COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

_____

2016-CA-0534

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TERRI LEWIS STEVENS and JENNIFER FRUCHTNICHT,

wife of/and CRAIG RIVERA

vs.

ST. TAMMANY PARISH GOVERNMENT

_____

ON APPEAL FROM THE TWENTY SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OFST. TAMMANY, No. 2015-10649, DIVISION "H", HONORABLE ALLISON H. PENZATO, JUDGE

_____

ORIGINAL BRIEF ON BEHALF OF APPELLANTS, TERRI LEWIS STEVENS, JENNIFER FRUCHTNICHT, wife of/and CRAIG RIVERA

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CIVIL CASE

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JURISDICTION OF THIS COURT

This Honorable Court has jurisdiction under Article 5, Section 10 of the Louisiana Constitution of 1974.

The judgment appealed was rendered January 21, 2016, with notice thereof issued on January 25, 2016. A motion for suspensive appeal was filed February 5, 2016 and the order granting the appeal was signed by the court on February 12.

This is an appeal from an interlocutory judgment, inter alia, finding one of the plaintiffs and the two attorneys of record in contempt and ordering monetary sanctions against them. It is therefore immediately appealable under La. C.C.P. Art 1915(A)(6). (This Honorable Court issued a Rule to Show Cause relating to this issue pursuant to which it has been separately briefed.)

CONCISE STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This began as an action for mandamus to compel the St. Tammany Parish Government ("STPG") to "correct parish maps and other official records" to properly reflect the condition and situation of Plaintiff's, Terri Lewis Stevens ("Stevens"), immovable property situated in St. Tammany Parish; and to compel it to produce public records; for damages and attorney fees under 42 USC §1983 (violation of civil rights under color of state law); and for a temporary restraining order; a preliminary injunction and thereafter a permanent injunction to stop a road widening project that threatened to increase drainage and runoff, which included raw sewerage, that ran across her property and that of her neighbors, the Rivera's, who joined as party plaintiffs with Stevens. The temporary restraining order was denied and the public records mandamus action was by agreement of the parties removed from this action and re-filed as a separate action. The preliminary injunction was heard on March 27 and April 1, 2015 and judgment denying same was signed the following April 20. (An appeal from the denial of the preliminary injunction was taken and is presently pending before this Honorable Court, with briefs due in June: *Terri Lewis Stevens, et als. v. St. Tammany Parish Government*, 2016 CA 0197)

After the close of the trial of the preliminary injunction a flash drive (alternately also called a "thumb drive") was anonymously delivered to Ms. Stevens. On it Stevens found thousands of public records never previously produced to her despite a year of public records requests from her. There were also some email strings between parish employees regarding those records requests. Three documents, subsequently filed and identified as Exhibits 28 - 30, were of particular importance: Not only were they clearly public records which had been requested and quite obviously withheld by STPG, but they also not only directly contradicted

what Stevens had previously been told by parish employees, but also contradicted the testimony of the two parish engineers who had testified at the preliminary injunction hearing. These events sparked the following chain of actions which led to this appeal:

After Exhibits 28-30 were revealed, STPG responded to prior discovery and produced Exhibits 28-30, but also sent out discovery seeking to know where the documents came from. The plaintiffs objected on the grounds that who or where the documents came from was irrelevant. A motion to compel was filed and heard and the court ordered that the plaintiffs respond fully to specific interrogatories and requests for production. [1] The plaintiffs complied with the order and timely responded on June 23. STPG took Stevens' deposition on July 13 wherein she responded to all their questions about Exhibits 28-30. The next day Stevens' counsel hand delivered a copy of the flash drive to counsel for STPG, and forwarded a copy to the court. (A copy was also provided to the District Attorney for St. Tammany, the FBI and the Louisiana Inspector General.) On July 23 STPG filed its motion for protective order, contempt and sanctions which was heard on August 26 and October 30.

STPG claimed that the entire contents of the flash drive were privileged. At the time of the August 26 hearing the original of the flash drive was handed to the court by Mr. Blazek. The court ordered it placed under seal pending review by the court of STPG's claims of privilege. On September 17, 2015, the court rendered judgment granting STPG's motion for protective order, inter alia, prohibiting the plaintiffs from using any of the information obtained from the flash drive "unless that information has been subsequently produced by the Defendant...," ordering plaintiffs to produce all documents derived from the flash drive, and further ordered that everything produced in compliance with the judgment "be placed under seal

until further adjudication by this Court."[2] The court also continued the hearing on the motion for contempt and sanctions to September 21.

The court had a personal emergency on September 21 and continued the hearing to October 30. Arguments were heard on that date and the court took the matter under advisement. It issued reasons for judgment on December 4.[3] A judgment was eventually signed thereafter holding Stevens and her attorneys, Louis R. Koerner, Jr. and James E. Blazek, in contempt and sanctioning them in the amount of $2,500 and all costs incurred by STPG in bringing the motion.

The judgment also ordered that the "Protective Order signed by the court on September 17, 2016 shall be made permanent." The court's reasons for judgment gave no reasons why it was making this order, other than to state that that is what it was going to do.

This appeal followed.

ASSIGNMENTS OF ERROR

1. The trial court erred in finding Ms. Stevens and her attorneys, Louis R. Koerner, Jr. and James Blazek, in contempt.

2. The trial court erred in permanently sealing the flash drive and its contents.

ISSUES PRESENTED FOR REVIEW

1. Whether there was a failure on the part of plaintiffs to comply with discovery.

2. Whether there was any showing of willfulness on the part of Stevens and counsel.

3. Whether a party who claims attorney fees and expenses due to an alleged failure of the other party to comply with discovery must prove such fees and costs.

