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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

CASE NO. 1D18-0687

REP. LARRY METZ, *et al.*,

Appellants,

v.

MAT MEDIA, LLC, and CHARLES "PAT' ROBERTS,

Appellees.

CORRECTED **REPLY BRIEF OF ALL APPELLANTS**

On Appeal from the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida

L.T. Case Nos. 2017-CA-2284, 2017-CA-2368

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ARGUMENT IN RESPONSE AND REBUTTAL

MAT Media falls short in all three of its arguments for why the House's subpoenas should not be enforced. First, MAT Media applies an incorrect and unduly restrictive interpretation of relevance to the House's investigative subpoenas. Relevance in an investigative context has a much broader meaning than it does in an evidentiary context. There can be no doubt that the House has the authority to investigate the VISIT FLORIDA contracts, and MAT Media's journals and ledgers pertaining to those contracts will assist in that investigation. A facial review of the subpoenas easily supports the conclusion that the demanded documents are not *wholly* unrelated to the House's investigation.

Second, MAT Media relies on inapposite discovery cases to support its contention that the trial court's *in camera* review properly balanced the House's need for the documents against MAT Media's "privacy" interests. The cases are inapposite because a court's authority to engage in balancing flows from its inherent power to control procedural matters like discovery. However, that authority cannot extend to controlling the conduct of legislative investigations, because the authority behind legislative subpoenas flows from article III of the Florida Constitution, rather than from article V. The judicial power over discovery, then, cannot operate to circumscribe this separate legislative subpoena authority.

Finally, MAT Media improperly relies on a judicially created corporate privacy right to argue against enforcement of the subpoenas. There, however, is not a single case that extends the *Florida Constitution's* privacy right beyond the text that establishes the right, which is expressly limited to natural persons. To the extent there are discovery cases that suggest a corporate right to privacy in financial documents, that right can be only a procedural right, enforceable only in the context of discovery. Because only the Legislature can create substantive rights, a court-created right to control discovery cannot operate to limit the scope of a statutorily authorized legislative subpoena.

At bottom, then, this is a separation of powers case. And it boils down to whether the judiciary can apply its procedural protections utilized in discovery to create substantive rights that limit the legislative authority to issue and enforce investigative subpoenas. It cannot. The trial court should not have utilized discovery procedures in its assessment of MAT Media's objections to the legislative subpoenas, which crossed the line separating judicial from legislative power.

A. "Relevance," as Applied in an Investigative Context, Is More Expansive and Permissive, and It Cannot Reasonably Be Argued That the Subpoenas Were *Wholly* Unrelated to the House Investigation.

The House subpoenas fit comfortably within the broader concept of relevance typically applied in the enforcement of investigative subpoenas, which effectively inquires whether a subpoena is *wholly* unrelated to an authorized investigative

purpose. By their express terms, the subpoenas were addressed specifically to publicly funded contracts and how they were procured and valued. Surely, the responsive documents will provide useful insight that will assist the committee in its investigative function, and the subpoenas are relevant in the investigative sense.

MAT Media incorrectly reads the House investigation to be limited "to the establishment of the contracts themselves." AB 21. And it argues for an unreasonable and unsupportable application of "pertinence" to the subpoenas. AB 21–25. A facial review of the subpoenas, however, reveals a direct connection to the broad legislative power that "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins v. United States*, 354 U.S. 178, 187 (1957), *quoted in Hagaman v. Andrews*, 232 So. 2d 1, 6 (Fla. 1970). That should end the matter.

As the House explained in its initial brief, and its complaint before that, the committee sought documents to gain insight into the quality of VISIT FLORIDA's procurement of programming like *Emeril's Florida*, pursuant to legislative authority to review how government is functioning and "to determine whether the public is receiving a *positive return on its investment*" in VISIT FLORIDA. § 288.904(4), Fla. Stat. (emphasis supplied); § 11.143(1), Fla. Stat.; *see* IB 3, 31–32; SR 2351. The subpoenas consistently reference the *Emeril's Florida* contracts.

