IN THE DISTRICT COURT OF APPEAL FOR
THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO.: 4D18-1220, 4D18-1519
4D18-2124
L.T. NO.: 432017CA001098
432018CA000108

EVERGLADES LAW CENTER, INC.,
MAGGY HURCHALLA, and
DONNA MELZER,

Appellants,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, MARTIN COUNTY, LAKE POINT PHASE I, LLC, and LAKE POINT PHASE II, LLC,

Appellees.
_____/

On Appeal from the Circuit Court
of the Nineteenth Judicial Circuit in and for Martin County, Florida

APPELLANTS' INITIAL BRIEF

MARCY I. LAHART, P.A.
Attorney for Appellant
EVERGLADES LAW CENTER, INC.
207 SE Tuscawilla Road
Micanopy, FL 32667
(352) 545-7001
marcy@floridaanimallawyer.com
Marcy I. LaHart
Fla. Bar No. 0967009

LITTMAN, SHERLOCK & HEIMS, P.A.
Attorneys for Appellant
MAGGY HURCHALLA
P.O. Box 1197
Stuart, Florida 34995
(772) 287-0200
LSHLawfirm@gmail.com
Virginia P. Sherlock
Fla. Bar No. 893544
Howard K. Heims
Fla. Bar No. 38539

DONNA SUTTER MELZER
Attorney for Appellant
DONNA MELZER
2286 SW Creekside Drive
Palm City, FL 34990
(772) 485-9429
DonnaSMelzer@gmail.com
Donna Sutter Melzer
Fla. Bar No. 0216941

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JURISDICTION

This Court has jurisdiction pursuant to Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure, and Article V, § 4(b)(1), Constitution of Florida.

STANDARD OF REVIEW

Appellate review of a Final Judgment granting or denying declaratory relief is *de novo*. *See* Palm Beach County v. Bellsouth Telecommunications, Inc., 819 So.2d 876, 877 (Fla. 4th DCA 2002) (standard of review is *de novo* where appeal is restricted to issues of law and interpretation of ordinance). *See also* Butler v. City of Hallandale Beach, 68 So.3d 278, 280 (Fla. 4th DCA 2011) (Purely legal issue of whether a document is a public record is a matter reviewed *de novo*).

When the appellate court's analysis is based purely on legal interpretation of relevant provisions of a statute, ordinance, or the Constitution, the trial court's conclusions are subject to *de novo* review. Diaz v. Lopez, 167 So.3d 455, 459 (Fla. 3d DCA 2015). *See also* Reed v. Honoshofsky, 76 So.3d 948, 951 (Fla. 4th DCA 2011), determining that "where a trial court's conclusions . . . are based upon legal error, the standard of review is *de novo*," *citing* Acoustic Innovations, Inc. v. Schafer, 976 So.2d 1139 (Fla. 4th DCA 2008).

The parties acknowledged during the proceedings below that the trial court need not take evidence as there were no issues of material fact to be decided, only matters of law and statutory interpretation. (R2: 425; T2 6/13/18: 4)

REFERENCES TO THE RECORD

Citations to the Record will be stated as R1: page number(s) pursuant to the Record transmitted by the clerk of the lower court in Case Nos. 4D18-1220 and 4D18-1519, and R2: page number(s) pursuant to the Record transmitted by the clerk of the lower court in Case No. 4D18-2124.

Transcripts will be referred to as T1 DATE: page number(s) pursuant to the Record transmitted in Case No. 4D18-1220 and 4D18-1519, and T2 DATE: page number(s) pursuant to the record transmitted in Case No. 4D18-2124.

THE PARTIES

Appellant EVERGLADES LAW CENTER, INC. ("ELC"), is a Florida not-for-profit law firm dedicated to representing the public interest in environmental and land use matters. ELC uses litigation, advocacy and policy development to protect and sustain unique and irreplaceable ecosystems and communities of the Everglades and South Florida. ELC strives to enhance government transparency and ensure that government agencies and third parties examine the impacts of their actions. ELC's principal place of business is in Palm Beach County, Florida.

Appellant MAGGY HURCHALLA ("HURCHALLA") is a private citizen who was sued by the owners of property in Martin County where a rock mining operation known as the Lake Point project is operated. HURCHALLA, a former

Martin County Commissioner (1974-1994) and inductee into the Everglades Coalition's Hall of Fame, has been a community activist and environmental advocate in Martin County and Florida for decades. She was accused of tortiously interfering with contracts related to the Lake Point project by e-mailing environmental concerns about the mining operation to her elected representatives.

Appellant DONNA MELZER ("MELZER") is a private citizen and resident of Martin County, Florida. MELZER is a former Martin County Commissioner (1996-2000) and community activist who advocates on behalf of environmental issues as well as local government participation and transparency.

Appellee SOUTH FLORIDA WATER MANAGEMENT DISTRICT (the "DISTRICT") is a state agency charged with managing and protecting water resources in 16 counties in South Florida, including Martin County. In 2008, the DISTRICT entered into an agreement to acquire the Lake Point project site to construct stormwater treatment areas. In 2013, the property owners sued the DISTRICT, claiming breach of contract, as well as HURCHALLA. All claims asserted against the DISTRICT were settled before trial, and the lawsuit was dismissed with prejudice as to the DISTRICT on September 1, 2017.

Appellee MARTIN COUNTY ("the COUNTY") is a political subdivision of the State of Florida. The COUNTY entered into an agreement with the DISTRICT

to allow the Lake Point project to continue operating on the property which was the subject of the agreement between the DISTRICT and the property owners. The COUNTY also was named as a Defendant in the lawsuit filed by the property owners against the DISTRICT and HURCHALLA. All claims against the COUNTY were settled and the action was dismissed with prejudice as to the COUNTY on January 11, 2018.

Appellees LAKE POINT PHASE I, LLC, and LAKE POINT PHASE II, LLC ("LAKE POINT"), are Florida limited liability companies that own the property which was the subject of the agreement with the DISTRICT and the site of the rock mining operation authorized by the agreement between the DISTRICT and the COUNTY. The LAKE POINT entities were the Plaintiffs in the lawsuit against the DISTRICT, the COUNTY and HURCHALLA ("the Lake Point litigation"). After settlements were reached with the DISTRICT and the COUNTY, the LAKE POINT entities proceeded to trial in February of 2018 against HURCHALLA, individually. A Final Judgment was entered against HURCHALLA after a two-week jury trial in Martin County Circuit Court.[1]

[1] An appeal of a jury verdict against HURCHALLA has been filed and is pending in this Court as Case No. 4D18-1221.

STATEMENT OF THE CASE AND OF THE FACTS

In February of 2013, LAKE POINT sued HURCHALLA, the COUNTY and the DISTRICT asserting breach of contract and tortious interference with a contract related to a mining operation on property in Martin County.[2] (R1: 4)

After several years of litigation, the court ordered the parties to engage in mediation. On June 6, 2017, the DISTRICT filed a Certification of Authority designating General Counsel Brian Accardo to attend mediation as the DISTRICT's representative pursuant to Rule 1.720(d), Fla. R. Civ. Pro.[3]

On August 23, 2017, the Chair of the DISTRICT's Governing Board called a special publicly noticed closed-door attorney-client meeting pursuant to Section 286.011(8), F.S.,[4] putatively to discuss the Lake Point litigation. The DISTRICT's

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[2] LAKE POINT initially sued the COUNTY and the DISTRICT in Palm Beach County Circuit Court and filed a separate action against HURCHALLA in Martin County. The Martin County case against HURCHALLA was subsequently dismissed and HURCHALLA was added as a Defendant in the Palm Beach County action. That action was subsequently transferred to Martin County Circuit Court and is the subject of this appeal.

