IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

CASE NO.: 65,426

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.

PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

PETITIONERS' INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PREFACE

The Petitioners/Appellants/Cross Appellees, Respondents below, STEVEN EDELSTEIN, the CITY OF MIAMI, MICHAEL J. MURPHY and FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., will hereinafter be referred to as either "EDELSTEIN", the "CITY" "MURPHY" or the "LAW FIRM" respectively or collectively as the "PETITIONERS". The Respondents/Appellees/Cross Appellants, Relators below, MIRIAM DONNER and her attorney ARTHUR J. MORBURGER, will hereinafter be referred to as either "DONNER" or "MORBURGER" respectively or collectively as the "RESPONDENTS".

References to the record on appeal will be made by the designation "R" with appropriate pagination. References to the appendix to this appeal will be made by the designation "A" with appropriate pagination.

"Code" refers to the Florida Evidence Code, Florida Statutes, Chapter 90 et. al.

"Act" refers to the Public Records Law, Florida Statutes, Chapter 119 et. al.

All emphasis is added unless otherwise indicated.

SIMILAR MATTERS PENDING BEFORE THIS COURT

The PETITIONERS wish to point out that the question certified to the Supreme Court by the Third District Court of Appeal in the instant case is identical to the question certified by the Third District Court of Appeal in the case of City of

North Miami, et al. v. Miami Herald Publishing Co., Case No. 64,944 which has already been briefed and argued before this Court.

STATEMENT OF THE CASE AND FACTS

On May 8, 1984 the District Court of Appeal of Florida Third District certified the following question as one of great public importance pursuant to Article V, Section 3(b)(4) of the Constitution of Florida and Rule 9.030(a)(2)(A)(v) of the Fla.R.App.P.:

> "Does the attorney client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communication between a lawyer and his public-entity client?" (A. 1-3)

DONNER a pro se litigant and MORBURGER her attorney sought from EDELSTEIN, the CITY, MURPHY and his LAW FIRM their litigation and claims files with respect to an underlying false arrest suit filed by DONNER. (A. 17-41) See Donner v. Hetherington, 370 So.2d 1225 (Fla. 3d DCA 1979) (reversal of a summary judgment) (A. 10-12); Donner v. Hetherington, 376 So.2d 404 (Fla. 3d DCA 1979) (reversal of a dismissal with prejudice based on the disruptive behavior of DONNER during trial) (A. 13-14); Donner v. Hetherington, 399 So.2d 1011 (Fla. 3d DCA 1981) (reversal of a directed verdict) (A. 15-16). In the underlying lawsuit MURPHY and his LAW FIRM are counsel of record for the CITY, Vernon Hetherington the individual police officer, and

Appalachian Insurance Company the insurer. EDELSTEIN was at the time of the filing of the instant case an Assistant City Attorney for the CITY and had appeared as co-counsel for the CITY in the underlying action. (A. 17)[1] DONNER's main action (false arrest) against Hetherington, the CITY and Appalachian Insurance Company is currently pending in the Eleventh Judicial Circuit in and for Dade County awaiting retrial as ordered by the Third District Court of Appeal in Donner v. Hetherington, 399 So.2d 1011 (Fla. 3d DCA 1981). (A. 15-16)

Under the guise of "public access" pursuant to the Act, DONNER and MORBURGER sought to discover the pending claims and litigation files of Donner v. The City et al., from EDELSTEIN, the CITY, MURPHY and his LAW FIRM by filing a Motion for Order to Show Cause and Compel and a Petition for Writ of Mandamus. See Donner v. Edelstein, 415 So.2d 830 (Fla. 3d DCA 1982) (EDELSTEIN I) (A. 6-7) On the first appeal relating to DONNER and MORBURGER's attempt to obtain access to litigation files the Third District reversed the order of dismissal, holding that the PETITIONERS were required to reply in writing to DONNER and MORBURGER's Petition for Writ of Mandamus. (EDELSTEIN I) (A. 6-7) Subsequent to the PETITIONERS compliance with the Third District's mandate, the lower court entered an order dated September 17, 1982 finding the requested records exempt from disclosure

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1 EDELSTEIN is no longer employed as an Assistant City Attorney.

pursuant to the Act. Thereafter the Third District, on a Motion for Order in Accordance with the Mandate, directed the lower court to examine the claimed privileged documents or copies thereof to determine which were indeed privileged. The lower court was also directed to retain copies of all records inspected and seal them as exhibits to be transmitted to the court preserving all parties' rights to appeal. Donner v. Edelstein, 423 So.2d 367 (Fla. 3d DCA 1982) (EDELSTEIN II) (A. 8-9).

