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

Case No. 3D24-0287
Lower Case No. 2018-026405 CA 01

GARY B. CROUCH,

Appellant,

vs.

BRIANA BRUMER and JBKELLY, LLC d/b/a LIP SMART, a Florida limited liability company,

Appellee(s).

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Throughout this Initial Brief, the parties will be referred to by their given names. Appellant, Gary B. Crouch, will be referred to as the "Mr. Crouch" or "Appellant." Appellee, Briana Brumer, will be referred to as "Ms. Brumer," while Appellee, JBKelly, LLC d/b/a Lip Smart," will be referred to as "JBKelly." The Appellees, collectively will be referred to as "Appellees."

Where possible, references will be to the Record on Appeal. For example, "5" refers to the fifth page of the Record on Appeal. The "Record on Appeal," however, as prepared by the Clerk of the Court for the lower court omits, omits many documents in the record that are discussed in this Initial Brief. They have been provided to this Court in an Appendix and references to the Appendix, for example, will cite to that page with the letter "A" preceding. Thus, "A5" refers to the fifth page of the Appendix.

STANDARD OF REVIEW

The standard of review for orders relative to a confidentiality order is an abuse of discretion. *Port Marina Condo. Ass'n, Inc. v. Roof Serv.*, Inc., 119 So. 3d 1288, 1291 (Fla. 4th DCA 2013). This Court reviews a lower court's findings of facts under the competent

substantial evidence standard of review. *Young v. Levy*, 140 So. 3d 1109, 1111 (Fla. 4th DCA 2014). To the extent that a lower court's order is based on conclusions of law, the standard of review is also *de novo*. *Bluth v. Blake*, 128 So. 3d 242, 245 (Fla. 4th DCA 2013).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ENFORCE ITS CONFIDENTIALITY ORDER AND NONDISCLOSURE AGREEMENT, WITHOUT ANY EXPLANATION, AFTER MULTIPLE VIOLATIONS OF SAME BY APPELLEES AND COUNSEL, RELYING ON THE UNSWORN STATEMENTS OF COUNSEL

STATEMENT OF THE CASE AND FACTS

On August 3, 2018, Appellant, Gary B. Crouch, filed a Verified Complaint for Replevin, Money Lent and Unjust Enrichment (49-58) against Appellees in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, *Gary B. Crouch v. Briana Brumer, et al.,* Case No. 2020-CC-011273. The Verified Complaint alleged that there had been a romantic relationship and subsequent engagement between Mr. Crouch and Ms. Brumer, which lasted from approximately 2008 to 2018 (50).

In the lawsuit, Mr. Crouch stated that the relationship ended in 2018 when Ms. Brumer called off their engagement. Mr. Crouch's claims centered around two things: (1) replevin of an engagement ring, which Ms. Brumer still had in her possession; and (2) repayment of approximately $337,500, owed from an initial $750,000 loaned by Mr. Crouch to Ms. Brumer, which was used, in turn, to fund Ms. Brumer's business venture, Appellee, JBKelly. (50-52).

Ms. Brumer filed a Counterclaim against Mr. Crouch (113-160), asserting that she was entitled to keep the engagement ring. She claimed it was Mr. Crouch, and not her, who ended their relationship, and sought declaratory judgment to that effect. (117). Ms. Brumer also claimed that she had lent Mr. Crouch $387,500, which was still unpaid, seeking relief under civil theft, money lent and unjust enrichment theories, for recovery of same. (119).

Issues related to discovery of the finances of Mr. Crouch and Ms. Brumer arose early and continued throughout the litigation. For example, in their June 26, 2019, Request to Produce (A4-A8), Appellees sought the complete federal tax returns of Mr. Crouch for the preceding five years, as well business records and tax returns from any business in which Mr. Crouch had an interest. Mr. Crouch,

a businessman and real estate developer in South Florida, objected to the unfettered release of such private information, including his confidential, personal finances.

