Filing # 77581255 E-Filed 09/07/2018 11:56:52 AM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-886

REX E. RUSSO,

Petitioner,

vs.

**MARY CAY BLANKS,
CLERK OF THE THIRD DISTRICT
COURT OF APPEAL, IN AND FOR
THE STATE OF FLORIDA,**

Respondent.

PETITIONER'S REPLY TO THE CLERK'S RESPONSE

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REBUTTAL TO LEGAL ARGUMENT

Neither the Petitioner nor any other resident of the State of Florida is obligated to give reason for exercising their constitutional right to receive production of public records. *Fla. Const., Art. I, Sec. 24; Fla. R. Jud. Admin. 2.420.* Petitioner's motive is irrelevant. *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871, 875 (Fla. 2d DCA 2004) ("the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law") (request made under analogous Fla. Stat., Ch. 119); see also *Warden v. Bennett*, 340 So. 2d 977, 978 (Fla. 2d DCA 1976) (fact that requester "intended to use [the public records] to help her in her labor organizing was irrelevant") (request made under analogous Fla. Stat. Ch. 119). With no applicable exemption nor compelling reason to keep the records from the public's view, the Clerk's obligation to produce the records is as clear, strong, and unambiguous as it gets.

In response to the petition, no reasoned argument was presented by the Clerk for asserting that the court's records disclosing the assignment of a case to a panel, or a panel to a case, falls within the exemption at Florida Rules of Judicial Administration, Rule 2.420(c)(1). At best, the Clerk implies that such records are "part of the court's judicial decision - making process utilized in disposing of cases and controversies ..." See, *Fla. R. Jud. Admin. 2.420(c)(1)*. [Response p-6]. However, in making that implication the Clerk muddled the Petitioner's very specific requests for records disclosing how the panel came into existence, as well as who had

a hand in selecting the members of the panel, with records that are clearly within the exemption — and which accordingly were not requested (i.e. internal memorandum regarding the merits of the case, drafts of opinions, court conference records, record of votes by the panel). If exempted matter is intertwined with requested non-exempted matter, then the exempted matter may be redacted. *Fla. R. Jud. Admin. 2.420(b)(4)* ("To the extent reasonably practicable, restriction of access to confidential information shall be implemented in a manner that does not restrict access to any portion of the record that is not confidential"). But, the non-exempted matter must be produced to Petitioner. And, the complete record should be produced to this court for verification that the Clerk redacted only exempted matter. *Walton v. Dugger*, 634 So. 2d 1059, 1061–62 (Fla. 1993) ("When, as in the instant case, certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the documents ... for an *in camera* inspection.") (request made under analogous Fla. Stat., Ch. 119).

By implying that the manner in which judges are selected for a panel is exempt because that process is in furtherance of the "court's judicial **decision - making** process utilized in disposing of cases and controversies ..." [bold emphasis added], the Clerk, in essence, admitted that the assignment of panel members is not random — but rather deliberate. Attempting to utilize Rule 2.240(c) as a shield to prevent disclosure of such deliberate action that had, or at least potentially had, an affect on the final

outcome is patently wrong. Deliberate placement of panel members affects the right of litigants to a truly fair and impartial tribunal. Judicial assignments should never have anything to do with the course of determining the outcome of a case — which is the very reason for random assignments. Random judicial assignments do not merit protection under Rule 2.240(c), and neither should deliberate assignments under the guise of "judicial decision - making." Furthermore, no argument was presented by the Clerk to support such conduct. Instead, the Clerk misdirects this court by asserting that non-requested public records are readily available to the Petitioner.

REBUTTAL OF FACTUAL IMPLICATIONS

Since the Clerk attempts to discredit the Petitioner by casting him as nothing more than a disgruntled lawyer, Petitioner will respond to that implication in the hope of bringing to light his altruistic intentions.

> **"Sometimes people don't want to hear the truth because they don't want their illusions destroyed."** — Friedrich Nietzsche.

