IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO: 65,426

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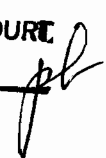

STEVEN EDELSTEIN, CITY OF MIAMI, MICHAEL J. MURPHY, and FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A.,

Petitioners,

vs.

MIRIAM DONNER and ARTHUR J. MORBURGER,

Respondents.

______________________________/

DADE COUNTY TRIAL LAWYERS ASSOCIATION
AMICUS CURIAE BRIEF IN SUPPORT OF THE POSITION
OF THE RESPONDENT

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On Behalf of the DADE COUNTY
TRIAL LAWYERS ASSOCIATION

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I. STATEMENT OF THE CASE AND FACTS

The DADE COUNTY TRIAL LAWYERS ASSOCIATION files this Brief as Amicus Curiae in support of the Respondent's position urging this Court to uphold the decision of the Third District Court of Appeal holding that the adoption of the Florida Evidence Code does not create an exemption from disclosure under the Public Records Act on the basis of the attorney/client privilege. The DADE COUNTY TRIAL LAWYERS ASSOCIATION accepts the Respondent's Statement of the Case and Facts.

II. POINTS ON APPEAL

A. THE THIRD DISTRICT CORRECTLY HELD THAT THE ADOPTION OF THE FLORIDA EVIDENCE CODE DOES NOT CREATE AN EXEMPTION FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT ON THE BASIS OF THE ATTORNEY/CLIENT PRIVILEGE

B. THE PETITIONERS ARE "AGENCIES" WITHIN THE PROVISIONS OF THE FLORIDA PUBLIC RECORDS ACT

C. REFUSAL TO CREATE AN EXEMPTION UNDER THE FLORIDA PUBLIC RECORDS ACT BASED UPON THE ATTORNEY/CLIENT PRIVILEGE DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OR DUE PROCESS

D. THE THIRD DISTRICT WAS CORRECT IN FOLLOWING THE PRIOR DICTATES OF THIS COURT AS WELL AS THE CLEAR LEGISLATIVE INTENT BEHIND THE ACT IN REFUSING TO EXEMPT THE DISCLOSURE OF DOCUMENTS BASED UPON THE WORK PRODUCT PRIVILEGE

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III. ARGUMENT

A. THE THIRD DISTRICT CORRECTLY HELD THAT THE ADOPTION OF THE FLORIDA EVIDENCE CODE DOES NOT CREATE AN EXEMPTION FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT ON THE BASIS OF THE ATTORNEY/CLIENT PRIVILEGE

The Legislature's intent in enacting the Florida Public Records Act is unambiguously set forth in Florida Statutes §119.01, which provides:

> "It is the policy of this State that all state, county and municipal records shall at all times be open for personal inspection by any person."

The nondiscretionary nature of the Act is further emphasized by the mandatory language employed in Florida Statutes §119.07(1)(a) which orders that:

> "Every person who has custody of public records shall permit the records to be inspected and examined by any person desiring to do so."

If there could be any doubt as to the Legislature's intent in passing the Public Records Act following those provisions, the Legislature clearly sought to remove it by further providing:

> "Any person who shall willfully and knowingly violate any of the provisions of this chapter shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083."

Florida Statutes §119.10.

The District Courts of Appeal have followed the lead of this Court in construing the Act in accordance with the Legislature's clear and unambiguous intent by providing that it neither recognizes nor permits judicially created exemptions, since:

> "The Legislature intended to exempt those public records made confidential by statutory law and not those documents which are confidential or privileged only as a result of the judicially created privilege of attorney/client and work product."

Wait v. Florida Power and Light Company, 372 So. 2d 420, 424 (Fla. 1979).

Also see Rose v. D'Alessandro, 380 So. 2d 419 (Fla. 1980), Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4th DCA 1978) cert. den'd 360 So. 2d 1247 (Fla. 1978), News-Press Publishing Company v. Gadd, 388 So. 2d 276 (Fla. 2nd DCA 1980), Gannett Company, Inc. v. Goldtrap, 302 So. 2d 174 (Fla. 2d DCA 1974), Donner v. Edelstein, 415 So. 2d 830 (Fla. 3d DCA 1982), Tober v. Sanchez, 417 So 2d. 1053 (Fla. 3d DCA 1982), Miami Herald Publishing Company v. City of North Miami, ____So. 2d_____ (Fla. 3d DCA 1984), State of Florida v. Kropff, 445 So. 2d 1068 (Fla. 3d DCA 1984).