This resulted in Ms. Brumer filing a August 7, 2019, Motion to Compel (A9-A43) and following a hearing, the lower court entered a December 13, 2019, Order (A44), requiring in-camera production of Mr. Crouch's tax returns, and also directed that "[a]ll production from the parties shall be subject to a mutually agreeable confidentiality and non-disclosure agreement and order." (A44). The absence of the parties' agreement to such language resulted in more motions filed in the lower court related to discovery.[1]

For example, Appellees filed a March 15, 2020, Motion to Compel and for Sanctions (A45-A55) on April 14, 2020 and Mr. Crouch filed a Motion for Redaction and Reconsideration (A56-A61). Pending discovery issues related to federal tax returns and the finances of Mr. Crouch (and Ms. Brumer) were considered by the trial court at a special set May 7, 2020, hearing. This resulted in lower

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[1] Given that both sides were seeking discovery of the other's finances, Appellees were also required to produce five years of federal tax returns.

court entering a May 16, 2020, Order on Defendant's Motion to Compel Discovery and for Sanctions and Plaintiff's Motion for Redactions and Reconsideration. (A64-A64).

The lower court's May 16, 2020, Order, again provided that "[a]ll production from the parties shall be subject to a confidentiality and non-disclosure agreement, 'for attorney's eyes only,' which shall be entered into before production takes place." (A62). The Order also established a procedure for the parties to attempt to reach a mutually agreeable confidentiality and non-disclosure agreement, which would then be adopted and signed off by the lower court. (A62).

But because the parties were unable to reach agreement as to the language of a proposed non-disclosure agreement, on May 19, 2020, Mr. Crouch filed an Amended Motion for Court Review and Approval of Confidentiality and Non-Disclosure Agreement (A65-A75). This Amended Motion was considered by the lower court at a hearing held on September 16, 2020. By Order dated September 22,

2020 (A76-A78), the lower court approved and adopted the form of a separately filed[2] Confidentiality Order and Nondisclosure Agreement.

Simply stated, the language of the Confidentiality Order and Nondisclosure Agreement was agreed to and executed by the parties and their counsel, and then adopted by the lower court. The Confidentiality Order and Nondisclosure Agreement again provided that "[t]he documents produced in this action involve disclosure of personal, confidential, and private information and other proprietary business information and ***records [and] [t]he information or any summation derived from the information is not to be disclosed in any manner or form including but not limited to verbal, written or electronic format***." (A80, ¶¶ 1 and 2) (emphasis added).

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[2] The September 22, 2020, Order provided that a copy of the Nondisclosure Agreement was attached as Exhibit A, yet the Order filed in the record does not have an attachment. While the absence of an Exhibit A appears to be an oversight of the lower court, a complete copy of the September 22, 2020, Order, with the Nondisclosure Agreement attached, was filed as an Exhibit to Mr. Crouch's Motion for Sanctions for Disclosure of Tax Returns in Violation of Court Order and Non-Disclosure Stipulation (1,393-1,399) and Motion for Sanctions for Disclosure of Audio Recordings in Violation of Order & Non-Disclosure Stipulation (1,409-1,414), as well as the August 3, 2021, Verified Motion for Contempt and Enforcement and Sanctions and Attorney's Fees (974-995). A complete copy is in the Appendix to this Initial Brief (A78-A84).

In Paragraph 3(a) the parties agreed that "[a]ll documents, materials, or other information produced in this action shall be deemed confidential and are hereby designated as confidential and subject to the provisions of this NDA." (A80, ¶ 3). Confidential materials was broadly defined as including:

> a. **Documents, materials or information, produced or to be produced**, in this litigation, or obtained from any other source or through a third-party, **whether pursuant to court order, through discovery, or by agreement of the parties**, will be held in strict confidence for attorney's eyes only, **including but not limited to, all documents and materials produced**, **including but not limited to *Tax Returns***, Social Security Number, Marital Status, Curriculum Vitae, ***Bank Records,*** Affidavits, Credit Card Statements, Photos, Videos, Correspondence, Emails, depositions, interogatories and any information derived therefrom, are deemed confidentiality information.

(emphasis added) (A80-A81, ¶ 3(a)).

The use of the documents and information or "information and embodiments or any summation derived thereof strictly subject to this NDA, [was] restricted solely to Counsel," (A81, ¶ 5) and it specifally provided "***[n]o document, material or other information including embodiments, or any summation derived shall be published, re-produced or filed in the Public Record.***" (emphasis added) (A81, ¶ 7).

Further, in Paragraph 4 it was agreed "that the information, contents, materials, documents, and things disclosed subject to the NDA is ***private***, confidential, ***non-public*** and propriety … of which there will be ***no dissemination.***" (emphasis added) (A81, ¶ 4). The consequences for violation of the Confidentiality Order and Nondiclosure Agreement that were agreed to by the parties was also clear.

