

IN THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT, STATE OF FLORIDA

CITY OF ST. PETERSBURG,

Appellant/Defendant,

Case No. 2D16-3361

L.T. No. 522013CA010801

v.

BRUCE WRIGHT,

Appellee/Cross-Appellant/Plaintiff.

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BRIEF OF AMICUS CURIAE  
FIRST AMENDMENT FOUNDATION, INC.  
IN SUPPORT OF BRUCE WRIGHT

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

THE HONORABLE KATHLEEN T. HESSINGER PRESIDING

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WEBER, CRABB & WEIN, P.A.

Paul M. Crochet, Esq.

FBN: 111942

5999 Central Ave., Suite 203

St. Petersburg, FL 33710

Telephone: (727) 828-9919

Fax: (941) 866-7323

[paul.crochet@webercrabb.com](mailto:paul.crochet@webercrabb.com)

[barbara.hall@webercrabb.com](mailto:barbara.hall@webercrabb.com)

Attorneys for Amicus Curiae

First Amendment Foundation, Inc.

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**CITATIONS TO AUTHORITY**

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*Wood v. Marston*,  
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## **STATEMENT OF IDENTITY AND INTEREST**

The FIRST AMENDMENT FOUNDATION ("Foundation") is a Florida not-for-profit corporation qualified as a public charity under Section 501(c)(3) of the Internal Revenue Code. It was founded in 1984 for the purpose of protecting and advancing the public's constitutional right to open government by providing education and training, advocating open government before the courts of Florida, and disseminating public information on the public's right of access to records and meetings of government.

The Foundation is Florida's leading public interest organization dedicated to defending and advocating the public right to open government. It represents more than 200 members, including most of Florida's daily newspapers, other media organizations, First Amendment and media law attorneys, students, private citizens and public interest organizations. The Foundation has filed numerous *amicus curiae* briefs in the Florida courts relating to Florida's Government in the Sunshine Law (the "Sunshine Law"). The Foundation provides education and training, monitors open records and meetings laws, and assists citizens and journalists in obtaining access to government.

The Foundation is interested in this case because it involves questions relating to the scope of the exemption granted by Florida Statutes, Section 286.011(8) (the "Shade Exemption"), which allows a collegial body covered by the

Sunshine Law to hold a closed-door meeting for the purpose of discussing litigation settlement negotiations or strategy sessions regarding litigation expenses. The Foundation proposes to argue that the scope of allowable discussions under the Shade Exemption does not include the substance of a proposed ordinance amendment and does not allow local government to use the Shade Exemption to shield issues that otherwise be required to be discussed in the sunshine.

### **SUMMARY OF THE ARGUMENT**

The issues discussed in the CITY OF ST. PETERSBURG's (the "City") closed meeting was not confined to settlement negotiations or strategy sessions related to litigation expenditures and therefore breached the strict limits of the Shade Exemption under Florida Statutes, § 296.011(8)(b). Consequently these meetings violated the Sunshine law. The City's discussion in the closed meeting involved creating an amendment to the trespass ordinance to render the underlying lawsuit moot. Although the City began its shade meeting by discussing an issue relating to limiting the expenditure of attorney's fees, the shade meeting later took a turn in the wrong direction. The City frequently mentioned it needed to amend the disputed "trespass ordinance" so that it can begin enforcing the ordinance again to prevent crime from occurring on public property. Even further, the City discussed how its amended ordinance compared to other cities that had similar ordinances. The City also discussed whether the issue which prompted the shade

meeting, the Eleventh Circuit's ruling that the trespass ordinance did not provide enough procedural protection to challenge a citation, was apparent in other parts of the City's code not related to the underlying litigation.

This Court has the opportunity to prevent an expansion of a very narrow Shade Exemption to the Sunshine Law. If a city wishes to adopt new legislation to reset the table and possibly moot a pending lawsuit, the City should conduct that legislation in open public meetings complying with the Sunshine Law. Ruling that the City's discussions in this case were confined to the proper scope of the Shade Exemption would have the consequence of allowing other cities to use the Shade Exemption to block the public from issues which would otherwise be required to be in the sunshine.

## **ARGUMENT**

### **I. The Competing Interests of Open Government and Governmental Settlement Discussions**

The purpose of the Sunshine Law is the protection of the public's right to be present and to be heard during all phases of enactments by governmental boards and commissions, *School Bd. of Duval Cty. v. Florida Publishing Co.*, 670 So. 2d 99, 101 (Fla. 1st DCA 1996), and "to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *See Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 860 (Fla.

