IN THE COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DCA Case No. 1D16-5416; Consolidated with 1D16-5408
LT Case No. 2016-CA-02159

THE FLORIDA OFFICE OF INSURANCE REGULATION and DAVID ALTMAIER, as Commissioner of the Florida Office of Insurance Regulation,

Appellants,

v.

JAMES F. FEE, JR.,

Appellee.

APPELLANTS OFFICE OF INSURANCE REGULATION AND COMMISSIONER DAVID ALTMAIER'S REPLY BRIEF

On Appeal from an Order on Non-Jury Trial and Final Judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida

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ARGUMENT

All of the cases cited by Mr. Fee in support of applying the Sunshine Law broadly, the need for public transparency, and the "evasive devices" rejected by the Courts when employed to avoid the Sunshine, involve boards and commissions charged with performing government functions. NCCI is not a public agency, board, or commission and does not perform a government function. Thus, this case law and its sweeping policy statements about the guarantees of the Florida Constitution and section 286.011, Florida Statutes, shed little light on the fundamental, threshold issue in this case: how far did the Legislature extend the Government in the Sunshine Law to meetings of a private company when it passed section 627.091(6), Florida Statutes?

I. NCCI DOES NOT HAVE A "COMMITTEE" AS DEFINED IN SECTION 627.291, FLORIDA STATUTES

Three words in section 627.091(6), Florida Statutes, highlighted below, provide the plain-language answer to this question:

> Whenever **the committee of** a recognized rating organization with responsibility for workers' compensation and employer's liability insurance rates in this state meets to discuss the necessity for, or a request for, Florida rate increases or decreases, the determination of Florida rates, the rates to be requested, and any other matters pertaining specifically and directly to such Florida

> rates, such meetings shall be held in this state and shall be subject to s. 286.011.

To briefly summarize the Office's argument on this point in the Initial Brief, NCCI has several committees, none of which have responsibility for matters pertaining specifically and directly to such Florida rates. Initial Brief at 6-8. Responsibility for the subject Florida rate filings was assigned to an individual, actuary Jay Rosen, not "the committee." Thus, the extension of the Sunshine Law provided in section 627.091(6), is inapplicable in this case. Id. at 9.

In the Answer Brief, Mr. Fee acknowledges the absence of a formal NCCI committee as described in the statute.[1] However, continues Mr. Fee, by assigning responsibility to Mr. Rosen, NCCI has qualified him as a "committee" under

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[1] While Mr. Fee couches his admission as an assumption "*arguendo*" that Mr. Rosen was assigned sole authority, Answer Brief at 23, there is no competent, substantial evidence in the record that any other person or group of persons were assigned or exercised any actual control over the substance of the rate filings. See Tr. at 136 ("ultimately it was Jay Rosen's decision on the rate filing"). Mr. Fee references Ms. Lovgren's statement that other actuaries were given the opportunity to "poke holes" in Mr. Rosen's rate indication as support for the proposition that the ultimate rate decision was made as a group. However, that statement is followed by Ms. Lovgren unequivocally stating that Mr. Rosen did not change his opinion in this case, and "once he makes up his mind . . . [h]e does not change his mind." Lovgren depo. at 41.

section 627.091(6), Florida Statutes, and subjected his individual actions to the Sunshine Law. Answer Brief at 23.[2]

As initial support for his proposition that a committee can be an individual, Mr. Fee cites Robert's Rules of Order as "illustrative" of the ordinary meaning of the word "committee." Answer Brief at 25. The Florida Supreme Court has directed where to look for ordinary meaning in the absence of a statutory definition, and it is not Robert's Rules of Order. "If necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary." *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) (citing *Gardner v. Johnson,* 451 So. 2d 477 (1984)). The dictionary definition of "committee" includes "a body of persons delegated to consider, investigate, take action on, or report on some matter." *Merriam Webster Online Dictionary 2017*, https://www.merriam-webster.com/dictionary/committee. (January 5, 2017) (emphasis added); see Initial Brief at 22, n. 6.

Mr. Fee specifically cites a portion of one sentence in Article IX, Section 49, of Robert's Rules of Order, titled "Committees Classified," which provides that a "committee is a body of one or more persons." Answer Brief at 25. However, the

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[2] Specifically speaking to implementation of his interpretation of the law, Mr. Fee asserts that NCCI must publish notice in the Florida Administrative Register fourteen days prior to any internal meeting which includes Mr. Rosen in discussions of a rate filing. Answer Brief at 24.

following Sections in Article IX further define the two "distinct classes" of committees by characteristics found only in groups and not an individual. See Article IX, Section 50 (titled "Boards of Managers or Directors, Boards of Trustees, Executive Committees, etc.") ("Committees of this class are essentially small deliberative assemblies"); Article IX, Section 51 (titled "Committees, Special and Standing") ("The committee constitutes a miniature assembly, being able to act only when a quorum (a majority of the members) is present"). Thus, to the extent applicable, Robert's Rules of Order do not support the concept of a "committee of one."

