

2017 WL 1277776

Unpublished Disposition

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DETERMINED.

District Court of Appeal of Florida,
Second District.

CITIZENS FOR SUNSHINE, INC., Appellant,

v.

Susan CHAPMAN, Appellee.

Case No. 2D16-3173

|
Opinion filed April 5, 2017

Appeal from the Circuit Court for Sarasota County; Brian
A. Iten, Judge.

Attorneys and Law Firms

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Inc.

Opinion

PER CURIAM.

*1 Affirmed.

KHOUZAM, BLACK, and ROTHSTEIN-YOUAKIM,
JJ., Concur.

All Citations

Slip Copy, 2017 WL 1277776 (Table)

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Second District Court of Appeal Case Docket**Case Number: 2D16-3173****Final Civil Other Notice from Sarasota County****CITIZENS FOR SUNSHINE, INC. vs. SUSAN CHAPMAN****Lower Tribunal Case(s): 2013-CA-7532-NC**Right-click to copy shortcut directly to this page

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Date Docketed	Description	Date Due	Filed By	Notes
07/12/2016	Notice of Appeal Filed		Andrea Flynn Mogensen, Esq. 549681	
07/25/2016	Case Filing Fee			
07/25/2016	Miscellaneous Trial Court Document			STATEMENT OF JUDICIAL ACTS TO BE REVIEWED
07/26/2016	Acknowledgment Letter 1			
09/19/2016	Mot. for Extension of time to file Initial Brief		Andrea Flynn Mogensen, Esq. 549681	AE's opposition is noted.
09/21/2016	ORDER GRANTING EOT FOR INITIAL BRIEF	10/20/2016		
10/14/2016	Received Records			ITEN
10/14/2016	Transcript Received			
10/14/2016	Supplemental Records			
10/14/2016	Received Records			CORRECTED OMISSION
10/19/2016	Stipulation for Extension of Time		Andrea Flynn Mogensen, Esq. 549681	IB DUE 10/27/16
10/27/2016	Initial Appellant Brief on Merits		Andrea Flynn Mogensen, Esq. 549681	
10/27/2016	Request for Oral Argument			
10/31/2016	Motion To File Amicus Curi. Brief		James J. Mc Guire, Esq. 187798	MOTION FOR LEAVE BY THE FLORIDA PRESS ASSOCIATION, THE FIRST AMENDMENT FOUNDATION, & THE FLORIDA CENTER FOR INVESTIGATIVE REPORTING TO FILE AN AMICUS

**IN THE CIRCUIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

**CITIZENS FOR SUNSHINE, a Florida
not-for-profit corporation,**

Plaintiff,

v.

Case No: 2013 CA 007532 NC

**CITY OF SARASOTA, SUSAN CHAPMAN,
and SUZANNE ATWELL,**

Defendant(s).

FINAL JUDGMENT OF THE COURT

THIS CAUSE came before the Court on May 10 and May 11, 2016, at which time the Court reviewed the relevant pleadings filed in this cause, heard witness testimony, received documentary evidence, and considered the arguments of counsel. Based on the foregoing, the Court finds as follows:

Findings of Fact

In the summer of 2013, the City of Sarasota, through its elected officials, was actively confronting area homelessness, which at the time was a prominent local issue. On August 9, 2013, a written agreement was entered into by and between the City of Sarasota, Sarasota County, and Dr. Robert G. Marbut, Jr., a consultant with expertise in improving the efficiency and organization of providers of homeless services. City Commissioners Susan Chapman, Suzanne Atwell, and Paul Caragiulo were all in attendance at a September 3, 2013 City Commission Meeting, where there was open discussion of homelessness, including a \$289,000 Community Development Block Grant which had been designated for a homeless facility. When

Chapman inquired about the deadline associated with the Grant, the conversation turned to Dr. Marbut's forthcoming report, which was due prior to the Grant's August 2014 deadline.

On October 3, 2013, Pat Westerhouse of CASTO Property Management reached out to City officials in an effort to invite them to an October 10, 2013 gathering of local merchants to address the "transient issue." The invitation made its way to Commissioner Chapman, Commissioner Atwell, City Manager Tom Barwin, and Deputy City Manager Marlon Brown, among others.

At an October 7, 2013 meeting of the City Commission – attended by Chapman, Atwell, and Caragiulo – there was open discussion of "site placement" for the homeless facility and reference to the fact that Dr. Marbut's report was due in November.

The October 10, 2013 gathering – which is the focus of this case – was held as scheduled at downtown Sarasota's Tsunami restaurant. The participating merchants provided the refreshments. It is undisputed that the event was initiated by local businesspeople, who were in no way guided in their endeavor by public officials. It is likewise undisputed that the public received no notice about the event and that no minutes were prepared to document that which transpired at the venue. Commissioner Chapman, Commissioner Atwell, City Manager Barwin, and Deputy City Manager Brown all attended, as did Captain Patrick Robinson of the Sarasota Police Department, along with some of his fellow officers. According to witness testimony, a total of somewhere between twenty and thirty individuals were in attendance.