Moreover, there is nothing in the record to support MAT Media's narrow assertion that the investigation did not include the "ultimate performance" of the contracts "or anything thereafter." AB 21. The subpoenas were issued as part of the committee's investigation into VISIT FLORIDA's contracting to spend public funds to produce television programs, as part of the committee's effort to "discover the integrity of such contracts and the quality of their procurement." R 114, 428, 1593; AB 21; *see also Fla. H.R. Jour.* 297 (Reg. Sess. 2018). And as MAT Media alleged in its pleading, the committee's investigation sought insight into how the costs that VISIT FLORIDA agreed to pay with public funds were developed and negotiated with MAT Media. R 98. To do this, the committee needed to understand how the quoted prices were developed "on the vendor's side" of the contracts as they were being negotiated with VISIT FLORIDA. R 98. In other words, included within the scope of understanding the quality of the *Emeril's Florida* procurement is a comparison of the quoted and negotiated price *prior* to the execution of the contracts with the actual costs and value of the product *subsequent* to the vendor's (here, MAT Media) performance.

MAT Media's argument in support of the trial court's substantive review of the responsive documents for relevance also misses the mark. AB 21–25. The argument applies an evidentiary standard of relevance, which is an overly exacting

and inoperative standard for investigative subpoenas. An inquiry into relevance regarding enforcement of an investigative subpoena is much more permissive.

It is true that there are times when "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). That was not the case here. The House subpoenas were specific in what they sought. On their face, they were limited to records relating to MAT Media's expenses incurred as part of its performance under the public contracts with VISIT FLORIDA.[1]

The trial court, of course, is not a "rubber stamp," and its function in considering enforcement of the House's subpoenas is "neither minor [nor] ministerial." *Cf. United States v. Markwood*, 48 F.3d 969, 979 (6th Cir. 1995) (considering enforcement of agency investigative demands for documents). But the inquiry should have been limited to examining whether the subpoenas and their enforcement were statutorily authorized, whether the information sought was "reasonably relevant" to the House's investigation, and whether the subpoena was too indefinite or an abuse of the court's process. *See Morton Salt*, 338 U.S. at 652; *Markwood*, 48 F.3d at 979. The examination should not have been a substantive

[1] Notably, the responsive documents are a discrete set that was easily obtainable. R 2165–69, 2173–74, 2180–87. *See also* IB 15–17. Those records were provided to the trial court under seal. R 1707–1950, 2206–07.

review by the trial court of the documents themselves to determine whether the committee really needed them. The trial court improperly substituted its judgment for the House committee's regarding how to conduct the legislative investigation.

The relevancy requirement instead should have been considered in broad terms, should not have been "especially constraining," and should have been "generously construed" to allow access "to virtually any material that might cast light" on the committee's inquiry into how VISIT FLORIDA priced the *Emeril's Florida* contracts. *Cf. EEOC v. Fed. Express Corp.*, 558 F.3d 842, 854 (9th Cir. 2009) (explaining that relevancy should be considered "in terms of the investigation rather than in terms of evidentiary relevance"). Put another way, the legislative subpoenas should have been enforced unless they were "plainly incompetent or irrelevant to any lawful purpose" of the committee. *Cf. Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

Relevance in the investigative context is even broad enough to include documents that would help the committee get a better overview of the topic being investigated so that it could craft additional requests. *Cf. Fed. Express Corp.*, 558 F.3d at 854. Likewise, documents are "directly relevant" to an investigation if they will help "better focus" the investigation. *Cf. EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 114 (4th Cir. 1997).

The House's subpoenas, then, should have been judged by a more permissive standard, one that gauged the "*potential* relevance to an ongoing investigation." *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984) (emphasis in original). The committee could "hardly be expected to know" whether the documents it sought would be relevant until it obtained those documents and reviewed them, so it should not have been "required to establish that the documents it [sought were] actually relevant in any technical, evidentiary sense." *Id.*

As MAT Media concedes, "legitimate legislative action is the ultimate objective and the prime justification for the inquiry." AB 19 (quoting *Gibson v. Fla. Legislative Investigation Comm.*, 108 So. 2d 729, 737 (Fla. 1959) (brackets omitted). "[A]ny inquiry must be pertinent to the subject of the applicable legislative inquiry." AB 19 (citing *Gibson* and *Hagaman*). That is indeed the case here.

