee, FL 32302
rmeyer@meyerbrookslaw.com
lhearn@meyerbrookslaw.com

Counsel for Coalition Plaintiffs

Blaine Winship
Timothy D. Osterhaus
Office of the Attorney General of Florida
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
blaine.winship@myfloridalegal.com

Counsel for the Attorney General

George T. Levesque
General Counsel
THE FLORIDA SENATE
404 South Monroe Street, Suite 409
Tallahassee, Florida 32399
Levesque.George@flsenate.gov

Michael B. DeSanctis
Jessica Ring Amunson
Paul Smith
JENNER & BLOCK, LLP
1099 New York Ave NW, Suite 900
Washington, DC 20001
mdesanctis@jenner.com
jamunson@jenner.com
PSmith@jenner.com

J. Gerald Hebert
191 Somerville Street, #415
Alexandria, VA 22304
hebert@voterlaw.com

Gerald E. Greenberg
Adam M. Schachter
GELBER SCHACHTER & GREENBERG, P.A.
1441 Brickell Avenue, Suite 1420
Miami, Florida 33131
ggreenberg@gsgpa.com
aschachter@gsgpa.com
dgonzalez@gsgpa.com

Counsel for Coalition Plaintiffs

J. Andrew Atkinson
Ashley Davis
General Counsel
Florida Department of State
R.A. Gray Building
500 S. Bronough Street
Tallahassee, FL 32399
JAndrew.Atkinson@DOS.myflorida.com
Ashley.Davis@dos.myflorida.com
Diane.Wint@dos.myflorida.com

Counsel for Florida Secretary of State

Charles T. Wells
George N. Meros, Jr.
Jason L. Unger
Andy Bardos
GRAYROBINSON, P.A.
P.O. Box 11189 (32302)

Glevesque4@comcast.net
Carter.velma@flsenate.gov

Michael A. Carvin
Louis K. Fisher
JONES DAY
51 Louisiana Avenue N.W.
Washington, D.C. 20001
macarvin@jonesday.com
lkfisher@jonesday.com

Raoul G. Cantero
Jason N. Zakia
Jesse L. Green
WHITE & CASE LLP
Southeast Financial Center, Ste. 4900
200 South Biscayne Boulevard
Miami, FL 33131
Telephone: (305) 371-2700
Facsimile: (305) 358-5744
rcantero@whitecase.com
jzakia@whitecase.com
jgreen@whitecase.com
ldominguez@whitecase.com
mgauldin@whitecase.com

Counsel for the Florida Senate

John M. Devaney
Mark Erik Elias
PERKINS COIE, LLP
700 Thirteenth Street, NW, Suite 700
Washington, D.C. 20005
jdevaney@perkinscoie.com
melias@perkinscoie.com
efrost@perkinscoie.com
sYarborough@perkinscoie.com

Abha Khanna
Kevin J. Hamilton
PERKINS COIE, LLP
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099
akhanna@perkinscoie.com
rkelly@perkinscoie.com
khamilton@perkinscoie.com

301 South Bronough Street, Suite 600
Tallahassee, Florida 32301

Charles.Wells@gray-robinson.com
George.Meros@gray-robinson.com
Jason.Unger@gray-robinson.com
Andy.bardos@gray-robinson.com
croberts@gray-robinson.com
tbarreiro@gray-robinson.com
mwilkinson@gray-robinson.com

Matthew J. Carson
General Counsel
Florida House of Representatives
422 The Capitol
Tallahassee, FL 32399-1300
matthew.carson@myfloridahouse.gov

*Counsel for Florida House of
Representatives*

Allison J. Riggs, *Admitted Pro Hac Vice*
Anita S. Earls
Benjamin Stevenson
SOUTHERN COALITION FOR SOCIAL
JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
anita@southerncoalition.org
bstevenson@aclufl.org

Victor L. Goode
Dorcas R. Gilmore
NAACP
4805 Mt. Hope Drive
Baltimore, MD 21215-3297
vgoode@naacpnet.org
dgilmore@naacpnet.org

Mark Herron, Esq.
Robert J. Telfer III, Esq.
Angelina Perez, Esq.
Messer, Caparello & Self, P.A.
Post Office Box 1876
Tallahassee, FL 32302-1876
mherron@lawfla.com
rtelfer@lawfla.com
aperez@lawfla.com
clowell@lawfla.com
bmorton@lawfla.com
statecourtpleadings@lawfla.com

Counsel for Romo Plaintiffs

D. Kent Safriet
Thomas R. Philpot
Mohammad O. Jazil
Hopping Green & Sams, P.A.
P.O. Box 6526
Tallahassee, Florida 32314
kents@hgslaw.com
tp@hgslaw.com
mohammadj@hgslaw.com

Counsel for NonParty

Counsel for Intervenor/Defendant, NAACP

Daniel C. Brown, Esq.
Carlton Fields Jordan Burt
P.O. Box 190
Tallahassee, FL 32302-0190
dbrown@cfjblaw.com

Counsel for NonParty

David Healy, Esq.
Dudley, Sellers & Healy, P.L.
SunTrust Financial Center
3522 Thomasville Road, Suite 301
Tallahassee, FL 32309
dhealy@davidhealylaw.com

Counsel for NonParties