The parties agreed and recognized in the Confidentiality Order and Nondiclosure Agreement, that damages arising from a violation would be difficult to determine. Thus, the parties agreed that "[a]ny violation of this NDA shall subject the Violating Party to a monetary fine of One Hundred Thousand Dollars ($100,000) per violation, [which] was in addition to such other sanctions as the Court may deem appropriate, including but no limited to contempt, striking of pleadings and entry of default." (A81-A82, ¶ 8).

On October 1, 2020, Mr. Crouch filed a Notice of Compliance with Order Dated 9-22-2020 (341-342), indicating that he had produced his federal tax returns for the prior five years, and other financial documents, subject to the terms of the Confidentiality Order and Nondisclosure Agreement. The parties proceeded to engage in

discovery and Appellees appeared to be acting in accordance with Confidentiality Order and Nondisclosure Agreement.

On July 26, 2021, the lower court attempted to hold a non-jury trial of the matter. The following day, however, the lower court suspended trial and then entered an July 30, 2021, Order (970-971) referring the parties to mediation. Thereafter, Mr. Crouch filed an August 3, 2021, Verified Motion for Contempt and Enforcement and Sanctions and Attorney's Fees (974-995), asserting multiple violations of the Confidentiality Order and Nondisclosure Agreement on the part of Appellee's counsel in connection with the July 26, 2021, bench trial.

In connection with their response and opposition to the Verified Motion, Appellees filed a December 9, 2021, Motion to Determine Confidentiality of Court Records (903-904). The basis of the Motion to Determine was a concern by the Appellees that their response to Mr. Crouch's Verified Motion could implicate the Confidentiality Order and Nondisclosure Agreement, and guidance was sought to enable a response without running afoul of the Confidentiality Order and Nondisclosure Agreement. A hearing was held on January 19, 2022, and the lower court granted the Appellees' Motion.

By Order dated January 24, 2022 (1615-1617), the lower court again reaffirmed that Mr. Crouch's tax returns and financial information were confidential. The Order stated that "[a]ny references or inclusions to/of Mr. Crouch's tax returns or other financial information in Defendant's Response in Opposition to Plaintiff's Verified Motion for Contempt and Sanctions, *et al.* is confidential pursuant to the parties Stipulation of Non-Disclosure and Confidentiality of Information and ***Documents and shall be redacted upon filing with the Court***." (emphasis added). Appellees proceeded to file a response to the Verified Motion. (1,618-2,133).

The following week the lower court, *sua sponte*, entered an January 31, 2022, Agreed Order on Court's Sua Sponte Motion to Seal Entire Record (1,015-1,017), which directed the Clerk of Court to seal the entire record in the matter. Three months later, however, the lower court undid the January 31, 2022, Order with a May 3, 2022, Order (1026-1027), noting that "neither the Court, nor the attorneys of record are able to view the record/docket." The May 3, 2022, Order directed the Clerk of Court to immediately "take approviate measures to allow the attorneys of record and the Court

to have access to the record." (1026). As it turned out this resulted in virtually all of the record being unsealed, as well as all future filings in the record being available to public.

The non-jury trial was reconvened and held on June 15, 2022, and June 16, 2022. Mr. Crouch was the only witness who testified in connection with his case against Appellees. Appellees' counsel sought to cross-examine Mr. Crouch, but before questioning Mr. Crouch as to his tax returns and other financial records, Appellees' counsel, sensitive to the requirements of the Confidentiality Order and Nondisclosure Agreement, reminded the lower court of the requirements of same and had "non-essential individuals" leave the courtroom.

> MS. COLWIN: Your Honor, before I begin, this is going to be referring to the tax records.
>
> May I proceed?
>
> THE COURT: I don't know who's here –
>
> MS. COLWIN: There's no –
>
> MR. ZILBER: I think you wanted Ms. Brumer, Kelly.
>
> MS. COLWIN: Ms. Brumer, right. Kelly Brumer.
>
> THE COURT: I assume that she's here. Would you step outside for a few minutes. We'll go get you.

MS. KELLY BRUMER: Yes.

MS. COLWIN: Thank you.

