

COPY

In the Matter Of:

CA FLORIDA HOLDINGS vs DAVE ARONBERG

50-2019-CA-014681

HEARING

June 03, 2020

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IN THE CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50-2019-CA-014681
CIRCUIT CIVIL DIVISION: "AG"

CA FLORIDA HOLDINGS LLC PUBLISHER
OF THE PALM BEACH POST,

Plaintiff/Petitioner

-vs-

DAVE ARONBERG,
SHARON R. BOCK,

Defendant/Respondents.

/

HEARING BEFORE THE HONORABLE KRISTA MARX
(ZOOM CONFERENCE)

Wednesday, June 3, 2020
10:08 a.m. - 10:28 a.m.

REMOTE ZOOM CONFERENCE
Port Saint Lucie, Florida

Stenographically Reported By:
SONJA M. REED
Court Reporter

1 APPEARANCES:

2 On behalf of the Plaintiff/Petitioner:
3 GREENBERG TRAURIG, P.A.
4 1840 Century Park East
5 Suite 1900
6 Los Angeles, California 90067
7 310.586.7700
8 boyajian@gtlaw.com
9 BY: NINA D. BOYAJIAN, ESQUIRE

10 On behalf of the Defendant/Respondent:
11 JACOB, SCHOLZ & WYLER, LLC
12 961687 Gateway Boulevard
13 Suite 2011
14 Fernandina Beach, Florida 32034
15 904.261.3693
16 doug.wyler@comcast.net
17 BY: DOUGLAS A. WYLER, ESQUIRE

18 On behalf of the Defendant/Respondent:
19 CLERK & COMPTROLLER, PALM BEACH COUNTY
20 P.O. Box 229
21 West Palm Beach, Florida 33401
22 561.355.2983
23 nfingerhut@mypalmbeachclerk.com
24 BY: NICOLE R. FINGERHUT, ESQUIRE

25 - - -

1 PROCEEDINGS

2 *****

3 THE COURT: We are here today for a very
4 limited purpose. I'm sure the attorneys are aware of
5 that, but I just don't want there to be any
6 confusion. We are here on Defendant Dave Aronberg
7 and Defendant Sharon Bock for the Comptroller and the
8 State Attorney's motion to dismiss Count II.

9 You're all acutely aware as the lawyers that
10 this is a question of law. So we're not going to be
11 diving into facts and the Court will not be deciding
12 the merits of this motion this morning. We are
13 simply here for the sole purpose of that motion to
14 dismiss. So I just wanted to make sure that we all
15 stay on track and we're all on that same page.

16 So, Ms. Boyagian, I'll send it to you first,
17 Ma'am. I -- of course, we all know that the Law 101,
18 I must look at the four corners of the motion, which
19 alleges that the State Attorney, David Aronberg, and
20 the clerk and comptroller, Sharon Bock, actually have
21 custody and control of these grand jury proceeding.

22 Whether that is true or not is not for this
23 court to determine because I'm looking simply at the
24 four corners of the complaint. But, not for nothing,
25 I think we all know that they don't have control and

1 custody of the records. But I'm going to assume that
2 it's correct because that's what has been alleged.

3 So what I first want to hear from is the
4 attorney for Florida Holdings with regard to,
5 assuming arguendo, that Florida Statute 905.27 does
6 create a cause of action, what relief is it that
7 you're seeking from -- in Count II, specifically.
8 Not the dec action. We're not here on that today --
9 what is it you hope to get, a judgment?

10 MS. BOYAGIAN: Thank you, your Honor. Good
11 morning, and thank you for the privilege of appearing
12 before this court.

13 The relief we are seeking is disclosure of the
14 grand jury records, pursuant to the Furtherance of
15 Justice Exception to 905.27. And under the First
16 Amendment.

17 The press, as your Honor is aware, has a right
18 of access under the First Amendment as a surrogate of
19 the public --

20 THE COURT: Let me just stop you for a minute.
21 I'd like you to answer my specific question.

22 So I am not particularly convinced -- and I'd
23 like for you to address that. So we're not going to
24 dive into facts or the press's standing because
25 that's not something we're here to discuss today.

