IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

CASE NO. 1D16-5408
L.T. CASE NO. 2015-CA-002159

THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., a Florida foreign not for profit corporation, THE FLORIDA OFFICE OF INSURANCE REGULATION, an agency of the State of Florida, and DAVID ALTMAIER, as Commissioner of the Florida Office of Insurance Regulation,

Appellants,

vs.

JAMES F. FEE, JR., individually,

Appellee.
_____/

APPELLEE'S RESPONSE TO ORDER TO SHOW CAUSE AND INCORPORATED RESPONSE IN OPPOSITION TO RENEWED EMERGENCY MOTION FOR STAY PENDING APPELLATE REVIEW AND RESPONSE WITHOUT OPPOSITION TO MOTION TO EXPEDITE PROCEEDINGS

Appellee James F. Fee, Jr. ("Fee" or "Appellee"), by and through undersigned counsel, hereby responds to this Court's December 5, 2016 Order to Show Cause by responding in opposition to Appellant the National Council on Compensation

Insurance ("NCCI" or "Appellant")'s Renewed Emergency Motion for Stay Pending Appellate Review ("Emergency Motion for Stay")[1] and further responds without opposition to NCCI's Motion to Expedite Proceedings, and states as follows:

I. Introduction

For a multitude of reasons, this Court should not stay the trial court's Order on Non-Jury Trial and Final Judgment Providing Declaratory and Injunctive Relief ("Final Judgment"). For one, NCCI cannot make a showing that a stay is proper – or even permissible – under the circumstances. In order to obtain a stay, NCCI would have to demonstrate a likelihood of prevailing on appeal, that it would suffer irreparable harm if the stay were not granted, or that a stay would be in the public interest. First, NCCI cannot possibly demonstrate a likelihood of prevailing on appeal with respect to the trial court's detailed, well-reasoned 73-page Final Judgment, which is founded upon fundamental open government principles of Florida law. Moreover, once Appellant's entirely unsupported allegations are disregarded, it cannot possibly show that any irreparable harm would occur if the stay were not granted. To the contrary, where (as here) open government violations have been established, *the public* – whose interest is furthered through the Final

[1] Further, this response shall also serve as Appellee's Response in Opposition to NCCI's Emergency Motion for Stay Pending Appellate Review, and Motion to Expedite Proceedings, dated November 30, 2016 ("Nov. 30th Motion to Stay"), which is incorporated in NCCI's renewed motion dated December 5, 2016.

Judgment – is presumed to have suffered irreparable harm and the requested stay would permit such harm to continue. Finally, given that the Final Judgment vindicates the public's rights to open government, the requested stay is entirely at odds with the public interest.

Moreover, granting the stay would, in essence, permit the unlawful workers' compensation insurance rate increase to go into effect. NCCI fails to acknowledge, as it must, that the relief granted by the trial court included a prohibitory injunction preventing the unlawful workers' compensation insurance rate increase from going into effect. The effect of the increase would be to defeat the trial court's order altogether. Florida law, which is consistent with decisional law from other jurisdictions, clearly prohibits the entry of a stay in this circumstance (even when a public body is an appellant). Put simply, there is no legal support for permitting constitutional and statutory violations to continue during an appeal.

The trial court's well-reasoned Final Judgment simply aligns the bedrock and salutary principles required by Florida's constitutionally-mandated open government laws with the workers' compensation insurance public rate-setting process. Such compliance is required and ensures that any rate which is ultimately approved by Commissioner of the Office of Insurance Regulation (the "OIR"), David Altmaier (the "Commissioner"), after being analyzed and proposed by NCCI, may also be appropriately evaluated by the public and all relevant stakeholders so as

to ensure that the rate serves the interests of both insurers and insureds in Florida. The effect of a stay would be to permit a rate that does not comply with Florida's open government laws to go into effect.

For all of these reasons, which are detailed more fully below, the Court must not grant the stay of the trial court's Final Judgment requested by Appellant.

II. Factual Background

On August 10, 2016, Fee filed his Complaint alleging violations of Article I, Section 24 of the Florida Constitution, which requires access to public records and meetings, the Florida Government in the Sunshine Law (Section 286.011, Fla. Stat.), the Florida Public Records Act (Section 119.07(1), Fla. Stat.) and, relatedly, provisions of the Florida Statutes which require open government in the context of the setting of insurance rates (Sections 627.091 and 627.291, Fla. Stat.). The violations related to the conduct of the OIR and NCCI (collectively, "Appellants") preceding a workers' compensation insurance rate increase that was scheduled to go into effect on December 1, 2016. Importantly, through his Complaint, Fee never challenged the substance of the rate increase; instead, he simply challenged the unconstitutional process through which it was derived and approved.

