

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

158 C.D. 2019

JANE LADLEY and CHRISTOPHER MEIER,
Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION,
Appellee

**AN ADMINISTRATIVE MOTION PURSUANT TO PA.R.A.P. 3305:
APPELLEE'S 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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AND NOW comes the Appellee, Pennsylvania State Education Association, pursuant to Pa.R.A.P. 123, 1921, and 3305 and moves this Honorable Court to Strike portions of the Brief of Appellants, and the entirety of “Exhibit A” attached to Appellants’ Brief, and in support thereof, aver as follows:

1. On March 27, 2019 Appellants filed their Initial Brief in Support of their Appeal in this matter.

2. Appended to and part of the Appellants’ Initial Brief is a 201 page attachment identified as “Exhibit A,” stated to contain four collective bargaining agreements from four separate schools, (three of which have no relationship to this case whatsoever) along with several emails between counsel for Appellants and various school officials.

3. The contents of “Exhibit A” are identified in detail in footnote 1 of Appellants’ Brief, found on page 2 of the Brief. Crediting the identification provided by Appellants, without verifying it, “Exhibit A” contains:

- A copy of the 2017-2021 Collective Bargaining Agreement between the Penn Manor School District and the Penn Manor Education Association;
- A copy of the 2019-2022 Collective Bargaining Agreement between the Southern Fulton School District and the Southern Fulton Education Association;

- A copy of the 2019-2023 Collective Bargaining Agreement between the Steel Valley Board of School Directors and the Steel Valley Education Association;
- A copy of the 2016-2021 Collective Bargaining Agreement between the East Stroudsburg Board of Education and the East Stroudsburg Education Association.

4. None of the information contained in Appellants' Exhibit A was part of the record made in the court below, and it is not part of the certified record forwarded to this court in conjunction with this appeal.

5. 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.

6. 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).

7. 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.

8. "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.)

9. 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 procedural posture of 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.

10. 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 after this suit was initiated by Appellants, and in place when the Supreme Court decided *Janus*. (See 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 school districts that employed 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. (See Appellants' brief at pages 2, 11, 12, 19, 21, 27).

11. 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, Exhibit A attached to Appellants' Brief, at page 21.)

12. In addition to striking the entirety of "Appendix A" from Appellants' brief, this Court should also strike the following references and arguments from Appellants' Brief:

- 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.

13. 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.

14. At such a hearing Petitioning 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 2014-2017 Penn Manor Contract that *is* in the certified record, which 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.

WHEREFORE, 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), 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

Name: Thomas W. Scott, Esquire

PA I.D. No. : 15681

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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