In the first set of cases (3D15-1437 and 3D15-2330), the Clerk admits that the original panel did not hear the case because, after consolidation of the cases, oral argument was rescheduled to "a date which had previously been assigned to a different panel of Judges." [Response p-6 and p-13]. That raises far more questions than it answers. Why reassign the panel? Why not have the originally assigned merit panel sit for oral argument on the "continued to" date regardless of what panel was assigned to that week on the court's master calendar? By October 29, 2015, had not

the originally assigned panel already commenced review of the briefs and analysis of the arguments in advance of the November 9, 2015 oral argument date? Had not the judge primarily assigned to that panel already commenced preparation of a summary? Is it not a frequent occurrence for the originally assigned panel to hear oral argument on a reset week even though the reset week was assigned to a different panel? Does consolidation not always result in the later case consolidating into the first filed case? When were the judges on the originally assigned panel assigned the case? If the case was randomly assigned by the Clerk to the originally assigned panel, when did the chief judge and the other judges first learn of such assignment? Was the "continued to" date randomly chosen by the Clerk; intentionally chosen by the chief judge; or suggested by someone else? Who decided that the panel for the "continued to" week of oral argument (a panel already known to the court) should hear the case instead of the original merit panel? What judge was assigned "as the judge primarily responsible" on the initial merit panel? Who assigned Judge Rothenberg "as the judge primarily responsible" on the ultimate merit panel?[1] When was that assignment

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[1] The assigned primary judge has a position of potentially greater influence because case summaries are only prepared (or at least only required to be prepared) by the clerks for the assigned "primary judge" [Ax 34, 3D IOPs 9] who are also responsible for preparing and circulating a summary to the other judges on the panel [Ax 25, 3D IOPs 11; Ax 61 to 65, 3D IOPs Appendix B "Preparation of Case Summaries"] at least ten days prior to the date set for oral argument. A case summary should have been ready for distribution to the original merit panel the very next day after the consolidation order (i.e. on October 30, 2015). It would be interesting to see that summary and compare it with any later summary.

made? The requested public records would at least disclose the answers to some of these questions.

In the third case (3D17-0001)[2] the Clerk states that Judge Suarez exchanged his assignment for the day with Judge Luck, as allowed by the court's internal operating procedures. [Response p-11]. But again, more questions are raised than answered. When was Judge Suarez originally assigned to the panel? If the case was randomly assigned by the Clerk of the court to the originally assigned panel, when did the chief judge and the other judges first learn of such assignment? Did Judge Luck approach Judge Suarez with a request to change dates, or did Judge Suarez approach Judge Luck? When was the request made to exchange dates? What was the stated reason for the necessity of the exchange? When was the case assigned to the panel for the reset date? Who assigned the case to the panel for the reset date? Was the assignment random or deliberate? Who assigned Judge Luck "as the judge primarily responsible?" Was the assignment of Judge Luck "as the judge primarily responsible" random or deliberate? Had Judge Suarez previously been assigned the duty "as the judge primarily responsible" before he traded assignments with Judge Luck? If so,

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[2] Actually, this case is related to a lagging fourth case (3D17-1254) that appealed the trial court's judgment awarding sanctions under Florida Statute §57.105 in the approximately amount of $40,000 (severally entered against Petitioner and his clients the Bennetts). The same panel that was assigned to case 3D17-0001 heard the appeal from the attorney fee award, although a motion to consolidate the two cases was in that instance denied. Thereafter, the district court entered a *per curiam* affirmation, without oral argument, thus precluding any chance of discretionary review by this court.

when was it made known to Judge Suarez, Judge Luck, and to the other judges of the district court, that Judge Suarez had been assigned "as the judge primarily responsible?" Judge Luck could have traded with Judge Suarez in the morning and the case could have been assigned to the panel by the Chief Judge (or another judge in her place) in the afternoon if it had not already been, and that would have been in step with the court's explanation of the order in which such substitutions occur — so, the Clerk's explanation does nothing to allay concerns. The requested public records would at least disclose the answers to some of these questions.