An expedited non-jury trial was held on the matter on November 9, 2016. All parties were present and represented by counsel. Each party introduced evidence and examined the witnesses called to testify. Thereafter, on November 23, 2016, the

trial court issued its Final Judgment ("Final Judgment") finding that Appellants had in fact violated the Florida Constitution and Florida Statutes by holding secret meetings and failing to produce public records related to the subject workers' compensation rate increase. Following well-established precedent from, *inter alia*, the Supreme Court of Florida, the trial court voided the rate increase and ordered that it not go into effect as scheduled.

Thereafter, on November 30, 2016, NCCI filed in the trial court an Emergency Motion to Stay the Court's November 23, 2016, Order Pending Appellate Review, which the OIR and the Commissioner later joined. Also on November 30, 2016, the OIR and the Commissioner filed a notice of automatic stay. Importantly, while NCCI's motion sought court approval for a stay, the OIR and the Commissioner asserted that they were entitled to an indefinite automatic stay which would extend beyond the 48-hour limit imposed by Rule 9.310(b)(2) for public entities in open government cases. Notwithstanding the fact that this case was pled as an open government case, and despite the fact that it was tried by consent as an open government case, the OIR and the Commissioner asserted for the first time that this was not an open government case.

On December 1, 2016, the trial court held a hearing on NCCI's Emergency Motion to Stay the Court's November 23, 2016, Order Pending Appellate Review, and the joinder in same filed by the OIR and the Commissioner. At that hearing, the

trial court also heard Fee's *ore tenus* motion to vacate a portion of the OIR and the Commissioner's notice of automatic stay, which purported to extend an automatic stay beyond 48 hours. All parties were again present and represented by counsel at the hearing and, after reviewing the pleadings and hearing counsels' arguments, the trial court denied NCCI's motion to stay and granted Fee's *ore tenus* motion to vacate the portion of the OIR and the Commissioner's stay which purported to extend the automatic stay beyond 48 hours.

Simultaneous with the filing of its November 30, 2016 motion to stay in the trial court, NCCI also filed its motion to stay in this Court. While the OIR and the Commissioner joined in the motion to stay filed with the trial court, they have not joined NCCI's efforts to obtain a stay from this Court. To the extent that the OIR and the Commissioner have not joined in NCCI's motions to stay in this Court because they continue to take the position that they remain entitled to an automatic stay despite the trial court's vacating of such stay, Appellee hereby seeks to confirm the trial court's vacating of stay for the reasons set forth herein.

III. NCCI Has Not, And Cannot, Make The Showing Necessary To Obtain A Stay From This Court

This Court should not stay the Final Judgment because NCCI has not, and cannot possibly, make the showing necessary to obtain a stay.[2] To stay a trial court's

[2] Notably, Appellee's motion does not even cite the rule upon which it relies for the relief requested. Rule 9.300 of the Florida Rules of Appellate Procedure

order, this Court requires that, "[a] party seeking to stay the lower tribunal order pending appeal should demonstrate a likelihood of prevailing on appeal, irreparable harm to movant if the motion is not granted, or a showing that a stay would be in the public interest." *Lampert-Sacher v. Sacher*, 120 So. 3d 667, 668 (Fla. 1st DCA 2013) (*citing White Const. Co., Inc. v. Dep't of Transp.*, 526 So. 2d 998 (Fla. 1st DCA 1988)).[3] Appellant cannot satisfy any of these prongs and, as such, the request for a stay must be denied.

a. *NCCI Does Not Have A Likelihood Of Prevailing On Appeal*

For the many factual reasons and legal conclusions detailed in the trial court's 73-page Final Judgment, which are adopted and incorporated herein, NCCI does not have a likelihood of prevailing on appeal.

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requires that, "The motion shall state the grounds on which it is based, the relief sought, argument in support thereof, and appropriate citations of authority." The motion does not cite any rule, statute, or case that authorizes a stay.