(Thereupon, Kelly Brumer left the courtroom).

Trial Transcript (A157-A158).

Thereafter, given their confidential nature, the lower court also directed Appellee's counsel to keep Mr. Crouch's federal tax returns and financial records separate from all of the other trial exhibits.

> THE COURT: I'll mark it as confidential. That's why I told her to keep it separate.
>
> MR. MILLS: Yes. Your Honor, if I may, as Your Honor is aware, the issue of the tax returns is a highly sensitive issue in this case. Only after the motion to compel the tax returns, that's all that was produced to us. We did not receive the entire – the complete copies.

Trial Transcript, (A160).

Appellees' counsel then proceeded to question Mr. Crouch about each of the five years of tax returns (2014, 2015, 2016, 2017 and 2018), he produced to Appellees, only after the parties (and the lower court) agreed to the language of and the protections of the Confidentiality Order and Nondisclosure Agreement. For all five years, Appellees' counsel either had Mr. Crouch read in open court

the figures from his financial records or Appellees' counsel would read the figures, questioning Mr. Crouch as to same.

BY MS. COLWIN

Q. I'm showing you what's been marked as Defendant's Exhibit X. Its right in front of you, Mr. Crouch.

A. All right. Good.

Q. And that is your tax return – is that your name up at the very top.

A. Yes.
Q. And its your 1040 that you had – that you had submitted to IRS as your tax form for 2014, correct?

* * *

Q. It says adjusted gross income is $------

A. Its says what it says, but its not the full story.

* * *

Q. Mr. Crouch, that is your 1040 for 2015; correct?

A. That is just the first page.

Q. And the adjusted gross income listed there is $------. correct?

A. The document says what it says.

* * *

Q. Mr. Crouch, I'm showing you a 1040 form for 2016. Your adjusted gross income is $--------, is that right?

A. You're showing me one page of the tax return.

* * *

Q. That's your tax return for 2017; it is not?

A. Yes.

* * *

Q. And on the bottom it says the loss of $---------, correct?

A. That's what is says.

* * *

Q. Showing you what's been marked as – admitted into evidence as Defendant's Exhibit BB. This is your profit and loss statement in 2018; is that right?

A. That's what is says.

Q. And if you look at line 31 on that document, sir, it establishes a ----- of $---------, correct?

A. Yes, it does.

Trial Transcript, (A166 -A172).

The trial concluded on June 16, 2022, and the lower court directed the parties to brief legal issues arising during trial and to provide proposed findings of fact and conclusions of law. Three weeks later, however, Mr. Crouch's counsel filed an July 8, 2022, Emergency Motion to Withdraw as Counsel (1,230-1,232). In turn,

Mr. Crouch, *pro se,* filed a July 14, 2022, Emergency Motion to Bar the Filing, Use and Disclosure of Illegal and Secretly Made Recordings (1,239-1,240).

In the Emergency Motion to Bar Filing, Mr. Crouch indicated that it had "recently come to the attention of Mr. Crouch that Defendant, Briana Brumer … surreptitiously audio recorded Mr. Crouch on several occasions, in clear violation of Florida law." Mr. Crouch further noted that "Ms. Brumer's counsel have threatened to bring illegally obtained audio records to the attention of the Court, in an attempt to force Mr. Crouch into what he believes is an unfavorable settlement of this proceeding." And the following day, Appellees acted upon this threat – by filing not only the transcripts of the audio records, but also the unredacted trial transcripts containing the testimony regarding Mr. Crouch's federal tax returns.

Indeed, the day following Mr. Crouch's Emergency Motion, the Appellees filed a July 15, 2022, Motion to Dismiss for Fraud and Motion for Sanctions (the "Motion to Dismiss") which was *unredacted and placed into the public record.* (2,134-2,392). The Motion to Dismiss stated that after "Mr. Crouch provided his sworn testimony at trial, the Defendants and their counsel have uncovered his

duplicitous scheme." In short, the Motion to Dismiss asserted that audio recordings made by Ms. Brumer contradicted the trial testimony of Mr. Crouch, arguing that Mr. Crouch's trial testimony was a fraud on the court.

To show the alleged "fabrication" of trial testimony, Appellees and their counsel attached unredacted transcripts of the June 15, 2022, and June 16, 2022, non-jury trial to their Motion to Dismiss. This included those portions of the trial testimony in which Appellees' counsel cross-examined Mr. Crouch about his financial records and federal tax returns, with either counsel or Mr. Crouch stating the contents of the documents read into the record.