1 And I have read the voluminous paperwork --
2 I've received paperwork as -- and -- five-minute ago
3 from some of the other parties. But I deeply
4 appreciate the fact that you sent this to me so much
5 in advance and I have been able to spend some time
6 with, as I said, the voluminous paperwork that was
7 provided.

8 But as you know, Ma'am, we are here for such an
9 extremely limited issue today, and that their motion
10 to dismiss where they state "you're suing the wrong
11 people"; that the court has these records.

12 And so, more importantly, I want you to address
13 whether Section 905.27 gives you a private cause of
14 action against the state attorney and the clerk.

15 Again, I'm going to assume the facts are true
16 that are asserted in the motion. Whether they are or
17 not -- because I think we can all agree we're not for
18 sure if they ever -- that the state attorney doesn't
19 have these records. So what is it you're seeking in
20 Count II -- not the dec action. I know you want the
21 records. I've got that. But in Count II,
22 specifically, what do you -- what's the relief you're
23 seeking and, more importantly, how under this statute
24 do you get to assert a private action -- a private
25 cause of action against the state attorney and the

1 clerk?

2 MS. BOYAGIAN: Your Honor, we are aware, of
3 course, that there is no expressed private right of
4 action, 905.27. But that does not end the inquiry.

5 As the Florida Supreme Court stated:

6 "Where a statute like 905.27
7 forbids an act which is to Plaintiff's
8 injury, the party injured should have
9 an action."

10 And that's the Smith Piezo case in the volume
11 of materials that we sent you.

12 There's no question here that the denial of the
13 FIRST AMENDMENT right to the press is an injury which
14 gives rise to a right of action.

15 Stated another way, looking at the analysis
16 that the Fischer Metcalf Court looked at, there are
17 three factors in determining whether there is a
18 private right of action where a statute does not
19 expressly provide for one.

20 One is whether the Plaintiff is part of the
21 class for which the statute is intended to protect;
22 second is a legislative history; and the third is the
23 underlying purposes of the statutory scheme.

24 The first factor I already addressed, that the
25 press is part of the class that the statute is

1 intended to benefit, being the surrogate of the
2 public and exercising its first amendment right.

3 The second issue of legislative history and the
4 purpose -- statutory purpose are somewhat related.
5 We were unable to find much legislative history on
6 this issue of a private right of action under the
7 statute.

8 There is nothing that says we intend to create
9 a private action, but there's certainly nothing that
10 says we do not want to create a private right of
11 action.

12 What we do have is that in 1994, the same time
13 that 905.27 was reenacted, a statute that pertains to
14 the secrecy of State Grand Jury -- statewide grand
15 juries was also enacted. That provision, which is
16 905.395, has no exceptions for -- for revealing these
17 records. By contrast, the legislature intentionally
18 enacted 905.27 with the Furtherance of Justice
19 Exception.

20 If the public through the press can't bring a
21 private right of action to enforce that exception or
22 to seek relief under that exception, that
23 intentionally placed exception of furthering justice
24 is essentially rendered hollow --

25 (Speaking simultaneously.)

1 THE COURT: Okay. Pause for a minute.

2 I don't think anybody is saying that there
3 isn't a cause of action or that the press doesn't
4 have standing. That's not what I'm asking you. I'm
5 asking you, how are the clerk and the state attorney
6 the proper defendants?

7 So, you know, nowhere have I said there isn't a
8 cause of action. Clearly there is. I'm puzzled by
9 the procedural posturing of this case naming the
10 state attorney.

11 And, you know, I'm further stymied by the fact
12 that you allege in your complaint that they have --
13 particularly David Aronberg the State Attorney --
14 that he has these records.

15 But I'm going to assume that's true. So I'm
16 not telling you, you don't have a cause of action.
17 I'm just saying, okay, let's run this all the way
18 out. Let's say you win and you get a judgment
19 against the State Attorney Dave Aronberg.