[3] Moreover, the threshold should be even higher considering that the trial court has already issued an order denying NCCI's motion for stay pending appeal. Indeed, where a stay has been denied, a movant must demonstrate to an appellate court that the trial court *abused its discretion* in denying the stay. *Lampert-Sacher v. Sacher*, 120 So. 3d 667, 668 (Fla. 1st DCA 2013) ("Accordingly, we find no abuse of discretion and affirm the order of the trial court denying a stay.") (*citing Polar Ice Cream & Creamery v. Andrews*, 159 So. 2d 672 (Fla. 1st DCA 1964)); *see also Tampa Sports Auth.*, 914 So. 2d at 1077 ("[W]hen deciding the stay issue our understanding of the facts is grounded in the traditional appellate principle that must apply throughout the appeal-that is, the order on appeal is presumed correct unless or until the appellant demonstrates otherwise."). NCCI could not possibly demonstrate that the trial court abused its discretion in denying the stay.

The trial court's detailed factual findings are entitled to deference,[4] and are fully supported by the record evidence set forth in detail in the Final Judgment. For instance, central to the trial court's ruling is the following conclusion:

> Because the multiple non-public, secret meetings held by NCCI internally and with the OIR before the August 16, 2016 public hearing and NCCI's further violation of the Sunshine Laws after the August 16, 2016 public hearing violate Florida's Sunshine Law, the 14.5% rate increase order and the underlying amended rate filing are void *ab initio;* the increase shall not take effect on December 1, 2016. Similarly, the original Castellanos rate filing and the post-Westphal amended rate filing are null and void, *ab initio.*

(Final Judgment, pp. 70-71). The factual evidence relating to these impermissible meetings is described in detail over the course of nearly *thirty* (30) pages of the Final Judgment. (*See* Final Judgment, pp. 26-55).

Moreover, the trial court's conclusions of law are fully supported by bedrock, binding legal principles, which are set forth in detail in the Final Judgment. Significantly, the trial court relied on fundamental principles of Florida law, including, *inter alia*, the Florida Constitution, principles of open government including the Sunshine Law and longstanding, well-respected Florida Supreme Court decisions. (*See* Final Judgment, pp. 22-26, "Binding Legal Principles"). The Final Judgment contains over ten (10) well-reasoned, detailed findings of fact and

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[4] *See Van v. Schmidt*, 122 So. 3d 243, 258 (Fla. 2013) ("[T]rial court's … findings of facts and determinations of credibility are [] entitled to deference because of the trial court's superior vantage point of having been present during the entire trial.").

conclusions of law, which definitively establish numerous violations of Florida constitutional and statutory law on the part of the Appellants. (*See* Final Judgment, pp. 55-70).

In light of the trial court's well-reasoned ruling based on ironclad legal principles, NCCI does not have a likelihood of prevailing on appeal.

b. *NCCI Cannot Show Irreparable Harm; To The Contrary, Appellee And The Public Will Suffer Irreparable Harm If The Stay Is Granted*

NCCI has not, and cannot, show that it will suffer irreparable harm. Put simply, none of the irreparable harm alleged by NCCI (namely, a purported threat and losses to insurers or the so-called "market as a whole") (Nov. 30th Motion to Stay, ¶¶ 6-8) has any factual support whatsoever in NCCI's motion, let alone anywhere in the record. NCCI did not submit an affidavit in support of its request for relief or verify its motion.

NCCI's entirely unsupported allegations should not – and cannot – possibly serve as grounds for relief. *See, e.g., Poston v. Wiggins*, 112 So. 3d 783, 786 (Fla. 1st DCA 2013) (rejecting argument of irreparable harm as speculative); *Taylor v. TGI Friday's, Inc.*, 16 So. 3d 312, 313 (Fla. 1st DCA 2009) (declining to review order by certiorari where irreparable harm was condition precedent and no evidence in the record established such harm); *Snibbe v. Napoleonic Soc'y of Am., Inc.*, 682 So. 2d 568, 570 (Fla. 2d DCA 1996) (stating that an order granting a temporary injunction must do more than parrot back each tine of the four-prong test)).

Unsupported legal argument cannot somehow serve as a substitute for facts and evidence. *See Geralds v. State*, 111 So. 3d 778, 795 n.16 (Fla. 2010) ("[I]t isaxiomatic that the arguments of counsel are not evidence.") (citation omitted).[5] Without evidence, this Court cannot evaluate the need for a stay.