The unredacted filing of the Motion to Dismiss in the public record was clearly in violation of the Confidentiality Order and Nondisclosure Agreement. To make matters worse, the Motion to Dismiss also attached transcripts of several illegally made tape recordings, which contained scandalous and outrageous statements. At no time during the preceding four years of the litigation had these recordings ever been disclosed, listed as exhibits for trial, let alone produced in any fashion during the parties' extensive discovery.

Because the Motion to Dismiss (and its attachments) was accessible by the public, four days later, on July 19, 2022, Mr. Crouch, *pro se,* filed an Emergency Motion to Remove Protected Confidential Information and Illegally Obtained Audio Recordings from the Public Record (1,243–1,258). This Emergency Motion sought relief (and sanctions) arising from the knowing violation of the Confidentiality Order and Nondisclosure Agreement – as the Appellees and their counsel had filed into the public record the: (1) unredacted trial transcript containing testimony as to tax returns and financial records; and (2) transcripts of the never before disclosed, illegally and surreptitiously made recordings of conversations.

Rather than take immediate and appropriate efforts to either seal the documents at issue, or at a minimum, redact Mr. Crouch's financial information, the Appellees and their counsel *doubled down and again violated the Confidentiality Order and Nondisclosure Agreement by filing a July 28, 2022, Amended Motion to Dismiss* (2,393–2,683) *in the public record.* As was the case with the July 15, 2022, Motion to Dismiss, the July 28, 2022, Amended Motion to Dismiss again contained the unredacted trial transcript, including

the financial testimony of Mr. Crouch, along with the transcripts of the numerous illegally made tape recordings.[3]

On August 4, 2022, Appellees filed an Omnibus Opposition to the Motions (1,259-1,265), acknowledging that while the Confidentiality Order and Nondisclosure Agreement "does mandate that any documents produced during the course of discovery or information derived therefrom must be kept in strict confidence, [but Mr. Crouch] ignores the fact that the docket is sealed and only accessible to the parties and their attorneys of record."[4] (1,263).

In doing so Appellees and their counsel conveniently failed to acknowledge that the Confidentiality Order and Nondisclosure Agreement barred the filing of such unredacted information into the public record -- and failed to acknowledge (as pointed out by Mr.

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[3] Counsel for Appellees would file an Affidavit (1,416-1,417) indicating that she had no personal knowledge of how the recordings were obtained, how they were received, whether there were any other recordings, whether the recordings had been edited or altered – beyond that information provided by Ms. Brumer.

[4] It was also subsequently revealed that both the Motion to Dismiss and Amended Motion to Dismiss had been served by Appellees through the Florida efile portal on eight other individuals who were no longer associated with the case, which included a mediator and several attorneys who had long withdrawn from the proceeding.

Crouch's Emergency Motion) that the lower court's record was not sealed. And even after Mr. Crouch had pointed this out, the Appellees and their counsel had again intentionally filed unredacted, confidential information into the public record.

On August 5, 2022, the lower court held a hearing on pending motions, at which time Mr. Crouch's new counsel indicated that both the Appellees' Motion to Dimiss and the Amended Motion to Dismiss, along with the unredacted trial transcripts and transcripts of the tape recordings *were still not sealed as of August 5, 2022, and readily available for review by the public*. On August 16, 2022, a month after the initial Motion to Dismiss was filed by Appellees, the lower court entered an Order Granting Motion to Seal Certain Documents Filed with the Court (1,290-1,291). This Order directed the Clerk of Court to seal the July 15, 2022, Motion to Dismiss and the July 28, 2022, Amended Motion to Dismiss (1,290). Further, the Order provided that the "recordings at issue and transcripts of same are to be treated as subject to the Stipulation of Non-Disclosure and Confidentiality of Information and Documents previously entered into by the parties." (1,290).