20 What's he supposed to do with it? He can't
21 release the grand jury testimony. He has no
22 authority whatsoever to do that.

23 MS. BOYAGIAN: Well, your Honor, as you stated,
24 this is a motion to dismiss stage, and we are
25 entitled to discovery on the issue of possession,

1 custody, and control. My understanding is that the
2 state attorney has asserted that he does not have
3 possession. It's not my understanding that the clerk
4 has taken that position. So the clerk may indeed be
5 the -- someone who does have possession, custody, and
6 control.

7 In any event, we would submit that the state
8 attorney, even it does not have actual possession at
9 this time, it might be able to have the power to
10 control or direct the entity or persons who do have
11 control and possession to release those -- to effect
12 the judgment.

13 THE COURT: So let me ask you this: So the
14 clerk is the keeper of the record. But even if you
15 got a judgment against her -- let's say you asserted
16 this cause of action and let's say you win and you
17 get a judgment against the clerk. The clerk cannot
18 release grand jury testimony to you. Only the court
19 can.

20 So really -- all I'm saying to you is I do not
21 understand the way this case was filed or why these
22 are the defendants because it's impossible for them
23 to perform.

24 I mean, I'm going to assume, based on your
25 motion, again, that they do have the records. But we

1 all know -- everyone in the room knows they do not --
2 that only the court -- they're -- they're with a
3 court interpreting. And only the court can release
4 the records.

5 So if you get a judgment against either the
6 state attorney or the clerk, they cannot -- I mean, I
7 guess what you're saying to me is, well, we want to
8 do discovery and we want them to say unequivocally "I
9 have these records" or "I don't have them."

10 And -- I mean, the law is abundantly clear.
11 You cannot do it without a court determining whether,
12 in the furtherance of justice, the release is
13 appropriate.

14 MS. BOYAGIAN: And that is a determination
15 we're asking your Honor to make, and we're asking for
16 an order from your court.

17 THE COURT: When we get to the merits of the
18 case, sure it is. But, again, you're asking me to
19 make that determination and for me to make a
20 determination of whether the grand jury records
21 should be released. And the only thing we're here
22 today about is why should the clerk and the state
23 attorney have to defend a civil action when it's a
24 possibility of performance? They -- even if you were
25 to win and get a judgment against them, they cannot

1 give you what they don't have.

2 So -- I mean, it's as simply as this: Are
3 you -- you just want to engage in some discovery for
4 them to absolutely assert, particularly, the state
5 attorney, "I don't have these records"; look to the
6 rules that say the moment the grand jury's over,
7 they're sealed and they're turned over and they
8 cannot be released without court order?

9 So I'm not addressing the merits or whether you
10 have an exception or you're able to argue that
11 there's an exception in the furtherance of justice.
12 We're not getting there today. I'm simply saying why
13 should these two entities have to defend this lawsuit
14 when even down the road if they win they can't give
15 you what they don't have?

16 MS. BOYAGIAN: As your Honor stated, I'm not
17 sure that's the case with the clerk. That was not in
18 their -- that issue was not stated in their papers.

19 THE COURT: Let me ask you this, then: Do you
20 think, if you got a judgment and I or the court
21 doesn't make the determination that the grand jury
22 records should be released, that the clerk would be
23 able to perform?

24 Would they be able to say "here you go"? I
25 mean, could the clerk just make that unilateral

1 decision "I'm going to release the records, sealed
2 confidential records"?

3 Does she have any authority to do that?

4 MS. BOYAGIAN: My understanding, your Honor, is
5 that 905.27 requires a court order before the records
6 are unsealed.

7 THE COURT: Exactly. Exactly.

8 All right. Let me hear from Mr. Aronberg's
9 attorney, Mr. Wyler.

10 MR. WYLER: Thank you, your Honor. May it
11 please the Court --

12 THE COURT: Good morning, Sir.

13 MR. WYLER: Good morning.

14 Your Honor, I just wanted to let you know that
15 I spoke with counsel for the clerk, Ms. Fingerhut, a
16 couple of days before this hearing, and we decided
17 that I would just make the presentation for both of
18 of us, being that our arguments overlap except for
19 the fact of who this claim -- whether they have the
20 records or not, which, of course, we've said we don't
21 have custody of the records.