[3] The DISTRICT and the Appellants have agreed to supplement the record and to request judicial notice of South Florida Water Management District's Certification of Authority filed June 6, 2017, in Case No. 2013-CA-001321, Martin County Circuit Court, designating Brian Accardo, General Counsel, as the agency representative to attend mediation on behalf of the DISTRICT.

[4] Section 286.011(8), F.S., provides a temporary exemption to the Government in the Sunshine Law under certain conditions to allow agency boards

General Counsel "request[ed] advice from this Governing Board concerning the litigation in the case of Lake Point Phase I, LLC, et al., v. South Florida Water Management District." (R2: 272)

The Governing Board went into a closed-door shade meeting without identifying the persons who would be attending as required by Section 286.011(8)(d), F.S.[5] ("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.")

According to the minutes of the public portion of the meeting, the shade session was attended only by Governing Board members and two attorneys for the DISTRICT. (R2: 383) No representatives from LAKE POINT or the COUNTY attended. Neither opposing counsel nor the mediator attended. Id.

At the conclusion of the attorney-client session, the Chair solicited a motion to "accept or reject the terms of the settlement" which apparently had been

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to hold private strategy sessions with their attorneys to discuss pending litigation. These sessions are sometimes referred to as "attorney-client sessions" or "shade meetings". *See* City of St. Petersburg v. Wright, 241 So.3d 903 (Fla. 2d DCA 2018)

[5] The minutes of the meeting state that the Chair announced the names of the attorney-client session attendees (R2: 83), however, the transcript of the public portion of the meeting confirms that no such announcement was made. (R2: 271-272)

discussed in the attorney-client session but had not yet been publicly disclosed. (R2: 273-274) A motion to approve the secret settlement agreement presented during the shade meeting was made, seconded, and unanimously approved by the Governing Board in the public session following the shade meeting. (R2: 274-275, 284) A written settlement agreement was executed several hours after the conclusion of the Governing Board meeting. Only after the vote was taken and the document was executed were the terms of the settlement finally made public.[6]

LAKE POINT's action against the DISTRICT was dismissed with prejudice on September 1, 2017.[7] (R2: 68)

On October 4, 2017, Appellant ELC requested via electronic mail that the DISTRICT:

> Please provide copies of the transcripts of any/all closed door attorney-client sessions held pursuant to Chapter 286.011(8) Florida Statutes in the case of Lake Point Phase I LLC, et al v South Florida

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[6] The DISTRICT and the Appellants have agreed to supplement the record and to request judicial notice of the Mediated Settlement Agreement which was signed after the August 23, 2017, Governing Board meeting concluded.

[7] The COUNTY entered into a separate settlement agreement with LAKE POINT and was also dismissed from the litigation. This appeal involves only the settlement agreement entered into between LAKE POINT and the DISTRICT. The settlement agreement between LAKE POINT and the COUNTY was discussed in a public meeting by the Board of County Commissioners, and transcripts of shade meetings related to the litigation and the settlement were disclosed to citizens who requested those records. (T2 06/13/18: 36)

> Water Management District, et al, 19th Judicial Circuit, Martin County, Florida, Case No. 2013-001321-CA, from which the South Florida Water Management District was dismissed as a party, with prejudice, on September 1, 2017. Please also provide any briefing materials used in these sessions. (R1: 13)

Notwithstanding the fact that the DISTRICT had already settled the case with Lake Point on August 23, 2017, and on September 1, 2017, had been dismissed with prejudice from *Lake Point Phase I LLC, et al v South Florida Water Management District*, et al, Appellee DISTRICT did not provide Appellant ELC copies of the requested transcripts and briefing materials.

Instead, on October 17, 2017, Appellee DISTRICT filed a Complaint for Declaratory Relief in Circuit Court in Martin County. (R1: 1-19) Although the action asked for declaratory relief only against the ELC, four other parties were named as Defendants – HURCHALLA, the COUNTY, and the LAKE POINT entities – putatively because those parties were parties to the Lake Point litigation, the lawsuit that was the subject of closed door attorney-client sessions. (R1: 1-2)

Appellee asserted in the Complaint for Declaratory Relief that it named the four additional parties "as interested parties for the sole purpose to secure a determination of its rights to maintain [the transcripts] as confidential <u>at this time</u> and to secure a determination that the District <u>is not presently obligated</u> to make this information available to the Law Center." (R1: 4) (Emphasis supplied)

On October 26, 2017, ELC and HURCHALLA filed Motions to Dismiss the action for improper venue. ELC and HURCHALLA asserted that because the DISTRICT is headquartered in Palm Beach County, ELC maintains an office in Palm Beach County, the records sought by ELC are maintained in Palm Beach County, the requested records concern meetings which took place in Palm Beach County, and the request for disclosure of public records was made by ELC to the DISTRICT in Palm Beach County, the action should have been brought in Palm Beach County. (R1: 56-57, 58-60)

On December 6, 2017, the trial court denied both Motions to Dismiss and ordered the ELC and HURCHALLA to file Answers to the DISTRICT's Complaint for Declaratory Relief. (R1: 114-115)

On December 11, 2017, HURCHALLA filed a request pursuant to Chapter 119, F.S., to inspect and copy "transcripts of all closed-door attorney-client sessions held pursuant to Section 286.011(8), Florida Statutes, in the case of Lake Point Phase I, LLC, and Lake Point Phase II, LLC, Florida Limited Liability Companies v. South Florida Water Management District, Martin County, and Maggy Hurchalla (Case No. 2013-001321-CA)." HURCHALLA's request noted that the case against the DISTRICT had been dismissed with prejudice at the time her request was made. (R1: 146-154; 200-208)

On December 14, 2017, the ELC filed its Answer as well as a Counterclaim seeking a Writ of Mandamus to compel the DISTRICT to allow inspection of the shade meeting transcripts. Sec. 119.11(1), F.S. (R1: 118-145)

On December 17, 2017, MELZER also requested copies of the transcripts of the August 23, 2017, shade meeting and all other shade meetings conducted by the DISTRICT's Governing Board regarding the Lake Point litigation. (R2: 287) On December 26, 2017, the DISTRICT refused to produce the records and referenced the action filed by the DISTRICT against ELC and HURCHALLA. (R2: 315)

HURCHALLA filed her Answer and Affirmative Defenses on December 19, 2017, asserting, *inter alia*, failure to join indispensable parties (all members of the public who are entitled to obtain public records from state agencies) and bad faith/ fraudulent misrepresentations by the DISTRICT in its Complaint for Declaratory Relief. (R1: 115-165) The DISTRICT moved to supplement its Complaint to add additional allegations related to the records request made by HURCHALLA. (R1: 146-154)

On January 8, 2018, and again on January 16, 2018, MELZER notified the DISTRICT that she would commence an action to obtain the records if a response was not received within five days. The DISTRICT again refused to disclose the requested shade meeting transcripts. (R2: 305, 311)

On January 19, 2018, MELZER filed an Emergency Petition for Writ of Mandamus for Violations of the Public Records Act in the Circuit Court in Palm Beach County, seeking a writ directing the DISTRICT to release the shade meeting transcripts. (R2: 66-81) However, on January 30, 2018, before the Emergency Petition was heard, the DISTRICT filed a separate action for declaratory relief against MELZER which was almost identical to the Complaint previously filed against ELC and HURCHALLA. The complaint against MELZER also was filed in Martin County Circuit Court. (R2: 1-85)

