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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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158 C.D. 2019

JANE LADLEY and CHRISTOPHER MEIER,
Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
Appellee

**APPELLEE'S MEMORANDUM OF LAW
IN SUPPORT OF APPELLEE'S ADMINISTRATIVE MOTION
PURSUANT TO PA.R.A.P. 3305, APPLICATION FOR RELIEF
IN THE NATURE OF A MOTION TO STRIKE
PORTIONS OF APPELLANTS' BRIEF AND THE ENTIRETY OF
"EXHIBIT A" ATTACHED TO APPELLANTS' BRIEF**

Appeal from a Final Order of the Court of Common Pleas, Lancaster County,
Pennsylvania
(Case No. CI-14-08552)

Date: May 6, 2019

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I. STATEMENT OF THE ISSUES PRESENTED

1. Should the Court strike the 201 page addendum to Appellant's Brief identified as "Exhibit A," because the information contained therein was not part of the evidence presented to or considered by the court below and is not part of the certified record?

   Suggested answer: Yes.

2. Should the Court strike all arguments contained in Appellants' Brief that are based upon or flow from the extra-record documents contained in Appellants' "Exhibit A" and direct Appellants to file an amended brief?

   Suggested Answer: Yes.

3. In the alternative, if the Court takes judicial notice of the materials appended to Appellants' Brief, is the Court required to give the Appellee an opportunity to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed as required by Pa.R.E. 201(e)?

   Suggested Answer: Yes.

II. THE BACKGROUND OF THIS MOTION

The Appellants in this case are two non-union public-school teachers, (one of whom has since retired) who were religious objectors to the payment of "fair share fees" to the Appellee union, PSEA. Pursuant to the provisions of the Act of July 13, P.L. 493, 71 P.S. §575(h), the Pennsylvania Fair Share Fee Law, religious objectors to the payment of the fee to the union representing them could have their

fee paid to a non-religious charity "agreed upon" by the fee payer and the union. The Appellant religious objectors were never able to agree with PSEA on the charity to receive their fees, and filed this declaratory judgment action challenging the manner PSEA implemented the religious objector "charity selection" process under the statute. While the suit was pending the United States Supreme Court handed down *Janus v. AFSCME, Council 31* 138 S.Ct. 2248 (June 27, 2018). As set forth at length in the main brief filed by Appellee PSEA, *Janus* struck down the Illinois fair share fee law, and clearly stated that all similar state laws, which includes the Pennsylvania statute, are similarly unconstitutional and unenforceable. As established I the record, and found by the lower court, PSEA immediately stopped all fair share deductions from non-union members, including Appellant religious objectors, and refunded all money held that had been collected from them. PSEA filed a summary judgment motion to dismiss the religious objectors' suit as moot. The lower court granted the PSEA motion and dismissed the suit as moot. The religious objectors appealed, and their appeal is now pending before the court.

Pursuant to the scheduling order of the court, the Appellant religious objectors filed the reproduced record and the Appellants' Brief on March 27, 2019. The reproduced record includes all of the pleadings, and evidence presented and available for consideration in the court below. However, Appellant religious

objectors also attached 201 pages of additional documentation that was not part of the record below, and is not part of the certified record, to the Appellants' Brief, styling the additional information as "Exhibit A." Appellants then proceeded to make arguments in their brief that are drawn from and rely upon the additional, non-record information appended to their brief. The information appended to the brief was not presented to or considered by the lower court. The arguments that rely upon that information were never made to the lower court. This motion is filed asking the court to strike the offending "Exhibit A" and the arguments drawn from it, and to award Appellee counsel fees and costs as provided in Pa.R.A.P. 3301 (1) and (8).

III. REASONS TO GRANT THE RELIEF REQUESTED

A. The 201 page addendum to Appellant's Brief identified as "Exhibit A" should be stricken because the information contained therein was not part of the evidence presented to or considered by the court below and is not part of the certified record.

It is well settled that an appellate court may consider only the facts that have been duly certified in the record on appeal. *Commonwealth v. Young, 317 A.2d 258 (Pa. 1974); Kochan v. Com., Dept. of Transp., Bureau of Driver Licensing*, 768 A.2d 1186, 1189 (Pa. Cmwlth. 2001). In *Kuznick v. Department of Public Welfare*, 5 A.3d 832, 834 n.5 (Pa. Cmwlth. 2010) the court ruled to strike a reply brief where the brief violated the Rules of Appellate Procedure by referring to and

attaching documents to it that were not part of the record, and addressing factual matters that had not been raised before the court below.