22 But, nonetheless, our arguments overlap. The
23 Plaintiff is attempting to assert a cause of action
24 under Section 905.27. That statute settled testimony
25 not to be disclosed exceptions. So it's just

1 explaining exceptions to the disclosure of the grand
2 jury testimony.

3 Our position is that it doesn't set forth a
4 cause of action and that it's impossible for us to
5 perform what they're asking.

6 I know you said you didn't really want to get
7 into the Furthering Justice Exception, but I know
8 that's what they're using as their basis to get to
9 these. But it's our position that the clear
10 unambiguous statutory language, it shows that this
11 disclosure only applies to a civil or criminal case,
12 and that within that civil or criminal --

13 (Speaking simultaneously.)

14 THE COURT: Again, sir -- I'm sorry. As I told
15 Plaintiff's counsel --

16 MR. WYLER: -+ can only be used in the defense
17 for --

18 THE COURT: Okay. We're not there. We're not
19 discussing the merits of the case, and -- I'm not
20 ready to cross that bridge. I'm here for a very,
21 very limited hearing today.

22 So just as I stopped Plaintiff's counsel from
23 arguing the merits of the case and whether or not the
24 Furtherance of Justice Exception will apply in this
25 instance, we're not even there yet.

1 I'm only here for the purpose of determining
2 whether or not the clerk and state attorney should be
3 dismissed. And I am bound by the four corners of the
4 document, which assert that you do have control and
5 custody over it.

6 So if you'll fashion your argument with regard
7 to that limited purpose, I would appreciate it.

8 MR. WYLER: No problem, your Honor. I
9 apologize.

10 Within the four corners of their complaint, our
11 position is that they failed to state a cause of
12 action under 905.27. It does not provide for -- it
13 doesn't list that there's no element that they have
14 adequately pled to assert a cause of action under
15 that. There's -- and the only thing they're asking
16 for is records that we don't have.

17 There's really not much more to it, your Honor.
18 And we would ask that you would grant our motion to
19 dismiss for failure to state a cause of action.

20 THE COURT: Okay. Ms. Fingerhut, are you still
21 on the phone?

22 MS. FINGERHUT: Yes, your Honor.

23 THE COURT: Is there anything you wish to add?

24 MS. FINGERHUT: We agree with the state

1 attorney's position, and we also agree with what the
2 Court has said, that the plain language of the
3 statute, a cause of action doesn't exist. And we
4 really cannot -- we'll be defending something without
5 the four corners. We're simply involved in this
6 action because the clerk is the custodian of the
7 records.

8 THE COURT: Okay. Thank you, Ma'am.

9 Ms. Boyagian, back to you.

10 MS. BOYAGIAN: Your Honor, I'd like to note
11 that in the Butterworth case in which the Supreme
12 Court limited the application 905.27 by saying that a
13 witness can reveal her own testimony and prohibiting
14 that they violate the First Amendment --

15 THE COURT: Say that again, please.

16 MS. BOYAGIAN: In the Supreme Court case, the
17 Butterworth case, in which the Supreme Court ruled
18 that 905.27 can't restrict a Grand Jury witness from
19 revealing her own testimony, that would be a
20 violation of First Amendment, in that case, the state
21 attorney was, in fact, a party.

22 THE COURT: Well, I assume the state attorney
23 that was present -- I mean, I don't find that that's
24 close to what we're talking about here, and that's
25 whether or not -- I mean, as we know, this was in

1 2006. Certainly Dave Aronberg wasn't even the state
2 attorney then. But this is about the release of
3 records.

4 I want to give you ample opportunity -- and
5 again, I sincerely appreciate that all of the case
6 law and the way that it was presented to the Court in
7 such a timely fashion. I really do. And I did spend
8 some time with it. But I want to give you whatever
9 opportunity you want to take to convince me that it
10 is in -- as to Count 2, again. Not the dec action --
11 whether these would be the appropriate defendants.