After the City officials introduced themselves, the merchants voiced their concerns about crime, loitering, and aggressive panhandling. Captain Robinson offered assurances that law enforcement was working diligently. In addition, City Manager Barwin addressed the businesspeople, to update them on actions the City had taken and to respond to their inquiries,

which included questions about area homeless facilities. Barwin, who is not an elected official, directed his remarks to the merchants, not the commissioners who were present.

Trial testimony revealed that Commissioner Chapman and Commissioner Atwell were not seated near each other at the event and did not speak to each other while in attendance. It was clearly established that no third party served as an intermediary that day to relay messages between the two. When Chapman spoke at the Tsunami, she directed her words to only the merchants. When shopkeepers asked her about Dr. Marbut's report – which had been mentioned in multiple newspaper accounts during that time period – Chapman told them to be patient and wait for its release, the antithesis of Chapman "discussing" the Marbut report with the audience. Chapman also encouraged the gathered citizens to attend public meetings in their community. No official act of the City Commission was taken thereafter as a result of the gathering at the Tsunami.

There is no doubt that as of October 10, 2013, Susan Chapman knew that Sarasota's homeless population was a subject on which foreseeable action would be taken by the City Commission in the not-so-distant future. She likewise knew that the gathering at issue was intended to address the "transient issue." Before Commissioner Chapman walked through the restaurant's door that day, she was fully aware that Suzanne Atwell planned to attend Pat Westerhouse's event.

Conclusions of Law

Section 268.011, Florida Statutes, which is commonly referred to as the "Sunshine Law" or "Public Meetings Act" provides in pertinent part as follows:

- (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has

not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

(3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding \$500.

The Act was first enacted in 1967. See *Tribune Co. v. School Bd. of Hillsborough County*, 367 So. 2d 627, 628 (Fla. 1979). And although “[o]riginally codified by statute, the Sunshine Law [eventually] . . . became part of the Florida Constitution.” *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla. 3d DCA 1994). As a result, Article I, Section 24(b), of the Florida Constitution, now reads as follows:

(b) All 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 and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

In 2008, to commemorate the fortieth anniversary of the Sunshine Law, The Florida State University Law Review published a comprehensive article on the subject, which provided the following historical account:

Florida's comprehensive Sunshine Law found its genesis during a meeting of the Gainesville chapter of the journalism fraternity Sigma Delta Chi (O). Florida State Senator J. Emory “Red” Cross met with O members, including H.G. “Buddy” Davis, Jr. Davis was a longtime journalism professor at the University of Florida and a Pulitzer Prize-winning editorial writer. During the O meeting in the early 1950s, Cross expressed concern about private meetings of public bodies

throughout the state. The ensuing discussion resulted in assistance from Davis and other O members in gathering examples of open meetings laws from other states. Cross drafted a bill that he introduced to the Florida Senate during every regular session for the next decade.

Lawmakers' resistance to unprecedented public access to government meetings stifled Cross's bill until 1967, when federal court rulings called for the reapportionment of the legislature. Reapportionment resulted in the dissolution of the "Pork Chop Gang" of rural lawmakers who dominated the legislature. An influx of lawmakers from urban areas and a new governor, Claude Kirk, provided the right environment for Cross's Sunshine bill to finally become law. The media's push for the measure was also instrumental in convincing legislators to pass the Sunshine Law.

Cross' proposal, Senate Bill 9, was introduced to the Florida Senate in April 1967 The House eventually compromised, and the bill was signed into law by Gov. Kirk on July 12, 1967.

See Sandra F. Chace & Christina Locke, The Government-in-the-Sunshine Law Then and Now: A Model for Implementing New Technologies Consistent with Florida's Position As A Leader in Open Government, 35 Fla. St. U.L. Rev. 245, 248-50 (2008) (footnotes omitted).

It is against this backdrop that Florida Supreme Court has declared that the "right of the public to be present and to be heard during all phases of enactments by boards and commissions is a source of strength in our country." *Board of Public Instruction of Broward County v. Doran*, 224 So 2d 693, 699 (Fla. 1969). According to the Court, "[o]ne purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies." *Id.* Our State's highest court has announced that governmental boards and commissions "should not be allowed to deprive the public of this inalienable right to be present and to be heard at all deliberations wherein decisions affecting the public are being made." *Id.* Of course, as noted by the Fourth District, the Sunshine Law "was never intended to become a millstone around the

neck of the public's representatives." *Deerfield Beach Pub., Inc. v. Robb*, 530 So. 2d 510, 511 (Fla. 4th DCA 1988). Thus, "[n]othing in the Sunshine Law requires each commissioner [or other similarly-situated public official] to do his or her thinking and studying in public." *Occidental Chemical Co. v. Mayo*, 351 So. 2d 336, 342 (Fla. 1977).