The committee, of course, had the statutory authority to investigate VISIT FLORIDA, which spends millions of taxpayer dollars for the State. *See* §11.143(1), Fla. Stat. (authorizing legislative committees to continuously review "the performance of the functions of government"). A full understanding of that return on investment starts with a determination of whether VISIT FLORIDA negotiated a fair price with MAT Media for the production of the *Emeril's Florida* seasons at taxpayer expense. And that determination requires knowledge of the actual expenses associated with that production, which are available only from MAT Media's

journals and ledgers. The House subpoenas easily satisfied the question of relevance, as that term typically is applied, in the broad sense, to investigative subpoenas.[2]

B. The House Was Entitled to Judicial Enforcement of its Subpoenas, Which Were Facially Lawful. The Trial Court Erred By Engaging in a Balancing Test Used in Discovery to Limit That Enforcement.

MAT Media contends that the trial court had the authority to substantively weigh the relevance of the responsive documents against MAT Media's claim of confidentiality and privacy as part of an *in camera* review. AB 25–28. There is no substantive law that gave the trial court that authority. The authority for legislative subpoenas flows from a different source than the authority to administer discovery, so the trial court erred by applying court discovery procedures to enforcement of the House subpoenas.

The rules of court are the authority for the courts to order and control discovery, and the judicial power to adopt those rules flows from the Florida

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[2] The subpoenas were relevant for another reason. During the same legislative term, the committee considered and advanced legislation that would have required proposed contractors to include good faith estimates of gross profits to be earned under public contracts they were bidding for and required agencies to make written determinations of whether those estimates were excessive. R 1622–24, 1634; *see generally* R 1100–1198, 1595–1696. As the House explained to the trial court, the committee was trying to "assess whether there should be better procurement methodologies in place to obtain state tourism marketing services like those provided by MAT Media" and "whether the State can contract for programming like Emeril's Florida at a lower cost and in a more transparent way." R 1102.

Supreme Court's exclusive authority to "adopt rules for the practice and procedure in all courts." Art. V, § 2, Fla. Const. The Supreme Court explained that it "adopted discovery as part of our *procedural rules* to improve our system of justice." *Dodson v. Persell*, 390 So. 2d 704, 706 (Fla. 1980) (emphasis supplied).

Courts, then, possess "broad discretion in overseeing discovery, and protecting the parties that come before it." *Bush v. Schiavo*, 866 So. 2d 136, 138 (Fla. 2d DCA 2004) (internal quotation and citation omitted). As to issues pertaining to "parties, their counsel and the Court throughout the progress of the case" and to "the *method* of conducting litigation," the judiciary has exclusive authority. *DeLisle v. Crane Co.*, 258 So. 3d 1219, 1225 (Fla. 2018), *reh'g denied*, SC16-2182, 2018 WL 6433137 (Fla. Dec. 6, 2018) (emphasis supplied); *see also id.* at 1229 (invalidating legislative amendment to § 90.702 of the Florida Evidence Code because it "solely regulates the action of litigants in court proceedings").

The Florida Constitution's separation of powers keeps the Legislature from invading the exclusive province of the judiciary to control its own procedural matters. *See State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005) (explaining that "the constitution provides that powers constitutionally bestowed upon the courts may not be exercised by the Legislature"); *accord DeLisle*, 258 So. 3d at 1228.

At the same time, courts cannot invade the exclusive *legislative* province to make substantive law and create new rights. *See* Art. III, § 1, Fla. Const. (vesting

all "legislative power of the state" in the Legislature); *DeLisle*, 258 So. 3d at 1224 ("Generally, the Legislature has the power to enact substantive law while this Court has the power to enact procedural law."); *see also Boyd v. Becker*, 627 So. 2d 481, 484 (Fla. 1993) (observing that Florida Supreme Court's "exclusive rule-making authority . . . does not extend to substantive rights"). "Substantive law has been described as that which defines, creates, or regulates rights." *DeLisle*, 258 So. 3d at 1224.