The lower court held an in camera inspection upholding the PETITIONERS attorney-client privilege as to certain documents and work product privilege as to others and appropriately sealed copies of the aforementioned documents in separate boxes. (A. 4-5) After various motions for recusal, rehearing, and reconsideration, the final order was amended to delete the privilege as to work product documents. (R. 129-130). The PETITIONERS filed their notice of appeal as to the portion of the order denying the claim of work product. (R. 97). DONNER and MORBURGER appealed the June 17, 1983 final order as it related to the attorney-client privilege. (R. 126-127). The two appeals, (3d DCA Case Nos. 83-1504 and 83-2005), were consolidated for purposes of appeal.

On May 8, 1984 the Third District per curiam affirmed the lower court's granting of production of work product materials and reversed the order denying production of the attorney-client privileged documents. (A. 2-3) The Third District did

certify to this Court as it did in Miami Herald Publishing Co. v. City of North Miami, Case No. 64,944 the following question as one of great public importance:

> "Does the attorney-client privilege section of the Florida Evidence Code exempt from the disclosure requirements of the Public Records Act written communications between the lawyer and his public entity client?" (A. 1)

On June 6, 1984 the PETITIONERS filed the instant notice to invoke the discretionary jurisdiction of this court.

QUESTIONS PRESENTED

WHETHER THE LOWER COURT ERRED IN PERMITTING ACCESS TO PETITIONERS' ATTORNEY-CLIENT COMMUNICATIONS.

WHETHER THE LOWER COURT ERRED IN PERMITTING ACCESS TO PETITIONERS' WORK PRODUCT.

SUMMARY OF ARGUMENT AS TO THE FIRST QUESTION PRESENTED

1. Section 90.502 of the Code provides that attorney-client communications are privileged and not subject to disclosure.

2. The Act cannot be construed to require disclosure of attorney-client communications contrary to the Code of Professional Responsibility. Additionally, the Legislature acted without authority because the Supreme Court has exclusive jurisdiction over attorneys to promulgate rules of professional conduct inclusive of the obligation to keep client confidences and prohibit disclosure of the same.

3. The Act as applied to require disclosure of attorney-client communications denies the CITY's right to equal protection of the laws and due process of law under both the Constitutions of the United States and the State of Florida.

4. If the Act is construed to require disclosure of attorney-client communications, such disclosure would be contrary to the intent and purpose of the Act.

5. MURPHY and his LAW FIRM also represent Vernon Hetherington and Appalachian Insurance Company, private citizens whose files are not subject to disclosure under the Act.

SUMMARY OF ARGUMENT AS TO SECOND QUESTION PRESENTED

The Act as applied to the CITY requiring disclosure of the CITY's attorneys' work product is unconstitutional. It denies equal protection of the law and due process of laws under both the Constitution of the United States and Constitution of the State of Florida in that it unfairly and unjustly discriminates against the CITY and other public entities similarly situated while all other corporations and individuals are afforded this privilege in the courts of this State.

ARGUMENT

The relationship of attorney and client is of paramount importance. In 1952 then Justice Roberts of the Supreme Court in Seaboard Air Line R. Co. v. Timmons, 61 So.2d 426 (Fla. 1952)

stated as follows in refusing a demand for disclosure of confidential communications:

> "The confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice. It cannot be so lightly brushed aside."

THE CODE PROVIDES THAT ATTORNEY-CLIENT COMMUNICATIONS ARE PRIVILEGED AND NOT SUBJECT TO DISCLOSURE.

The files of EDELSTEIN, the CITY, MURPHY and his LAW FIRM are absolutely privileged pursuant to Section 90.502 of the Code. That section of the Code provides in pertinent part as follows:

> "(1) For purposes of this section:
>
> (a) A "Lawyer" is a person authorized or reasonably believed by the client to be authorized, to practice law in any state or nation. [MURPHY and his LAW FIRM and EDELSTEIN]
>
> (b) A "client" is a 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. [CITY, Hetherington and Insurer].
>
> * * *
>
> "(2) 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.