> **"Liberty cannot be preserved without a general knowledge among the people, who have a right and a desire to know."** — John Adams

The Clerk is wrong about the Petitioner's thinking process and the order in which the Petitioner's concerns arose. Over the years Petitioner has had other adverse decisions reached by appellate courts, a few of which caused Petitioner to ponder the reasoning (or lack thereof) in an appellate court's decision — and to have some concerns. However, Petitioner was never more concerned than in the cases mentioned herein. These cases relied upon laws favoring the homeowners that required the court to liberally interpret the law in favor of the homeowners.

Petitioner's first concern with these sets of cases did not arise after the opinions were entered. Petitioner's concerns did not arise from any knowledge of changes in the panel members. In fact, Petitioner was unaware that there had been a change in the panel members assigned to the first set of cases (3D15-1437 and 3D15-2330) prior

to the Clerk's response[3] — but his eventual concerns caused him to ponder that possibility. In the third case (3D17-0001), Petitioner never thought to look and see if there was a change in the panel members for oral arguments, by comparing the panel for that day with the panels hearing oral argument later in the week, because Petitioner had no idea that panels were generally assigned for an entire week until he received and reviewed the district court's IOPs — but his concerns did cause him to ponder whether the panel was randomly chosen.

Petitioner's concerns first arose at oral argument on the first set of cases (3D15-1437 and 3D15-2330). To the best of undersigned counsel' recollection, some of the first words from the panel came from Judge Fernandez who asked something along the lines of whether the Mirzataheris (the homeowners) also wanted a free house.[4]

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[3] In keeping with the district court's internal operating procedures, the members of the panel scheduled to hear the November 9, 2015 oral argument would not have been published on the district court's website until November 2, 2015.

[4] The court will not find Judge Fernandez's first question in the archived audio recording of the oral argument because it was apparently redacted out, along with another statement, in which, to the best of Petitioner's recollection Judge Fernandez essentially assured opposing counsel during the rebuttal "not to worry". In the third case (17-0001) brought by the Bennetts, once again portions appear to be missing. From the best recollection of the Petitioner, Judge Fernandez asked opposing counsel something to the effect of "What took you so long? " To which opposing counsel responded along the lines of "These things take time." Early in the oral argument on case 17-0001 Judge Luck stated something to the effect that he did not understand "what attorney's fees had to do with" the need to file a separate appeal to which Judge Salter replied, while looking at Petitioner who was concerned with his allotted time, "I will explain it to them later, go ahead with your argument." But, those statements were also apparently edited out, as were, to the

The thought that immediately came to Petitioner's mind was that Judge Fernandez's thinking process, in the wake of the November 12, 2015 *en banc* oral argument in *Beauvais II*, was predisposed to bias against homeowners. There was considerable chatter in the legal community following the panel's decision in *Beauvais I*, that was heightened following the district court's decision to rehear the case *en banc*, and heightened yet again following *en banc* oral argument in *Beauvais II*. *Deutsche Bank Trust Co. v. Beauvais*, 188 So. 3d 938 (Fla. 3d DCA, 2016) (*Beauvais II*) (Judge Scales wrote the dissent to which Judges Shepherd, Salter and Emas concurred);[5] *Deutsche Bank Trust Co. v. Beauvais*, 40 Fla. L. Weekly D1, 2014 WL 7156961 (Fla. 3d DCA, Dec. 17, 2014) (*Beauvais I*) (Before Judges Shepherd, Emas and Scales).

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best of counsel's recollection his reminder to the panel during rebuttal that the monthly payment disclosure letter contained forged signatures of the Bennetts. Petitioner believes there may be other omissions within the archived oral arguments and that editing of the archived oral argument on the first set of cases was done by different personnel than the Bennett's case because the transitions on the recording of the Mirzataheris' oral argument are exceptionally smooth and more professional especially when compared to the recording in the Bennett's case. Clearly, the audio/video recordings are not entirely reliable and should not have been published as though they are. Petitioner has made a records request for the Clerk to provide the "raw" recording.