3d DCA 1994) (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla.1974)). As such, Florida requires governmental entities to conduct their business at open, public meetings, “in the sunshine.” *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998). Any meeting in which official acts are to be taken are to be open to the public, and no “resolution, rule or formal action shall be considered binding except as taken or made at such meeting.” *Id.*

At an early point, the Florida Supreme Court recognized that such enactment was even at the expense of the attorney-client privilege. See *Neu v. Miami Herald Publishing Co.*, 462 So. 2d 821 (Fla. 1985) (recognizing that the Legislature had waived the attorney-client privilege for public bodies). Accordingly, there was no right to private consultation with counsel for public bodies under the Sunshine Law.

Against this backdrop, in 1993 the Legislature enacted an exemption to the law to permit counsel to obtain non-public advice from public bodies concerning “settlement negotiations” and “strategy related to litigation expenditures.” See Chapter 93-232, § 1, Laws of Florida, which added subsection (8) to s. 286.011. While the exemption permitted certain non-public conversations between a public body and its counsel on pending litigation, the limitations imposed were created with the specific intention that they be narrower than a private party’s unconditional right to privileged conversations with counsel. A.G. Op. 97-61. The

statute requires that “[t]he subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.” Fla. Stat. §286.011(8). As noted by the court in *Zorc*, the legislative history describes the narrow scope of the exemption as “an attempt to provide a means for government to meet behind closed doors to accomplish goals out of the sunshine. This act simply provides a governmental entity’s attorney an opportunity to receive necessary direction and information from the governmental entity.” *Zorc*, 722 So. 2d at 897-898 (quoting Staff of Fla.H.R.Comm. on Gov’t Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement at 3). Discussion in the closed meeting must "be confined to settlement negotiations or strategy sessions related to litigation expenses." Fla. Stat. § 286.011 (8)(b).

## **II. The City’s Catalyst Theory Justification Expands the Shade Meeting Exemption Such That Substantive Discussions and Secret Intentions Regarding Ordinance Amendments Can be Shielded From the Public**

Although the City stated that the purpose of the shade meeting was to discuss enacting new legislation to moot the underlying lawsuit and potentially reduce its exposure to an attorney’s fee award, the transcript of the shade meeting reveals that the true purpose of discussing the amendment was so that the City can begin to enforce the trespass ordinance again. The City’s argument concerning the “catalyst theory” of awarding attorney’s fees, if accepted by this Court, has the potential to allow cities across Florida to amend and propose ordinances outside of the public’s

knowledge. A city's secret intentions in adopting or amending an ordinance then would be shielded from the public view.

There is no doubt that a main purpose of amending the trespass ordinance was so that the City can begin enforcing the ordinance to prevent crime from occurring on City property. One of the attorneys present for the shade meeting even stated, "**Forget the lawsuit.** It's a good idea. We need to get back out and enforce 20-30. The chief of police is very eager to have us do that." (R. 40; Tr. 16, lines 21-25) (emphasis supplied). Attorney Patner mentioned how he told the chief of police, the manager of the City's recreation and park facilities, and other facility managers that they should not enforce the current ordinance. (R. 38; Tr. 8, lines 15-22). Attorney Patner went on to tell the commission that he thought amending the ordinance was good idea "so we can enforce 20-30 going forward." (R. 39; Tr. 10, lines 4-6). Later on in the shade meeting, Mr. Kornell went on to discuss the issue of people committing crimes on City property and how, if the City couldn't enforce the trespass ordinance, there's "going to be a big problem." (R. 43; Tr. 27, lines 5-16). Attorney Wolfe, noticing that the discussions were exceeding the scope of the exemption, stated "That's an enforcement problem. And really we're getting away from what you're allowed to speak about." (R. 43; Tr. 28, lines 5-7).

Despite this warning, enforcement of the trespass ordinance was still a major topic of discussion. Mr. Patner discussed how police officers are given

photographs of previous violators of the trespass ordinance to help their enforcement efforts. (R. 43; Tr. 29, lines 19-22). Mr. Patner also discussed issues relating to enforcement issues concerning a violator's presence at right of ways such as bus stops. (R. 44; Tr. 30, lines 5-20). And finally, in response to a question regarding what will happen if the amended ordinance isn't passed, Mr. Patner stated that "If you-all don't pass it, then we can't enforce 20-30. Like Counselor Kornell was saying, if somebody is smoking pot out in front of the rec center, you can charge them with that but you're not going to trespass." (R. 44; Tr. 31, lines 2-6).

On top of the enforcement issue, the City also discussed whether other ordinances in the City's code suffered from the same defects as the previous version of the trespass ordinance. (R. 44; Tr. 31-33). As mentioned by BRUCE WRIGHT in his Answer Brief/Cross-Initial Brief, the City also discussed the mechanics of how the new amendment to the trespass ordinance would work. Further, the City also discussed how the amendment brought the City in line with other local governments in Florida with similar trespass ordinances. (R. 41; Tr. 21, lines 11-16) (R. 42; Tr. 23, lines 20-25).