Based on the multiple violations of the Confidentiality Order and Nondisclosure Agreement, on October 13, 2022, Mr. Crouch filed two Motion for Sanctions. The first was directed to the multiple disclosures of Mr. Crouch's tax returns and financial records – a Motion for Sanctions for Disclosure of Tax Returns in Violation of Court Order and Non-Disclosure Stipulation (1,387-1,403). The second was directed to transcripts of the recorded conversations between Mr. Crouch and Ms. Brumer, made subject to the Confidentiality Order and Nondisclosure Agreement by the lower court's August 16, 2022, Order (1,290-1,291) – a Motion for Sanctions for Disclosure of Audio Recordings in Violation of Order & Non-Disclosure Stipulation (1,404-1,415).

On January 12, 2024, the lower court held a hearing on Mr. Crouch's two Motions for Sanctions (1,587-1,602).[5] During the hearing, the lower court was reminded of the strict requirements of

[5] In advance of this hearing, Mr. Crouch filed a Motion and Request to Take Judicial Notice (1,585-1,586), to enable the lower court to take into account the pleadings in the record and the numerous times the lower court directed Mr. Crouch to produce his financial records, all subject to a confidentiality safeguards that had been agree to by the parties.

the Confidentiality Order and Nondisclosure Agreement and how the Appellees and counsel violated same multiple times, despite a series of lower court orders prohibiting the filing of the offending pleadings, unredacted, into the public record.

In response, Appellees' counsel again told the lower court that Appellees' believed the entire court file had been sealed, and blamed the Clerk of Court for the Appellees' violation of the Confidentiality Order and Nondisclosure Agreement. (1593-1594). Counsel added that Appellees had no intent to violate the Confidentiality Order and Nondisclosure Agreement and, in any event, Mr. Crouch had suffered no damages. (1594). Of course, all of these unverified and otherwise unsupported statements of counsel were just statements of counsel and not evidence.

But in trying to blame others for the intentional violation of the Confidentiality Order and Nondisclosure Agreement, counsel also failed to address: (1) the prohibition against filing unredacted and confidential information into the record; (2) the parties' agreement as to damages arising from a violation; and (3) the filing of the Amended Motion to Dismiss, even after there were multiple indications that Appellees' filings were public and not sealed.

At the end of the hearing, the lower court, without providing any explanation or without setting the matter for an evidentiary hearing, merely stated "[a]t this time both motions for sanctions are denied. Have a good day gentlemen." (1588). On January 16, 2024, the lower court entered a written Order that denied both Motions for Sanctions (1,609-1,610), again only stating that the Motions "are DENIED." On February 12, 2024, Mr. Crouch filed a Notice of Appeal of the Order Denying Plaintiff/Counter-Defendant's Motion for Sanctions for Disclosure of Tax Returns and Motion for Sanctions of Disclosure of Audio Recordings (1,603-1,606) giving rise to the subject appeal.

SUMMARY OF ARGUMENT

The Florida Supreme Court has recognized that "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose same. The lower court abused its discretion by failing to enforce a Confidentiality Order and Nondisclsoure Agreement. The parties had agreed to the language of a Nondisclosure Agreement (that was approved and adopted by the lower court), which barred disclosure of the personal finances and confidential information (and audio recordings) of Mr. Crouch and Ms. Brumer. It was agreed by all parties such information could not

be filed into the public record and set the damages which would be recoverable for each violation of same.

After multiple intentional breaches of the Confidentiality Order and Nondisclosure Agreement by Appellees, the lower court erred in its refusal to impose sanctions for the breaches, appearently basing its ruling in large part on the unsworn statements of counsel. The lower court also abused its discretion in failing to enforce the parties' agreement -- as to the prohibitions against disclosure and their agreement as to the imposition of sanctions for any violations.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ENFORCE ITS CONFIDENTIALITY ORDER AND NONDISCLOSURE AGREEMENT, WITHOUT ANY EXPLANATION, AFTER MULTIPLE VIOLATIONS OF SAME BY APPELLEES AND COUNSEL, RELYING ON THE UNSWORN STATEMENTS OF COUNSEL

The Florida Supreme Court has recognized that "the disclosure of personal financial information may cause irreparable harm to a person forced to disclose it, in a case in which the information is not relevant. *Friedman v. Heart Inst. of Port St. Lucie, Inc.,* 863 So. 2d 189, 194 (Fla. 2003). Article I, Section 23, of the Florida Constitution

which is titled "Right to Privacy," provides, in pertinent part, that "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

This Section of the Florida Constitution protects the disclosure of financial information of private persons if there is no relevant or compelling reason to require disclosure. *Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101, 1103 (Fla. 2d DCA 2012). This is because "personal finances are among those private matters kept secret by most people." Id. (citing *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985)).