4. Whether Appellee carried its burden of proving that the contents of the

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[1] V. 3, p. 451
[2] V. 4, pp 695-6

flash drive were covered by an attorney client privilege.

5. Whether the trial court needed to review the contents of the flash drive to determine whether any of its contents were privileged.

6. Whether having attorneys handle public records requests, a substantially clerical job, can turn those public records and any communications about them into privileged documents.

STATEMENT OF FACTS

Background facts for context:

The basic facts are set forth in plaintiffs' original,[4] first[5], and second amended petitions.[6] Stevens purchased a home and large lot in the Dove Park Subdivision located in St. Tammany Parish in August, 2011. In early 2014 she noted that there was increased drainage across her property, which included raw sewerage, which upon investigation appeared to be due to a change in the drainage of the subdivision by the parish. Ms. Stevens is an architect by profession and the daughter of a civil engineer.[7] She also is an investigator for a non-profit government watch group, Concerned Citizens of St. Tammany.[8] She was therefore quite knowledgeable in who to contact, what questions to ask, and how to obtain the applicable public records. Over the course of almost a year she made public records requests to discover what authority the parish possessed for diverting drainage, what servitudes if any existed, what drainage changes had been made over the years and what changes were proposed. By midyear of 2014 she was barred from speaking directly to parish engineers and instead directed to place all communications with the parish legal department.

In St. Tammany Parish all public record requests must be sent to the legal

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[3] V. 5, p. 790
[4] V.1, pp. 23 et seq.
[5] V.1, pp. 126 et seq.
[6] V.1, pp. 176 et seq.
[7] V. 2, p. 497; pp. 519-20 & V.5, 13-25 & 920

department, and effectively what happened was that Stevens would craft requests to find a few needles, and the parish would produce stacks of hay. After months and months of partial and nonresponsive productions, Stevens filed suit. She is joined in the suit by her neighbors, the Rivera's, over whose property the drainage also flows.

Preliminary Injunction hearing

A preliminary injunction hearing was held on March 27, 2015. Appellants sought to enjoin the parish from proceeding with a road widening project for Dove Park Road, which is the public roadway with which Appellants' properties connect, and along side which drainage is controlled. They alleged that the proposed road widening project as planned would increase the drainage across their property, and that the parish had no right or authority to direct drainage across their property in the first place. STPG's defense was substantially twofold: That the project would not change the drainage across the plaintiffs' property in any respect, and that the drainage was "natural" and had always been that way; i.e., that STPG had a servitude of drainage by being the dominant estate and that the plaintiffs' properties were therefore the subordinate estates. (A full statement of the facts concerning the hearing will appear in *Terri Lewis Stevens, et als. v. St. Tammany Parish Government*, 2016 CA 0197 as that is the focus of that appeal.)

The USB flash or thumb drive

Irma Russell, at the time a parish employee in the code enforcement division, and also a friend of Stevens, found an envelope in her curbside mailbox.[9] It was a standard size (or legal size) envelope that was sealed and on its face was written the name of Terri Stevens. (Ms. Russell did not find this unusual since she had told anyone who thought there was any kind of wrongdoing in the parish government to contact Stevens, since they were both were members of Concerned Citizens of St.

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[8] V.2, 552
[9] See V. 4, pp. 864 et seq,

Tammany and Stevens was one of the principal investigators.) She delivered the envelope to Stevens still sealed, which was Ms. Russell's entire contact with the envelope. At some point after the hearing Stevens opened the envelope and found a flash drive inside. Upon opening it up on her computer she found apparently thousands of documents which she scanned. What she discovered was that it apparently contained the file of her public records requests to STPG. As far as she could see, most of it was miscellaneous and irrelevant documents, but mixed in with these were what came to be called Exhibits 28, 29 and 30[10]. What was important about these was that they showed surveys of her property when it was owned by her predecessor in title and concerned a drainage project that was done in 1993 on Dove Park Road, and that the "natural drainage" of her property was *from* about the middle of her lot *to* the drainage ditch on Dove Park Road. In other words, her property had a high point in the middle such that the front portion drained to the public road and the rear drained to the creek in the rear. Her property was the dominant lot and STPG's was the subordinate. Further, there was correspondence between her predecessor in title and the Department of Public Works that expressly acknowledged that the parish had no servitude or easement across the property. All of these were documents in the St. Tammany Department of Public Works; all of them were contained in the file concerning Stevens' public records requests; and none of them had been previously produced despite clear requests for same. Very clearly, their previous non-production was intentional.

Stevens sent copies of these documents to her counsel, Mr. Koerner, who used them in post trial filings. He never had possession of the flash drive.

Procedural history leading to this appeal

The procedural history is substantially and accurately set forth in the court's

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[10] These exhibits appear at V. 3, pp. 403 et seq.

reasons for judgment which are attached, and hence do not need to be repeated here, except to add a few details. The judgment ordering full responses to STPG's interrogatories and requests for production was rendered on June 16, 2015. Mr. Blazek enrolled as co-counsel of record two days later.[11] Per the June 16 order full responses were to be provided to STPG within 10 days, or by June 26, which did occur. Stevens' deposition was taken July 13 and a copy of the flashdrive was provided to counsel for STPG the next day, July 14. STPG's motion for protective order, contempt and sanctions was filed nine days later, July 23.[12] Thus, even assuming *arguendo* that there was any duty on the part of Stevens to produce the flash drive or reveal its existence pursuant to the June 16 order (which is most definitely denied), there was at most an 18 day delay in STPG receiving this information - and there were no trial dates set while discovery was ongoing.