* * *

"(3) The privilege may be claimed by:

* * *

(e) The lawyer, but only on behalf of the client. The lawyer's authority to claim the privilege is presumed in the absence of contrary evidence."

In Wait v. Fla. Power & Light Co., 372 So.2d 420 (Fla. 1979) this Court held that:

> "The Public Records Act exempts only those records that are provided by statutory law to be confidential or which are expressly exempted by general or special law ... If the common law privileges are to be included as exemptions it is up to the Legislature and not this court to amend the statute."

Following the Wait decision, and effective July 1, 1979, the Legislature superseded the common law attorney-client privilege (§90.102 F.S.) and replaced it with a statutory privilege (§90.502 F.S.). This statute created an attorney-client privilege that is different from the common law privilege; it is narrower in some respects and broader in others. Significantly, the statute defines the holder of the privilege, the client, as "any person, public officer, corporation ... either public or private ..." (See §90.502(1)(b)). This action of the Legislature was intended to and did supersede the earlier decision of Wait on the common law attorney-client privilege. In an article appearing in 8 F.S.U. Law Review, page 265, entitled "Exemptions

to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida?", the author, Kreamer, states at page 282 as follows:

> "Two other judicially created exemptions were validated by legislative amendments, thereby creating statutory exemptions for communications protected by the attorney-client privilege and for certain records." 135/
>
> 135/ Florida Evidence Code, Fla. Stat. §90.502(1) (1979) (creating attorney-client privilege exemptions). Fla.Stat. §119.07(3) (d) - (k) (1979) (creating police records exemption). See Wait v. Florida Power & Light Co. (1979) (common law privileges must be exempted by the legislature and not by the courts). See e.g., Rose v. D'Alessandro, 364 So.2d 763 (Fla. 2d Dist. Ct. App. 1978); Glow v. State, 319 So.2d 47 (Fla. 2d Dist. Ct. App. 1975) (police records exemptions).

Additionally, §90.102 entitled Construction of the Code states as follows:

> "This chapter [Code] shall replace and supersede existing statutory or common law in conflict with its provisions."

To the extent that the Act may be construed to entitle persons to discover an attorney-client privileged communication, it is in conflict with §90.502 and is superseded and replaced by §90.502 by the express terms of §90.102 recited above. The Code is the most recent pronouncement of legislative intent regarding attorney-client communications, and the courts must give credence to it. One of the basic tenents of statutory construction is that the last expression of the legislative will is the law and

should be given effect. Johnson v. State, 157 Fla. 685, 27 So.2d 276 (Fla. 1946); cert. denied, 327 U.S. 799, 91 L.Ed. 683, 67 S.Ct. 491; State v. Board of Public Instruction, 113 So.2d 368 (Fla. 1962). See also 30 Fla. Jur., Statutes, §120 and the cases cited therein.

The Legislature must have intended public officers and public corporations such as Hetherington and the CITY to be protected by this attorney-client privilege or inclusion of "public officer" and "public corporation" and "public entity" within the definition of "client" in Code §90.502 would amount to a legislative nullity. It is presumed that the Legislature intended every part of the statute for a purpose, and that there was a purpose in using the particular language in enacting the statute. Stein v. Biscayne Kennel Club, Inc., 145 Fla. 306, 199 So. 365 (1940); Lee v. Gulf Oil Corp., 148 Fla. 612, 4 So.2d 868 (Fla. 1941). If the Legislature did not intend for public entities such as the CITY and public employees or officers such as Hetherington to have an attorney-client privilege then, why did they include such individuals and entities in the statutory definition of "client" in §90.502?

The Third District's decision in the case of Miami Herald Publishing Co. v. City of North Miami et al., Case No. 64,944 cannot be distinguished, but these PETITIONERS do not concede that this abberation should be followed by this Court. The decision is wrong; it should not be followed; it should be expressly overruled.

The court in the Miami Herald case overlooked and/or erroneously refused to follow the applicability section of the Code contained in §90.103(2) which states in pertinent part as follows:

> "This act shall apply ... to civil actions and all other proceedings pending on or brought after October 1, 1981."