Here, a gathering clearly occurred. Issues were discussed at said gathering that were reasonably foreseeable to come before the City Commission. The gathering was not open to the public. No prior notice was provided. Minutes were not taken. In light of the foregoing, the sole issue to be resolved is whether or not the gathering was a "meeting" under the Sunshine Law. While mindful of the Florida Supreme Court pronouncing, in dicta,¹ that "[i]f any public official is unable to know whether by convening of two or more officials he is violating the law, he should leave the meeting forthwith[,]"² this Court finds that Chapman engaged in no "deliberation" during her passive attendance at the October 10, 2013 assembly, a gathering sponsored by her constituents. The gathering was thus not a "meeting" under either Section 268.011(1) or Article I, Section 24(b), of the Florida Constitution. The opportunity for deliberation does not constitute deliberation. To find otherwise would lead to an absurd result, which is what a court is compelled to avoid when applying the law. *See State v. Summerlot*, 711 So. 2d 589, 592 (Fla. 3d DCA 1998). According to the Third District Court of Appeal, "[i]n order to give effect to legislative intent, and to avoid a construction of . . . statutory language which would lead to an absurd result, our analysis must focus upon a consideration of the statute as a whole." *Id.* This includes examination of "the evil to be corrected, the language of the act, including its title, the history of its enactment, and the state of the law

¹ Dicta is a "purely gratuitous observation or remark made in pronouncing an opinion and which concerns some rule, principle or application of law not necessarily involved in the case or essential to its determination . . ." *Bunn v. Bunn*, 311 So. 2d 387, 389 (Fla. 4th DCA 1975).

² *City of Miami Beach v. Berns*, 245 So. 2d 38, 41 (Fla. 1971).

already in existence bearing on the subject' . . . [and then giving] that construction to the act which comports with the evident intent of the legislature." See *Foley v. State ex rel. Gordon*, 50 So. 2d 179, 184 (Fla. 1951).

In arguing its case, Plaintiff relies heavily on *Finch v. Seminole County School Bd.*, 995 So. 2d 1068 (Fla. 5th DCA 2008). In *Finch*, the Fifth District – affirming the trial court’s denial of the plaintiffs’ request for a permanent injunction against the defendant School Board – found that the circuit court below reached the right result for the wrong reason. *Id.* According to the Fifth District, denial of injunctive relief was appropriate because the defendant’s “inadvertent” Sunshine Law violation – which the appellate court declared to be neither “willful” nor “egregious” – had been cured by later actions of the School Board. *Id.* at 1073. But it is the nature of the Sunshine Law violation in *Finch* that, according to Plaintiff, mandates the issuance of a judgment in its favor. In *Finch*, the Fifth District found that the School Board’s participation in a bus tour of neighborhoods that would be affected by school rezoning plans violated the Sunshine Law because the School Board “had ultimate decision-making authority; it was gathered together in a confined bus space; and it undoubtedly had the opportunity at that time to make decisions outside of the public’s scrutiny.” *Id.* at 1073. The *Finch* court found a violation despite the fact that there were purportedly no discussions among the members during the trip, who were separated from each other throughout said trip by several rows of seats. *Id.* at 1070.

It is undisputed that in the absence of interdistrict conflict, an opinion from any one of the Sunshine State’s five district court of appeals that does not contradict the Florida Supreme Court binds all Florida trial courts. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). Here, however, one cannot harmonize *Finch* with the large body of Florida law that defines “meetings” under the

Sunshine Law as gatherings of members of a governmental entity for the purpose of dialogue, decision, and action about a subject within the entity's purview. See *Times Pub. Co. v. Williams*, 222 So. 2d 470, 474 (Fla. 2d DCA 1969) (defining "meetings" as the "acts of *deliberation, discussion and deciding* occurring prior to and leading up to" official acts), overruled in part, *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985); *Board of Public Instruction of Broward County v. Doran*, 224 So 2d 693, 698 (Fla. 1969) (noting that the intent of the Sunshine Law "was to cover any gathering of the members where the members deal with some matter on which foreseeable action will be taken [by the governmental entity]"); and *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (explaining that a meeting under the Sunshine Law includes both the ceremonial acceptance of an entity's decision-making and "the collective inquiry and discussion stages" which relate "to any matter on which foreseeable action will be taken").

This Court's ruling in this case should not be deemed an endorsement of Commissioner Chapman's decision to attend the October 10, 2013 gathering at Tsunami with full knowledge that another commissioner would be in attendance. Those entrusted to hold public office should always endeavor to avoid even the appearance of impropriety. While plainly dicta, the above-referenced Supreme Court admonition about leaving the meeting "forthwith" would well serve all public officials who find themselves in situations similar to the one at issue here.

In light of the foregoing, it is hereby **ORDERED AND ADJUDGED** as follows:

- A. Plaintiff has not proven a violation of either Section 286.011, Florida Statutes, or Art. I, § 24(b), Fla. Const., by the greater weight of the evidence.
- B. Plaintiff shall take nothing by this action and that the Defendant, Susan Chapman, shall go hence without delay.

C. The Court reserves jurisdiction to tax costs, award attorney's fees, and to enter such other orders as may be necessary to amend or enforce this final judgment.

DONE AND ORDERED in Chambers at Sarasota, Sarasota County, Florida on this

8th day of July, 2016.



BRIAN A. ITEN
CIRCUIT COURT JUDGE

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