Nor do other enactments by the Florida Legislature. Like the dictionary, the Legislature apparently does not find the "plain and ordinary" meaning of committee to include only one person. When the Legislature creates and references committees, it does so consistently with respect to a group having multiple members. See, e.g., § 17.575(1), Fla. Stat. (five member Treasury Investment Committee); § 378.033(1), Fla. Stat. (five member Nonmandatory Land Reclamation Committee); § 430.501(2), Fla. Stat. (ten member Alzheimer's Disease Advisory Committee); § 718.103(7), Fla. Stat. ("committee" for condominium law purposes means "a group of board members, unit owners, or board members and unit owners"); § 947.02(2), Fla. Stat. (five member parole qualifications committee).

Where the same words or phrases are used in different statutes they should be afforded the same meaning. *See State v. Hackley*, 95 So. 3d 92, 95 (Fla. 2012). The reference to "committee" in section 627.091(6), Florida Statutes, should accordingly be construed according to its ordinary use by the Legislature as a multi-member decision-making body.

Mr. Fee next turns to NCCI's abolition of the Classification and Rates Committee, deemed by the Trial Court an "evasive measure" designed by NCCI "to avoid its public meeting responsibilities," as somehow evidence of violations of the Sunshine Law. Answer Brief at 25-26. Initially, there is no testimony or other direct evidence in the record to support the Trial Court's conclusion. It is an inference of intent made from the observation that NCCI has not given notice or otherwise complied with the Sunshine Law for internal meetings regarding rate filings since disbanding the Committee.

Two other undisputed facts give rise to a strong inference of an alternative reason the Classification and Rates Committee was disbanded. First, all groups deemed to be "committees" by NCCI are comprised of member insurers. Lovgren depo. at 61. Second, these committees are subject to the following antitrust provision found in the NCCI Bylaws, which is read at the beginning of every meeting:

> RESOLVED, pursuant to Article XV, Section 2, of the NCCI Bylaws, Committee members and meeting

> participants are prohibited from discussing or taking any action pertaining to the determination of prices, rates, or market agreements, as well as other acts or discussions where such acts are prohibited by law, administrative rule, or directive, including boycotts or other conduct that may be discriminatory or anticompetitive.

Fee Ex. 16 at 3. These facts directly support an inference that NCCI disbanded the Classification and Rates Committee based on antitrust concerns. *Cf. North Carolina State Bd. of Dental Examiners v. Federal Trade Comm'n*, 135 S. Ct. 1101 (2015) (non-sovereign entity comprised of active market participants not entitled to antitrust immunity). This inference is at least as compelling as that relied upon by the Trial Court and undermines the conclusion that NCCI engaged in evasive measures with respect to the Sunshine Law.[3]

Motives aside, the effect of NCCI disbanding the Classification and Rates Committee was the elimination of "the committee" and the condition precedent to the statutory application of the Sunshine Law to the subject rate filings. Mr. Fee argues that the Sunshine Law still applies by virtue of Mr. Rosen's assigned authority, citing two Attorney General Opinions for the proposition that "the Sunshine Law remains despite attempts to delegate decision making to one individual." Answer Brief at 26. In both Opinions, an individual was being

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[3] Though undersigned counsel for the Office were unable to locate any legislative history directly on this issue, it may be fair to infer that the Florida Legislature extended the Sunshine Law to a specifically-described committee of a particular type of private company due to these same antitrust concerns.

delegated the governmental authority of a public body to engage in specific negotiations; in one case from the City Commission of the City of Clearwater for an employment contract, and the other from the City Council of the City of Hallendale for a referendum to be submitted for subsequent Council consideration. See Ops. Att'y Gen. Fla. 93-78 & 84-54.