Whether or not Stevens and/or her counsel failed to comply with the June 16 order as alleged by STPG turns upon the interpretation of the language of the discovery requests, which was expressly directed to Exhibits 28 - 30:

> ***INTERROGATORY NO.* 16:** Please describe in detail how you came to possess Exhibit 28 .. Your response should state the date you first received Exhibit 28, and identify each person providing you with Exhibit 28, all documents associated with the receipt of Exhibit 28 and all communications relating in any manner to your acquisition of Exhibit 28.

This request was the same for the other two, and the court expressly noted in the October 30 hearing:

> ..I've read the wording [of the discovery requests] many, many times, and I know that y'all have a disagreement on the scope and breadth of the wording.[13]

As per the court's reasons, it found that the above wording "was sufficient to require

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[11] V. 2, p. 455 N.B.: Volumes 2 and 3 are inverted. Where the record index indicates "V.2" the record number actually appears in V. 3, and vice versa.
[12] V. 2, p. 456
[13] V. 5, p. 1010

plaintiffs to disclose their possession of the flash drive,"[14] and went on to hold that Stevens and counsel " willfully failed to disclose their possession of the USB flash drive..."[15]

As to sealing the flashdrive and its contents permanently, the court contradicted what it had said several times before:

> "...for the record, this Court has not reviewed the contents of the thumb drive... So I have not reviewed the materials on the thumb drive..."[16]

In response to STPG's repeated claim that the flash drive contained STPG's "litigation file" for which there was no proof of any kind other than argument of counsel:

> Well, I don't know if I can go that far because I haven't seen them. Okay? I certainly feel that they should be protected and there should be no further disclosure or use of them until such time as rulings can be made concerning the documents. But since I haven't reviewed the file, I can't make a determination as to whether each and every document contained in the file is subject to the protection offered under 44:4.1(C)...
>
> You are telling me that's what it is...
>
> I don't know because I haven't seen it. That's my point. [17].

SUMMARY OF ARGUMENT

As to the discovery requests and responses, the trial court interpreted the general language of the discovery requests as somehow requiring a disclosure of the format of the documents received even though that was never asked, and even though at the time of the first hearing the trial court admitted from the bench that opposing counsel had different interpretations of the same requests. There was further no showing of any willfulness on the part of Stevens or her counsel: STPG never asked any questions which were clearly directed to the format in which the documents were received, and the day after the deposition a copy of the flashdrive

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[14] p. 3 of attached reasons
[15] p. 4 of attached reasons
[16] V.5, p. 859

was delivered to counsel for STPG, refuting any notion of willful failure to disclose.

As to the order permanently sealing the flash drive and its contents, STPG made no showing other than argument of counsel that any of its contents were privileged, even though it had multiple opportunities to do so. The court further repeatedly stated that it had not reviewed the contents of the drive and could not make a determination of privilege without doing so. The court nevertheless sealed the drive permanently without ever reviewing its contents, without any proof of privilege, apparently accepting the argument of counsel in lieu thereof. Further, STPG's assertion of privilege was self-serving nonsense: The drive's contents were public records that should have been produced in the preceding year but instead were improperly withheld - the obvious reason why an anonymous Whistleblower produced it to Stevens.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 1

The trial court erred in finding Ms. Stevens and her attorneys, Louis R. Koerner, Jr. and James E. Blazek, in contempt.

There is no small degree of irony in the judgment appealed. The above facts reveal that the clearly culpable party is STPG. It cheated and set out to deceive by withholding clear evidence. Caught the proverbial red-handed by the revelations contained in the flash drive, there was not the slightest expression of remorse or contrition. Instead, it has for the past six months of this case used the flash drive as an excuse to change the subject, in which endeavor it has so far been successful - and it has done so by viciously attacking the plaintiffs and their counsel personally. It has been a display of reprehensible and shameful conduct which will need to be dealt with in due course, and that course can begin to be properly righted and set by this Honorable Court in this appeal.

Now to the rather narrow issue here: Trial courts are vest with discretion in

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[17] V5, p. 943

determining whether a person is to be held in contempt[18], so "abuse of discretion" is the standard of review here.

Lambert v. Adams, 347 So.2d 883, 884-85 (La.App. 3 Cir.1977) succinctly stated the considerations as follows:

> Our jurisprudence has established the following general rules regarding contempt proceedings: First, the object and purpose of a contempt proceeding is to vindicate the authority and dignity of the court. It is not designed for the benefit of the litigants, even though infliction of punishment for contempt may inure to the benefit of the mover in the contempt rule.... Second, unless a litigant *willfully* disobeys a *direct* order of the court issued prior to the contempt rule, he should not be held in contempt, even if his acts tend to frustrate the opposing litigant... Third, proceedings for contempt must be strictly construed, and the policy of our law does not favor extending their scope... Fourth, as a general rule, contempt proceedings should not be resorted to where other specific remedies are provided by law.
>
> (emphasis by the court; numerous citations omitted)

The court in *New v. New*, 93-702, p. 10 (La. App. 5 Cir. 1/25/94), 631 So.2d 1183, 1188 construed La. C.C.P. Art. 224 concerning constructive contempt thus:

> Under our jurisprudence interpreting this statute, it must be shown by the party seeking the contempt ruling that the alleged offender willfully disobeyed a direct order of the court prior to the contempt rule; otherwise, he should not be held in contempt. *James v. Spears*, 372 So.2d 617 (La.App. 1st Cir.1979); *Lambert v. Adams*, 347 So.2d 883 (La.App. 3rd Cir.1977). *Hawkins v. Hawkins*, 592 So.2d 843 (La.App. 3 Cir.1991).
>
> One act enumerated as constituting a constructive contempt of court is "(2) Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court; ..." Willful disobedience is an act or failure to act that is done intentionally, knowingly and purposefully, without justification. A trial court is vested with great discretion in determining whether a person is to be held in contempt for willful disobedience of a trial court judgment. *Kirby v. Kirby*, 579 So.2d 508, 519 (La.App. 4th Cir.1991), writ denied 582 So.2d 1308 (La.1991); *Tschirn v. Tschirn*, 434 So.2d 113 (La.App. 5th Cir.1983).