This amendment to the original applicability section was made by the Legislature at the request of the Bar and this Court in In Re: Florida Evidence Code 376 So.2d 161 (Fla. 1979). Additionally, after it was amended above, this Court in The Florida Bar In Re: Amendment of the Florida Evidence Code 404 So.2d 743 (Fla. 1981) approved the Code as amended and specifically stated that we "adopt them [amendments] as part of the rules of evidence and hereby modify those rules to incorporate the changes." The lower court somehow overlooked or chose to ignore the amendment to the Code which makes the Code applicable to cases "pending on" its effective date. There is no question that the Herald case involved matters pending on the effective date, and there is no question in this case that the underlying civil action was "pending on" the effective date of the Code.

In construing the Code, the Third District misread the Code or erroneously editorialized the plain language in holding the inclusion of public entities in the definition of the term "client" in the lawyer-client privilege section was to prevent privileged communications of a public entity from being

"admitted" into evidence in court. It chose to ignore the plain wording and intent of the statute to allow a "client", such as the CITY, the privilege "to refuse to disclose" and to prevent any other person from "disclosing" confidential communications. What good is preventing admission of privileged communications into evidence when they have previously been "disclosed" and the privilege lost through discovery or demand pursuant to the Act?

The glaring error in the analysis by the Third District in the Miami Herald case is their statement that the Code doesn't really mean that public officers and public entities are afforded a "privilege," it only means that the communication once revealed cannot be admitted into evidence. This holding is contrary to the Third District's own prior decisions and the decisions of this Court. See Mobily v. State, 409 So.2d 1031 (Fla. 1982); Pounce v. State, 353 So.2d 640 (Fla. 1977); Jimani Corp. v. S.L.T. Warehouse Company, 409 So.2d 496 (Fla. 1st DCA 1982); State v. Matera, 401 So.2d 1361 (Fla. 3d DCA 1981); Young, Stern & Tanenbaum, P.A. v. Smith, 416 So.2d 4 (Fla. 3d DCA 1982), which case specifically held that communications between an attorney and client are protected from discovery, not merely protected from "admissibility into evidence" as the Third District would now have that privilege so restricted; Sepler v. State, 191 So.2d 588 (Fla. 3d DCA 1966); Liberty Mutual Insurance Company v. Flitman, 234 So.2d 390 (Fla. 3d DCA 1970).

The Third District also noted in the last footnote in the Miami Herald case that the Legislature in the last four years had rejected seven bills which attempted to create a lawyer-client exemption to the Act. They rationalized their holding by noting that the Legislature had not seen fit to enact these proposed attorney-client exemptions specifically within the Act. This logic by the Third District ignores the fact that the obvious reason for the Legislature having rejected seven bills attempting to create a lawyer client exemption to the Act is the fact that the Legislature has already exempted a lawyer-client communication by virtue of the Code provisions as noted previously.

Even assuming, arguendo, that the Act does preempt the attorney-client privilege as outlined in the Code, the Third District politely brushes aside any potential challenge as to the constitutionality of such a law without a single word and passes the buck to the Legislature stating that the Legislature "is free to enact such a law", and therefore, sub silentio, it must be constitutional. Nowhere is there any discussion of why the Code should be subordinated to the Act with respect to attorney-client communications. There is no attempt to harmonize or give credence to the intent of both the Act and the Code. Nowhere does the Third District attempt to measure the Act against any constitutional yardstick under either the United States or Florida Constitution with respect to due process or equal protection. (These specific constitutional attacks will be addressed infra.)

THE LEGISLATURE CANNOT REGULATE ATTORNEY CONDUCT BY REQUIRING AN ATTORNEY TO DISCLOSE PRIVILEGED COMMUNICATIONS.

The Supreme Court of Florida has exclusive jurisdiction to adopt rules of professional conduct for lawyers. Article X of the Integration Rule, as amended October 1, 1979, provides that the Code of Professional Responsibility promulgated by Order of the Supreme Court of Florida, entered June 30, 1970, constitutes a code of ethics applicable to members of the Florida Bar. MURPHY and EDELSTEIN, at all times material hereto, were and are members of the Florida Bar representing the CITY, Hetherington and Appalachian Insurance Company in the underlying false arrest suit filed by DONNER prosecuted by her attorney, MORBURGER.

Disciplinary Rule 4-101 of the Code of Ethics prohibits a lawyer from revealing the secrets and confidences of clients. There is no exception in that disciplinary rule for clients who are public entities. This is not an ethical consideration, it is a disciplinary rule, and if an attorney violates this disciplinary rule, he is subject to censure by the Florida Bar including the loss of his license to practice law.