MELZER's Emergency Petition was subsequently abated and dismissed by the Palm Beach County Circuit Court, citing the pending actions filed by the DISTRICT in Martin County. (R2: 88-89)

On February 28, 2018 an Alternative Writ of Mandamus/Order to Show Cause was issued on ELC's Petition for Mandamus (R1: 300-301). At a hearing on March 6, 2018, the trial court denied the ELC's petition. (R1:T2 03/06/18: 53)

In entering the March 22, 2018 Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim, the trial court ruled that *all* closed-door attorney-client sessions conducted by the DISTRICT's Board of Governors between April 4, 2017, when the parties in the underlying action were

ordered to engage in mediation, up until a global settlement was entered into among LAKE POINT, the DISTRICT and the COUNTY on January 11, 2018, constituted "mediation proceedings." The trial court further determined that transcripts of those sessions are "written mediation communications" forever exempt from public disclosure pursuant to Sec. 44.102(3), F.S. (R1: 361-365)

An Order Granting Plaintiff's Motion for Entry of Final Judgment and Final Judgment was entered on April 23, 2018, incorporating the Final Judgment on the ELC's counterclaim and granting the relief sought by the DISTRICT against the ELC and HURCHALLA, *i.e.*, a declaration that "[t]he transcripts or portions of the transcripts requested are exempt from disclosure." (R1: 447-450)

ELC appealed the Final Judgment denying its counterclaim on April 25, 2018, as Case No. 4D18-1220. (R1: 420-428)

HURCHALLA appealed the Final Judgment as to the DISTRICT's Complaint and Supplemental Complaint on May 21, 2018, as Case No. 4D18-1519. (R1: 511)

The appeals were consolidated on the unopposed motion of HURCHALLA by Order of this Court entered on June 13, 2018.

Meanwhile, on April 6, 2018, the court denied MELZER's motion to dismiss the separate proceeding filed against her by the DISTRICT and ordered

her to file a response. (R2: 137) MELZER filed her answer and affirmative defenses on May 5, 2018 (R2: 146-192)

The trial court took judicial notice of the Final Judgment entered in the DISTRICT's action against the ELC and HURCHALLA (R2: 401-412) and on June 25, 2018, entered a final judgment which made the same findings as in the earlier case, again ruling that transcripts of the Governing Board shade meetings are "written communications in a mediation proceeding, and are, therefore, exempt from disclosure under Chapter 119, Florida Statutes." (R2: 425-429)

MELZER appealed the Consolidated Order Regarding Defendant Donna Melzer's Second Amended Counterclaim and Incorporated Final Judgment on July 16, 2018, as Case No. 4D18-2124. (R2: 432-438)

That appeal was consolidated with the previously consolidated appeals of the ELC and HURCHALLA upon the unopposed motion of the DISTRICT by Order entered in this Court on July 23, 2018.

This Initial Brief is jointly submitted on behalf of the ELC, HURCHALLA and MELZER, addressing all issues raised in the consolidated appeals.

SUMMARY OF ARGUMENT

I.

Florida's Constitution assures every citizen the right to inspect or copy any record made or received in connection with the official business of any public agency, except for records which have been specifically made confidential.

The only exemptions from the Public Records Law are statutory.

In determining that the DISTRICT may forever withhold transcripts of Governing Board shade meetings from the public, the trial court concluded that the transcripts are "written communications in a mediation proceeding" which remain exempt from disclosure even after the conclusion of litigation.

However, the Sunshine Law does not authorize mediation proceedings to be conducted under the auspices of a shade meeting. As a matter of law, the subject matter of shade meetings is confined solely to "settlement negotiations or strategy sessions related to litigation expenditures." Members of a governing board of a public entity may not participate in mediation proceedings during a closed-door attorney-client session.

A public entity must designate a representative to attend mediation on behalf of the entity and to recommend settlement. Only a designated representative may participate in mediation proceedings for a public entity.

A closed-door meeting at which a designated representative recommends settlement to the appropriate decision-making body is not a mediation proceeding but is, rather, a shade meeting which must be transcribed. The transcripts of a shade meeting by law become public records at the conclusion of the litigation.

There is no statutory exemption for oral communications during the mediation process. However, the shade meeting transcripts record verbatim all oral communications during shade meetings, not during mediation proceedings.

Governing officials may not withhold their rationale for settling litigation pursuant to agreements that commit public funds or other resources. The trial court's ruling impermissibly expands a temporary exemption intended to facilitate candid communication regarding pending litigation by allowing transcripts of closed-door sessions to be kept from the public forever by labeling such discussions as "confidential mediation proceedings."

The judiciary may not create public policy exemptions beyond those specified by the Legislature. The trial court's rulings allowing the DISTRICT to withhold transcripts of shade meetings conducted for the purpose of discussing settlement of litigation are not authorized and must be reversed.

II.

Mandamus is the appropriate remedy to enforce the Public Records Act.

The ELC had no adequate remedy to obtain the requested public records other than mandamus.

The DISTRICT is obligated to permit any person to inspect and copy public records in its custody. The only exemptions to the Public Records Act are those specifically provided by statute. There is no statute that explicitly exempts from disclosure the transcript of a public entity's shade meeting, even if the discussion contains references to what may have been said in a mediation proceeding.

An exemption to the Public Records Act does not by implication allow a public agency to close a meeting in which exempted material is to be discussed absent a specific exemption.

There is no provision in the Sunshine Law for withholding transcripts of shade meetings under any circumstances, and the trial court erred in refusing to issue a writ compelling production of the requested transcripts pursuant to ELC's petition for mandamus.

III.

At the time the issue of venue was decided by the trial court, only the ELC had requested access to the transcripts of the DISTRICT's shade meetings. Florida law allows corporations like the ELC to be sued only in the county where the corporation has, or usually keeps, an office for transaction of its customary

business, where the cause of action accrued, or where the property in litigation is located. The ELC made its request in Palm Beach County, the transcripts are maintained in Palm Beach County, and the meetings that were transcribed took place in Palm Beach County. Moreover, the District is headquartered in Palm Beach County and the ELC maintains an office in Palm Beach County.

The proper venue for litigation concerning public records is typically where the records are maintained.

The trial court erred in forcing ELC to defend itself in Martin County.

ARGUMENT

I.A. The trial court erred in determining that transcripts of attorney-client sessions conducted by a government agency pursuant to Sec. 286.011(8), F.S., are "written mediation communications" that are forever exempt from public disclosure.

The Constitution of the State of Florida contains unequivocal assurance that 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.*" Article I, sec. 24(a), Florida Constitution. (Emphasis supplied)

Article I, sec. 24(b) of the Florida Constitution provides similar assurance

that "[a]ll meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . *except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.*" (Emphasis supplied)

As stated expressly in the Public Records Act and repeatedly emphasized by Florida courts, the only exemptions from the Public Records Act are statutory. *See* Sec. 119.07(e), F.S. ("If the person who has custody of a public record contends that all or part of the record is exempt from inspection and copying, he or she shall state the basis of the exemption that he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute.")

The Florida Supreme Court has repeatedly held that public records exemptions are limited to those created by statute. *See* Forsberg v. Housing Authority of Miami Beach, 455 So. 2d 373 (Fla. 1984) ("This Court, in a series of cases, has recognized that the important public purpose served by our public meeting and open record laws is to ensure governmental accountability. We have specifically upheld the constitutional validity of these acts and have expressly stated that exemptions to the statutory disclosure requirement could be created

only by the legislature"), *citing* Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980); Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633 (Fla. 1980), Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979); Florida Commission on Ethics v. Plante, 369 So.2d 332 (Fla. 1979); News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977).