It was that discretion which was sorely abused by the court below in this

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[18] *James v. Spears*, 372 So.2d 617 (La.App. 1st Cir.1979); *Hodges v. Hodges*, 02-489, p. 9 (La.App. 3 Cir. 10/2/02), 827 So.2d 1271, 1276, writ denied, 02-2485 (La.11/8/02), 828 So.2d 1122; *Kirby v. Kirby*, 579 So.2d 508, 519 (La.App. 4th Cir.1991), writ denied 582 So.2d 1308

instance. Here is the operative portion of the reasons for judgment:

> The Court finds that the language of the requested discovery was sufficient to require the plaintiffs to disclose their possession of the flash drive. As noted above, the interrogatories requested plaintiff to **describe in detail how you came to** possess the exhibits and to identify all documents associated with **the receipt of** Exhibits 28, 29, and 30. Thus the plaintiffs violated this Court's Judgment of June 16, 2015 by failing to fully and completely respond to the written discovery.
>
> (emphasis by the court)

The court's reasoning *might* have been within the scope of its discretion - *if* this ruling had been made in 1990, or perhaps even 2000. But this is 2015, the "digital age" when there are numerous Continuing Legal Education programs on subjects like "ediscovery." Here, for example, is a simple question numerous attorneys know to ask: "In what format were the documents received?" And we all know about "hard copies" versus digital formats. *None* of that was asked. *Ever* - not in interrogatories, not in requests for production and not at any time in Stevens' five hour deposition. STPG asked about "documents" and the response was in like kind. In fact, weeks after they were in possession of the flash drive, counsel for STPG continued to talk about "documents" and "records" in questioning witnesses.[19]

The point is that all of STPG's discovery was focused on the three exhibits, and the plaintiffs were quite meticulous in responding properly to the precise questions asked. Mr. Blazek, a former senior partner at Adams and Reese in New Orleans with over 50 years at the bar with a classic "sterling reputation," tried to explain this to the court in detail.[20] And here note the interesting emphasis found in the court's cited reasons: "... identify all documents associated with **the receipt of** Exhibits 28, 29, and 30." The emphasis is wrong as the operative language - STPG's chosen language - is "associated with" and not the "receipt of." That has particular

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(La.1991); *Tschirn v. Tschirn*, 434 So.2d 113 (La.App. 5th Cir.1983)

[19] V. , pp. 869 and 875

[20] V. 5, pp. 1010-1012

connotations in the English language which, again, Mr. Blazek tried to respectfully bring to the court's attention.[21] Here are the relevant parts of the definition of "associate" found in Merriam Webster's Unabridged Dictionary, the ruling authority on the English language as spoken in the United States:

> 1 a: to join often in a loose relationship as a partner, fellow worker, colleague, friend, companion, or ally "was associated with him in a large law firm" :were closely associated with each other during the war"...
> ***
> 3 : to join (things) together or connect (one thing) with another...
> 4 : to join or connect in any of various intangible or unspecified ways (as in general mental, legendary, or historical relationship, in unspecified causal relationship, or in unspecified professional or scholarly relationship) "surrealism has been associated with psychological and intellectual atmosphere common to periods of war - Bernard Smith "she wished to associate him with her unusual mood - J.C> Powys
> 5 : to submit to public identification (as with a principle or sentiment) "the House will associate itself with these expressions" - Sir Winston Churchill "I should wholeheartedly associate myself with the general libertarian views" - Felix Frankfurter...

If one were to ask an attorney for a particular file concerning, say, a real estate transaction, "and all other files associated with it," would that mean all the files in the filing cabinet in which that particular file resided, or would it mean all other files with some sort of relevant relationship to the real estate transaction? The answer is obvious. Yet Stevens and counsel are being punished for not producing the entire file cabinet when that was not what was requested.

What STPG asked for was any documents "associated with" the stated exhibit, which Stevens and counsel very reasonably took to mean any other documents that had some relevant relationship with the content of the exhibits. And there were, quite truthfully and reasonably, none. So the fault does not lie with either Stevens or Messrs. Koerner or Blazek but with the failure of STPG to properly or reasonably articulate what it was seeking. That could quite obviously,

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[21] V. 5, p. 1010

and easily, have been done in numerous different ways: "Were any other documents received with Exhibit 28?" "Please identify/produce any and all documents received together with/ at the same time as/ your receipt of Exhibit 28." Etc.

Finally, where in all of this can the court in any reasonable fashion find *willful* disregard or disobedience? Meaning, that they *intended* to hide the flash drive. Despite five hours of questioning, STPG did not ask one question of Stevens directed to the format in which the documents were received. Counsel kept asking about "documents" and Stevens responded in kind. Mr. Blazek then told counsel that he would bring him all the "documents" and the next day delivered to him a copy of the flash drive. Where's the intent to hide? Where's the willfulness the law requires? It doesn't exist and the judgment cannot stand.