One method which trial courts often employ to permit the disclosure of sensitive personal matters and financial information is through the use of confidentiality orders entered by a lower court and nondisclosure agreements reached by litigants. In fact, where a lower court requires the production of such otherwise confidential documents and information – in the absence of a confidentiality order – it is a departure from the essential requirements of the law. *Rocket Group, LLC v. Jatib*, 114 So. 3d 398 (Fla. 4th DCA 2013)(reversing lower court compelling production of documents what the parties

agreed were confidential, without including a provision to protect them from exposure in the public record); *Laser Spine Inst., LLC v. Makanast,* 69 So. 3d 1045, 1046 (Fla. 2d DCA 2011)(granting certiorari relief where lower court should have stayed production to negotiate a protective order).

In the subject case, Mr. Crouch resisted the production of his personal finances, asserted they were irrelevant to the proceedings while the lower court stated on multiple occasions that the disclosure of such information would be subject to a mutually agreeable confidentiality and non-disclosure agreement and order. In fact, the lower court "helped" the parties reach an agreement as to the language of the Confidentiality Order and Nondisclosure Agreement at issue.

This Agreement (blessed by the lower court) precluded, among other things, the disclosure of confidential information, the filing of the unredacted trial transcript and the transcripts of the illegal tape recordings, in the public record. Indeed, the parties agreed that confidential "records [and] [t]he information or any summation derived from the information *is not to be disclosed in any manner or form.*" (emphasis added). Similarly, the parties agreed "that the

information, contents, materials, documents, and things disclosed subject to [this Agreement] is *private*, confidential, *non-public* and propriety … of which there will be *no dissemination*." (emphasis added). And the parties also agreed that "*[n]o document, material or other information* including embodiments, or any summation derived *shall be published, re-produced or filed in the Public Record*." [6] (emphasis added).

Here, the Appellees and their counsel violated the Confidentiality Order and Nondisclosure Agreement on multiple occasions. Appellees' counsel assertion that they were under the mistaken belief that the entire record was sealed and such unsworn statements is not evidence. And counsel also sought to blame the Clerk of Court, washing their hands of the language agreed to in the Confidentiality Order and Nondisclosure Agreement – even after being made aware the record was not sealed and yet committed subsequent violations.

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[6] The lower court's January 24, 2022, Order further directed that confidential information and documents "shall be redacted upon filing with the Court."

It is black letter law, however, that "[a]rgument of counsel is not evidence." *State v. Fink*, 557 So. 2d 129, 130 n. 1 (Fla. 3d DCA 1990). But even if one were assume Appellees' assertion as true, the situation presented in this appeal would not have occurred if the attachments to the Motion to Dismiss had not been "published, re-produced or filed in the Public Record" or if attachments to the Motion to Dismiss had been treated as "private, confidential, non-public and propriety … of which there will be no dissemination" or, as to the tax returns issue, had "been redacted upon filing with the Court."

As for the filing of the Amended Motion to Dismiss, there is simply no excuse. In his *pro se* filings, Mr. Crouch placed the Appellees and their counsel on notice that the Motion to Dismiss and virtually all other filings in the proceeding were available for the public to view. Still Appellees ignored the Confidentiality Order and Nondisclosure Agreement and filed the Amended Motion to Dismiss. Had there been any doubt, the Florida Rules of Judicial Adminstration also provided Appellees with a means of not violating the Confidentiality Order and Nondisclosure Agreement.

For example, under Florida Rule of Judicial Administration 2.420, a person filing confidential information with the court may file with it a "Notice of Confidential Information within Court Filing," or another party or affected nonparty may file such a notice when the confidential information fits within the limited parameters described in Rule 2.420. Otherwise, a "Motion to Determine Confidentiality of Court Records" may be filed, something which Appellees had done much earlier in the litigation. Fla. R. Jud. Admin. 2.420(d)(3).[7]

Appellees claim that Mr. Crouch has "suffered no damages" is also an attempt to move the focus off their violation of the Confidentiality Order and Nondisclosure Agreement. It also conveniently overlooks what the parties had agreed to in Confidentiality Order and Nondisclosure Agreement -- that "the amount of loss or damages likely to be incurred [by a violation] is incapable or difficult to precisely estimate." Thus, the parties further

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[7] Here, not only had this mechanism not been followed, but both the Motion to Dismiss and Amended Motion to Dismiss had been served by Appellees through the Florida efile portal on eight other individuals who were no longer associated with the case, which included a mediator and several attorneys who had long withdrawn from the proceeding.

agreed that any violation of the Confidentiality Order and Nondisclosure Agreement would subject the violating party "to a monetary fine of One Hundred Thousand Dollars ($100,000) per violation."