There is no statutory exemption from disclosure for public records that state agencies would simply prefer to keep secret.

The final order denying the ELC counterclaim, which was incorporated by reference in the Final Judgment, granted the DISTRICT's request to forever maintain the secrecy of discussions among its Governing Board members about the settlement of the Lake Point litigation, and, in fact, went further than the requested relief in the Complaint, which alleged only that "[t]he District is obligated to withhold the records requested by the Law Center until the Lake Point Litigation is complete." (R1: 2, ¶ 1.4)

In announcing its ruling in open court on May 6, 2018, the trial court, reading verbatim from the DISTRICT's May 5, 2018, response to Order to Show Cause (R1: 319), pronounced: "Florida law expressly acknowledges that there are situations where the public benefits of confidentiality transcend the desirability of disclosure of what would otherwise be public records," *citing* Article I, sec. 24(c),

Florida Constitution, and Sec. 119.011(8), F.S. (R1: 361; R2: 425)

However, contrary to the DISTRICT's representation (repeated word-for-word by the trial court), nowhere in Art. I, sec. 24(c)[8] nor in Section 119.011(8), F.S.,[9] is there express acknowledgment of any situation in which an agency's desire for confidentiality overrides the constitutional entitlement of Florida citizens to disclosure and transparency. Section 119.011(8), F.S., defines the term "exemption" but does not acknowledge or imply "transcendence" of confidentiality over transparency in any given situation.

In determining that the DISTRICT may forever withhold transcripts of

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[8] Article I, Section 24(c), Florida Constitution: This section shall be self-executing. The legislature, however, may provide by general law passed by a two-thirds vote of each house for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.

[9] Sec. 119.011(8): "Exemption" means a provision of general law which provides that a specified record or meeting, or portion thereof, is not subject to the access requirements of s. 119.07(1), s. 286.011, or s. 24, Art. I of the State Constitution.

Governing Board shade meetings from the public, the trial court concluded that the transcripts constitute "written communications in a mediation proceeding" which are exempt from the requirements of Chapter 119, F.S., pursuant to Sec. 44.102(3), F.S.

Although the DISTRICT alleged in its Complaint that it is "obligated to withhold the records . . . until the Lake Point Litigation is complete," p. 19, *supra*, the trial court ultimately determined that the DISTRICT may withhold the records from public disclosure **forever**, even after conclusion of the litigation.

This flies in the face of the express requirements of Florida's Open Meetings Law, commonly known as the Sunshine Law. The Sunshine Law provides that all attorney-client shade meetings must be recorded by a certified court reporter, that no portion of any such session may be "off the record" and that the transcript of each session "**shall** be made part of the public record upon conclusion of the litigation." Sec. 286.011(8)(c), (e), F.S. (emphasis supplied) The statute provides no exemptions to this requirement.

Further, the Sunshine Law restricts the subject matter of shade meetings to "settlement negotiations or strategy sessions related to litigation expenditures." Sec. 286.011(8)(b), F.S. There is no provision for "mediation proceedings" to be conducted under the auspices of a shade meeting pursuant to Sec. 286.011, F.S.

Only the designated representative or representatives may participate in mediation proceedings on behalf of a public entity.

The Rules of Civil Procedure dictate the manner in which a public entity like the DISTRICT, which is required to operate in compliance with the Sunshine Law, may participate in mediation. *See* Rule 1.720, Fla. R. Civ. Pro.

A public entity must designate a representative or representatives with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. Id. A certificate of authority must be filed with the court and served on all parties "identifying the person or persons who will be attending the mediation conference as a party representative." Id.

The closed-door attorney-client session at which an agency's designated representative recommends settlement to the appropriate decision-making body is not a mediation proceeding pursuant to Sec. 44.404, F.S. It is a "shade meeting" pursuant to Section 286.011(8), F.S., entitled to only limited exemption while litigation is on-going.

As noted in Anderson v. City of St. Pete Beach, 161 So.3d 548 (Fla. 2d DCA 2014), the limited exemption authorized by Sec. 286.011, F.S., was not "an attempt to provide a means for government to meet behind closed doors to accomplish goals out of the sunshine."

The DISTRICT's argument that all sessions or meetings which occur within the duration of a months-long mediation process are "mediation proceedings" is an overly broad reading of Sec. 44.404, F.S., and the trial court's acquiescence establishes a troubling precedent that may encourage public agencies to claim that all shade meeting discussions – regardless of the subject matter – are exempt from public disclosure if a mediation is pending at the time a meeting is conducted.

Sec. 44.404, F.S., defines the duration of court-ordered mediation as commencing when an order is issued by the court directing the parties to mediate and ending when a settlement agreement is signed or an impasse is declared, unless mediation is terminated by a court order, rule, or applicable law. In this case, it is undisputed that the trial court entered an order on April 4, 2017, requiring the parties to engage in mediation and that the DISTRICT and LAKE POINT signed a settlement agreement and stipulation that dismissed the DISTRICT from the action, with prejudice, on August 23, 2017.

It is, however, absurd to suggest that all discussions, meetings and communications among Governing Board members during this period of time constitute "mediation proceedings," especially when members of the Governing Board were not designated – and could not lawfully have been designated – as the DISTRICT's mediation representatives pursuant to Rule 1.720, Fla. R. Civ. Pro.

"Mediation" is defined as "a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties." Sec. 44.1011(2), F.S. It is undisputed that the mediator was not present during the August 23, 2017, shade meeting or any other shade meeting conducted regarding the Lake Point litigation.

The August 23, 2017, shade meeting was noticed and described by the DISTRICT's counsel as an attorney-client meeting pursuant to Section 286.011(8), F.S., to discuss settlement of litigation. The shade meeting was not noticed or described as a "mediation proceeding."

Communications among Governing Board members and counsel during the shade meeting were not "mediation communications" but were required by law to be strictly confined to "settlement negotiations or strategy sessions related to litigation expenditures." Sec. 286.011(8)(b), F.S. *See* City of St. Petersburg v. Wright, 241 So.3d 903, 906 (Fla. 2d DCA 2018) (As is plain from the language of the statute, the exemption is limited to discussions involving the actual settlement of pending litigation), *citing* Anderson v. City of St. Pete Beach, 161 So.3d 548, 553 (Fla. 2d DCA 2014).

There is no statutory exemption for oral communications during the mediation process. "All **written** communications in a mediation proceeding, other

than an executed settlement agreement, shall be exempt from the requirements of chapter 119." Sec. 44.102(3), F.S. (emphasis supplied)

The transcript required by Sec. 286.011(8), F.S., records verbatim all *oral communications* spoken during a shade meeting regarding pending litigation[10] and cannot be considered "written communications in a mediation proceeding" simply because what happened at mediation may have been among the topics of discussion during the shade meeting.

The transcript is not a "communication" but is intended to create a record of oral discussions of governing body members regarding litigation expenditures or settlement negotiations so that those discussions may be made public at the conclusion of the litigation.

The DISTRICT and the trial court improperly modified and broadened the exemption set out in Sec. 44.102(3), F.S., to include ***all*** mediation communications defined by Sec. 44.403(1), F.S. (oral or written statements or nonverbal conduct made by or to a participant in mediation) from the date an order of referral to

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[10] 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. Sec. 286.011(8)(c), F.S.

mediation is issued to the date a settlement agreement is signed or mediation is otherwise terminated. Sec. 44.404, F.S.

