

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: CI 97-3385

SUNCAM, INC., a Florida corporation,

Petitioner,

v.

HAROLD WORRALL, as Executive
Director of the ORLANDO-ORANGE
COUNTY EXPRESSWAY AUTHORITY, and
the ORLANDO-ORANGE COUNTY
EXPRESSWAY AUTHORITY,

Respondents.

ORDER GRANTING INJUNCTIVE RELIEF

THIS CAUSE came before the Court on the Motion of SunCam, Inc. ("SunCam") for a temporary and permanent injunction. The Court has reviewed the Motion and case file, has heard arguments of counsel, and is fully advised. Accordingly, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. SunCam is a Florida corporation and is a citizen of Florida as that term is used in Section 286.011(2), Florida Statutes.

2. Harold Worrall is the Executive Director of the Orlando-Orange County Expressway Authority (the "OOCEA"), an agency or authority within the scope of Section 286.011, Florida Statutes, with its principal place of business in Orange County, Florida. The OOCEA is governed by a board (the "Board").

3. SunCam's principal place of business is in Dade County, Florida, however, it attends and records various public meetings of the State and its subdivisions, including various commissions, authorities and boards throughout the State, and reports on these meetings through the use of videotapes and other communications. Videotapes of presentations and deliberations concerning the award of contracts for public-works projects are offered for sale by SunCam. SunCam is a commercial venture.

4. Early this year, the OCEA publicly advertised requests for proposals for consulting work on two Western Beltway design projects, Project Nos. 654 and 655 (collectively, the "Projects").

5. After reviewing written submissions by the consultants responding to each request for proposal, a selection committee established by the Board (the "Selection Committee") invites those it determines to be the best qualified candidates to give oral presentations. This process is commonly referred to as "short-listing". The Selection Committee schedules the presentations for review and thereafter deliberates to formulate its recommendation to the Board, identifying the consultant which it concludes should be awarded the contract for the project at issue.

6. On February 27, 1997, SunCam's president wrote a letter to the OCEA advising that SunCam would be videotaping proceedings related to the Projects and requesting to know when they would occur. Specifically, SunCam disclosed its intent to videotape (a) the Selection Committee's deliberations to prepare the "short

list" of candidates, (b) the short-listed candidates' oral presentations, and (c) the Selection Committee and the Board's subsequent deliberations leading to the selection of the consultants to be awarded the Projects (collectively, the "Proceedings"). OOCEA Deputy Executive Director Joseph A. Berenis ("Berenis") informed SunCam that the Proceedings had not yet been scheduled and would not be advertised in a publication of general circulation, but when scheduled, would be posted on a bulletin board at the OOCEA in the City of Orlando.

7. SunCam's president explained to Berenis that it is based in Miami and does not have routine access to the OOCEA's bulletin board and would be unable to determine when the notices were posted in Orlando. Berenis, on behalf of the OOCEA, however, refused to take any further action to notify SunCam of the date, time and location of the Proceedings, such as calling a toll-free telephone number or simply adding SunCam to its mailing list. Neither Berenis nor anyone at the OOCEA stated why the OOCEA would be unable to notify SunCam of the Proceedings' schedule.¹

8. On March 31, SunCam sent via facsimile a second letter to the OOCEA care of Berenis, again requesting notice of the dates of the Proceedings and giving a toll-free number.

9. On April 3, Berenis for the OOCEA mailed SunCam a letter transmitting a policy adopted by the Board at its meeting of

¹ Subsequently, on April 8, the OOCEA's counsel Thomas Ross declined to tell SunCam's counsel when the Proceedings were to occur, although notices for the April 7 and 9th meetings had already been posted and one had occurred.