Numerous cases have therefore made it extremely clear that the motivation of the record seeker or the purpose for which the records are sought are not proper considerations for denying disclosure under the Act. Accordingly, the fact that litigation between the record seeker and the record holder is either pending or eminent will not act to exempt the requested records, even where they would be otherwise privileged under the applicable rules of discovery. Wait, supra, Tober, supra, Donner, supra, Kropff, supra, Warren v. Bennett, 340 So. 2d 977 (Fla. 2d DCA 1977), Gadd, supra, Veale, supra. This Court itself has also previously held that disclosure may not be denied based upon public policy considerations which attempt to weigh the relative significance of the public's interest in disclosure with the damage to an individual institution resulting from such disclosure. Wait, supra. Also see, Gadd, supra.

It is apparent from the overwhelming weight of authority cited above, which has uniformly supported disclosure under the Act, that each and every argument raised by the Petitioners in this case has consistently been previously rejected by this Court as well as the various District Courts of Appeal in this State. The only so-called "new" argument

raised by the Petitioners is that the adoption of Florida Statutes §90.502 acts to create an exemption for the disclosure on the basis of the attorney/client privilege. This argument must clearly be rejected, however, in light of the clear Legislative intent behind the Act as set forth above as well as the compelling logic of the Third District which clearly followed the dictates of this Court's prior opinions in Wait, supra and Rose, supra.

In concluding that the adoption of the Florida Evidence Code did not create an exemption for the disclosure of documents under the Public Records Act in this case and its companion decisions in Miami Herald Publishing Co., supra and Kropff, supra, the Third District aptly noted that the statutory exemptions permitted under Florida Statutes §119.07 relate to exemptions enacted by the Legislature in specific response to the provisions of the Act. Thus, statutory exemptions are directed solely to the nondisclosure of public records, unlike the Florida Evidence Code, which is merely a general codification of judicially created rules of evidence applicable in all civil trials. To accept the Petitioner's argument to the contrary would be to equate the scope of disclosure under the Public Record Act with the scope of admissible evidence under the Evidence Code. Under this rationale the scope of disclosure would be even more restrictive than under the discovery rules, a position which this Court expressly rejected in Wait, supra.

The Third District's further observation that the Florida Legislature had rejected no less than seven bills attempting to create an attorney/client exemption to the Public Records Act between 1979 and 1983 is also particularly relevant in deciphering the Legislature's intent. The Petitioner's unsupported conclusion that the "obvious reason" for this action by the Legislature was the "fact" that the

Legislature had already exempted an attorney/client communication is totally unsupported in both logic as well as by any authority in the Petitioner's brief. To the contrary, if such an exemption was intended by the Legislature by virtue of its adoption of Florida Evidence Code, it is hard to imagine any reason for any rational Legislator to vote against a bill designed merely to clarify any doubt as to this intention.

Although not expressly considered by the Third District in these cases, it should also be noted that the Florida Evidence Code was initially enacted by Laws of Florida, Chapter 76-237 and had an original effective date of July 1, 1977. Thus, the drafting of the Code was long before this Court's decisions in Wait (1979) and Rose (1980) as well as the District Court's decisions in Veale (1978) and Gadd (1980), which all specifically rejected an exemption based upon the attorney/client privilege. Moreover, the decisions in Rose (1980) and Gadd (1980) were also rendered after the Florida Evidence Code's delayed effective date of July 1, 1979.

The fact that the Florida Evidence Code was initially enacted in 1976 also clearly undercuts the Petitioner's argument that the action of the Legislature in adopting Florida Statutes §90.502 "was intended to and did supercede the earlier decision of Wait on the common law attorney/client privilege." To the contrary, the 1976 version of Florida Statutes §90.502, which was drafted three years prior to this Court's decision in Wait, does not differ at all from the version which went into effect on July 1, 1979. Moreover, since the Evidence Code was "pending" for over two years before its delayed effective date, it must be presumed that this Court was well aware of its existence at the time it decided both Wait and Rose, and yet no mention was ever made of it.