The trial court in this case made an express finding that "the District and its Governing Board were 'participants' in mediation pursuant to the statute itself," presumably referring to the Mediation Confidentiality and Privilege Act (Sec. 44.401-406, F.S.) (R1: 363; R2: 427)

This finding is contrary to the law.

A "mediation participant" is a party or a person who attends a mediation. Sec. 44.403(2), F.S. A mediation party is "a person participating directly, or through a designated representative, in a mediation." Sec. 44.403(3), F.S.

The District is a named party in the litigation; however, members of the Governing Board are not, by the plain terms of the statute, "mediation participants." As a public entity that is required to operate in compliance with Chapter 286, F.S., the District may participate in mediation only through a designated representative as set out in Rule 1.720(d), Fla. R. Civ. Pro.

In this case, General Counsel Brian Accardo was designated as the District's mediation representative. (n. 3, *supra*) It would be a violation of Florida's Sunshine Law for two or more members of the Governing Board to convene secretly to discuss matters that will come before the Board for a vote, such as a

mediation settlement agreement.

The DISTRICT's argument would allow government officials to withhold their rationale for settling litigation that commits public funds or other resources and would allow debate on important public matters to be kept from the public forever merely by designating such discussions as confidential mediation proceedings without statutory or Constitutional authority. In the case below, the DISTRICT approved a settlement agreement that will cost taxpayers millions of dollars over an extended period of time, adding 30 years to a 20-year contract and requiring the agency to purchase aggregate from LAKE POINT without obtaining bids or proposals from other suppliers for the next 15 years. **The reasoning behind the Governing Board's approval of the agreement and the rationale for the settlement are still being withheld from the public.**

In Brown v. Denton, 152 So.3d 8 (Fla. 1st DCA 2014), the appellate court rejected a public entity's argument that a closed-door session may be conducted in secret if discussions are labeled "mediation"-related. "We cannot condone hiding behind federal mediation, whether intentionally or unintentionally in an effort to thwart the requirements of the Sunshine Law." Id. at 12.

While conserving the resources of litigants and the court by resolving lawsuits through mediation is a laudable goal, the judiciary may not create public

policy exemptions beyond those specified by the Legislature. *See* Marino v. University of Florida, 107 So.3d 1231 (Fla. 1st DCA 2013), *citing* Tribune Co. v. Public Records, 493 So.2d 480, 483 (Fla. 2d DCA 1986). "Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure." *Accord*, Florida Freedom Newspapers, Inc. v. McCrary, 520 So.2d 32 (Fla. 1988). *See also* Tober v. Sanchez, 417 So.2d 1053 (Fla. 3d DCA 1982) and Forsberg v. Housing Authority of Miami Beach, 455 So.2d 373 (Fla. 1984).

Public policy considerations such as those articulated by the trial court in this case cannot be forged into an exemption to the Public Records Act without statutory or constitutional support. Gadd v. News-Press Pub. Co., 412 So.2d 894 (Fla. 2d DCA 1982) ("Public policy considerations, aside from statutory or constitutional rights, can no longer be urged as an exemption to the Public Records Law"). *See also* Greater Orlando Aviation Auth. v. Nejame, Lafay, Jancha, Vara, 4 So.3d 41 (Fla. 5th DCA 2009) ("Courts are not authorized to create exemptions from disclosure or to read into laws exemptions not clearly created by Congress or by the State Legislature"), *citing* Housing Authority of City of Daytona Beach v. Gomillion, 639 So.2d 117 (Fla. 5th DCA 1994).

The final orders authorizing the DISTRICT to withhold transcripts of shade meetings conducted to discuss settlement of the LAKE POINT litigation are not supported by any Constitutional and statutory authority and must be reversed.

I.B. The trial court erred in authorizing non-disclosure of public records, including shade meeting transcripts, and closed-door decision-making by public agencies under the pretext of "mediation communications" without statutory or constitutional basis.

In refusing to disclose transcripts of shade meetings to the public, the DISTRICT claimed – and the trial court applied – as exemptions from the Public Records Act: (1) an exemption for "written communications in a mediation proceeding" pursuant to Sec. 44.102(3), F.S., and (2) an exemption based on the "strict mediation confidentiality" exemption of Sec. 44.405(1), F.S., combined with Sec. 44.403(1)-(3) and Sec. 44.404, F.S. (R1: 2-3; R2: 426-427)

The DISTRICT asserted that transcripts of private attorney-client meetings "contain mediation communications that are strictly confidential and exempt from disclosure under the public records law." (R2: 9) And the trial court concluded 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." (R2: 427-428)

The trial court, again reading directly from the DISTRICT's response to the

Order to Show Cause (R1: 320), also pronounced: "The reason for strict mediation confidentiality is obvious to this Court. Mediation could not take place if litigants had to worry about admissions against interest being offered against them at trial." (R1: 363) This finding clearly does not apply to public disclosure of shade meeting transcripts which is authorized only after the litigation has concluded.

The "strict mediation confidentiality" exemption[11] of Sec. 44.405(1), F.S.,[12] which the trial court cited in ruling that the DISTRICT may withhold the shade meeting transcripts, relies on a determination that a transcript of a shade meeting of a public agency constitutes "mediation communications."

It has previously been established that members of the DISTRICT's Governing Board were not and could not have been "mediation participants." *See* p. 26, *supra*. However, even if shade meeting discussions included comments

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[11] Nowhere in Chapter 44 is there any reference to "strict mediation confidentiality". In fact, the mediation parties may agree in writing to waive all confidentiality provisions of Sec. 44.405(1), 44.405(2), or 44.406 pursuant to Sec. 44.402, F.S. While confidentiality attaches absent an agreement among the parties, there are clearly circumstances when confidentiality may be waived.

[12] Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees. Sec. 44.405(1), F.S.

made by the DISTRICT's mediation representative, such comments could not have been "mediation communications" because shade meeting discussions are "confined to settlement negotiations or strategy sessions related to litigation expenditures." Sec. 286.011(8), F.S. Mediation communications are outside the lawful confines of an authorized shade meeting.

A private, out-of-the-sunshine discussion by public officials about pending litigation must be recorded, and the transcript of the discussion is expressly deemed to be a public record at the conclusion of the litigation. Sec. 286.011(8), F.S. The Sunshine Law contains no exemption from disclosure for a shade meeting transcript simply because the transcript references what was said at mediation.

In ruling that transcripts of shade meetings conducted by the DISTRICT pursuant to Sec. 286.011, F.S., are exempt from public disclosure, the trial court created exemptions that were not established by the Legislature in Chapter 286 or Chapter 119 or by the Florida Constitution.

The trial court concluded that the DISTRICT's decision-making process in reaching a settlement of litigation against a public entity and committing public resources can be kept from the public forever. This result is directly contrary to the purpose of the Government in the Sunshine Law, which is to ensure the

public's right to be present and to be heard during all phases of enactments by government boards and commissions. City of St. Petersburg v. Wright, 241 So.3d 903, 905 (Fla. 2d DCA 2018), *citing* School Bd. v. Florida Publ. Co., 670 So2d 99, 101 (Fla. 1st DCA 1996). The Sunshine Law functions "to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." Monroe Cty. v. Pigeon Key Historical Park, Inc., 647 So.2d 857, 860 (Fla. 3d DCA 1994), *quoting* Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla. 1974)

The trial court's ruling in this case eviscerates that function.

Exemptions to the Public Records and Sunshine Laws must meet constitutional and statutory mandates to be valid and may not be created by judicial fiat.