Prior to the records being demanded of the CITY, MURPHY, his LAW FIRM and EDELSTEIN in this matter, the Florida Bar responded to a specific request for an opinion on August 27, 1981. (A. 39-41) That request came from Attorney Toby Simon, who at the time was representing the City of North Miami. (A.

37-38) He asked the Florida Bar whether he is required to surrender attorney-client communications. (A. 37-38) The Ethics Committee responded that he was required to oppose any attempt to obtain lawyer-client communications. (A. 39-41) Furthermore, they opined he would be justified in appealing any Order requiring such disclosure. (A. 41) Staff Counsel for the Florida Bar specifically stated:

> The attorney-client privilege is firmly established in the Lawyers Code of Professional Responsibility and its maintenance is a fundamental ethical duty of the lawyer." (A. 41)

The Legislature may not require lawyers to divulge confidences of their clients, as contained in their files. The Legislature may not waive this requirement for lawyers. The Supreme Court of Florida is the only entity authorized to amend the Code of Professional Responsibility; the Legislature is not! It is axiomatic that the Legislature may not invade the constitutional authority of the Supreme Court. Art. II, §3, Fla. Const. states that no person belonging to one branch of government shall exercise any power that is lodged in either of the other branches of government. This means that neither the executive branch nor the Legislature can control what is purely a judicial function.

Earlier efforts by the Legislature to regulate the conduct of lawyers have been declared unconstitutional by this Court.

In In Re: Advisory Opinion Concerning the Applicability of Chapter 119 Florida Statutes, 398 So.2d 446 (Florida 1981), this Court was asked if the Act was applicable to the Committee of The Florida Bar on unauthorized practice of law. This Court acknowledged that the definition of public records was broad enough to encompass "the records of judicial branch entities", however, the records of The Florida Bar:

> "... are subject to the control and direction of this court and not to either of the other branches of the government".
>
> * * *
>
> "As a practical matter, the public interest is best served by shielding The Florida Bar unauthorized practice of law investigative files from disclosure under chapter 119, Florida Statutes, for to do otherwise might allow adverse and harmful publicity to focus on persons innocent of any wrongdoing but who, nevertheless, are subject to an unfounded complaint. When probable cause appears that someone is engaged in the unauthorized practice of law, the bar initiates litigation. From that point all records, of course, are open for a public inspection.
>
> We hold that chapter 119, Florida Statutes does not apply to The Florida Bar's Unauthorized Practice of Law investigation files."

In In Re: Petition for Advisory Opinion Concerning Applicability of Chapter 74-177 (financial disclosure law), 316 So.2d 45 (Fla. 1975), the Bar sought an opinion as to the applicability of the Financial Disclosure Law to members of The

Florida Bar who were serving in an administrative supervisory capacity necessary to operate the Bar (e.g. referees in disciplinary matters, members of grievance committees, representatives of indigents, etc.). This Court held that only it had the power to regulate the conduct of Florida attorneys; the Legislature could neither add to nor subtract from the code of conduct governing lawyers as promulgated by this Court.

> "The judicial branch has both a code of conduct for the judiciary and a code of professional responsibility for lawyers, and in addition, has the procedure to interpret them and the authority to enforce them through the Judicial Qualifications Commission and this Court."
>
> "Unlike the executive or legislative branches the judicial branch depends upon this historical professional responsibility of lawyers to obtain the necessary noncompensated labor to effectively operate the judicial system. To classify an attorney who is fulfilling his obligation as an 'officer of the Court' as a public officer subject to the control of the legislature would seriously impede the operation of the courts."
>
> "In accordance with the findings here, we find that Chapter 74-177 is inapplicable to the Florida Bar officers, staff, referees, and committee members."

REQUIRING THE CITY TO DISCLOSE CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS DENIES THE CITY EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW UNDER BOTH THE U.S. AND FLORIDA CONSTITUTIONS.

In Upjohn Company v. United States, 449 U.S. 383 (1981), the United States Supreme Court referred to the attorney-client privilege in the following manner:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 Wigmore, Evidence §2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice of advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed. 2d 186 (1980), 'The attorney-client privilege rests on the need for advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.' And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed. 2d 39 (1976), we recognized the purpose of the privilege to be 'to encourage clients to make full disclosures to their attorneys.' This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege 'is founded upon the necessity in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of the disclosure').