None of these topics relate to either settling the underlying litigation or shielding the City from exposure to a large attorney's fee award. The fact the City may have discussed some a single issue appropriate for a shade meeting does not

somehow save the City from its violation. A similar issue was discussed in *Anderson v. City of St. Pete Beach*, 161 So. 3d 548 (Fla. 2d DCA 2014) where this Court found there to be a violation of the shade meeting exemption even when some discussions were within the confines of allowable discussions:

While some of the discussion at these meetings did in fact involve the costs associated with the pending litigation, by and large the meetings pertained to finding a way to readopt the comprehensive plan amendment that had been invalidated by the court and to avoid future litigation regarding the readopted amendment.

*Id.* at 553.

The Sunshine Law, being enacted for the public benefit, is interpreted most favorably to the public. *Board of Public Instr. of Broward Co. v. Doran*, 224 So. 2d 693, 699 (Fla. 1969). It is “broadly construed to effect its remedial and protective purpose,” *Wood v. Marston*, 442 So. 2d 934, 938 (Fla.1983), and all exemptions to the law must be narrowly construed. *Zorc*, 722 So. 2d at 897. There is no “substantial compliance” argument that can be made under the sunshine law. *City of Dennellon v. Aran*, 662 So. 2d 1026, 1027 (Fla. 5th DCA 1995).

Overall, a discussion of the need to begin enforcing the ordinance to clean up crime on government property does not help avoid attorney’s fees in pending litigation. A discussion of how police officers are enforcing the ordinance does not help avoid attorney’s fees in pending litigation. A comparison of the proposed ordinance to other city’s trespass ordinance does not help settle litigation. A

discussion of an administrative appeals process for other unrelated City ordinances does not help settle the litigation. Shielding all of these topics from the public does not accomplish the purpose of the shade meeting exemption.

All of these issues could have been discussed in front of the public without creating a disadvantage for the City in the pending litigation. The shade meeting exemption simply provides a governmental entity's attorney an opportunity to receive necessary direction and information from the governmental entity concerning litigating or settling the pending case. What the City has done here is precisely what the statute, its legislative history, and case law forbid.

### **CONCLUSION**

This Court should rule that the City's shade meeting discussions were not confined to settlement negotiations or strategy sessions related to litigation expenditures and therefore breached the strict limits of the Shade Exemption under Florida Statutes, § 286.011(8)(b).

Respectfully Submitted,

s/ Paul M. Crochet  
Paul M. Crochet, Esq.  
FBN:111942  
Weber, Crabb & Wein, P.A.  
5999 Central Ave., Suite 203  
St. Petersburg, FL 33710  
Telephone: (727) 828-9919

Fax: (941) 866-7323  
[paul.crochet@webercrabb.com](mailto:paul.crochet@webercrabb.com)  
[barbara.hall@webercrabb.com](mailto:barbara.hall@webercrabb.com)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 23, 2017, I filed a copy of the foregoing using the Florida Courts E-filing Portal, which will electronically serve a copy to the following:

Kenneth W. MacCollom  
FBN: 68705  
Assistant City Attorney  
P.O. Box 2842  
St. Petersburg, FL 33731  
Telephone: (727) 893-7401  
Fax: (727) 892-5262  
[eservice@stpete.org](mailto:eservice@stpete.org)  
[Kenneth.maccollom@stete.org](mailto:Kenneth.maccollom@stete.org)  
[Patricia.bluhm@stpete.org](mailto:Patricia.bluhm@stpete.org)

Kirsten Anderson  
FBN: 511617  
Jodi Siegel  
FBN: 511617  
Southern Legal Counsel, Inc.  
1229 NW 12<sup>th</sup> Ave.  
Gainesville, Florida 32601  
Telephone: (352) 271-8890  
Fax: (352) 271-8347  
[kirsten.anderson@southernlegal.org](mailto:kirsten.anderson@southernlegal.org)  
[jodi.siegel@southernlegal.org](mailto:jodi.siegel@southernlegal.org)

Alice K. Nelson  
FBN: 211771  
Nelson Law Group  
14042 Shady Shores Drive  
Tampa, FL 33613  
Telephone: (813) 284-5517  
[alice@nelsonlg.com](mailto:alice@nelsonlg.com)

*s/ Paul M. Crochet*  
Paul M. Crochet, Esq.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief complies with the font requirements of Fla. R.  
App. P. 9.210(a)(2).

*s/ Paul M. Crochet*  
Paul M. Crochet, Esq.