Art. I, sec. 24, Florida Constitution, which was adopted in 1993, ratified existing Public Records and Sunshine Laws.[13] Prior to 1993, Chapters 119 and

[13] Art. I, sec. 24(a) provides that every person "has the right to inspect or copy any public record." Art. I, sec. 24(b) provides "[a]ll meetings of any collegial public body . . . at which official acts or to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public." Art. I, sec. 24(c) provides the Legislature with mandates for adopting exemptions to (a) and (b). Art. I, sec. 24(d) grandfathers exemptions that existed as of 1993.

286, F.S., governed exemptions to disclosure of public records.[14] Settled case law applies statutory and constitutional mandates for such exemptions.

The judiciary cannot create an exemption.

Laws enacted prior to adoption of Article 1, sec. 24, of the Florida Constitution did not include an exemption from the Public Records Act for shade meeting transcripts and did not include a mediation confidentiality exemption from Chapters 119 or 286 for governing board shade meetings.

Sec. 44.1011(2), F.S., defines "mediation" as a process involving a neutral mediator. Sec. 44.102(3), F.S., in both its pre-1993 version and in the post-1993 revisions, includes a Chapter 119 exemption for "written communications in a mediation proceeding," *i.e.,* writings communicated or shared with a mediator and opposing parties.

Because transcripts are not "communications" and are not communicated in a mediation proceeding, transcripts are not exempt under Sec. 44.102(3), F.S. Moreover, provisions of Chapter 44, F.S., both those adopted before 1993 and revisions adopted after 1993, contain no exemption for "mediation

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[14] All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed. Art. I, sec. 24(d), Florida Constitution.

confidentialities" that may be discussed in a Chapter 286 shade meeting.

Sec. 44.102(1), F.S., assigned responsibility for establishing mediation procedures to the Florida Supreme Court. Rules of Procedure adopted by the Supreme Court restrict the role of the governing board of a public entity to ensure compliance with Chapter 286. For public entities, the Supreme Court adopted Rule 1.720(d)-(e), Fla. R. Civ. Pro.:

> 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.

Rule 1.720(e) provides for certification of the agency's mediation representative. Thus, members of the governing board are not engaged in any "mediation confidentialities."

Sec. 119.07(7), F.S., expressly provides that "[a]n exemption from this section does not imply an exemption from s. 286.011. <u>The exemption from s. 286.011 must be expressly provided</u>." (Emphasis supplied)

And Sec. 286.011(8)(c)-(e), F.S. provides for a court reporter to transcribe closed-door shade meetings of governing boards of public entities with the directive that "[n]o portion of the sessions shall be off the record" and that the

transcript of shade meetings must be made part of the public record at the conclusion of the litigation being discussed.

Exemptions from Public Records and Sunshine Laws created by statutes adopted subsequent to 1993 must comply with Art. I, Section 24(c), Florida Constitution, and the statutory protections of Chapters 119 and 286.

In 2004, the Florida Legislature revised Chapter 44, F.S. Ch 2004-291, Laws of Florida. Sec. 44.103(3), F.S., was modified by removing "oral communications" from records which are exempt from Chapter 119. There were no changes to Sec. 44.102(1), 119.07(7), or 286.011(8), (8)(c), (8)(e), F.S.

Sec. 44.404, 44.405(1), and 44.403(1)-(3) were added to Chapter 44 in the 2004 revisions. These new sections form the basis for the DISTRICT's and the trial court's claimed "mediation confidentiality" for shade meetings and application of Sec. 44.102(3), F.S., to forever maintain the secrecy of mediation confidentialities as may be reported in shade meeting transcripts.

The revisions to Chapter 44 must, however, pass constitutional and statutory muster in order to create new exemptions to Chapters 119 and 286, F.S.

Art. I, Section 24, Florida Constitution, has strict requirements for creating valid exemptions to the Public Records and Sunshine Laws arising out of laws adopted after 1993. Art. I, sec. 24(c), provides that a law creating an exemption to

the Public Records and Sunshine Laws "shall state with specificity the public necessity justifying the exemption" and shall ensure that the exemption "shall be no broader than necessary to accomplish the stated purpose of the law."

In ch 2004-291, the Legislature did not reference any exemption to public disclosure statutes, did not "state with specificity the public necessity" that would justify any new or broadened exemption, and did not provide any analysis that a new exemption was "no broader than necessary to accomplish the stated purpose."

The legislative framework of Chapter 44, as revised by ch 2004-291, did not specify new or modified exemptions to Chapter 119 or Art. I, sec. 24(a). No Chapter 286 or Art. I, sec. 24(b) exemptions were included. The constitutional mandates were not met by ch 2004-291; the Legislature did not create any new exemptions in adopting ch 2004-291 and the DISTRICT's claimed exemptions, adopted by the trial court in the Final Judgment, fail.

The constitutional mandates are clear. The Legislature knows how to create or avoid exemptions to Public Records and Sunshine Laws. The Legislature has not modified or eliminated Sec. 44.102(1), F.S., that directs that the mediation process is governed by the Florida Supreme Court.[15] The Florida Supreme Court

[15] Court-ordered mediation – Court-ordered mediation shall be conducted according to rules of practice and procedure adopted by the Supreme Court. Sec. 44.102(1), F.S.

adopted Rule 1.720(d), Fla. R. Civ. Pro., which obviates the need for a mediation confidentiality exemption to the Public Records and Sunshine Laws.

The Legislature knew how to create an exemption and, in fact, did so in Sec. 44.102(3).[16] The Legislature did not add any exemption from the requirements of Sec. 286.011(8), either before or after 1993. Even confidential information inadvertently or carelessly shared with members of a governing board by a mediation representative is not exempt. *See* AGO 96-75, September 30, 1996, and discussion at pp. 41-42, *infra*.

The DISTRICT's assertions and the findings of the trial court relied on post-1993 revisions to Chapter 44 to establish claimed exemptions to open government laws. However, the mandates of Art. I, sec. 24(c), were not met in the statutory revisions to create valid exemptions. The claimed exemptions are very broad and would improperly withhold all decision-making rationale for the Lake Point Settlement from public disclosure in perpetuity. (R1: 364; R2: 428)

Statutory exemptions adopted prior to 1993 were intended to prevent secret decision-making by public agencies. As explained by the Florida Supreme Court:

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[16] All written communications in a mediation proceeding, other than an executed settlement agreement, shall be exempt from the requirements of chapter 119. Sec. 44.102(3), F.S.

> One 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 . . . . The 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 472, 487 (Fla. 1974).

Courts follow the same adherence to the law when there is any doubt whether the Public Records Act applies: "The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be construed narrowly so that they are limited to their stated purpose." Seminole County v Wood, 512 So 2d 1000, 1002 (Fla 5th DCA 1987) (internal citations omitted).

Especially important in this case, both constitutional and statutory mandates seek to avoid evasive devices, such as the shroud of mediation confidentiality, to avoid public disclosure of litigation settlement discussions.

The public records disclosure exemptions claimed by the DISTRICT, and approved by the trial court, are dependent upon this evasive device and raise concerns that transcripts of the secret settlement discussions by members of the

Governing Board may reveal a questionable if not unlawful basis for the agency's decision to divert millions of dollars in public resources to private entities.

As this Court recently opined: "The Sunshine Law must be 'construed so as to frustrate all evasive devices,' and the law protect[s] the public from 'closed door' politics." Transparency for Florida v. City of Port St. Lucie, 240 So. 3d 780, 784 (Fla. 4th DCA 2018), citing Sarasota for Responsible Gov't v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010).

