

## *FLORIDA SUPREME CLARIFIES EVIDENCE OF PRIOR SETTLEMENTS*

By **Esteban F. Scornik**

In the recent Florida Supreme Court case of *Saleeby v. Rocky Elson Construction, Inc.*, 3 So. 3d 1078 (Fla. 2009), the Plaintiff was injured when roof trusses on the construction site he was working at collapsed on him. He filed a negligence action against Rocky Elson Construction Company (“Elson”), which was the construction company that installed the trusses, and A-1 Roof Trusses Ltd. (“A-1”), the company that manufactured them.

Prior to trial, the Plaintiff’s attorney deposed A-1’s President regarding the cause of the collapse. Subsequently, the Plaintiff settled with A-1 and dismissed A-1 from the lawsuit. The trial then went forward against Elson.

During the trial, the President of A-1 was again called as a witness. His testimony was damaging to the defense of Elson.

During cross examination, Elson’s attorney attempted to impeach the A-1 President with evidence that A-1 had previously been a party to the lawsuit and had settled with the Plaintiff. The trial court allowed this testimony to be admitted before the jury. The Fifth District Court of Appeals affirmed.

The Florida Supreme Court reversed. During its analysis, it discussed how there are two Florida Statutes specifically addressing the issue of evidence of settlement to the jury. Florida Statute Section 768.041 addresses the ramifications of the signing of a release for a covenant not to sue. Specifically, subsection 3 of this statute states as follows: “The fact of such a

release or covenant not to sue, or that any defendant has been dismissed by Order of the Court shall not be made known to the jury.”

The Florida Supreme Court further cited Florida Statute Section 90.408, which states as follows: “Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant comments or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.”

The Florida Supreme Court indicated how these statutes promote Florida’s public policy favoring settlement by excluding any such prejudicial evidence at trial. It further indicated that the admissibility of such evidence, even for impeachment purposes, will produce unfair prejudice.

The Court quoted the following phrase from the case of *City of Coral Gables v. Jordan*, 186 So 2nd 60 (Fla. 3rd DCA 1956):

“It is a practical impossibility to eradicate from the jury’s mind the consideration that where there has been a payment there must have been liability.”

The Florida Supreme Court concluded that based on the plain language of Section 768.041(3) and Florida Rule of Evidence 90.408, evidence of a settlement and that a Defendant has been dismissed from a lawsuit are absolutely inadmissible at the trial of a case. There is no exception permitting such evidence even for impeachment purposes.

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## SUNSHINE LAW – UPDATE REGARDING USE OF “SHADE” MEETINGS

By Dale A. Scott

On April 23, 2009, the Florida Attorney General issued two advisory legal opinions concerning the use of so-called “shade” meetings, pursuant to § 286.011(a), *Fla. Stat.* Under this statutory provision, any “board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity’s attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency,” provided certain conditions stated in the statute are met. But for § 286.011(a), discussions between the governing board and anyone—including its attorneys—are subject to the requirements of Florida’s Sunshine Law.

Often, governmental entities faced with the *possibility* or *threat* of litigation consider whether a presuit “shade” meeting, to discuss matters germane to such *potential* litigation, is appropriate. Recently, the Cities of Pembroke Pines and Melbourne inquired as to holding meetings under such circumstances.

Pembroke Pines inquired as to whether it may hold a § 286.011(a) session to discuss pending litigation

where the city is *not* a party, but the named defendant is a city employee who is to be fully indemnified by the city, and the city is responsible for the all costs and coordination of the legal defense. Op. Att’y Gen. Fla. 09-15. Upon consideration of this inquiry, the Attorney General first noted his office has previously, narrowly interpreted application of the “shade” meeting provision, and noted it does not create a blanket exception to the open meeting requirement for all meetings between a public board or commission and its attorney. The Attorney General reiterated the exemption is narrower than the broader category of attorney-client communications vis-à-vis private litigants, and only applies to discussions on *pending* litigation to which the public entity is presently a party. Op. Att’y Gen. Fla. 95-06. The Attorney General has further noted such discussions are limited to settlement negotiations or strategy sessions related to litigation expenditures.

Although case law concerning the uses of the “shade” meeting provision is limited, decisions of the Fifth and First District Courts of Appeals have clarified the statute is to be construed narrowly, and only, for example, those individuals who are specifically identified in the statute may attend such meetings. It must also be noted that during such meetings, no final de-

isions on litigation matters can be voted upon; only discussions may be had, but the final decision must be voted upon in a public meeting. *See Sch. Bd. of Duval County v. Fla. Publishing Co.*, 670 So.2d 99, 100 (Fla. 1st DCA 1996).

Upon consideration of Pembroke Pines’ inquiry, the Attorney General also noted his previous opinions whereby his office found, in situations where a health care district was a *real party in interest* to litigation, although not specifically named, the district may hold a § 286.011(a) meeting. Op. Att’y Gen. Fla. 08-17. This previous opinion relied heavily upon *Brown v. City of Lauderdale*, 654 So.2d 302 (Fla. 4th DCA 1995), a case in which an ethics charge was brought against a mayor, but all claims against the mayor were dismissed, and the city later filed a claim for attorney’s fees against the complainants, alleging the lawsuit was frivolous. The claim was brought in the mayor’s name, although the city attorney defended the mayor.