Finally, there was no evidence presented of STPG's alleged expenses or attorney fees, despite multiple hearings and opportunities to do so. (And besides which, STPG does not pay any court costs as a matter of law.) The party demanding sanctions, fees and/or costs has the burden of proving them. *Corumia v. Broadhurst*, 584 So.2d 377, 379 (La.App. 3 Cir.1991), wherein the court held:

> In the case sub judice, the record is void of any proof of the expenses USAA and Broadhurst incurred as a result of the termination of the deposition by Corumia's attorney. Therefore considering the absence of proof, we are compelled to set aside the judgment of the trial court.
>
> We further find that a remand is not appropriate. USAA and Broadhurst came to court fully aware of their need to prove the expenses they incurred because of the terminated deposition. They had an opportunity at the hearing to introduce supporting evidence and failed to do so.

The judgment appealed was a clear abuse of discretion, and contrary to law, and should be reversed.

ARGUMENT ON ASSIGNMENT OF ERROR NO. 2

The trial court erred in permanently sealing the flash drive and its contents.

On this issue the standard manifest error rule would apply to the trial court's findings of fact with regards to the public records in issue, but as the above shows,

there were no findings of fact, which is manifest error per se. Despite several times saying that she needed to review the records[22] the judge never did any such review and made no findings. Instead, she just leapt to the conclusion that the *entirety* of the contents of the flash drive were protected. Here is the relevant part of the ruling:

> As noted above, the Court granted a Protective Order in this case. The Protective Order, signed by the Court on September 17, 2015, provides, inter alia, that the plaintiffs and their counsel are prohibited from using any of the information contained on the USB flash drive unless that information is subsequently produced by St. Tammany pursuant to discovery requests or a Public Record request. The Court finds that this Protective Order shall be made permanent.[23]

Some hints for the reason for the court's flip-flop may be found in other comments made at the hearings. One of her concerns was that the disclosure was not done with the consent of the parish, adding this interesting comment:

> It was not done --- and it was not done with the consent of the Parish.... That is what I have before me today. Now, whether or not at a subsequent time you can prove to me that none of the documents are privileged, because there is an exception obviously in the public records law, 44:4.1(C), "The provisions of this chapter shall not apply to any writings, records, or other accounts that reflect the mental impressions, conclusions, opinions or theories of an attorney or an expert obtained or prepared in anticipation of litigation or in preparation for trial."[24]

"Consent of the Parish" is irrelevant to the status of the contents of the flashdrive as public records or any alleged privilege. And the Court clearly has it completely backwards: It was not and is not for the plaintiffs/Appellants to "prove to [the court] that none of the documents are privileged," but quite the opposite: The party asserting the privilege bears the burden of proof. *Keith v. Keith*, 48,919 (La. App. 2 Cir. 5/15/2014), 140 So.3d 1202, 1209; *Hill v. TMR Exploration, Inc*., 2014-1373 (La. App. 1 Cir., 11/24/2014), ____ So.3d._____. As the Court did properly note, the public records law contains an *exception*, and it was *STPG's* burden to prove that

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[22] Besides the above references, see V. 1, p. 15, minutes of the hearing held on August 26, 2015: "Court will have to determine whether privileges are applicable to the documents and make sure those documents are protected."

[23] p. 4 of Reasons for Judgment attached hereto.

[24] V.5, pp. 904-5

exception. Despite multiple hearings and opportunities, it failed to carry that burden. Instead STPG's counsel kept repeating the phrases "litigation file," "anticipation of litigation," and "attorney work product" ad nauseam, as if they were magical incantations which if repeated enough times could transform the numerous *public* records contained on the flash drive into privileged documents.[25]

Our Public Records laws are very strong and quite clear, as this Honorable Court set forth in *State v. Mart*, 96 1584 (La.App. 1 Cir. 6/20/1997), 697 So.2d 1055. That case overturned a ruling very similar to the one in issue here: A television station obtained a copy of a video tape that parish authorities did not want the media to use on the grounds that it was evidence in a criminal prosecution - even though the prosecution had terminated. The trial court obliged and enjoined the television station from copying and distributing a copy of the videotape it had in its possession. This Court reversed, and because the ruling is directly on point, it is here quoted at length:

> Under Louisiana law, the right of the public to access public records is a fundamental right protected by the constitution and by statute... La. Const. art. 12 § 3 provides that "no person shall be denied the right to examine public documents except in cases established by law." The Public Records Law, La. R.S. 44:31, grants to each person of the age of majority the right to "inspect, copy or reproduce or obtain a reproduction of any public record," except as otherwise provided by law. Any request for a public record must be analyzed liberally in favor of free and unrestricted access to the record... The right of access may be denied only when a law, specifically and unequivocally, provides against access to the public record...
>
> The District Attorney contends that the evidence tape is not a public record falling within the purview of Louisiana's public access law. Without explanation, he posits that the tape does not fit the legal definition of a public record. La. R.S. 44:1, A(2) defines a public record to include:
>
> > All ... tapes, recordings.... having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution

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[25] See, e.g., V. , pp. 944 et seq.