While the Court's inquiry may end with the complete lack of evidence of any irreparable harm demonstrated by NCCI, it nonetheless bears mentioning that any purported claims of harm to NCCI are further dispelled by the notion that NCCI is not even an insurer. NCCI does not issue insurance policies that would be affected by the Final Judgment, and its member organizations, which do issue policies, are not parties to this action. Those member organizations have not intervened, and NCCI has not made any showing by affidavit or any other record evidence of irreparable harm to any entity.[6] Moreover, insurers do not have to utilize NCCI as

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[5] *United Prop. & Cas. Ins. Co. v. Concepcion*, 83 So. 3d 908, 909 (Fla. 3d DCA 2012) ("The argument of counsel . . . does not constitute evidence.") (citing *Leon Shaffer Golnick Advert., Inc. v. Cedar*, 423 So. 2d 1015, 1016-17 (Fla. 4th DCA 1982) ("[A]ttorneys[']. . . unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations; and [an appellate] court cannot so consider them on review of the record. If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.").

[6] Because the member organizations are not parties to this action, NCCI's contention that those member organizations can simply be directed to refund the increased premiums to policyholders if the Final Judgment is affirmed (Nov. 30th Motion to Stay, ¶ 8) lacks evidentiary support.

a proxy to make their rate filings; thus, they could avoid any purported "harm" by now making their own rate filings.[7] *See* Fla. Stat. § 627.091.

Moreover, there is no support in the record for the proposition that additional premiums could somehow be refunded to policyholders if the trial court's order is affirmed on appeal. (*See* Nov. 30th Motion to Stay, ¶ 8). Certainly, Appellant cannot speak for the insurers across Florida that would be issuing those refunds and who would have to bear the untenable burden of doing so.

Additionally, contrary to NCCI's contention (Nov. 30th Motion to Stay, ¶ 10), transmission of documents pursuant to the terms of the Final Judgment will not cause irreparable harm as these documents are *not* confidential; instead, they are public documents that must be produced to the public.[8] Indeed, the trial court expressly held that NCCI violated Florida's Public Records Act by withholding them. (Final Judgment, p. 58, ¶ 5) ("The totality of the evidence supports the contentions of plaintiff Fee that NCCI violated the statutes and withheld from him information to

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[7] Moreover, even assuming, *arguendo*, that the absence of a lack of stay impacts any entity in a negative fashion, any such impact is tempered by the fact that Appellee agrees to expedite the instant of the appeal.

[8] *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486 (Fla. 1st DCA 2011) to which NCCI cites (Nov. 30th Motion to Stay, ¶ 10) is entirely inapposite as it involved confidential trade secrets contained in documents in which the public did not have any interest. Notably, *Endicott* recognizes that "irreparable harm cannot be speculative, but must be real and ascertainable." *Endicott*, 81 So. 3d at 490.

which he was entitled pursuant to sections 627.291 and 119.07. The lack of full information to which Appellee Fee was entitled meant that neither he nor his actuary had the appropriate ability to meaningfully comment in the single public hearing that occurred."). The trial court further concluded that NCCI violated the Florida Government in the Sunshine Law because NCCI failed to produce the very records it is now required to produce. (Final Judgment, p. 64, ¶ 10(d)) ("As indicated above, the Sunshine Law violations relating to the original and amended rate filings were not cured by the August 16, 2016 public rate hearing because the needed, required information mandated by section 627.291 and 119.07(1), Florida Statutes continued to be withheld."). Permitting NCCI to continue to withhold these documents by virtue of a stay would allow NCCI to continue to violate the Sunshine Law.

As the trial court's ruling illuminates, the only true risk of irreparable harm under the circumstances is that which would be suffered by Appellee and the public were a stay to be granted. Indeed, where, as here, a violation of Florida's open government laws has occurred, irreparable harm to the public is presumed as a matter of law. Specifically, the Florida Supreme Court has stated that a, "[m]ere showing that the government in the sunshine law has been violated constitutes an irreparable

public injury so that the ordinance is void Ab initio." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974).[9]

Therefore, NCCI will not suffer irreparable harm and the Final Judgment should not be stayed. In fact, to ensure that *Appellee and the public* (not NCCI or the OIR) do not suffer irreparable harm, the stay must not be granted.

c. NCCI Cannot Show That A Stay Would Be In The Public Interest

Given that this action sought to enforce bedrock principles of Florida constitutional and statutory law, a stay of the trial court's ruling vindicating these principles would be entirely at odds with the public interest. Through this lawsuit, it has been established that significant violations of Florida's open government laws have occurred. The trial court's order seeks to remedy these violations by granting Appellee and the public access to the records and meetings to which they are entitled. On the other side of the coin, NCCI's contention that the failure to grant the stay would somehow disrupt the marketplace finds no support in any evidence in the record. To the contrary, the marketplace is served by access to the records and meetings at issue in this lawsuit.

