SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 64,944

CITY OF NORTH MIAMI, a municipal corporation of the State of Florida, and TOBIAS SIMON, as City Attorney for the City of North Miami; MAYOR HOWARD NEU, JAMES DEVANEY, JOHN HAGERTY, ROBERT LIPPELMAN, and DIANE BRANNEN as member of the City Council of the City of North Miami,

Petitioners,

vs.

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight-Ridder Newspapers, Inc., a Florida corporation,

Respondents.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

As a Matter of Great Public Importance

BRIEF OF AMICUS CURIAE, ORANGE COUNTY, FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Other Authorities:

PRELIMINARY STATEMENT

Orange County, Florida, submits this amicus brief in support of the City of North Miami's right to assert an attorney/client privilege against a demand for disclosure based on the Public Records Act. In adopting the Evidence Code, the Florida Legislature expressly extended the attorney/client privilege to local governments like the City of North Miami and Orange County. That privilege was accorded to local governments even though the Legislature had previously enacted the Public Records Act and presumably understood the scope of its disclosure requirements.

The effect of the Third District Court of Appeal's decision in the instant case is to render meaningless the Legislature's decision to extend the attorney/client privilege to public entities. Once otherwise privileged documents are disclosed pursuant to a demand based on the Public Records Act, they will forever be stripped of their confidentiality. The documents will thus lose their privileged status and will be as admissible in a hearing or at trial as if the privilege had never been granted to public entities.

The decision of the Third District Court of Appeal will have the effect of making all confidential communications between local governments and their counsel open to public perusal and misconstruction. It will cause local governments and their attorneys to fear committing anything to writing. It will restrict the capacity of attorneys for a public entity to communicate with their client or among themselves. Unless the decision

is reversed, the ultimate result will thus be a marked diminution in the capacity of local governments to effectively represent themselves. Such a result could not have been intended by the Legislature when it enacted the Public Records Act; such a result should not be upheld by this Court.

ARGUMENT

I. CONFIDENTIAL COMMUNICATIONS BETWEEN A PUBLIC ENTITY AND ITS ATTORNEYS ARE PRIVILEGED AND CANNOT BE DISCLOSED ABSENT THE ASSENT OF THE PUBLIC ENTITY

The attorney/client privilege is the oldest of the privileges for confidential communications known to the common law. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Its purpose has always been to encourage full and frank communication between attorneys and their clients and thereby to promote the broader public interest of assuring that laws are observed and justice properly administered. It rests on an attorney's need to know all that relates to his client's reasons for seeking representation, so that his professional mission may be carried out. See Trammel v. United States, 445 U.S. 40, 51 (1980).

In upholding an attorney/client privilege courts recognize that clients will not seek out persons having knowledge of the law and skilled in its practice and will not make full disclosure to such individuals, unless they can be certain that they may do so free from the consequences or apprehension of disclosure. See Fisher v. United States, 425 U.S. 391, 403, (1976); Hunt v. Blackburn, 128 U.S. 464, (1888). As the United States Supreme

Court has succinctly stated: "The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." Upjohn Co., supra, 449 U.S. at 383.

The desirability of according a client a privilege to preserve the confidentiality of his communications with an attorney is in no respect diminished when the client happens to be a local government. On the contrary, the very structure of local governments creates a particularly compelling need for such bodies to be able to preserve the confidentiality of discussions they have with counsel. Being subjected to constant public scrutiny, a local government must be assured of the legality of any activities it undertakes or contemplates undertaking. Its officers must feel free to explore alternatives and to communicate candidly with counsel without fearing that their discussions will subsequently be revealed. Correspondingly, its attorneys must feel free to communicate forcefully with their client, to assess such sensitive issues as the effect of proposed governmental action on competing local interests and to exchange ideas among themselves without fearing that some day their words will be used against them in court.

Because the attorney/client privilege advances a public interest, the Florida Legislature in formulating the Evidence Code chose to expressly extend the privilege to all public entities. Subsection 90.502(2) of the Evidence Code provides:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications

> when such other person learned of the communications because they were made in the rendition of legal services to the client.

