IN THE NINETEENTH JUDICIAL CIRCUIT IN AND
FOR MARTIN COUNTY, FLORIDA

LAKE POINT PHASE I, LLC, and
LAKE POINT PHASE II, LLC,
Florida limited liability companies,
Plaintiffs,

v. CASE NO. 432013-001321-CA

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, a public corporation of the State of Florida; MARTIN COUNTY, a political subdivision of the State of Florida, and MAGGY HURCHALLA,
Defendants.
_____/

ORDER ON PLAINTIFFS' MOTION TO SET ASIDE JUDGMENT AND FOR NEW TRIAL

THIS CAUSE came on to be heard upon the Plaintiffs' Motion to Set Aside Judgment and for New Trial on the grounds of newly discovered evidence. Having considered the record, the law, and the arguments of counsel, the Court finds and determines:

1. Martin County Commissioner Anne Scott, along with Commissioners Ed Fielding and Sarah Heard, was presented with a public record's request for emails "between you and Maggy Hurchalla" by a letter from Plaintiffs' counsel dated February 7, 2013.
2. The Plaintiffs' brought an action against Martin County for injunction and writ of mandamus under the Florida Public Records Act, Chapter 119, Florida Statutes (2013), in Counts VII and VIII of their Third Amended Complaint filed November 11, 2014 ("the Complaint").
3. Counts VII and VIII alleged that public records requests were made for records of Commissioners Ed Fielding, Sarah Heard, and Anne Scott which the County failed to produce. (Complaint, ¶126.) Among other things, the relief requested was that the Court enter a

judgment requiring the County to comply with the public records requests including "all other public records from County Commissioners in their original format that relate to Lake Point (from both their public and private email accounts) and award attorney's fees, costs" and other relief. (Complaint, pgs. 28 & 29.)

4. In August 2015, the parties tried Counts VII and VIII to the Court without a jury. At that time the parties stipulated that the requests for an injunction and a writ of mandamus were moot because it was represented by the County's attorneys and believed by the Plaintiffs' attorneys that all public records which were requested had been produced. Each party, however, had pending claims for attorney's fees and costs arising out of the public records controversy which remained to be adjudicated. On September 3, 2015, the Court entered a final order thereon. Plaintiffs' pending motion asks the Court to set aside that order and grant a new trial.

5. The grounds for the motion are that in a March 2016 response to a new public records request the County produced emails between the Defendant Maggy Hurchalla and Commissioner Anne Scott from a private email account of Commissioner Scott's which predated the 2013 request. These emails would have been responsive to the 2013 public records request and had not been previously produced by the County nor by Ms. Hurchalla. The failure to produce them would be encompassed in the allegations of Counts VII and VIII.

6. It is a well-established rule of law that:

> A motion for new trial based on newly discovered evidence should be granted when: 1) it appears that the new evidence is such that it will

> probably change the result if a new trial is granted, 2) the evidence has been discovered since the trial, 3) the evidence could not have been discovered before the trial by the exercise of due diligence, 4) the evidence is material to the issue, 5) the evidence is not merely cumulative or impeaching.
> *Whitley v Warren*, 884 So.2d 431, 432 (Fla. 4th DCA 2004)

7. The application of this rule to the circumstances in this case requires determination of what was being tried. The Plaintiffs argue that Counts VII and VIII were being tried. The County claims that only the three allegations of violation of the Public Records Act addressed by the Court in the order were tried. The Court finds that Counts VII and VIII were the subject of the trial and the only evidence offered concerned three alleged violations. Surely if the Plaintiffs knew of evidence of other violations, that evidence would have been offered also. The Plaintiffs did not knowingly waive a claim about Commissioner Scott's private email account.
8. The newly discovered emails from a heretofore unrevealed private email account of Commissioner Scott are direct evidence of an unlawful refusal to disclose public records. As such it will probably change the result if a new trial is granted. As it is a different violation than the three other alleged violations, it is material to the claims in Count VII and VIII and not merely cumulative or impeaching. Indisputably it was discovered after the trial.
9. The County argues, however, that the evidence could have been discovered before the trial by the exercise of due diligence. In particular, it faults Plaintiffs for not taking the deposition of Commissioner Scott. This argument must fail because not only did the County represent to the Plaintiffs and to the Court repeatedly that the evidence had been produced or that it

did not exist, it successfully opposed forensic discovery of Commissioner Scott's computer. See, for example, the transcript of hearing February 24, 2014, page 71, lines 11 -17. Furthermore, there is no showing that a deposition of Commissioner Scott would have revealed any useful information about her email accounts. To the contrary, the County's Response indicates that Commissioner Scott was unaware of the emails. (Response 4/11/2016, pg. 9.) Beyond that there is a record here of discovery which hardly bespeaks of a lack of due diligence. Indeed, the County complains that the Plaintiff has "attempted to drown the County" with discovery. (Response, pg. 3.)

10. For the foregoing reasons, the motion should be granted in part.

Therefore, it is

ADJUDGED that the Plaintiffs' Motion to Set Aside Judgment and for New Trial on the grounds of newly discovered evidence is GRANTED. The "Order on Public Records Act Claims" of September 3, 2015 is hereby vacated. The matter shall be scheduled for a final hearing in due course.

ORDERED at Stuart, Martin County, Florida on April 28, 2016.

F. Shields McManus

F. SHIELDS MCMANUS
Circuit Court Judge

Service to counsel of record by e-filing.