[9] To state that Appellee cannot be harmed by a stay – which would permit ongoing violations of Florida constitutional and statutory law – is entirely incorrect. (Nov. 30th Motion to Stay, ¶ 9). First, the record establishes that Appellee is the owner of an entity that maintains a workers' compensation insurance policy. (Final Judgment, ¶ 41). Moreover, Appellee is a member of the public who has a right to participate in the public meetings and obtain the documents at issue in this action.

It also bears mentioning that, recognizing the importance of open government and the related public interest in preventing stays in public records/public meetings cases, the Florida Rules of Appellate Procedure expressly provide:

> (2) *Public Bodies; Public Officers.* The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; **provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases**. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

Fla. R. App. P. 9.310 (emphasis added). Through this Rule, the Florida Supreme Court recognized the public interest in open government and specifically carved out an exception limiting stays in these matters where, as here, public records and public meetings are involved, to 48 hours. A stay would essentially defeat the Florida Supreme Court's recognition of the importance of open government in this particular circumstance.

Thus, NCCI has not – and cannot – make any showing that the public interest would be served by granting the stay. As such, NCCI's Motion for Stay must be denied.

IV. This Court Must Also Deny The Stay Because It Would Impermissibly Defeat The Trial Court's Ruling

At the core of the trial court's ruling is the conclusion that the impermissible workers' compensation rate increase shall not go into effect. Any stay would impermissibly defeat this prohibitory injunction. *See City of Miami v. Cuban Vill-Age Co.*, 143 So. 2d 69, 70 (Fla. 3d DCA 1962) ("[I]t is generally held throughout the country that a supersedeas or stay of a final decree is not effective to prevent the operation of a prohibitory injunction…."); *see, e.g.*, *Shadid v. Hammond*, 315 P.3d 1008, 1013 (Okla. 2013) ("[G]enerally, prohibitory injunctions are not stayed during an appeal….") (citing Dobbs, Dan B., *Remedies* (West Publishing, 1973) pp. 105–106); *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.*, 238 Cal. App. 4th 259, 265, 2015 WL 3958296 (2d Dist. 2015) ("Injunction may grant both prohibitive and mandatory relief, and when it is of this dual character, and appeal is taken, such appeal will not stay prohibitive features of injunction…."); *State v. Town of Haverstraw*, 219 A.D.2d 64, 65–66, 641 N.Y.S.2d 879, 881 (1996) ("A prohibitory injunction… is one that operates to restrain the commission or continuance of an act and to prevent a threatened injury, thereby ordinarily having the effect of maintaining the status quo.").

Moreover, a stay would, in essence, permit illegal conduct on the part of Appellants. The Final Judgment prohibited the impermissibly set rate increase from going into effect. (*See* Final Judgment, pp. 70-71, ¶ 1). This aspect of the trial

court's order did not mandate that either NCCI or the OIR take any action, but instead only prohibited certain action from going forward.

A stay of any prohibitory order that seeks to enjoin unconstitutional conduct is entirely improper. Instructive on this point is *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076 (Fla. 2d DCA 2005). In that action, a professional football season ticket holder obtained a prohibitory preliminary injunction enjoining a public sports authority from conducting unconstitutional patdown searches of all persons attending Tampa Bay Buccaneer football games at Raymond James Stadium in Tampa, Florida. The sports authority appealed and claimed an automatic stay pursuant to Rule 9.310, of the Florida Rules of Appellate Procedure. In rejecting the stay, the court found that, although the sports authority's interest in preventing terrorists from carrying explosives into the stadium was great, "[i]f the stay were to remain in force during this appeal, [the ticket holder] would suffer definite, irreparable, and irremediable harm to his important constitutional interest each time the Buccaneers play at home." *Id.* at 1083.

By seeking a stay, NCCI asks this Court to make an unauthorized and unprecedented exception to the general rule that prohibitory injunctions are not stayed pending appeal as to allow its member insurers to ignore the Judgment and proceed as though the rate increase is in full effect. Indeed, issuing a stay and allowing the underlying rate increase (which resulted from the underlying Sunshine

Law violations) to take effect, effectively grants final relief to Appellants and authorizes the continued violations of the Florida Constitution and statutes.

Accordingly, this Court cannot grant the requested stay, which would in essence defeat the trial court's ruling and permit illegal conduct on the part of NCCI and the OIR to occur.

V. Motion to Expedite Proceedings

Appellee has no objection to NCCI's request to expedite these proceedings.

VI. Conclusion

For the foregoing reasons, NCCI's Emergency Motion for Stay Pending Appellate Review must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via email this 8th day of December, 2016 upon:

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