"Client" is defined by the Evidence Code as "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." (emphasis added) Section 90.502(1), Fla. Stat. (1983). It is incontrovertible, therefore, that the Evidence Code grants a local government the right to assert an attorney/client privilege.

In the instant case the Third District Court of Appeal has, nevertheless, concluded that any communications between a public entity and its counsel that qualify as public records must be disclosed upon a demand made under the Public Records Act. If this decision is allowed to stand, anyone so desiring will be able to make a demand for the disclosure of otherwise privileged communications and local governments will be forced to comply. Once the records are disclosed, the privilege will have been destroyed and the records, if relevant, will even be admissible as evidence at trial. Section 90.507, Fla. Stat. (1983). The Legislature's decision to extend the privilege to a public entity will thus be rendered a nullity.

Such a result must not be affirmed. As this Court has long recognized: "The confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice. It cannot be lightly brushed aside." Seaboard Airline R. Co. v. Timmons, 61 So.2d 426 (Fla. 1952).

II. THE PUBLIC RECORDS ACT DOES NOT COMPEL DISCLOSURE OF DOCUMENTS PROTECTED BY THE ATTORNEY/CLIENT PRIVILEGE

Since the Evidence Code unquestionably permits local governments to assert an attorney/client privilege, the sole question for this Court to consider is whether the public records should be construed so as to deprive a local government of that privilege.

A review of case law reveals only two recorded opinions that have considered whether a local government is entitled to assert an attorney/client privilege when confronted with a demand for disclosure under the Public Records Act.[1] In City of Tampa v. Titan Southeast Construction Corp., 535 F.Supp. 163 (M.D. Fla. 1982), the court upheld a municipality's right to assert an attorney/client privilege. In the instant case the Third District Court of Appeal denied the City of North Miami that right.

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[1] Three circuit courts have held that the Evidence Code does create an exception to the Public Records Act. Florida Land Co. v. Orange County, No. 81-5850 (Cir. Ct. Aug. 29, 1983); Aldredge v. Turlington, No. 79-1023 (Cir. Ct. Nov. 20, 1979), aff'd, 378 So.2d 125 (Dist. Ct. App. 1980) (per curiam), cert. denied, 383 So.2d 1189 (Fla. 1980); The Miami Herald Publishing Company v. City of North Miami, No. 81-313-Ex (Cir. Ct. Nov. 17, 1981). Three other circuit courts have found that privileges in the Evidence Code do not create exceptions to the Public Records Act. The Florida Companies v. City of Tarpon Springs, No. 81-11981-14 Cir. Ct. Dec. 30, 1981); The Miami Herald Publishing Company, et al. v. Bobby Jones, et al., Nos. 79-086-Ex; 79-4184 (Cir. Ct. Nov. 7, 1980); Resource Recovery, Inc. v. Greenberg, Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, P.A., No. 81-155 Ex (Cir. Ct. Oct. 9, 1981). The decision of the Third District Court of Appeal was expressly rejected in In re: Estate of Gordon J. Barnett, No. PR-76-1340 Adversary Proceeding #6 (Cir. Ct. Aug. 22, 1984), a copy of which is attached hereto as Appendix B.

The decision of the Third District Court of Appeal in the instant case cannot be upheld for two reasons. First, the Court misconstrued the scope of the Evidence Code and the Legislature's purpose in according an attorney/client privilege to public entities. Second, the Court failed to appreciate the interrelationship between the Evidence Code and the exemption provisions of the Public Records Act which read together exempt documents protected by the attorney/client privilege from the disclosure requirements of the Public Records Act.

A. DOCUMENTS PROTECTED BY AN ATTORNEY/CLIENT PRIVILEGE ARE EXEMPTED FROM THE DISCLOSURE REQUIREMENTS OF THE PUBLIC RECORDS ACT

The reasoning of the Third District Court of Appeal fails principally because it ignores the fact that the Public Records Act read in pari materia with the Evidence Code exempts documents protected by the attorney/client privilege from its disclosure requirements. Section 119.07(3)(a) Fla. Stat. (1983) provides:

> All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law, shall be exempt from the provisions of subsection (1). (emphasis added), § 119.07(3)(a) Fla. Stat. (1981).