The aforementioned common law right of attorney-client privilege has existed in Florida until such time as it was codified by §90.502 of the Code. Assuming, arguendo, that there is no express or implied exemption for attorney-client communica-

tions within the Act or as superseded by the Code, every other natural person or legal entity which does not come under the definitional ambit of the Act has a statutory attorney-client privilege (§90.502), however, that statutory privilege is denied those individuals as defined under the Act. This is the argument advanced by DONNER and MORBURGER. Such a result runs afoul of both the U.S. and Florida Constitutions.

Municipalities such as the CITY are constitutionally created legal entities pursuant to Article VIII, §2 of the Constitution of the State of Florida. The CITY, Hetherington and their insuror are all entitled to due process of law as guaranteed by Article I §9 of the Florida Constitution which states in pertinent part as follows:

> "Due process. No person shall be deprived of life, liberty or property without due process of law...."

Section I of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities as citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction to equal protection of the laws."

In Friedus v. Friedus, 89 So.2d 604 (Fla. 1956) this Court held that corporations as well as natural persons were within the definitional ambit of the due process clause quoted above.

The test for whether a statute is violative of due process is whether it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974); Johns v. May, 402 So.2d 1166 (Fla. 1981). This statute fails on all counts. Attorney conduct is not a permissible legislative objective (Supreme Court function); it discriminates against public entities and officers; it is arbitrary in that it bears no reasonable relationship to the Act's purpose; it most assuredly is oppressive by putting public entities at a distinct "disadvantage" [Miami Herald, supra; Tober v. Sanchez, 417 So.2d 1053 (Fla. 3d DCA 1982), review denied mem. 426 So.2d 27 (Fla. 1983)] in litigation.

The Act as applied is unconstitutional because it denies public corporations [CITY] and public officers [Hetherington] the same protection under the law [§90.502 privileged communications] as private corporations and individuals enjoy, i.e. confidential communications with their legal representatives.

Among the rights secured to the CITY and Hetherington by the Florida Constitution, are the right of access to the courts (Article I §21) and the right to trial by jury (Article I §22). If, pursuant to the Act, DONNER and MORBURGER are allowed access to the clients' files in this matter, they will have effectively destroyed the clients' right of access to the courts

and trial by jury. All of the attorneys' communications will become matters of public record including settlement discussions, trial strategies, etc. and any effective defense which could be mounted by the clients in defense of DONNER's claim will be nullified.

The adversary system of settling disputes will be subverted by an opponent's demand for unilateral discovery of privileged communications. Such a result cannot be countenanced and such a construction of the Act runs afoul of Article I, §9, of the Florida Constitution and §I of the Fourteenth Amendment to the United States Constitution.

DISCLOSURE OF ATTORNEY-CLIENT COMMUNICATIONS OF PUBLIC ENTITIES DOES NOT SERVE TO FURTHER THE PURPOSE OF THE ACT

The avowed purpose behind the Act is to open government records so that citizens can discover what the government is doing. Browning v. Walton, 351 So.2d 380 (Fla. 4th DCA 1977). Public entities such as the CITY have always had the ability to sue and be sued in their own name and enforce contracts, condemn land, etc. Additionally, the Legislature in 1975 waived sovereign immunity for all public bodies and made them subject to suit for damages the same as a private corporation but provided a cap upon the extent of their liability. Fla. Stat. §768.28. Could the Legislature have intended to subject public entities such as the CITY to damage suits pursuant to Fla. Stat. §768.28 and at the same time deny them effective assistance of counsel by not

affording them the same privilege as private corporations? DONNER and MORBURGER would have this Court believe that the Legislature intended this result.

If the purpose of the Act is to afford citizens the opportunity to discover what their government is doing, the disclosure of attorney-client communications in pending or anticipated litigation will not further the purpose of the Act. In fact, it will be counter-productive. One basis for providing access to public records is to insure that the governments are performing their functions properly and insuring that the public coffers are not being drained unnecessarily. If the attorney-client communications are made public in such cases, settlement discussions and settlement demands will become known to adversaries, and they will then hold out for as much money as they can in such cases. Additionally, because attorney strategies may be revealed, the public's defense against the claim will be compromised and the public coffers will be subject to higher settlement demands. It seems highly unlikely that the Legislature intended this result.