The broadened exemptions for "mediation confidentiality" and "writings that reflect mediation communications" established by the trial court produce a far-reaching erosion of open government laws by authorizing back-room decision-making. And the "strict mediation confidentiality" exemption would, according to the trial court, combine Sec. 44.405(1), 44.404, and 44.403(1)-(3), F.S., to provide a startlingly broad evasive device: All oral or written statements . . . made by or to DISTRICT . . . between April 4, 2017 and August 23, 2017 are confidential and exempt from Chapters 119 and 286, F.S. and Art. I, sec. 24 (a) and (b), of the Florida Constitution.[17]

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[17] The settlement agreement between LAKE POINT and the DISTRICT was signed August 23, 2017. The litigation was dismissed with prejudice as to the DISTRICT on September 1, 2017. The trial court noted in its final order that a "global settlement" that included both the DISTRICT and MARTIN COUNTY was reached on January 11, 2018. It is unclear whether the DISTRICT and the

Neither statutory nor constitutional mandates authorize or support any exemption from public disclosure for discussions by members of the governing board of an agency which is subject to the Sunshine Law when such discussions occur during a shade meeting noticed for the purpose of discussing settlement negotiations or strategy sessions related to litigation expenditures. The statute expressly provides that the transcript of such a meeting is a public record after the conclusion of litigation, and no exemption authorizes non-disclosure to the public.

Although the term "strict mediation confidentiality" does not appear anywhere in Chapter 44, F.S., the trial court adopted the DISTRICT's phraseology by reading Sec. 44.403(1)-(3), 44.404, and 44.405(1), F.S., in combination to establish a broad, startlingly evasive device to withhold critical information from the public regarding settlement of litigation.

Sec. 44.405(1), F.S., states that: "All mediation communications shall be confidential." This was addressed by Rule 1.720(d), Fla. R. Civ. Pro, which applies when public agencies are parties to mediation.

The Legislature knew how but did not exempt governing board shade meetings held during the duration of mediation. The Legislature, in ch 2004-291,

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trial court believe the mediation concluded on August 23 or September 1, 2017, or January 11, 2018.

did not add to 44.405(1) that all mediation communications "shall be confidential and exempt from Chapters 119 and 286 and Art. I, Section 24 (a), (b), of the Florida Constitution."

Sec. 44.403(1)-(2),F.S., define "mediation communication" and "mediation participant," but do not conflict with or override the requirement of Rule 1.720(d), Fla. R. Civ. Pro., that the DISTRICT must designate a representative to participate in the mediation process on behalf of the agency because members of the Governing Board are prohibited by the Sunshine Law from engaging in secret discussions that may never be disclosed to the public.

Finally, the trial court erroneously broadened the scope of the evasive device by determining that ***all*** communications made during the duration of the mediation process set out in Sec. 44.404(1), F.S., are confidential communications made "during the course of a mediation." This would prohibit disclosure of all communications, including shade meeting discussions, between April 4, 2017, and August 23, 2017, before the Governing Board.

The trial court erred in determining that Chapter 44 establishes new exemptions to the Public Records and Sunshine Laws without meeting any of the statutory or constitutional mandates for such exemptions.

II. The trial court erred in denying the ELC's petition for mandamus directing the DISTRICT to provide records requested pursuant to Chapter 119, F.S.

Mandamus is the appropriate remedy to enforce the Public Records Act. Stanton v. McMillan, 597 So.2d 940 (Fla. 1st DCA 1992), *rev. dism.* 605 So.2d 1266 (Fla. 1992). The ELC had no adequate remedy to obtain the requested public records other than mandamus.

The Public Records Act requires a custodian of public records who asserts an exemption to state the basis of the exemption and to redact only that portion of the record to which an exemption has been asserted. The remainder of the record must be made available for inspection and copying. Sec. 119.07(1)(d)-(e), F.S.

In this case, the DISTRICT refused to produce *any portion* of the transcript of the August 23, 2017, shade meeting. Times of commencement and termination of the session, names of all persons present and names of all persons speaking were not provided as required by Sec. 286.011(8)(c) and 119.07(1)(d)-(e), F.S.

Further, an agency is prohibited from asking the court to interpret how the agency should comply with its statutory duties, *e.g.*, to provide public records requested pursuant to Chapters 286 and 119, Florida Statutes. Special rules limit government officials to bringing declaratory actions only in narrow circumstances in which the official is willing to perform his or her duties but is prevented from

doing so by others. Crossings at Fleming Island Cmty. Dev. Dist. v. Escheverri, 991 So.2d 793 (Fla. 2008), *citing* Reid v. Kirk, 257 So.2d 3, 4 (Fla. 1972).

The DISTRICT is obligated to permit inspection and copying of every public record in its custody pursuant to Sec. 119.07(1)(a), F.S., upon reasonable request by any person. The only exemptions to the Public Records Act are those exemptions specifically provided by statute.

There is no statute that explicitly exempts from disclosure the transcript of a public entity's shade meeting, even if the discussion contains references to what may have been said in a mediation proceeding. *See* Crapo v. Palmer, 187 So.3d 953 (Fla. 1st DCA 2016) (Public records exemptions are limited to those provided by statute).

The Florida Attorney General determined that disclosure of a city employee's medical records to the city council during a closed-door meeting under Section 286.011(8), F.S., "does not alter the requirement that the transcript of the closed-door meeting be made a part of the public record at the conclusion of the litigation." AGO 96-75, September 30, 1996.

An exemption from disclosure of a transcript pursuant to Section 286.011, F.S., must be expressly provided and, thus, an exception to Chapter 119, F.S., does not by implication allow a public agency to close a meeting in which confidential

material is to be discussed absent a specific exemption to Section 286.011, F.S.

The confidentiality that attaches to medical records of municipal employees under Chapter 119, F.S., does not extend to the discussion of those records pursuant to Chapter 286, F.S. Therefore, given that the transcript of a closed-door meeting under the Sunshine Law is open to public inspection upon conclusion of the litigation, the city and its attorney should be sensitive to any discussions of an employee's medical reports that are reviewed during such a meeting, and the participants in such discussions should take precautions to protect the confidentiality of an employee's medical reports and condition so that when the transcript of the closed-door meeting is made part of the public record, the privacy of the employee will not be breached. Id.

In conducting a shade meeting to discuss settlement of the Lake Point lawsuit, the DISTRICT should have been mindful of the requirements of Chapter 286.011, F.S., and the obligation of the agency to disclose the transcripts of shade meetings upon the conclusion of the litigation.

There is no provision for withholding the transcript under any circumstances in Sec. 286.011, F.S., and the trial court erred in refusing to issue a writ compelling production of the transcripts to the ELC pursuant to the petition for mandamus.

III. The trial court erred in refusing to dismiss the action against the ELC based on improper venue.

The DISTRICT maintains its principal headquarters in Palm Beach County.

The ELC maintains an office in Palm Beach County and does not have an office in Martin County. The ELC made a public records request in Palm Beach County for public records maintained in Palm Beach County. Specifically, ELC asked to examine transcripts of a meeting that took place in Palm Beach County.

Florida law clearly provides that actions against corporations like the ELC "shall be brought only in the county where such corporation has, or usually keeps, an office for transaction of its customary business, where the cause of action accrued, or where the property in litigation is located." Sec. 47.051, F.S.

Nonetheless, the DISTRICT sued the ELC in Martin County, and the trial court denied ELC's motion to dismiss the complaint based on improper venue. (R1: 114-115)

The DISTRICT argued that, as the Plaintiff, it was free to choose where to file suit, and that "venue **is** clearly proper in Martin County" (emphasis in the original) because, according to the DISTRICT, the cause of action arose in Martin County and HURCHALLA, COUNTY, and LAKE POINT all "reside in Martin County." (R1: 74-75)

Furthermore, the DISTRICT asserted, because ELC sought a transcript of the DISTRICT Governing Board's discussion of settlement of a lawsuit that was filed in Martin County, the "cause of action arose in Martin County." (R1: 75)

No rule, statute, or decisional authority was cited to support this argument.