> or laws of this state ...
>
> Generally, all records, writings, recordings, tapes, reproductions and electrical data prepared for use by any instrumentality of the state, parish or municipal government are public records... Given this broad definition, it can hardly be disputed that the evidence tape constitutes a public record. It is a reproduction of a tape prepared for use by a parish school system during the course of its duty to provide public transportation to its students. Therefore, we find that the evidence tape is a public record subject to Louisiana's public access laws.
>
> The burden is on the party seeking to prevent disclosure to prove that withholding of a public record is justified... Because the District Attorney and the school board are attempting to shield the tape from public view, they must establish that a law, specifically and unequivocally, precludes public access to the evidence tape...
>
> *State v. Mart*, supra, @ pp. 6-7, 697 So.2d @1059 (numerous citations omitted)

As noted above, STPG very clearly had intentionally withheld Exhibits 28-30 even though they had been unequivocally requested almost a year before through a valid public records request. This would be, at the least, a violation of La. R.S. 44:37[26], which is a criminal statute.[27] And hence, *even if* STPG had shown some sort of privilege otherwise, it would be exempted from the privilege under LA. C.E. Art. 506(C).[28]

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[26] "Any person having custody or control of a public record, who violates any of the provisions of this Chapter, or any person not having such custody or control who by any conspiracy, understanding or cooperation with any other person hinders or attempts to hinder the inspection of any public records declared by this Chapter to be subject to inspection, shall upon first conviction be fined not less than one hundred dollars, and not more than one thousand dollars, or shall be imprisoned for not less than one month, nor more than six months. Upon any subsequent conviction he shall be fined not less than two hundred fifty dollars, and not more than two thousand dollars, or imprisoned for not less than two months, nor more than six months, or both."

[27] And unfortunately not too surprising. Within the last few years, St. Tammany Parish had its tax assessor resign for many instances of malfeasance in office; it's coroner plead guilty to crimes (Peter Galvan, M.D. , who's still serving his prison sentence); and its former District Attorney, Walter Reed, was just convicted by a jury in Federal Court on 19 out of 20 counts of criminal wrongdoing. And at this moment the new District Attorney (began office January, 2015), Warren Montgomery, has had to sue the Parish President and the Parish Council to enforce his and his office's authority under Section 4-03 of Part 5 of the Parish Charter, as the sole attorney for the parish. *Warren Montgomery v. St. Tammany Parish Government*, 2016-11538 "J", 22nd JDC for St. Tammany Parish, filed April 11, 2016. Part of what is at issue in that suit is Mr. Montgomery's authority over the same attorneys who were involved in handling the public record requests in issue in these proceedings, which control the Parish President and some members of the Council resist relinquishing despite the clear language of the Charter - *and* despite the voters' rejection in November, 2015 of their attempt to amend the Charter to remove that authority from the District Attorney.

[28] "There is no privilege under this Article as to a communication: ...(1) (b) Made in furtherance of

As to the STPG's claims of privilege, it never carried its burden of proof of establishing its existence. And the privilege, to the extent that it exists, is qualified and not absolute and must be clearly proved:

> ...To establish the attorney-client privilege, several elements must be proven by the party asserting the privilege: 1) the holder of the privilege is or sought to become a client; 2) the communication was made to an attorney or his subordinate in a professional capacity; 3) the communication was made outside the presence of strangers; 4) the communication was made for the purpose of obtaining a legal opinion or services; and 5) the privilege has not been waived. *In re Shell Oil Refinery,* 812 F.Supp. 658, 661 (E.D.La.1993); *Cacamo,* 798 So.2d at 1216. Under Louisiana law, the party asserting the privilege has the burden of proving that the privilege applies. *Cacamo,* 798 So.2d at 1216. Further, the party asserting the privilege must adequately substantiate the claim and cannot rely on a blanket assertion of privilege. *Id.*
>
> *Maldonado v. Kiewit La. Co.,* 2012-1868 & 2012-1869 (La. App. 1 Cir., 5/30/2014),152 So. 3d 909, 927*; writ denied,* 2014–2246 (La. 1/16/2015), 157 So.3d 1129:

As noted above, STPG mandates that all requests for public documents be made through its legal department, even though responding to such requests is substantially a clerical function.[29] Merely putting an attorney's finger prints on a document does not render it privileged, nor are the communications between the attorneys handling the requests privileged merely because they are attorneys.

The order in the judgment permanently sealing the flash drive and all of its contents was very clearly wrong as a matter of both fact and law and should be reversed.

CONCLUSION

In light of the above, the judgment of the court below should be reversed, finding that there was no contempt of court or violation of discovery orders by either

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a crime or fraud."

[29] La. R.S. 44:1 et seq. contains many exceptions, but most are clearly inapplicable to the daily workings of a parish government; e.g., Section 3.1 protects records of "terrorist-related activity" from production. Most of the exceptions are found in section 4, the great majority of which clearly do not apply. Having attorneys perform these clerical tasks is a waste of attorney time - unless, perhaps, the intent is to be able to claim privilege over public records certain persons within the parish government don't want disclosed.

Stevens or her attorneys, Messrs. Koerner and Blazek; and that the sealing of the flash drive and all its contents was likewise clearly erroneous as a matter of both fact and law. Further, all costs of this appeal should be assessed against Appellee, STPG.

Respectfully submitted:
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By:_____
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of the Appellants has been served upon all counsel of record by hand delivery, facsimile transmission, email, and/or by depositing same in the U.S. mails, postage prepaid, this 31 day of May, 2016.

_____
L. KEVIN COLEMAN

TERRI LEWIS STEVENS AND JENNIFER FRUCHTNICHT, WIFE OF/AND CRAIG RIVERA	**NUMBER 2015-10649 DIVISION "H"**
	22ND JUDICIAL DISTRICT COURT
VERSUS	**PARISH OF ST. TAMMANY**
ST. TAMMANY PARISH GOVERNMENT	**STATE OF LOUISIANA**
FILED: January 21, 2016	**DEPUTY CLERK**

JUDGMENT

This matter came before the Court on October 29, 2015 on a Motion for Contempt of Court filed on behalf of St. Tammany Parish Government. For the reasons set forth in this Court's Reasons for Judgment of December 4, 2015;

IT IS HEREBY ORDERED that St. Tammany's Motion for Contempt of Court is granted.