March 26, but not advising SunCam when the Proceedings would take place. The policy, titled "ORLANDO-ORANGE COUNTY EXPRESSWAY AUTHORITY POLICY REGARDING VIDEO RECORDING OF MEETINGS" (the "Policy"), purports to classify and dictate the conditions under which members of the public may videotape OOCEA proceedings. It divides persons wishing to videotape OOCEA public meetings into three groups. The first group are private citizens or OOCEA board or committee members, who may videotape "for private use and not for commercial use or exploitation." The second group are "news media organizations" who may videotape meetings while engaged "in bona fide news gathering, and not for any other commercial purpose or exploitation." The third group are persons who wish to videotape for "commercial use or exploitation." Such persons may videotape only with advance, written consent of each and every person participating in the meetings and the owners of rights claimed in connection with any allegedly copyrighted work to be presented.

10. Applying the Policy to SunCam, the OOCEA determined that SunCam belongs to the third group because it "sells" videotapes and, hence, is a "commercial user." The OOCEA therefore determined that SunCam may not be permitted to videotape the Proceedings, unless SunCam first obtains written consent of those being videotaped, including members of the Selection Committee and the consultants giving presentations. SunCam could not comply with this requirement because at least one of the participants in the Proceedings objects to being videotaped by SunCam.

Conclusions of Law

11. Florida's open-meetings laws apply to the OCEA, its Board and Selection Committees. The OCEA must give reasonable notice of meetings of both the Board and the Selection Committee (including, e.g., the Proceedings) which must be fully open to the public. See Fla. Const., Art. I, § 24(b); Section 286.011(1), Florida Statutes (1995); Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); Port Everglades Authority v. International Longshoremen's Association, 652 So. 2d 1169 (Fla. 4th DCA 1995); Krause v. Reno, 366 So. 2d 1244 (Fla. 3d DCA 1979).

12. Section 286.011 contemplates members of the public videotaping public meetings such as the Proceedings. See Fla. Atty. Gen. Op. 91-28 (Apr. 26, 1991).² While a public board may adopt reasonable rules and policies to ensure the orderly conduct of its public meeting and to require orderly behavior on the part of those attending, rules prohibiting the use of silent or nondisruptive recording devices would appear to be unreasonable and arbitrary and, therefore, invalid. Moreover, no provision of Section 286.011 or any other statute allows the Board to restrict videotaping of Board or Selection Committee meetings.

13. The Policy, however, impermissibly attempts to create an exception to the public's right of access to Board and Selection

² Though not binding, an Attorney General's Opinion "is entitled to careful consideration and generally should be regarded as highly persuasive." State v. Family Bank of Hallandale, 623 So. 2d 474, 478 (Fla. 1993).

Committee meetings, including the Proceedings. Exemptions to Section 286.011 may only be created by the Legislature, provided the laws exempting access specify the public necessity justifying the exemption and are no broader than necessary to accomplish the stated purpose of the law. Fla. Const., Art. I, Section 24(c); Canney v. Board of Public Instruction of Alachua County, 278 So.2d 260, 264 (Fla. 1973); Housing Authority of the City of Daytona Beach v. Comillion, 639 So.2d 117, 121 (Fla. 5th DCA 1994). The Policy violates Article I, § 24(b) and (c) of the Constitution because the public's right to attend and record public meetings cannot be restricted based on the purpose for such recording. Florida's Sunshine Laws provide these rights without regard to the purpose, which is immaterial. "The breadth of such right is virtually unfettered, save for the statutory exemptions" Lorel v. Smith, 464 So.2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So.2d 695 (1985). This in no way limits the Board's authority to control disruptions at its proceedings.