As argued in the Initial Brief, the reason the Sunshine Law was found to follow the delegation and apply to these individuals is that they had been delegated authority by public officials to act on their behalf on matters on which forseeable action will be taken by those public officials. Initial Brief at 22-23. Mr. Rosen has not been delegated authority by the Office, the only public entity in this case. NCCI is not a government entity and performs no public duty in submitting rate filings. Mr. Fee has not contested otherwise in the Answer Brief.[4]

So with no committee, no public duty, and no delegation from a public body to support an extension of the Sunshine Law to an actuary, the Answer Brief finally lands on the fundamentally flawed approach embraced by the Trial Court: read the words "the committee of" out of the statute or deem them "irrelevant" such that "[t]he statutory public meeting requirement attaches to the licensed rating organization, in this case NCCI." Answer Brief at 27 (*quoting* Order at 57). By

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[4] The attempt by the Media Amici to argue this "public function" issue on appeal when it has been abandoned by the real party in interest is improper.

assuming the Sunshine Law applicable to NCCI as an organization, as did the Trial Court, and not only "the committee," as is the plain language of the law passed by the Legislature, Mr. Fee argues that the case law applicable to public bodies is equally applicable to NCCI as an organization. Therefore, continues this strained logic, notice and open meeting requirements attach to whomever NCCI delegates responsibility for a rate filing, even a single person.

By its plain language, section 627.091(6), Florida Statutes, does not apply the Sunshine Law to NCCI as an organization. It applies only to meetings of "the committee of" NCCI. With those three words gone, the statute would read exactly as the Trial Court concluded it does and Mr. Fee argues it should. But it does not and cannot. This statute is clear and limited. Mr. Fee did not cite any other statute[5] that would support of the Trial Court's expansion of the Government in the Sunshine Law.

II. ANY SUNSHINE LAW VIOLATION WAS CURED BY THE AUGUST 16, 2016, PUBLIC HEARING

Should this Court find that any NCCI actions in preparing and submitting the rate filing violated the Sunshine Law, the Office submits that any such taint

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[5] Section 627.093, Florida Statutes, was relied upon by the Trial Court as support for its ruling on this issue. R. 483 (Order at 6). The Office contends that this reliance is misplaced procedurally and on the merits. See Initial Brief at 28-31. This statute was not mentioned in the Answer Brief and this argument has apparently been abandoned on appeal.

from these violations was cured by the August 16, 2016, public hearing. *See* Initial Brief at 43-36. The reasons offered in the Answer Brief to support the Trial Court's determination that the August 16th hearing was an ineffective cure to any taint are not supported – and are largely contradicted - by the controlling case law.

The Trial Court and Mr. Fee emphasize the number of alleged Sunshine Law violations – one for each internal meeting Mr. Rosen attended without first giving public notice[6] - seemingly as a demonstration that cure is unavailable because of the degree of the taint. *See* Answer Brief at 37 ("the numerous non-noticed meetings . . . are detailed extensively in the record and the Trial Court's ruling"). The three cases cited by the Trial Court do not support this general proposition of law. In fact, in the leading case on this issue, the Court found that cure occurred by virtue of one sunshine meeting that followed multiple shade meetings. *Tolar v. School Board of Liberty County*, 398 So. 2d 427, 428 (Fla. 1981) (shade meetings occurred "[o]n at least two occasions" (emphasis added)). The Court did not continue and list exactly how many meetings occurred and then weigh or quantify

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[6] These meetings are listed in the Answer Brief at page 32, footnote 16. Meetings at which Mr. Rosen were not present are not relevant.

the taint before turning to the sufficiency of cure. Such an inquiry is simply irrelevant.[7]

The relevant inquiry once any taint has been found is whether the cure hearing itself was open and full. *Tolar*, 398 So. 2d at 429. The August 16, 2016, public hearing conducted by the Office meet these criteria. See Initial Brief at 44-46. In the Answer Brief, Mr. Fee relies on the one following statement from the Trial Court to distinguish this clear case of cure from controlling law.

> This is not a situation analogous to Tolar, Pigeon Key and the City of Sarasota. In those cases the public meetings that did occur were actually independent meetings in which a responsible governing entity independently addressed the merits of the issue.

R. 534 (Order at 59). This is not an accurate statement.

The shade meetings in *Tolar* were private meetings between the School Superintendent-elect and members of the School Board and involved specific discussions of "removal of Tolar and the abolition of his position." *Tolar*, 398 So. 2d at 428. Subsequently,

> at an open formal meeting, the School Board members voted to abolish the position of director of administration and transfer Tolar to Bristol Elementary School. At this open meeting, Tolar was present and given full opportunity to express his views.

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[7] Mr. Fee elsewhere acknowledges that it is not the degree of the taint that determines a Sunshine Law violation, arguing that a "mere showing" of such a violation constitutes irreparable injury. See Answer Brief at 40.