Contrary to the DISTRICT's assertion, the proper venue for litigation concerning access to public records typically lies in the county where the records are maintained. In Fla. Dep't of Child. & Families v. Sun-Sentinel, Inc., 865 So. 2d 1278 (Fla. 2004), the Florida Supreme Court created a new exception to the "home venue privilege" which allows a government agency to transfer cases to the county in which the agency maintains its principal headquarters.

In Sun-Sentinel, although the government agency named in the petition to examine public records was headquartered in Tallahassee, the Florida Supreme Court upheld the trial court's order finding that venue was proper in Palm Beach County, where the records were maintained and the interested parties were located. *See also* Fla. DOT v. Sarnoff, 241 So. 3d 931 (Fla. 3d DCA 2018) (recognizing an exception to the home venue privilege where a party petitions the court for an order to gain access to public records).

The DISTRICT asserts that HURCHALLA, the COUNTY and LAKE POINT all had to be named as defendants in its declaratory action because the

ELC requested transcripts of settlement discussions regarding litigation to which HURCHALLA, the COUNTY and LAKE POINT were parties.

The DISTRICT cites no authority for this assertion.

At the time the issue of venue was decided by the trial court, only the ELC had requested access to the transcripts.[18]

Venue in Martin County was improper as to ELC because ELC does not have an office in Martin County, the public records request was made in Palm Beach County and, accordingly, the "action arose in Palm Beach County" and the "property in litigation", *i.e.*, the transcripts, was maintained in Palm Beach County. *See* Sec. 47.051, F.S.

Even if the Governing Board's closed door settlement discussion had revealed matters that would compromise the legal positions of remaining parties to the litigation, the Sunshine Law unequivocally required that the transcripts be made public upon dismissal of the DISTRICT from the case. Sec. 286.011(8)(e),

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[18] HURCHALLA made a similar request to examine records after her motion to dismiss was denied along. Ultimately, more than a dozen citizens requested copies of the shade meeting transcripts in separate Public Records Act requests. The DISTRICT did not include any of the citizens who requested records as defendants in the action below; however, discovery requests were served on the individuals demanding the production of personal emails and communications with other residents in a thinly veiled attempt to intimidate those who had filed Public Records Act requests.

F.S. ("The transcript shall be made part of the public record upon conclusion of the litigation.")

The DISTRICT filed a complaint for declaratory relief seeking to deny the ELC its statutory right to examine public records, specifically transcripts of closed-door sessions about a particular lawsuit as well as materials that may have been provided to the Governing Board. As previously stated, the ELC made the request in Palm Beach County, the transcripts are maintained in Palm Beach County, the meeting that was transcribed took place in Palm Beach County. The District is headquartered in Palm Beach County and ELC maintains an office in Palm Beach County.

The participation of HURCHALLA, the COUNTY and LAKE POINT was not necessary for the trial court to determine the issue of whether the DISTRICT could lawfully refuse the ELC access to the transcripts. The relief requested by the DISTRICT, a declaratory judgment that it was not required to disclose the transcripts of its attorney-client sessions, could have been granted without the participation of HURCHALLA, the COUNTY and LAKE POINT.

It was error to force the ELC to defend itself in Martin County. The complaint should have been dismissed for lack of proper venue.

CONCLUSION

For the reasons set forth herein, the Order Denying Writ of Mandamus Against Plaintiff South Florida Water Management District and Entering Final Judgment on Defendant Everglades Law Center's Counterclaim, Order Granting Plaintiff's Motion for Entry of Final Judgment and Final Judgment, and Consolidated Order Regarding Defendant Donna Melzer's Second Amended Counterclaim and Incorporated Final Judgment should be reversed.

Respectfully submitted,

MARCY I. LAHART, P.A.
Attorney for Appellant
EVERGLADES LAW CENTER, INC.
207 SE Tuscawilla Road
Micanopy, FL 32667
(352) 545-7001
marcy@floridaanimallawyer.com

By: */s/ Marcy I. LaHart*
Marcy I. LaHart
Fla. Bar No. 0967009

LITTMAN, SHERLOCK & HEIMS, P.A.
Attorneys for Appellant
MAGGY HURCHALLA
P.O. Box 1197
Stuart, Florida 34995
(772) 287-0200
LSHLawfirm@gmail.com

By: */s/ Virginia P. Sherlock*
Virginia P. Sherlock
Fla. Bar No. 893544
Howard K. Heims
Fla. Bar No. 38539

DONNA SUTTER MELZER
Attorney for Appellant DONNA MELZER
2286 SW Creekside Drive
Palm City, FL 34990
(772) 485-9429
DonnaSMelzer@gmail.com

By: */s/ Donna Sutter Melzer*
Donna Sutter Melzer
Fla. Bar No. 0216941

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed through the Florida eDCA Portal and served via electronic mail on counsel of record listed below this 21st day of September, 2018:

Counsel for SFWMD
Michael J. McCluskey, Esq.
Fox, McCluskey, Bush, Robison, PLLC
P.O. Drawer 6
Stuart, FL 34995-0006
(772) 287-4444
mmccluskey@foxmccluskey.com

Judith Levine, Esq.
Laura Scala-Olympio, Esq.
James Sherman, Esq.
3301 Gun Club Road
West Palm Beach, FL 33406
(561) 682-6546
jlevine@sfwmd.gov
lscalaol@sfwmd.gov
jsherman@sfwmd.gov

Timothy Riley, Esq. and
Erin Tilton, Esq.
Hopping Green & Sams, P.A.
P.O. Box 6526
Tallahassee, FL 32314
(850) 222-7500
timothyr@hgslaw.com
erint@hgslaw.com

Counsel for Martin County
Edward de la Parte, Esq.
Nicolas Q. Porter, Esq.
De La Parte & Gilbert, P.A.
P.O. Box 2350
Tampa, FL 33601-2350
(813) 229-2775
edelaparte@dgfirm.com

Sarah Woods, Esq.
Martin County Attorney's Office
2601 SE Monterey Road
Stuart, FL 34996
(772) 288-5446
swoods@martin.fl.us
nporter@dgfirm.com

Counsel for Lake Point Phase I, LLC, and Lake Point Phase II, LLC

Ethan J. Loeb, Esq., Jon P. Tasso, Esq.
Michael Labbee, Esq.
E. Colin Thompson, Esq.
Smolker Bartlett Loeb Hinds & Sheppard
100 N. Tampa Street, Suite 2050
Tampa, FL 33602
(813) 223-3888
EthanL@smolkerbartlett.com
SusanM@smolkerbartlett.com
JonT@smolkerbartlett.com
cynthiam@smolkerbartlett.com
MichaelL@smolkerbartlett.com
RochelleB@smolkerbartlett.com
ColinT@smolkerbartlett.com

Dan Bishop, Esq.
Bishop London & Dodds
3701 Bee Cave Road, Suite 200
Austin, TX 78746
dbishop@bishoplondon.com
Christina Carlson Dodds, Esq.
Christina Dodds, PLLC
2506 Hillview Road
Austin, TX 78703
cdodds61@gmail.com

CERTIFICATE OF COMPLIANCE

I certify that the foregoing has been prepared in Times New Roman 14 point font in compliance with appellate font requirements.

/s/ Virginia P. Sherlock
Virginia P. Sherlock