14. Nor may the OOCEA rely on Section 340.08 of the Florida Statutes to justify application of the Policy to restrict SunCam's rights. There are three reasons why this statutory right of publicity is inapplicable in this case. First, it creates no exemption to Section 286.011, but prohibits unconsented use of an individual's name and likeness when such use directly promotes a commercial product or service. Loft v. Fuller, 408 So. 2d 619,

622-23 (Fla. 4th DCA), review denied, 419 So. 2d 1198 (Fla. 1982).³ There is no evidence that SunCam has or will make such use of the name or likeness of any participant. Merely capturing the name or likeness of participants in a tape later sold for profit cannot alone constitute the commercial purpose contemplated by the Statute. Second, the Proceedings involve construction of public highways and the Statute exempts from its scope publication of a person's name or likeness in a "presentation having a current and legitimate public interest." Id.; National Football League v. Alley, Inc., 624 F.Supp. 6, 10 (S.D. Fla. 1983). Third, the consultants' consent to bid for public works contracts and to participate in the Proceedings constitutes a waiver of their rights under the Statute, even assuming a prohibited use were to occur. National Football League, 624 F.Supp. at 10; Ewing v. A-1 Management, Inc., 481 So.2d 99 (Fla. 3d DCA 1986). SunCam's intent to offer to sell videotapes of the Proceedings has no bearing on these conclusions. In addition, the OOCEA lacks standing to bring a claim under the Statute on behalf of others. National Football League, supra, at 10.

15. SunCam's videotaping, if permitted, also cannot reasonably be said to constitute copyright infringement. First, the Policy does not even facially purport to prevent infringement by those persons videotaping who are defined under the categories

³ Such publication is harmful not simply because it is included in a work that is sold for a profit, but rather because of the way it associates the individual's name or his personality with something else. Loft, at 622-23.

"private use" or "news". If the Board were truly attempting to prevent copyright infringement, this could not be effected given the classification scheme created by the Policy. Second, there has been no showing that any of the consultant bidders own protected or registered copyright interests in their presentations.⁴ Third, to the extent the OOCEA's concern arises from SunCam's recording of entire presentations, copyright law is inapplicable. The Copyright Act protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). The presentations SunCam wishes to record are not fixed in any medium, but are public events which are either deliberations of the Selection Committee members or expositions by persons trying to convince those members to choose them to carry out the OOCEA's work. Finally, the OOCEA does not own any of the alleged copyrights at issue (a matter of federal law), and therefore has no standing or jurisdiction to "protect" the alleged copyrights of others. ←

16. The OOCEA's reliance on Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), Jackson v. MPI Home Video, 694 F.Supp. 483 (N.D. Ill. 1988) and Mendonga v. Time, Inc., 678 F.Supp. 967 (D.R.I. 1988) is misplaced. Zacchini was an action brought by the performer of an act who sued to recover damages based on an unlawful appropriation of his professional property

⁴ To the extent that SunCam videotapes a copyrighted illustration, SunCam's videotape is in no way a substitute for the particular work allegedly copied. Cf. Triangle Publications, Inc. v. Knight Ridder Newspapers Inc., 626 F.2d 1171 (5th Cir. 1980) (newspaper's copying of competing magazine's cover was not infringement, because copied cover was not substitute for magazine).

under Ohio law. The U.S. Supreme Court reversed the Ohio Supreme Court's decision that a news report of the act was privileged under the First and Fourteenth Amendments. No effort to enjoin publication of the tape was ever raised nor did the decision ever reach the merits. Significantly, Zacchini concerned a private performance of an extraordinary act which many paid to observe, not a public solicitation to do business with an expressway authority, a subdivision of the State. Jackson, a case decided under federal copyright law, was strictly a claim of copyright infringement where the owner of the allegedly protected property sued on his own behalf. No issue parallel to those before this Court was ever raised and no public body attempted to assert Mr. Jackson's claims or to prevent them from arising by barring videotaping of his speech. Mendoza, a case decided under Rhode Island law, concerned a republication and offer to sell reprints of a famous photograph 35 years after it was taken as part of the news of V-J Day. There, the district court concluded only that the plaintiff had stated a claim of "commercial exploitation," which was not barred by the newsworthiness exemption. Copyright concerns, therefore, simply cannot warrant the creation of a ban on SunCam's videotaping of the Proceedings.