The city and its attorney subsequently met in private for a “shade” meeting to discuss litigation strategy, and the appellants in the case claimed since the city was not a named party to the litigation, the meeting violated Florida’s open

**Continued on next page**

government law.

The Fourth District Court of Appeal, however, agreed the city was a real party interest as to the fee claim, noting although only the mayor was the named party, the city retained its attorney to defend the charges and prosecute the fee action. Thus, based upon the rationale of *Brown*, the Attorney General opined when a Florida municipality, such as Pembroke Pines, is a real party in interest of a pending lawsuit, it may indeed conduct a “shade” meeting to discuss settlement negotiation or strategy regarding litigation expenses, even when not a named party at the time of the meeting.

The same day the Attorney General issued his Pembroke Pines opinion, he issued an additional opinion on a subject of “shade” meetings relative to an inquiry from the City of Melbourne. Op. Att’y Gen. Fla. 09-14. Melbourne inquired as to whether § 286.011(a) authorizes a council to meet in a “shade” session to consider the terms of settlement negotiations contemplated pursuant to the conflict resolution procedures set forth in Chapter 164, *Fla. Stat.* In sum, the Attorney General answered this inquiry in the negative.

Florida’s Governmental Conflict Resolution Act, § 164.101-164.1061, *Fla. Stat.*, provides a method by which governmental entities may resolve governmental disputes without the expense and disruption of litigation. Under the act, if a governmental entity files suit against another governmental entity, “proceedings on the

suit shall be abated, by order of the court, until the procedure or options of this act have been exhausted.”

Thus, as recognized by the Attorney General, the provisions of the act are intended to apply *before* a legal action is filed, or in a case where legal action has been initiated, the judicial action shall be abated until the conflict resolution procedure has been completed. Moreover, under § 164.1055, after a conflict assessment phase, the entities are required to schedule a “joint public meeting” between the representatives of the primary conflicting governmental entities. Then, if no agreement is reached following the joint public meeting, the conflicting governmental entities must mediate.

As noted, Melbourne’s inquiry was whether its council could meet in private, pursuant to § 286.011(a)(b), to “refine settlement offers and counteroffers” developed during the Chapter 164 conflict resolution process.

Melbourne analogized this to a discussion of “settlement negotiations or strategy session related to litigation expenditures.”

Upon consideration of Melbourne’s position, the Attorney General cited precedent from the Fourth District Court of Appeal, but noted there are few cases defining “settlement negotiations” or “strategy related to litigation expenditures.”

The Attorney General concluded while the “shade” meeting exception applies to settlement negotiations or strategy sessions related to litigation expenditures undertaken

regarding pending litigation, discussions between the city attorney and the commission relating to settlement of the conflict under the Florida Governmental Conflict Resolution Act would not come within the scope of this exemption.

That is, as the Attorney General noted, “[n]othing in section 286.011(8), Florida Statutes, extends the coverage of the exemption to discussions of mediated disputes or to issues arising through the conflict resolution procedure whether or not litigation has been filed.”

These recent Attorney General opinions hold two important lessons for governmental entities considering “shade” meetings. First, a governmental entity which is *not* named as a party to a lawsuit may nonetheless hold a “shade” meeting where the entity is a *real party in interest* to the lawsuit.

However, discussions may only be held as to settlement negotiations or strategy related to litigation expenditures. While the opinion concerning the Melbourne’s inquiry appears to draw a fine distinction, the key is whether the subject matter to be discussed is an aspect of the pending litigation matter.

Florida’s Governmental Conflict Resolution Act contemplates a “joint public meeting,” the forestalling or abatement of litigation, and other actions outside the scope of litigation. Thus, a related “shade” meeting may not be had.

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## ADA AMENDMENTS ACT OF 2008

By Kara D. Rogers

On September 25, 2008, the President signed the Americans with Disabilities Act Amendments Act of 2008 (“ADA Amendments Act” or “Act”). The Act emphasizes that the definition of disability should be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and generally shall not require extensive analysis. The Act was effective on January 1, 2009.

The Act makes important changes to the definition of the term “disability” by rejecting the holdings in several Supreme Court decisions and portions of EEOC’s ADA regulations. The effect of these changes is to make it easier for an individual seeking protection under the ADA to establish that he or she has a dis-

ability within the meaning of the ADA.

The Act retains the ADA’s basic definition of “disability” as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways. Most significantly, the Act (1) directs EEOC to revise that portion of its regulations defining the term “substantially limits”; (2) expands the definition of “major life activities”; (3) states that mitigating measures other than “ordinary eyeglasses or contact lenses” shall not be considered in assessing whether an individual has a disability; (4)

clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active; (5) changes the definition of “regarded as” so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is “regarded as” disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor; and (6) provides that individuals covered only under the “regarded as” prong are not entitled to reasonable accommodation.

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