The Florida Evidence Code, Fla. Stat. § 90.502 (1983), not only codified the traditional attorney/client privilege, but it expressly designated communications between an attorney and a client as "confidential," thus exempting such communications from the disclosure requirements of the Public Records Act. According to subsection 90.502(1):

> A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:
>
> 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
>
> 2. Those reasonably necessary for the transmission of the communication. Section 90.502(1)(c) Fla. Stat. (1983).

Since the Public Records Act exempts records presently provided by law to be "confidential," and since the Evidence Code presently provides that documents protected by an attorney/client privilege are "confidential," one must conclude that documents subject to an attorney/client privilege are exempted from the disclosure requirements of the Public Records Act.

Had the Florida legislature intended the Public Records Act to override the Evidence Code, it would have been pointless to extend the definition of "client" to include "public entities." A court, however, should never presume that the Legislature intended to enact purposeless, and therefore useless, legislation. As this Court noted in Sharer v. Hotel Corp. of America, 144 So.2d 813, 817 (Fla. 1962), "[l]egislators are not children who build block playhouses for the purpose, and with the gleeful anticipation, of knocking them down." In fact, the Legislature specifically sought to avoid such a result by stating that the Evidence Code should supersede "existing statutory and common law in conflict with its provisions." Section 90.102, Fla. Stat. (1983).

In addition to being obvious, a local government's right to assert an attorney/client privilege is also supported by an anal-

ysis of the Public Records Act and by traditional rules of statutory construction.

Under sub-subsection 119.07(3)(a) Fla. Stat. (1983), any time the Legislature designates documents as "confidential," they automatically are exempted from the disclosure requirements of the Public Records Act. This is true even if the documents are not expressly exempted by the Public Records Act. A review of Florida Statutes (1983), reveals that the Legislature has designated at least thirty-six kinds of documents as confidential without specifically excluding those documents from the disclosure requirements of the Public Records Act.[2]

It should be emphasized that sub-subsection (a) represents the first of twelve sub-subsections, all of which provide exemptions to the Public Records Act. Sub-subsection (b) provides cross-references of exemptions from seven other statutes, while sub-subsections (c) through (n) provide specific exemptions. Had the Legislature intended for all exemptions to be included within the list provided by sub-subsections (c) through (n) or to be cross-referenced to other statutes under sub-subsection (b), it would have had no reason to include sub-subsection (a). It is a basic rule of statutory construction, however, that a court may not presume that the Legislature employed useless language. Times Pub. Co. v. Williams, 222 So.2d 470, 476 (Fla. 2nd DCA 1969). Sub-subsection (a), therefore, must be construed as pro-

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[2]See Appendix A

viding a means of legislatively expanding the exemptions to the Public Records Act without specifically amending Chapter 119.

It is also important to note that sub-subsection (a) protects from disclosure all public records which are "presently" provided by law to be confidential. The Legislature did not fix in time exemptions provided by law to be confidential, as it could have done if it had used such words as "on the effective date of this statute," or "as of July 1, 1979," instead of the word "presently." By using the word "presently," the Legislature thus expressed its intention that exemptions to the Act provided by laws other than Chapter 119 should be of an ongoing nature.

The conclusion that exemptions provided by law should be of an ongoing nature is buttressed by the fact that, although the Public Records Act was originally adopted in 1975, it has effectively been reenacted in every odd-year session since that time pursuant to the Biennial Adoption Act. Most recently, the Florida Legislature, by enacting Fla. Stat. § 11.2421 (1983), reenacted all statutes included within "Florida Statutes 1983." The reenactment effect of a statute like § 11.2421 is underscored by the fact that courts view such biennial adoptions of the Florida Statutes as curing any title defects that might have existed in an act as originally passed. See State ex rel. Badgett v. Lee, 156 Fla. 291, 22 So.2d 804 (1945). Under such circumstances statutes are considered valid from the time of revision, rather than from the date of original enactment. See Thompson v. Intercounty Tel. & Tel. Co., 62 So.2d 16 (Fla. 1952).

