

IN THE SUPREME COURT OF FLORIDA

**CHARLES J. CRIST JR.,
Attorney General, State of Florida;
HAROLD McLEAN,
Public Counsel, State of Florida;
and AARP,**

Appellants,

v.

**Consolidated Case Nos.
SC04-9, SC04-10, SC04-946**

**LILA A. JABER, Chairman, et al.,
constituting the FLORIDA PUBLIC
SERVICE COMMISSION, an agency of
the STATE OF FLORIDA; BELLSOUTH
TELECOMMUNICATIONS, INC.;
VERIZON FLORIDA INC.; and
SPRINT-FLORIDA, INC., et al.,**

Appellees.

**JOINT MOTION TO STRIKE AARP'S NOTICES OF
SUPPLEMENTAL AUTHORITY**

Pursuant to rule 9.300(a), Florida Rules of Appellate Procedure, Appellees BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.; Sprint-Florida, Inc. and Sprint Communications Company Limited Partnership; Verizon Florida, Inc.; AT&T Communications of the Southern States, LLC; and MCI WORLDCOM Communications, Inc. (collectively "Telecommunications

Appellees”), file this Joint Motion to Strike AARP’s Notices of Supplemental Authority and state:

1. Appellant AARP filed notices of supplemental authority with this Court on September 28, 2004, and on October 1, 2004, in support of its pending Motion to Relinquish Jurisdiction (“Motion”). This Court should strike both notices because they violate rule 9.225, Florida Rules of Appellate Procedure, relating to supplemental authority.

2. The first so-called “supplemental authority” filed by AARP is nothing more than a brief news article from the Dow Jones Newswires about Verizon’s marketing efforts. Not only is the article not significant to the issues raised in the Motion, but it is not the type of document that should be considered as “authority” by this Court. The second notice not only improperly attaches pleadings filed in another case, but constitutes an unauthorized Reply to Verizon’s Response to AARP’s Motion to Relinquish Jurisdiction. AARP’s second notice also includes argument, which is prohibited by rule 9.225.

3. Rule 9.225 provides:

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain

argument. Copies of the supplemental authorities shall be attached to the notice.

(Emphasis supplied).¹

4. The purpose of the rule is “to permit a litigant to bring to the court’s attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because through inadvertence, they were not discovered earlier. They are not intended to permit a litigant to submit what amounts to an additional brief, under the guise of ‘supplemental authorities’; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.” *Ogden Allied Servs. v. Panesso*, 619 So. 2d 1023, 1024 (Fla. 1st DCA 1993). It is not appropriate in a notice of supplemental authority to provide editorial comment on the documents attached to the notice. *Florida Department of Health & Rehab. Servs. v. Martin*, 563 So. 2d 1124 (Fla. 1st DCA 1990).

5. Moreover, pleadings from another case do not constitute “authority.” *Hillsborough County Bd. of County Comm’rs v. Public Employees Relations Com’n*, 424 So. 2d 132 (Fla. 1st DCA 1982) (portion of the record of another case pending in a different court is not “other authority” to be included in an appendix

¹ The Telecommunications Appellees question whether AARP may even file notices of supplemental authority at this point in the litigation. The rule states that such notices may be filed “after the last brief served in the cause.” Neither the Answer Briefs nor the Reply Briefs have been served in this appeal.

under the rules of appellate procedure). Instead, pleadings and other records from another court are evidentiary in nature and constitute matters that may be judicially noticed. § 90.202(6), Fla. Stat. However, it has long been settled that appellate courts may not take judicial notice of records from another case unless such records already are part of the record on appeal. *See In re Adoption of Freeman*, 90 So. 2d 109, 110 (Fla. 1956); *Atlas Land Corp. v. Norman*, 116 Fla. 800, 802-03, 156 So. 885, 886 (Fla. 1934). In *Atlas*, this Court stated:

The court in which a cause is pending will take judicial notice of all its own records in such cause and of the proceedings relating thereto. But orders and other proceedings which do not properly belong to the record of a case being considered by a court must be proved or in some way directly brought into the record of the pending case by some order of the court referring to and adopting the outside records or proceedings as part of its own record, in order that an appellate court may, in the event of an appeal, know the exact nature, character, scope, and extent of the matters upon which the court below arrived at the decision appealed from and carried on the record to the appellate court.

6. AARP's notices violate these established principles relating to supplemental authority in multiple ways. First, the news article attached to the first notice is not of "real significance" to the issues raised in the AARP Motion, even if a daily newswire article somehow could be considered "authority." Second, the pleadings attached to the second notice are not authorities at all. *Hillsborough County Bd. of Comm'rs v. PERC*. Third, one of the pleadings attached to the

second notice was filed with the Court of Appeals for the D.C. Circuit on August 23, 2004, and was available to AARP before it filed its Motion to Relinquish Jurisdiction on September 8, 2004. Rule 9.225 states that litigants may file notices relating to supplemental authorities “that have been discovered after the last brief served in the cause.” The Petition for Writ of Mandamus attached to AARP’s second notice was filed two weeks before AARP filed its Motion, and if AARP thought the pleading was relevant, it should have addressed the pleading in its Motion.

7. Finally, AARP’s second notice of supplemental authority is essentially an unauthorized Reply to Verizon’s Response to AARP’s Motion, and it includes argument, which is prohibited by rule 9.225. On pages 2 and 3 of the notice, AARP quotes at length from Verizon’s Response and then attempts to relate the pleadings Verizon filed in another forum to statements in the Response. Such commentary in a notice of supplemental authority is prohibited by the plain language of rule 9.225, as well as by case law interpreting the rule. *Martin*, 563 So. 2d at 1125. Moreover, AARP’s Motion was filed pursuant to rule 9.300, Florida Rules of Appellate Procedure, which provides that “[a] party may serve 1 response to a motion within 10 days of service of the motion.” Rule 9.300 does not authorize a Reply to the party’s Response.

For the reasons expressed, the Telecommunications Appellees respectfully request that this Court strike both notices of supplemental authority filed by AARP.

Respectfully submitted this ____ day of October, 2004.

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served by U.S. Mail this ____

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