An appellate court is limited to considering only those facts that have been duly certified in the record on appeal." *B.K. v. Dep't of Pub. Welfare*, 36 A.3d 649, 657 (Pa. Cmwlth. 2012). "For purposes of appellate review, that which is not part of the certified record does not exist." *Id*. "Documents attached to a brief as an appendix or reproduced record may not be considered by an appellate court when they are not part of the certified record." *Id.* The appellant bears the responsibility for ensuring that the certified record contains sufficient information for proper appellate review. *Id*. Failure to do so constitutes a waiver of the issues sought to be examined. Id. *Bright v. Pa. Bd. of Prob. & Parole*, 197 A.3d 323, (Pa. Cmwlth, 2018), *Petition denied by Bright v. Pa. Bd. of Prob. & Parole,* 2019 Pa. LEXIS 1269 (Pa., Feb. 27, 2019).

There is no dispute that the information contained in Appellants' "Exhibit A" was not presented to the court below or contained in the certified record. Appellants' request that the court "take judicial notice" of the information contained in its "Exhibit A" and assert that the court may do so at any stage of the proceedings, including on appeal. "Judicial Notice" is governed by Pa. Rule of Evidence 201. A court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial

jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Pa. R. Evid. 201(b). While the court may take judicial notice at any stage of the proceeding, Rule 201(d), Courts will not allow judicial notice to trespass the well-defined boundary of admissibility. A trial court cannot take judicial notice of a public document which did not even exist during trial due to the proponent's lack of reasonable diligence and which the proponent fails to obtain or submit until post-trial proceedings. To permit judicial notice under these circumstances would allow a party to circumvent the prohibition against parties using post-trial proceedings to correct their own trial errors. *Drake Mfg. Co. v. Polyflow, Inc*., 109 A.3d 250, 254, (2015 Pa. Super.)

The information contained in "Exhibit A" attached to Appellants' Brief is not appropriate for "judicial notice." The contents of individual collective bargaining agreements are not "generally known within the trial court's territorial jurisdiction." Nor can the information "be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Pa. R. Evid. 201(b). Appellants' efforts to authenticate the extra-record information fall well short of the quality of verified evidence, supported by an affidavit of a person with actual knowledge, necessary to support or oppose a motion for summary judgment (the matter at issue in the court below and on appeal before this court). The Southern Fulton contract is sponsored through an email and a letter from the school district

to Appellants' counsel dated March 12, 2019. Similarly, the Steel Valley contract is sponsored through an email from a secretary in the school district business office to Appellants' counsel, dated March 25, 2019. The Penn Manor contract is referenced as available through the District's website. There is no indication in Appellants' "Exhibit A" providing any authentication for the document identified as the East Stroudsburg Contract.

A further reason to refuse judicial notice is that they raise arguments never raised or considered by the court below, which are therefore waived. Moreover, three of the four contracts proffered are completely irrelevant to the issues at hand, and if permitted into the record raise issues far beyond the scope of this case. They come from other school districts, which never employed either of the religious objector Appellants, and were negotiated by other local PSEA affiliate associations, under circumstances unknown and unknowable on this record. There is no suggestion by Appellants that there are *any* religious objectors employed by those school districts, much less religious objectors who have never been able to agree with PSEA on the selection of a charity to receive their fair share contributions.

B. The Court should strike all arguments contained in Appellants' Brief that are based upon or flow from the extra-record documents contained in Appellants' "Exhibit A" and direct Appellants to file an amended brief.

Appellants refer to and rely upon materials contained in Exhibit A to advance two arguments not supported by evidence in the record and not made in the court below:

- That the lower court erred in dismissing the case as moot because PSEA has not removed fair share language from the 2017-2021 Penn Manor Contract that was negotiated in prior years and in place when the Supreme Court decided *Janus*. (S*ee* Appellants' Brief at pages 2, 11, 12, 19, 21, 27; and
- That the lower court erred in dismissing the case as moot because two other PSEA local associations, in school districts completely unrelated to the religious objectors who brought this case, which are completely irrelevant to the issues presented here, negotiated contracts subsequent to the Supreme Court decision in *Janus* that still contain fair share provisions. (S*ee* Appellants' brief at pages 2, 11, 12, 19, 21, 27).

From these spurious and extra-judicial documents Appellants attempt to build a construct whereby the Court will look askance at the *record evidence* that

was properly introduced by PSEA in the court below. The lower court credited that evidence and found that the relevant record evidence established the good faith and diligence of PSEA in responding with immediacy and persistence to the changes brought about by the *Janus* decision. PSEA immediately notified school districts to stop collecting fair share fees. PSEA notified all fair share fee payers within one week of the *Janus* decision that they were no longer liable to pay fair share fees. If fair share fees were collected after the release of *Janus,* they were refunded. PSEA refunded the fair share fees in dispute to the religious objectors, even though they had been collected prior to *Janus.* (Slip Opinion of Judge Brown, attached as Appendix A to this Memorandum of Law.)