Here, the lower court abused its discretion by not, at a minimum, recognizing that facially there had been multiple breaches of the Confidentiality Order and Nondisclosure Agreement. Because of this, the lower court never reached the issue of damages and/or whether the complete disregard of the Confidentiality Order and Nondisclosure Agreement rose to the level of contempt. In short, "[a] party may not ignore a valid order court except at its peril." *Johnson v. Allstate Ins. Co.,* 410 So. 2d 978, 980 (Fla. 4th DCA 1982).

Indeed, there are instances in which sanctions have been properly imposed against a lawyer who violated a confidentiality order by disclosing financial information. *Roberts v. Bonati*, 133 So. 3d 1212 (Fla. 2d DCA 2014); *see Shir Law Group, P.A. v. Carnevale,* 345 So. 3d 380 (Fla 3d DCA 2022)(during hearing on motion for a confidentiality order, attorney repeatedly assured the trial court that he had no intention of sharing the defendants' financial information with anyone outside of the case). And facially, such is the case here.

Because the unsworn statements of Appellees' counsel is not "evidence," if the lower court had any concerns about whether a knowing violation of the Confidentiality Order and Nondisclosure Agreement, an evidentiary hearing could have been set. Instead, the lower court abused its discretion by chosing to ignore its own Confidentiality Order and the language that the parties had agreed to in the Nondisclosure Agreement.

To be sure, the Nondisclosure Agreement was a contract. Where words of a contract are clear and definite, they must be understood according to their ordinary meaning." *Coastal Loading , Inc. v. Tile Roof Loading, Inc.,* 908 So. 2d 609, 612 (Fla. 2d DCA 2005). It was not up to the lower court to re-write the terms of the Confidentiality Order and Nondisclosure Agreement to avoid addressing the issue of the violations of same.

Rather, it should have been enforced as would be any other contract, which was an abuse of discretion. Indeed, there are numerous contexts in which lower courts have been reversed for failing to enforce the agreements of the litigants, and such is the case here. *See Environmental Serv., Inc. v. Carter*, 9 So. 3d 1258, 1264 (Fla. 5th DCA 2009)(reversing lower court where it refused to enforce

the parties' agreement, where the language of the agreement was clear and unambiguous); *Richmond Healthcare, Inc. v. Digati*, 878 So. 2d 388, 390 (Fla. 4th DCA 2004)(lower court abused its discretion in refusing to enforce arbitration agreement in contract between parties); *Farmers Group, Inc. v. Madio & Co., Inc.,* 869 So. 2d 581, 582-83 (Fla. 4th DCA 2004)(reversing lower court who refused to enforce the parties' agreement as to forum for litigation where the parties had agreed to same).

The lower court's failure to apply the agreed language of the Confidentiality Order and Nondislosure Agreement, ignoring the filings in the record and the nature of same, was an abuse of discretion. It should have applied the record at hand and upheld the language of the Confidentiality Order and Nondisclosure Agreement to find violations of same. To the extent there was an issue as to "intent," it could have set an evidentiary hearing as to same. But to summarily dismiss Mr. Crouch's two Motion for Sanctions, without providing any basis for doing so, was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the trial court abused its discretion by summarily failing to enforce the Confidentiality Order and Nondisclosure Agreement. This Court must vacate the lower court's denial of same and remand to the lower court for further proceedings, including, but not limited to, an award of damages as agreed by the parties in accordance with the Confidentiality Order and Nondisclosure Agreement.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the font requirements of Rule 9.045(b) and 9.210(a)(2) of the Florida Rules of Appellate Procedure by using a Bookman Old Style 14-point font and does not exceed 13,000 words.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed with the Clerk via the Florida Courts e-Filing Portal, which will send notice of electronic filing to: this 18th day of May, 2024.

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