12 And, you know, really, I want you to boil it
13 down for me as to this -- let's take it all the way
14 down the road. You win. You get a judgment against
15 the clerk and the state attorney.

16 I know there's other reasons why you might have
17 filed it this way. But I'm just simply puzzled
18 because I do hear what the clerk and the state
19 attorney are saying, and that is, performance is
20 impossible. They don't have the records and
21 cannot -- absolutely. There's not even an inch of
22 wiggle room -- that they could release the records
23 even if you got a judgment. It is solely a
24 determination for the court.

25 I, frankly, think, you know, there's ways to

1 get to your records. There's ways to get
2 confidential records. But it isn't by suing the
3 state attorney and the clerk.

4 So I just want to hear your last final argument
5 on how Count II, the appropriate defendants are the
6 clerk and the state attorney. Even assuming arguendo
7 they have the records -- we know they don't -- you
8 were to get a judgment against them, how would you
9 expect them to perform?

10 MS. BOYAGIAN: Two points, your Honor: One is
11 that, again, the clerk did not assert in her papers
12 that she does not have control. That is a position
13 that the State Attorney's Office has asserted. It is
14 our allegation, and as your Honor noted, allegations
15 must be accepted as true -- as true at this stage of
16 the proceedings.

17 Second, it is also our understanding that the
18 state attorney and the clerk intend to block access
19 to these records. So our allegation is that they do
20 have possession, custody, or control, which the clerk
21 has not denied; and second, that they are trying to
22 block access to the records --

23 THE COURT: What do you mean? What do you
24 mean? They're not trying to block it. They're
25 saying that despite the fact -- let's just talk about

1 the clerk, because we all know the state attorney
2 doesn't have it.

3 So the clerk is the custodian of records.
4 That's her main job. There's no doubt about it. We
5 all know that. But we also know, unequivocally --
6 unequivocally, only the court can make the
7 determination of whether the moving party has
8 satisfied that there is an exception that these
9 should be released.

10 So, again, I ask you -- she is, in fact, the
11 custodian of the records -- is it your opinion that
12 if you got a judgment saying clerk and comptroller
13 gets a judgment against them, that she can release
14 the records without the court -- without the court
15 weighing in, without the court making that
16 determination as required by law?

17 MS. BOYAGIAN: No, your Honor. We are asking
18 your Honor to order the clerk to do that under your
19 discretion.

20 THE COURT: All right.

21 Mr. -- Ms. Fingerhut, you wish to be heard on
22 that?

23 MS. FINGERHUT: Your Honor, our position is
24 that we're not trying to block access to the
25 records --

1 (Speaking simultaneously.)

2 THE COURT: Can you hear? Can the attorneys
3 hear?

4 MS. FINGERHUT: -- custodian the records and
5 that he cannot release the records without court --

THE COURT: Exactly.

7 Okay. All right. Anything further, Mr. Wyler?

8 MR. WYLER: No, your Honor. I concur with the
9 attorneys for the clerk's office that it's impossible
10 for us to release these records. There's no intent
11 to hide them or block anything from the Plaintiff.

12 THE COURT: Okay. Anything further,
13 Ms. Fingerhut?

14 MS. FINGERHUT: No, your Honor.

15 THE COURT: And, Ms. Boyagian, anything
16 further. Ma'am?

17 MS. BOYAGIAN: Nothing further, your Honor.

18 THE COURT: Okay. I will get an order out
19 quickly. Thank you, folks so much. And I'll see you
20 on the next round. Thanks a lot.

21 MS. BOYAGIAN: Thank you, your Honor.

22 MR. WYLER: Thank you, your Honor.

23 (The proceedings concluded at 10:28 a.m.)

1 CERTIFICATE OF REPORTER
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I, Sonja M. Reed, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript, pages 1 through 19, is a true and complete record of my stenographic notes.

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10 Dated this 3rd day of June, 2020.
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Sonja M. Reed
Court Reporter