For this reason, a trial court's consideration of a legislative subpoena differs from its administration of a typical civil suit. Statutory law limits the trial court's jurisdiction and discretion to consider the legislative subpoenas. *See* § 11.143(4)(b), Fla. Stat. (requiring trial court to direct production of "*all* documentary evidence" that "is lawfully demanded") (emphasis supplied). This limitation is a function of the difference between a legislative subpoena, which stems from the Legislature's constitutional investigative authority, *see* Art. III, § 5, Fla. Const., and a civil discovery demand in litigation, which stems from the courts' constitutional authority to procedurally control litigation, *see* Art. V, § 2, Fla. Const.

The trial court's only charge, then, was to review the subpoenas and determine whether they "lawfully demanded" MAT Media's journals and ledgers regarding VISIT FLORIDA's contracts for *Emeril's Florida*. As long as the subpoenaed documents related to a cognizable legislative investigation and did "not infringe on

constitutional rights of the person investigated," the subpoenas should have been deemed "permissible." *Petition of Graham*, 104 So. 2d 16, 18 (Fla. 1958).

Legislative committees draw their authority to subpoena documents, including confidential ones, from statute, not from a court rule. *See* § 11.143(3)(b), Fla. Stat. In turn, while discovery is within the courts' inherent power to control litigation within their jurisdiction, the independent legislative power to issue and enforce investigative subpoenas is not a discovery matter subject to that judicial control. The trial court, then, should not have gone further and treated enforcement of the legislative subpoenas as it would a typical discovery dispute involving confidential financial records.

Yet this is precisely what the trial court did in this case. Rather than just review the subpoenas for scope, it applied discovery procedures to create a new substantive privilege that trumped the House's separate substantive entitlement to the documents. For this reason, MAT Media has cases to cite that seem to support the trial court's *in camera* review. *See* AB 26–27 (citing *Westco, Inc. v. Scott Lewis Gardening & Trimming, Inc.*, 26 So. 3d 620, 622 (Fla. 4th DCA 2009) and *Muller v. Wal-Mart Stores, Inc.*, 164 So. 3d 748, 750 (Fla. 2d DCA 2015)). But they illustrate the separation of powers problem that occurred here.

In *Westco*, for instance, a litigant in a pending lawsuit subpoenaed a non-party for an asset purchase agreement. *Westco*, 26 So. 3d at 621. The court noted the test

for "[w]hen confidential information is sought from a non-party," which is a determination of "whether the requesting party establishes a need for the information that outweighs the privacy rights of the non-party." *Id.* at 622. *Muller* applied a similar balancing approach to impose a judicial limitation on discovery where an individual asserts a constitutional right to privacy. *See Muller*, 164 So. 3d at 750; *see also Bianchi & Cecchi Services, Inc. v. Navalimpianti USA, Inc.*, 159 So. 3d 980, 982 (Fla. 3d DCA 2015).

These cases came out the way they did because "Florida's discovery rules grant the trial judge authority to control the manner and means of discovery in all of its aspects so as to protect against harassment, undue invasion of one's right to privacy, and other offensive results." *Springer v. Greer*, 341 So. 2d 212, 214 (Fla. 4th DCA 1976); *see also S. Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. 3d DCA 1985), *approved*, 500 So. 2d 533 (Fla. 1987). For good cause shown, a court "may make any order necessary to protect the interests set out *in the rules*," and the court must "balance the competing interests that would be served by the granting or denying of discovery" when determining whether there is "good cause." *Rasmussen*, 467 So. 2d at 801 (emphasis supplied).