B. THE PETITIONERS ARE "AGENCIES" WITHIN THE PROVISIONS OF THE FLORIDA PUBLIC RECORDS ACT

Florida Statutes §119.011 defines the operative word "agency" as meaning:

> "(2) . . . any state, county, district authority or municipal officer, department, division, board, bureau, commission or other unit of government created or established by law and any other public or private agency, person, partnership, corporation or business entity acting on behalf of any public agency."

There can be no doubt that the City's attorneys, both public and private, fall within the clear wording of this provision, since all of the records which they have compiled in connection with this lawsuit were clearly obtained while acting on behalf of the City of Miami.

Not only does the Petitioner's argument ignore the clear and express wording of the statute, but it would also create a mechanism for circumventing the Act by allowing "records custodians" to play a shell game with the records in attempt to avoid disclosure. In reliance upon the rule that a statute enacted for the benefit of the public is to be accorded a liberal construction, the District Courts have been quick to quash such schemes. See e.g. Tober, supra, The Tribune Company v. Canella, 438 So. 2d 516 (Fla. 2d DCA 1983). Also see Gibson v. Florida Legislative Investigative Committee, 108 So. 2d 729 (Fla. 1959), Falsone v. United States, 205 F. 2d 734 (5th Cir. 1953).

The Petitioner's argument is also effectively belied by virtue of the fact that the Legislature saw fit to specifically create an exemption for claim files maintained by the Department of Insurance's Division of Risk Management and yet provides no specific exemption for private or public attorneys or insurers. See Florida Statutes §284.40. The Petitioner's argument must therefore be rejected under the well known statutory principle of expressio unius est exclusio alterius. See e.g. Thayer v. State, 335 So. 2d 815 (Fla. 1976).

C. REFUSAL TO CREATE AN EXEMPTION UNDER THE FLORIDA PUBLIC RECORDS ACT BASED UPON THE ATTORNEY/CLIENT PRIVILEGE DOES NOT CONSTITUTE A DENIAL OF EQUAL PROTECTION OR DUE PROCESS

The Petitioner's due process and equal protection arguments are totally devoid of merit and in fact evidence a total lack of understanding of these constitutional guarantees. In fact, the Petitioners' so-called "constitutional argument" is nothing more than an attempt to create the very same type of "public policy weighing test" which this Court expressly rejected in Wait, supra.

It is axiomatic that municipalities and municipal officers in Florida constitute State agencies and in fact are defined as such in Florida Statutes §119.011(2). Also see Florida Statutes §768.28(2). It is a further elementary principle of constitutional law that the Fourteenth Amendment to the United States Constitution was enacted to place a limitation upon the State and its subdivisions in exercising their police powers against their citizens. The same is true of Article I, Section 9 of the Florida Constitution. Thus, it is a fundamental principle of constitutional law that subdivisions of a State may not be constitutionally deprived of due process or equal protection by the acts of the state's own Legislature. E.g., Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 53 S. Ct. 431 (1922), Trenton v. New Jersey, 262 U.S. 182, 43 S. Ct. 534 (1922), County Dept. of Public Welfare v. Stanton, 545 F. Supp. 239 (N.D. Ind. 1982). This principle has also been stated in terms that a political subdivision of a state has no standing to challenge a State statute on constitutional grounds. E.g., City of Safety Harbor v. Birchfield, 529 F. 2d 1251 (5th Cir. 1976), Stanton, supra.

Since there is no constitutional basis for the Petitioners to assert a deprivation of due process or equal protection, their attempt

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to boot strap a public policy argument to constitutional proportions must also fail. Nevertheless, even if it was possible for the cited provisions of the United States and Florida Constitutions to apply to the Petitioners, their public policy argument lacks merit as well.

Although State agencies have argued that the Public Records Act places them at a disadvantage in situations involving litigation, this argument ignores a number of overriding policy considerations. On one hand, State agencies are given many advantages over private litigants under Florida Statutes §768.28. Under this statute, a private litigant must undergo the expense and often times substantial delay in filing an administrative claim as a condition precedent to instituting a lawsuit. As numerous cases have made it clear, this is a path that is frought with many dangers and the failure to comply with the various technicalities involved can result in an absolute denial of a right to file a lawsuit, even though the State agency has suffered no prejudice as a result of the technical violation. _See e.g. Levine v. Dade County School Board_, 419 So. 2d 808 (Fla. 1983).