Id. There was no "independent" meeting with a "responsible governing entity" at which the merits were "independently addressed," as characterized in the quoted portion of the Order. The cure meeting was actually a public meeting of the same persons who had met in private to vote on the very same topics that had been previously discussed.

In *Sarasota Citizens for Responsible Government v. City of Sarasota*, the Sunshine Law violation that was sought to be cured arose from e-mail discussions among members of the Sarosota County Board of County Commissioners. 48 So. 3d 755, 766 (Fla. 2010). Like in *Tolar*, the Court found this violation cured by subsequent meetings of the same Board to consider the same issues, noting that the inquiry is on the cure hearing and whether it is full and fair or merely ceremonial. *Id.* at 767.

In *Monroe County v. Pigeon Key Historical Park, Inc.*, the Sunshine Law taint arose from shade meetings of an advisory committee. 647 So. 2d 857 (Fla. 3d DCA 1995). The cure in that case involved two hearings before the Monroe County Board of County Commissioners, as well as sunshine meetings the advisory committee itself conducted subsequent to the shade meetings. *Id.* at 861. It was the conduct of those hearings, not the entity who conducted them, that gave rise to cure.

There simply is no requirement of independent review by a responsible government entity required for cure as relied upon by the Trial Court. If the cure hearing is full and fair and not merely a ceremonial acceptance of a result reached in the shade, it is sufficient and no Sunshine Law violation will be found. The Office's over four-hour, simulcast hearing conducted with full public participation, followed by the Commissioner's independent action in issuing the Rate Orders, fully cured any taint.[8]

In the face of a legally sufficient cure hearing and independent decisions by the Commissioner following this sunshine, Mr. Fee has but one final argument: no cure is possible in this instance, no matter how full and fair the hearing, because of the failure by NCCI to produce requested documents. The taint cannot be erased, goes the argument, because Mr. Fee could not "meaningfully participate" in the August 16, 2016, public hearing without these missing documents. *See* Answer Brief at 20.

A request for documents from a rating organization under section 627.291, Florida Statutes, as made by Mr. Fee from NCCI here, is part of a specific statutory

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[8] The Trial Court also posits that the August 16th hearing could not be a cure because following that meeting the Commissioner disapproved the rate filing and directed that approval would be given to a different (lower) proposal. Contrary to evidencing a Sunshine Law violation, the ultimate approval of a proposal "markedly different" from that which was the subject of private meetings has been cited as indicative of cure. *See Pigeon Key*, 647 So. 2d 862.

procedure available to an insured affected by a workers' compensation insurance rate "made" by the organization. That statute specifically gives the insured the right to seek review of the manner in which that specific rating system "has been applied in connection with the insurance afforded him or her." § 627.291(2), Fla. Stat. The first section of that statute gives that insured the right to obtain "all pertinent information as to such rate" as part of this process. § 627.291(1), Fla. Stat.

This independent procedure designed solely to examine the application of an existing ("made") rating system to one insured has no direct bearing on a public hearing on a proposed rate to affect all policyholders. Documents produced as "pertinent" to an existing rating system and a particular application are not a necessary part of a public hearing on a proposed rate. The argument that the reference to "all pertinent information" in section 627.291, Florida Statutes, includes every document that may have been relied upon by a company regarding a rate about which question is raised, and that all such documents must be produced before a public hearing on the rate, stretches the statute far beyond any reasonable limits.

Mr. Fee had access to all the documents that had been submitted to the Office as of August 16, 2016. The Office actuary testified that these documents were the ones on which she relied, and formed a sufficient basis for her to reach an

actuarial opinion. There is no legal basis to conclude that Mr. Fee was entitled to yet more documents, and no factual basis to conclude that the August 16, 2016, public hearing was not full and fair.

For these reasons and as set forth in the Initial Brief, the Office respectfully requests that the Order on Non-Jury Trial be reversed and judgment be entered for Appellant Office.

Respectfully submitted this 2nd day of February 2017.

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and David Altmaier, solely in his capacity
as Commissioner of the Office.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing APPELLANTS OFFICE OF INSURANCE REGULATION AND COMMISSIONER DAVID ALTMAIER'S REPLY BRIEF has been furnished by e-mail on February 2, 2017, to:

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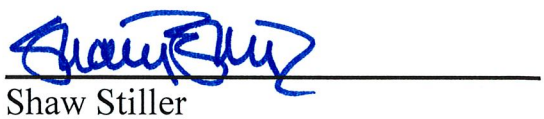

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