The specific references to the places in Appellants' Brief where the offending extra-record documents and arguments are made include:

- Page 2: "PSEA left a fair share fee clause in Mr. Meier's collective bargaining agreement and *continues* to bargain for fair share fees in collective bargaining agreements executed well after *Janus* was decided."
- Page 11: "However, PSEA did not promise that it would remove fair share fee agreements from collective bargaining agreements or stop seeking them in other school districts." [followed by a repetition of the same argument set forth on page 2, above]

- Page 12: "At the very least, PSEA should be directed to excise the fair share fee clause for Mr. Meier's agreement and to cease from bargaining, as it has done in other school districts, for fair share fees in the future." Arguing that an injunction is proper and "meaningful relief" can still be granted.
- Page 19: Same argument as page 12 regarding necessity for an injunction (despite the fact that the record evidence establishes that Appellants Meier and Ladley received refunds of all withheld fair share fees and no more are being collected).
- Page 21: Asserting that PSEA is "practically begging for injunctive relief" because the fair share provision in Appellant objector Meier's contract, which was negotiated before the *Janus* decision and was not "excised" from the contract after *Janus,* even though all money was refunded to objector Meier and no more money is being collected from him.
- Page 26-27: The non-record submissions are referenced to support arguments that "PSEA undercuts its own supposed promises not to violate *Janus* in the future" and "has already demonstrated a willingness, historically *and in this case,* to disregard Supreme Court rulings" because PSEA has not changed the fair share language in the Meier/Penn Manor

Contract *post-Janus,* and by retaining fair share language in other, unrelated and irrelevant contracts.

The above referenced arguments were never raised in the court below and are therefore waived.

C. In the alternative, if the Court takes judicial notice of the materials appended to Appellants' Brief, pursuant to Pa.R.E. 201(e), the Court is required to give the Appellee an opportunity to be heard on the propriety of taking judicial notice and the nature of the facts to be noticed.

In the alternative, (and a decidedly secondary and unnecessary alternative) if the Court does permit the record in this case to be expanded by the addition of the material contained in Appellants' "Exhibit A," then the Court must provide the Petitioning Appellee, PSEA, with an opportunity to be heard, as set forth in , Pa.R.E. 201(e):

> (e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

At such a hearing Petitioner Appellee, PSEA, will establish that all of the collective bargaining agreements contained in "Exhibit A" sought to be relied upon by Appellants contain "Severability clauses," identical or substantially similar to the language of the 2012-2014 Penn Manor Contract, and the 2014-2017 Penn Manor Contract, which *are* in the certified record, (R 390a, R 459a-460a). Those provisions explicitly provide that, should any provision of the contract be or

become illegal, that provision will be stricken from the contract and thereafter be unenforceable.

Petitioning Appellee PSEA will also establish that the offending language in the proffered contracts was legacy language carried over into new contracts from old contracts, without additional negotiation. In addition, notwithstanding legacy “fair share” language that may have been carried over into the contracts proffered by Appellants in “Exhibit A,” no fair share fees are being collected from any non-union members in any of those school districts, or anywhere else in Pennsylvania. Moreover, Petitioning Appellee PSEA will provide evidence to establish the steps it is taking to ensure that all legacy fair share language that may have carried over from *pre-Janus* contracts into subsequently negotiated *post-Janus* contracts is removed from those contracts.

IV. CONCLUSION.

Petitioning Appellee, PSEA, respectfully requests that the Court enter an order striking “Exhibit A” in its entirety from the Appellants’ Brief, and directing the Appellant to file an amended brief that eliminates all reference to the information contained in “Exhibit A” and the arguments derived therefrom and to award counsel fees and costs to Appellee, all as provided in Pa.R.A.P. 3305 (1) and (8);a or in the alternative, should the Court consider taking judicial notice of the

additional information provided by Appellants, provide Appellee with an opportunity to be "heard on the propriety of taking judicial notice and the nature of the fact to be noticed" pursuant to Pa.R.E. 201(e).

Respectfully submitted,

/s/Thomas W. Scott

Date: May 6, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:	Killian & Gephart, LLP
Signature:	__/s/Thomas W. Scott_____________
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Administrative Motion in the form of a Motion to Strike of Appellee PSEA has on this date been served on the individuals listed below as addressed, and in the manner indicated:

Electronically through the Court's ECF system:

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