Similarly, Florida Statutes §768.28 also sets a cap upon the damages which are recoverable against the State in the absence of insurance. Therefore, if a State agency decides not to insure itself, which is a far too common practice, litigants will be limited to damages of $50,000 or $100,000, depending upon the date of their accident.

Perhaps, more importantly, however, the interest of the State in civil litigation cases cannot be equated with that of a private individual. When the State litigates with a private individual, it is involved with one of its own citizen members and therefore the proceedings cannot be termed "adversary" in the same sense as a suit between two private individuals. In a case construing the companion Sunshine Law, the Third District observed:

"One purpose of the Sunshine Law was to maintain the faith of the public in governmental agencies . . . representative government requires that it be responsive to the wishes of the governed, because that is the ultimate source of its consent.

Krause v. Reno, 366 So. 2d 1244, 1250 (Fla. 3d DCA 1979).

This principle is more often seen in criminal cases than civil. In criminal proceedings, for example, far broader obligations of disclosure are imposed upon the State than the defendants, including the duty to disclose all material evidence which tends to negate the guilt of the accused. Fla. R. Crim. P. 3.220, D.R. 7-103, Code of Professional Responsibility. In fact, it has often been observed that

"The State's attorney is not an attorney of record for the State striving at all events to win a verdict of guilty. He is a quasi judicial officer whose main objective should always be to serve justice and seek that every defendant gets a fair trial."

Frasier v. State, 294 So. 2d 691, 692 (Fla. 1st DCA 1974). Along these lines, it has been further held that:

"The State prosecutor has an affirmative duty to correct what he knows to be false and to elicit the truth. Even though the State itself does not solicit the false evidence, it may not allow it to go uncorrected when it appears."

Lee v. State, 324 So. 2d 694, 697, (Fla. 1st DCA 1976).

The same rationale applies to civil cases and the role of the Public Records Act, since the purpose of this State is not self profit or self perpetuation, but instead is to serve the broad interests of its citizens. As observed by this Court:

"A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise or superior trial tactics."

Dotson v. Persell, 390 So. 2d 704, 707 (Fla. 1980). It is only through the liberal construction of the disclosure requirements of the Act given by the Third District in following this Court's propouncements in Wait and Rose that these purposes can be accomplished.

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D. THE THIRD DISTRICT WAS CORRECT IN FOLLOWING THE PRIOR DICTATES OF THIS COURT AS WELL AS THE CLEAR LEGISLATIVE INTENT BEHIND THE ACT IN REFUSING TO EXEMPT THE DISCLOSURE OF DOCUMENTS BASED UPON THE WORK PRODUCT PRIVILEGE

The Petitioner's argument that the Third District failed to properly exempt "work product" documents clearly flies in the face of this Court's prior decisions in Wait and Rose as well as its repeated admonition followed by every District Court in this State that exemptions to disclosure under the Act are only permitted by virtue of statute and not judicially created doctrines.

Apart from asking this Court to ignore the clear and unambiguous intent of the Legislature as correctly and consistently construed by this Court and the other appellate courts of this State for nearly a decade, the Petitioner's argument on this issue once again is based upon a constitutional building with a fatally defective foundation. As pointed out in previous subsections, the Petitioners are merely attempting to "create" a constitutional argument by draping their public policy argument in constitutional garb. This is nothing more than an attempt to hide a wolf in sheep's clothing.

The Petitioners attempt to create a constitutional basis for work product exemption to the Public Record Act suffers from the same infirmity as their attempt to create a constitutional exception based upon the attorney/client doctrine. The due process and equal protection clauses of both the State and Federal Constitution simply do not apply to the Petitioners who are agencies of the State. Thus, the Petitioners are merely left with the same hackneed public policy arguments which have been repeatedly rejected by both this Court and the various District Courts of Appeal.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the Third District Court of Appeal's decision in holding that the adoption of the Florida Evidence Code does not create an exemption for disclosure under the Public Records Act on the basis of the attorney/client privilege.

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V. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24 day of July, 1984 to ARTHUR MORBURGER, ESQ., P.O. Box 1232, Hallandale, Florida 3309; MICHAEL J. MURPHY, ESQ., 501 City National Bank Building, 25 W. Flagler Street, Miami, Florida 33130 and LEON M. FIRTEL, ESQ., Suite 1101, Alfred I. DuPont Building, 169 E. Flagler Street, Miami, Florida 33131.

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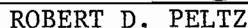
BY: 
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