Once it is recognized that § 11.2421 effectively reenacts the Public Records Act, it then becomes clear that the word "presently" must apply to any law included within "Florida Statutes 1983." Therefore, all public records provided by law in 1983 to be confidential are exempted from the disclosure requirements of the Public Records Act. Accordingly, all privileges of confidentiality provided by the Florida Evidence Code, which was passed in 1976, became effective on July 1, 1979, and was contained within "Florida Statutes 1983," must be considered as exemptions to the Public Records Act. All documents accorded an attorney/client privilege by § 90.502 Fla. Stat. (1983), must, therefore, be considered as exempt from the disclosure requirements of the Act.

Apart from the legislative intention to exempt public records provided by law to be confidential under § 119.07(3)(a) Fla. Stat. (1983), traditional rules of statutory construction require that this Court accord an attorney/client privilege to local governments. Unless the Public Records Act is construed to exempt the attorney/client privilege granted by the Florida Evidence Code, there is a manifest conflict between the two statutes. Under such circumstances, the last expression of the legislative will becomes law. This rule is applicable even when conflicting or irreconcilable provisions appear in different statutes. See State v. Board of Public Instruction of Escambia County, 113 So.2d 368 (Fla. 1959); Overstreet v. Ty-Tan, Inc., 48 So.2d 158 (Fla. 1950); Johnson v. State, 157 Fla. 685, 27 So.2d 276, (1946).

Since the Florida Evidence Code was enacted in 1976 (Laws of Florida, Ch. 76-237) and the applicable amendments to the Public Records Act in 1975 (Laws of Florida Ch. 75-225), the Evidence Code's protection of documents falling within an attorney/client privilege must take precedence over the disclosure requirements of the Florida Public Records Act. This conclusion is made virtually unavoidable by the fact that the Legislature has specifically stated that the Evidence Code should supersede any existing statutory law in conflict with its provisions. Section 90.102, Fla. Stat. (1983). Thus, even were the exemptions of the Public Records Act to be considered exclusive, their exclusiveness would be overridden by the subsequent adoption of the Florida Evidence Code, and local governments would be entitled to assert an attorney/client privilege.

B. THE THIRD DISTRICT COURT OF APPEAL MISCONSTRUED THE SCOPE OF THE ATTORNEY/CLIENT PRIVILEGE, THE LEGISLATURE'S PURPOSE IN ACCORDING THE ATTORNEY/CLIENT PRIVILEGE TO PUBLIC ENTITIES, AND THE EFFECT ITS DECISION WOULD HAVE ON THE PRIVILEGE

The Third District Court of Appeal also misconstrued both the scope of the attorney/client privilege accorded by the Evidence Code and the effect its decision would have on the privilege. Citing a definition of "Evidence Code" found in Black's Law Dictionary, the Court concluded that the scope of the Florida Evidence Code is restricted to the admissibility of evidence and burden of proof at hearings and trials. Having thus narrowly defined the scope of the Evidence Code, the court held that its

privileges did not extend to demands for disclosure made pursuant to the Public Records Act.

There are two reasons why the scope of the attorney/client privilege cannot be so narrowly construed. In the first place, the court in attempting to explain why the Legislature had enacted a section of the Evidence Code extending the attorney/client privilege to public entities, concluded "this is merely to insure that the privileged communications of a public entity will not be admitted into evidence in judicial proceedings." Such a conclusion, however, is untenable. If the "privileged communications" of a public entity are disclosed pursuant to demands made under the Public Records Act, they perforce lose confidentiality. Thus the privilege is deemed waived and the documents become fully admissible into evidence. Section 90.507, Fla. Stat. (1983). See also Mobley v. State, 409 So.2d 1031 (Fla. 1982); State v. Sardini, 395 So.2d 1178 (Fla. 4th DCA 1981). As one court remarked: "It is black letter law that once the privilege is waived, and the horse is out of the barn, it cannot be re-invoked." See also Delap v. State, 444 So.2d (Fla. 1983); Eastern Airlines, Inc. v. Gellert, 431 So.2d 329 (Fla. 3d DCA 1983); Roberts v. Jardine, 358 So.2d 589 (Fla. 2d DCA 1978).