IT IS FURTHER ORDERED that the Protective Order signed by the Court on September 17, 2015 shall be made permanent;

IT IS FURTHER ORDERED that pursuant to La.Code Civ. Pro. art. 1471(C), Plaintiff Stevens and her counsel, Louis R. Koerner, Jr. and James E. Blazek, shall pay to St. Tammany the costs incurred for the filing of the Motion for Contempt of Court, as well as attorney's fees in connection therewith, in the sum of $2,500.00, to be paid within thirty days of the signing of this Judgment.

Covington, Louisiana, this 21 day of January, 2016.

HONORABLE ALLISON H. PENZATO

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TERRI LEWIS STEVENS AND JENNIFER FRUCHTNICHT, WIFE OF/AND CRAIG RIVERA

VERSUS

ST. TAMMANY PARISH GOVERNMENT

FILED: December 4, 2015

NUMBER 2015-10649 DIVISION "H"

22ND JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

DEPUTY CLERK

REASONS FOR JUDGMENT

This matter is before the Court on the Motion for Contempt of Court of St. Tammany Parish Government ("St. Tammany") filed against plaintiffs, Terri Lewis Stevens, Jennifer Fruchtnicht and Craig Rivera, for their alleged intentional violation of this Court's Judgment of June 16, 2015. In connection with the Motion for Contempt, St. Tammany filed a Motion for Protective Order, which was granted by Order signed by the Court on September 17, 2015. In this pending Motion for Contempt, in addition to a protective order, St. Tammany requested that the proceedings be dismissed, and that the plaintiffs and their attorneys be assessed with all costs and attorney's fees incurred by St. Tammany for the actions taken to determine the source of the information improperly obtained by the plaintiffs, including, but not limited to, the drafting of the Second Set of Interrogatories and Second Requests for Production of Documents, the necessary Rule 10.1 conference, the filing of the initial Motion to Compel and the Motion for Protective Order, Contempt of Court, Sanctions and Evidentiary Hearing, and counsel's preparation for and attendance at the related hearings.

Historically, the issues involving the motion before the Court date back to the inclusion of Proposed Exhibits 28, 29 and 30 attached to a Post-Trial Memorandum filed by plaintiffs subsequent to the March 27, 2015 hearing on plaintiffs' Request for a Preliminary Injunction. St. Tammany filed a request for production of documents and interrogatories to Plaintiffs on April 14, 2015 which sought information concerning the source and scope of the plaintiffs' acquisition of these documents. The plaintiffs objected to the written discovery. St. Tammany raised with the Court informally on May 29, 2015, its contention that documents were obtained improperly. St. Tammany filed a Motion to Compel which was heard on June 15, 2015. The motion sought to compel responses to the following as to Exhibit 28:

> ***INTERROGATORY NO. 16:*** Please describe in detail how you came to possess Exhibit 28. Your response should state the date you first received Exhibit 28, and identify each person providing you with Exhibit 28, all documents associated with

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the receipt of Exhibit 28 and all communications relating in any manner to your acquisition of Exhibit 28.

Interrogatories No 17 and No. 18 requested the identical information as to Exhibits 29 and 30. The Request for Production of Documents sought production of all documents identified in response to the interrogatories.

Following the hearing on June 15, 2015, the Court ordered full and complete responses to Interrogatories 16, 17, and 18 as well as the production sought in Requests 11 and 12. A judgment was signed on June 16, 2015.

Thereafter on June 23, 2015 plaintiffs answered the interrogatories at issue. The sum of the response as to Interrogatories No. 16, 17 and 18 was that each exhibit (28, 29 and 30) was offered as a public record on or about March 27, 2015 by Ms. Irma Russell. No further documents were produced at that time. St. Tammany contends that at a July 13, 2015 deposition of plaintiff Stevens it first became aware that additional documents were received along with said exhibits. St. Tammany further contends that the following day, July 14, 2015, counsel for plaintiffs delivered a letter addressed to the Court with a USB flash drive which indicated that it contained a copy of all the documents delivered to Ms. Stevens by Ms. Russell. St. Tammany contends that the USB flash drive contained a complete copy of the St. Tammany Parish Legal Department electronic file for this litigation.

At issue is the failure of the plaintiffs to provide to St. Tammany the USB flash drive in response to the June 16, 2015 Judgment ordering full and complete responses to St. Tammany's written discovery. St. Tammany argues that the Interrogatories propounded to plaintiffs requested all documents associated with the receipt of Exhibits 28, 29, and 30, and that since the USB drive was received along with said exhibits, plaintiffs' possession of the USB drive should have been disclosed in response to the Interrogatories. In opposition, plaintiffs argue that the Interrogatory only required the plaintiffs to produce documents associated with Exhibits 28, 29, and 30, and as the Exhibits were "standalone documents" plaintiffs were not required to disclose their receipt of the flash drive.

There is no dispute that the plaintiffs possessed the flash drive at the time they responded to the Interrogatories and Request for Production of Documents. Irma Russel testified that someone placed an envelope on which was written "For Terri Stevens" in Ms. Russel's mailbox and that Ms. Russel delivered the envelope to Ms. Stevens. Ms. Stevens testified that the

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envelope she received from Ms. Russel contained a thumb drive. Ms. Stevens further testified that upon receiving the thumb drive she opened and reviewed its contents. In her review of the contents of the thumb drive, she discovered the documents that were identified as Exhibits 28, 29, and 30 in plaintiffs' Post-Trial Memorandum filed March 31, 2015.