[5] As members of the original merit panel for the first set of cases, Judges Scales and Salter were scheduled to hear oral argument on November 9, 2015 in the Mirzataheris' case (3D15-1437), while the *en banc* argument in *Beauvais* took place just three days later on November 12, 2015. One would think that opinions of the judges had already been shared at the time of the October 29, 2015 order rescheduling oral argument before a panel that did not include Judges Scales and Salter.

Petitioner considered that Judge Fernandez must believe that *Beauvais I* enticed homeowners to be emboldened to bring all sorts of cases seeking to stretch the law beyond where it should go and assumed that the Mirzataheris' case must have been such, even though the Mirzataheris' invoked a clear constitutional exemption that should have been liberally interpreted in their favor.[6]

In a broader sense, the requested public records encompass only two cases. The earlier case (3D17-0001 and 3D17-1254) entailed an action taken by homeowners invoking the Florida constitutional exemption from forced sale of their homestead (Mirzataheris' case). *Fla. Const., Art. X, Sec. 4.* The later case (3D15-1437 and 3D15-2330) entailed an action taken by homeowners defrauded by a forged federal Truth-in-Lending Act (TILA) disclosure (Bennetts' case). Proceedings under both TILA and those invoking the Florida homestead exemption against forced sale are to be liberally construed in favor of homeowners. But, neither set of homeowners experienced a liberal interpretation in their favor. To the contrary, the district court cited incorrect precedent in the homestead exemption case while ignoring the clear language of the constitutional exemption. In the Bennetts' case the district court

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[6] Petitioner also got a strong impression that Judge Fernandez (both cases) and perhaps Judge Salter (second case) had not read the briefs, or at least had not fully analyzed the briefs, and instead relied upon an internal memorandum leading them to present questions consistent with that memorandum while assimilating the oral argument in a skewed manner to accord with the presentation in that memorandum.

misconstrued the TILA statutes in odd fashion to favor the lending institution; against the Bennetts' contest, the district court accepted alleged facts not in the record; the district court implied facts against the homeowners although the homeowners were the non-prevailing party on summary judgment; the district court interpreted records contrary to the non-prevailing homeowners; the district court ignored clear issues of fact so as not to disrupt the summary judgment. In both cases the district court's opinion skewed facts, incorrectly stated or implied facts, omitted highly relevant facts, and stated legal analysis in a fashion that left little if any hope that this court could exercise its discretionary jurisdiction.

CONCLUSION

Whether any appeal taken resulted in success or not is irrelevant to the Petitioner's constitutional right to obtain the requested non-exempt public records maintained by the Clerk. Likewise, there is no requisite that Petitioner explain his reasons, beliefs, or intentions as a prerequisite to obtaining the non-exempt public records assigning the cases to the panel (or a panel to the cases). Should the court believe it nonetheless necessary, Petitioner has provided this court with plenty of reason to mandate the production of the requested public records.

Contrary to the argument of the Clerk, the Petitioner's concerns have not been allayed by what has been made known; rather, his concerns have been heightened. The Clerk's random assignment of sets of judges to "oral argument weeks" for the

year ahead is no indication that a case was randomly matched to a panel. Contrarily, the indication appears to be that the cases were not randomly assigned to the panels, but deliberately assigned. Production of the requested public records, redacted of any exemptible information, should be a simple duty for the Clerk to fulfill.

> **"The lady doth protest too much, methinks."** — from Hamlet, by William Shakespeare.

WHEREFORE, a writ of mandamus must issue compelling the Clerk to produce the requested public records, redacted of any exemptible matter, and to submit a non-redacted copy to this court to ascertain whether only exemptible matter was redacted.

CERTIFICATE OF SERVICE AND SIGNATURE OF COUNSEL

I HEREBY CERTIFY that a true and correct copy of the foregoing is being served via email to Respondents --- Mary Cay Blanks, Clerk of the Third District Court of Appeal, via email to BlanksM@flcourts.org; and to Leslie B. Rothenberg, Chief Judge of the Third District Court of Appeal, by service via email to RothenbL@flcourts.org --- on September 7, 2018.

/s/

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