In the second place, the Third District Court of Appeal's decision, relying as it does on a definition found in Black's Law Dictionary, ignores Florida case law which routinely extends the privileges recognized by the Evidence Code to the discovery process. See, e.g. Pounce v. State, 353 So.2d 640 (Fla. 1977);

Young, Stern & Tannenbaum, P.A. v. Smith, 416 So.2d 4 (Fla. 3d DCA 1982); Jimani Corp. v. S.I.T. Warehouse Co., 409 So.2d 496 (Fla. 1st DCA 1982). Moreover, Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides for the discovery only of matters that are "not privileged." Privileged matters, however, are not defined by the Rules. Instead, courts rely on the federal and state constitutions and most particularly the Florida Evidence Code, to define the privileges that will be preserved during the discovery process. This fact was recognized by the Florida Supreme Court in Briggs v. Salcines, 392 So.2d 263 (Fla. 2d DCA 1980), when it held that § 90.502, Fla. Stat. (1979) shielded from discovery information that was originally protected by an accountant-client privilege and was subsequently given by the client to his attorney. See also, East Colonial Refuse Service, Inc. v. Velocci, 416 So.2d 1276 (Fla. 1st DCA 1982); Affiliated of Florida v. U-Need Sundries, 397 So.2d 764 (Fla. 2d DCA 1981).

Were the privileges created by the Florida Evidence Code not routinely extended to the discovery process, the use of the term "privilege" in the Florida Rules of Civil Procedure would be without definition and thus virtually meaningless. Moreover, were the privileges recognized in the Code of Evidence restricted exclusively to the admissibility of evidence at a hearing or trial, much of the reason for granting such privileges would be undermined. Even if their confidential communications could somehow not be used against them at trial, clients would still

hesitate to speak freely with their attorneys, accountants, psychiatrists, or clergymen, when the confidentiality of their communications could be breached during the discovery process. The reasoning of the Third District Court of Appeal in the instant case is thus flawed and its conclusions should not be adopted by this Court.

C. THE DECISION OF THE COURT IN TITAN SOUTHEAST CONSTRUCTION CO. SHOULD BE FOLLOWED AND THIS COURT SHOULD RECOGNIZE A LOCAL GOVERNMENT'S RIGHT TO PROTECT ATTORNEY/CLIENT PRIVILEGED DOCUMENTS DESPITE A DEMAND FOR DISCLOSURE UNDER THE PUBLIC RECORDS ACT

The opinion of the Court in Titan Southeast Construction Co., supra, which recognizes the logical imperative of according local governments an attorney/client privilege, suffers from none of the inherent defects of the Third District Court of Appeal's opinion in the instant case. After interpreting Florida law, the District Court for the Middle District of Florida concluded that the Florida Legislature intended to create exemptions to the Public Records Act, even after 1975, without specifically amending the act. The court further noted that the Legislature, in passing the Evidence Code, had recognized "public entities" as "clients" that were entitled to "refuse to disclose and to prevent any other person from disclosing" lawyer-client communications. Id. 535 F.Supp. at 166. The court thus upheld the right of a public entity to assert the attorney/client privilege. The reasoning of the Court in Titan Southeast Construction Co. is logical and compelling. It should become the basis for reversing

the decision of the Third District Court of Appeal in the instant case.

CONCLUSION

In enacting the Evidence Code, the Florida Legislature expressly extended the attorney/client privilege to local governments like the City of North Miami. The Florida Legislature also defined privileged communications between clients like the City of North Miami and their attorneys as "confidential." Since the Florida Public Records Act excludes from its disclosure requirements all documents provided by law to be "confidential," all documents protected by the attorney/client privilege as confidential must be deemed exempt from a demand for disclosure under the Public Records Act.

This court must, therefore, reverse the decision of the Third District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent this 24th day of August, 1984, to PARKER D. THOMSON, ESQ. and SUSAN H. APRILL, ESQ., Thomson, Zeder, et al., 1000 Southeast Bank Building, 100 South Biscayne Boulevard, Miami, Florida 33131; RICHARD J. OVELMEN, ESQ., The Miami Herald, 1 Herald Plaza, Miami, Florida 33101; JIM WOLF, ESQ., Florida League of Cities, Inc., Post Office Box 1757, Tallahassee, Florida 32302; and THOMAS

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