It would certainly not further the interest of the public to allow this disclosure during the course of litigation. Disclosure can only be detrimental to the defense of the main action. Disclosure will result in making public, settlement evaluations, attorney strategies, work product, the attorney's subjective summaries of the testimony of witnesses and parties

and evaluations of judicial climate and juror climate all to the detriment of the public client.

MURPHY AND THE LAW FIRM REPRESENT HETHERINGTON AND THE INSURER WHOSE FILES ARE NOT SUBJECT TO DISCLOSURE UNDER THE ACT.

Although the CITY is represented by EDELSTEIN, MURPHY and the LAW FIRM, two parties to the main action, Hetherington and the Insurer are represented by MURPHY and his LAW FIRM exclusively and their files are comingled with the CITY's files in the main action. (A. 25-27)

Neither Hetherington nor the Insurer are "agencies" within the meaning of the Act §119.011(2). MURPHY and his LAW FIRM's litigation files with reference to their representation of their clients are not subject to disclosure under the Act. Liability of the CITY and the insurer is contingent upon the liability, if any, of Hetherington to DONNER in the underlying action. MURPHY's files contain correspondence to and from all of the clients he represents.

In the main action it is not the conduct of the CITY which is being questioned, but rather it is the conduct of Hetherington. Hetherington has been sued individually, and if DONNER prevails, he may be personally responsible for his alleged misconduct. Fla. Stat. §768.28.

MURPHY's files regarding the representation of his clients are privileged pursuant to the Code §90.502. These files

should not be made public because of the fortuitous circumstance of Hetherington having been employed by the CITY and the CITY having been sued vicariously for Hetherington's alleged misconduct. It is respectfully submitted that the Legislature, by passing the Act, did not intend to subject the attorney's files of a private litigant to public disclosure by virtue of the fact that the defendant happens to be employed by a public entity. Any statute or law which holds that such files must be disclosed to the public in general, and in this specific case to adversaries and her attorney, would create a system which is at odds with the adversary process of litigation. It would effectively abolish the attorney-client privilege and any work product privilege which Hetherington, the CITY and the Insurer should enjoy as do all other citizens of Florida.

ARGUMENT AS TO SECOND QUESTION PRESENTED

THE LOWER COURT ERRED IN PERMITTING ACCESS TO THE ATTORNEY'S WORK PRODUCT

In their response to the lower court's order to show cause the PETITIONERS asserted in addition to the attorney-client privilege, a claim of work product as to certain documents contained in their litigation and claims filed. (A. 27-30)

At first blush, the PETITIONERS claim of "work product" appears to be controlled by Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979). However, a strict reading of the Wait decision would eliminate the work product privilege for govern-

mental agencies within the State of Florida. Consequently, Wait should be limited to its facts, and should not be applied to all claims of work product because the application of the Act to work product under all circumstances would be unconstitutional under both the State and Federal Constitution. Additionally or alternatively this Court should re-examine the holding in Wait to limit or overrule it.

The PETITIONERS are not unmindful that the Third District only certified the question of attorney-client privilege as one of great public importance, however, this Court which now has jurisdiction of the "entire decision," is entitled to review the entire record, opinion and judgment involved in the decision of the lower court. Florida Real Estate Commission v. Williams, 240 So.2d 304 (Fla. 1970); Rupp v. Jackson, 238 So.2d 86 (Fla. 1970); Hillsborough Association for Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). In a footnote by Justice England in the Hillsborough case, supra, he stated

> "[O]ur review extends to the 'decision' of the District Court rather than the question on which it passed. Rupp v. Jackson, 238 So.2d 86 (Fla. 1970)."

Accordingly, this Court can review the denial of the PETITIONERS' claimed work product privilege. As highlighted by Judge Nesbitt in the Tober decision, supra, the attorneys representing public entities without a work product privilege have their hands tied and as he acknowledged,

> We would be less than candid if we did not acknowledge that, as the present case demonstrates, public agencies are placed at a disadvantage, compared to private persons, when faced with potential litigation claims.

Although the Legislature does have the power to enact laws, those laws must fit within the constitutional framework of both the Constitution of the United States and the State of Florida. Laws however well intentioned by the Legislature must be struck down if they deny equal protection of the law and due process of law as does the Act in the present case by not affording public entities a work product privilege. This Court can and must reexamine Wait and measure the Act against the constitutional yardstick of equal protection and due process.