17. The Policy is inconsistent with the constitutional requirement that exemptions to Florida's open-meetings laws must be no broader than necessary to achieve their purposes and must be interpreted narrowly. Fla. Const., Art. I, § 24(c) (1996); School

Board of Duval County v. Florida Publishing Co., 670 So. 2d 99, 101 (Fla. 1st DCA 1996) (citing Op. Atty. Gen. Fla. 95-06 (1995)).

18. The Policy, as applied to SunCam and the OOCEA's refusal to provide SunCam notice of the scheduled Proceedings following SunCam's specific request and identification of itself as a person interested in the Proceedings, denied SunCam its constitutional and statutory right of access to public meetings.⁵

19. By placing conditions upon SunCam's right to videotape OOCEA proceedings, the OOCEA has cut off SunCam's principal source of newsgathering material. The Court concludes that this denial of access to public meetings constitutes an irreparable injury. Moreover, violation of Section 286.011, without more, constitutes an irreparable public injury. Gradison, 296 So. 2d at 477; Port Everglades Authority, 652 So. 2d at 1170. This is true even if the exclusion that violates the open-meetings laws were applied only to selected members of the public. See Port Everglades Authority, 652 So. 2d at 1170 (exclusion of competing bidders during presentations by bidders for public-works project, was violation of Section 286.011 and constituted irreparable injury).

WHEREFORE, the Court now makes the following determinations:

A. SunCam has demonstrated a likelihood of success on the merits of its action by a showing that the Policy of the OOCEA violates SunCam's rights under Florida law;

⁵ Nor can the OOCEA take action to prevent conduct which might support the bringing of a claim. That would be an unlawful prior restraint violative of the First Amendment of the U.S. Constitution.

B. SunCam has demonstrated irreparable harm since a violation of Section 286.011 constitutes irreparable public injury under the law for which SunCam cannot be adequately compensated by money damages;

C. The harm SunCam will suffer if it is denied injunctive relief far outweighs any harm likely to affect the OCEA which has demonstrated no probability of injury; and

D. Issuance of an injunction in this case will serve the public interest since Florida law recognizes open access to government meetings as a highly desirable public interest.

In light of the above findings and legal conclusion, it is ORDERED as follows:

(a) SunCam's Motion is GRANTED as to its request to videotape the proceedings;

(b) SunCam's Motion is DENIED as to its request for individualized notice of any proceedings. All that is required of OCEA is reasonable public notice. This is accomplished by its present procedures. See: Yarbrough v. Young, 462 So. 2d 515 (Fla. 1st DCA 1985).

(c) Respondents forthwith shall allow SunCam unrestricted access to OCEA proceedings (which includes the right to videotape) and may not attempt to restrict the use of videotape recordings

made of such proceedings;

(d) The Court's emergency order permitting SunCam to videotape the proceedings of April 21 and 22, 1997, but prohibiting SunCam from selling such videotapes pending a final order of this Court, was an effort to preserve the status quo in order that the Court could review the applicable law and filings, and is hereby expressly vacated and superseded, and

(e) The Court reserves jurisdiction, pursuant to Section 268.011(4), Florida Statutes, to enter an award of attorneys' fees and costs in favor of SunCam upon a submission of appropriate affidavits.

AND ORDERED in Chambers in Orlando, Orange County, Florida, this May 9th, 1997.

JEFFORDS D. MILLER, CIRCUIT JUDGE

MAY - 9 1997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Granting Summary Relief has been furnished by U.S. mail delivery to JAMES B. LAKE, ESQ. and JENNIFER HERNDON McRAE, ESQ., Post Office Box 1288, Tampa, Florida 33612 and KIM P. McMAHON, ESQ., Post Office Box 231, Orlando, Florida 32802-0231; LORA A. DUNLAP, ESQ., POB 712, Orlando, FL 32802-0712 this May 9th, 1997.

Judicial Assistant