These judicial principles, applied in the context of court-controlled discovery, have no place in a proceeding to enforce a legislative subpoena. The trial court's application of these principles to the House subpoenas breached the separation of

powers and effectively, and improperly, added to the substantive law governing their enforcement. The courts' procedural power to control discovery does not extend to the Legislature's separate subpoena power, which independently flows from the Florida Constitution. Out of respect for this separation of powers, the trial court should have limited its inquiry to ensuring that subpoenas were within the legislative authority and did not infringe on any constitutional rights.

C. The Courts Do Not Have Authority to Create a Substantive Right to Privacy for Corporate Entities that Would Limit the House's Statutory Entitlement to Confidential Documents.

Both the trial court and MAT Media presume that MAT Media has a privacy right. As the House explains in its principal brief, though, corporate entities like MAT Media do not have a constitutionally guaranteed right to privacy. IB 42. Only natural persons hold that right in Florida. *See* Art. I, § 23, Fla. Const. (guaranteeing right of privacy to "[e]very natural person"); *see also Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002); *Parnell v. St. Johns Cty.*, 603 So. 2d 56, 57 (Fla. 5th DCA 1992).

MAT Media fails to cite any Florida case that interprets the plain language of article I, section 23, of the Florida Constitution differently. MAT Media instead turns to a single judicial discovery case as support for its contention that a corporate right to privacy exists. AB 30 (citing *Chetu, Inc. v. KO Gaming, Inc.*, Case No. 4D18-1551, 44 Fla. L. Weekly D210, 2019 WL 140991, at *1 (Fla. 4th DCA Jan. 9, 2019)).

This case is inapposite. It, at best, *alluded* to a company's "privacy" interest in its "personal financial information." *Id.* Any recognition of a corporate privacy interest, though, was in the limited context of review of a discovery order as part of a balance of that interest with relevance. *See id.* ("That balance allows discovery relating to personal financial information when it is relevant to the pending action."). But in any event, as already explained above, court rules governing discovery cannot create substantive rights, and any judicial recognition of such a privacy interest cannot operate against enforcement of legislative subpoenas.

The trial court erred, then, by creating a substantive right that limits the statutory subpoena authority of a legislative committee, which includes the power to obtain confidential documents. *See* § 11.143(3)(b), Fla. Stat. This is not to say that MAT Media has no cognizable trade secret claim. But the Legislature, not the Constitution, determined that those documents were confidential. *See* §§ 688.002, 688.003, 688.004, Fla. Stat.; *see also* § 815.045, Fla. Stat. (declaring trade secrets in public records to be confidential and exempt from disclosure); § 11.0431(2)(a), Fla. Stat. (rendering legislative records exempt from disclosure if they would be confidential or exempt if held by an agency under other statutory provisions). That statutory confidentiality, then, cannot preclude the House's statutory entitlement to confidential records under § 11.143(3)(b). *Cf. Seta Corp. of Boca, Inc. v. Fla. Dep't of Legal Affairs*¸756 So. 2d 1093, 1094 (Fla. 4th DCA 2000) (upholding order

requiring production of trade secret and financial information, which was demanded by the State and "not a competitor"); *see also* IB 48–49. There being no constitutional preclusion to the committee's obtaining those documents, and no substantive right against production that the trial court could create, the only inquiry as part of the *in camera* review that the trial court should have conducted was which outstanding documents should be protected from further disclosure upon production to the House, presumably pursuant to § 688.006, Fla. Stat., which outlines a process for maintaining the secrecy of produced trade secret documents.

* * *

The trial court's order should be reversed, the House's subpoenas should be enforced, and MAT Media should be ordered to produce to the House its financial records reflecting its *Emeril's Florida* costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February, 2019, a true copy of the foregoing reply brief was furnished to the Clerk of the Court through the Florida Courts eFiling Portal, which shall serve a copy via e-mail to the counsel listed below, constituting compliance with the service requirements of Florida Rule of Judicial Administration 2.516(b), Florida Rule of Appellate Procedure 9.420(c), and this Court's Administrative Order 19-1:

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I HEREBY CERTIFY that the foregoing brief was generated by computer using Microsoft Word 2016 with Times New Roman 14-point font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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