The Court finds that the language of the requested discovery was sufficient to require the plaintiffs to disclose their possession of the flash drive. As noted above, the interrogatories requested plaintiff to **describe in detail how you came to possess** the exhibits and to identify all documents associated with **the receipt of** Exhibits 28, 29, and 30. Thus the plaintiffs violated this Court's Judgment of June 16, 2015 by failing to fully and completely respond to the written discovery.

Louisiana Code of Civil Procedure Article 1471 provides that if a party fails to obey an order to provide discovery, including an order made under Article 1469, the court in which the action is pending may make such orders in regard to the failure as are just. The sanctions available under Article 1471 include, but are not limited to, an "order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence" and an "order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." La.Code Civ. Pro. art. 1471(A)(2) & (A)(3). "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." La.Code Civ. Pro. art. 1471(C).

For dismissal of a proceeding, the record must support "a finding that the failure was due to ... wilfulness, bad faith, or fault." *Horton v. McCary*, 635 So. 2d 199, 203 (La. 1994). Criteria to be considered in imposing sanctions are the prejudice to the other party and the willfulness of the disobedient party. *JP Morgan Chase Bank, N.A. v. Boohaker*, 2014-0594 (La. App. 1 Cir. 11/20/14), 168 So. 3d 421, 429 (La. Ct. App. 2014).

At the June 15, 2015 hearing on St. Tammany's Motion to Compel, the Court clearly expressed concern that information pertaining to the lawsuit was being produced to plaintiffs in

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an unauthorized fashion directly from St. Tammany's legal files which was clearly prejudicial to the administration of justice. Mr. Blazek indicated to the Court that he recognized the Court's concern, and made sure that Ms. Stevens carefully answered the question as to the documents received with Exhibit 28. Plaintiffs' Motion for New Trial filed on April 14, 2015, references that movers came into possession of Exhibits 28-30, "as well as other relevant and important documents". This pleading was signed by Mr. Koerner. Despite this, Ms. Stevens and her counsel failed to disclose in plaintiffs' Answers to Interrogatories that at the same time and in association with the receipt of documents identified as Exhibits 28-30, Ms. Stevens received a flash drive containing a number of other documents. In her deposition[1], when asked about the documents, Ms. Stevens testified that she was handed "documents" in an envelope by Ms. Russell. Mr. Blazek clarified that these were "papers". However, Mr. Blazek knew that Ms. Stevens received a flash drive from Ms. Russell, not papers. Mr. Blazek informed this Court that following the advice of his ethics counsel at Adams and Reese he met with Ms. Stevens before the deposition and learned that she had received a thumb drive from Ms. Russel. Taken as a whole, the Court finds that Ms. Stevens[2] and plaintiffs' counsel willfully failed to disclose their possession of the USB flash drive and/or additional documents in response to St. Tammany's Interrogatories.

As noted above, the Court granted a Protective Order in this case. The Protective Order, signed by the Court on September 17, 2015, provides, inter alia, that the plaintiffs and their counsel are prohibited from using any of the information contained on the USB flash drive unless that information is subsequently produced by St. Tammany pursuant to discovery requests or a Public Record request. The Court finds that this Protective Order shall be made permanent.

The Court does not find that dismissal of plaintiffs' case is warranted. Dismissal is a draconian penalty which should be applied only in extreme circumstances. *Horton,* 635 So.2d at 203. Before imposing sanctions for a parties' failure to obey an order to provide discovery a court must consider the prejudice to the other party. In this pending motion for contempt, the Court does not consider the prejudice to St. Tammany of the plaintiffs' possession of the flash

1 Ms. Stevens' deposition was attached as an Exhibit to Defendant's Motion, but was not introduced into evidence. At the October 30, 2015 hearing on this matter, counsel for plaintiffs, Mr. Blazek, indicated to the Court that it should review Ms. Stevens' deposition.

2 At the August 26, 2015 hearing in this matter, Mr. Rovira and Ms. Fruchtnicht testified that they did not learn that Ms. Stevens came into possession of the flash drive until the matter was raised by St. Tammany. Neither Mr. Rovira nor Ms. Fruchtnicht signed the Responses at issue.

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drive or any violations of the Protective Order, but the prejudice to St. Tammany of the failure of the plaintiffs to disclose their possession of the flash drive following the June 16, 2015 Order to do so. St. Tammany learned of plaintiffs' possession of the flash drive on July 14, 2015, approximately one month later. The Court finds that plaintiffs' failure to disclose their possession of the flash drive was not substantially justified, and awards to St. Tammany the costs incurred for the filing of the Motion for Contempt of Court. The Court further awards attorney's fees in connection therewith, in the sum of $2,500.00[3], to be paid within thirty days of the signing of the Judgment in this matter.

THESE REASONS DO NOT CONSTITUTE A WRITTEN JUDGMENT. The Court instructs counsel for defendant to prepare a judgment in conformity with these Reasons, circulate the proposed judgment in accordance with Rule 9.5 of the Louisiana District Court Rules, and submit the judgment within fifteen (15) days.

Covington, Louisiana, this 4 day of December, 2015.

HONORABLE ALLISON H. PENZATO

3 Neither Mr. Rovira nor Ms. Fruchtnicht are responsible for the monetary component of the sanctions awarded as the Court finds that they were not involved in the failure to disclose the possession of the USB flash drive.

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