Historically, the State and its agencies and subdivisions have been immune from tort liability, and it is only by legislative pronouncement, pursuant to Florida Statute, §768.28 that litigants such as DONNER are afforded access to the courts for the prosecution of private damage claims. As stated in the aforementioned statute, subsection (5):

> "The State and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages nor interest for the period prior to judgment. ..."

By allowing tort claimants, such as DONNER, access to the work product of the attorneys representing a municipality, (in this case EDELSTEIN, MURPHY and his LAW FIRM), it is obvious that the

intent of Florida Statutes, §768.28 would be thwarted. Clearly, the CITY, a state agency or a municipality would be at a distinct disadvantage should one be compelled to reveal the "work product" of its attorneys.

DONNER and MORBURGER claim access to the RESPONDENTS' records with respect to her tort claim under the guise of access to public records. This veiled attempt to pirate attorneys' mental impressions, legal research, notes and memoranda of law will obviously work to the disadvantage of any municipality sued by tort claimants if such conduct is condoned. It is well-settled that statutes should be read where possible to give effect to one another. By subordinating the waiver of sovereign immunity statute (§768.28) to the Act, the Court is making a subjective determination that access to Public Records is paramount to defending tort claims against a municipality to the obvious detriment of the municipal coffers. This runs afoul of both the Federal and State Constitutions with respect to due process of law and equal protection of the law.

Work product is an entirely different matter from the attorney-client privilege and includes writings prepared and received by an attorney in preparation for litigation. Examples of matters which fall within the work product privilege are:

> "... (1) [W]ritten statements of witnesses relating to the occasions on which the injury occurred;
>
> (2) statements or reports from agents, officers or employees of the defendant company relating to the accident, and

> (3) the records, investigation sheets, memoranda, and photographs, relating to the accident, including any and all information, investigation sheets, etc. received by the defendant's attorneys from investigators and adjusters."
>
> Seaboard Airline Railroad Company v. Timmon, 61 So.2d 426, 428 (Fla. 1952). Accord, Goldstein v. Great Atlantic and Pacific Tea Company, 118 So.2d 253 (Fla. 3d DCA 1960).

In addition to the above, an attorney's work product includes his personal notes, personal recollections, private memoranda from Associates, Clerks, Paralegals and any legal memoranda or drafts of pleadings or trial memoranda made in anticipation of litigation or during the course of litigation with regard to the future courses of action and/or strategy. Hickman v. Taylor, 329 U.S. 495 (1947); United States v. Thirty-Eight Cases More or Less, 35 F.R.D., 357 (W.D. P.A. 1964), appeal dismissed on other grounds, 369 F.2d 389 (3d Cir. 1966).

The Supreme Court of the United States in Hickman, supra, acknowledged the strict protection afforded an attorney's work product and the right to privacy and specifically stated as follows:

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case

> demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act, within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer'. Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing, and the interests of the clients and the cause of justice would be poorly served."
>
> 329 U.S. 510-11

The PETITIONERS will not reiterate the equal protection and due process arguments which were adequately set forth previously in this brief with respect to the attorney-client privilege except to state that they apply equally with respect to the work product privilege asserted herein.

To illustrate the fundamental unfairness in allowing the unilateral discovery of work product and attorney-client communications, assume for the purposes of argument, that Hetherington was employed by Zayre's Department Store as opposed

to the CITY at the time of his encounter with and arrest of MIRIAM DONNER. As a private security guard employed by Zayre's, Hetherington arrests DONNER and she ultimately prevails in the criminal court on the charges made against her. DONNER turns around and sues Hetherington, Zayre's and Zayre's insurer for false arrest. In this situation Zayre's, Hetherington and the insurer would not come under the ambit of the act and their attorneys' litigation file, work product and attorney-client communications could not colorably be subject to disclosure under the Act. Why then should Hetherington, the CITY and the insurer be put to a legal disadvantage by virtue of the fact that Hetherington was employed by the CITY at the time he arrested DONNER? The simple answer to this question is that it is fundamentally unfair to suggest this result. It is unreasonable; it is arbitrary; it is oppressive; and the result does not serve to further the purpose of the Act. Furthermore such disclosure destroys the adversary judicial process and such unilateral pretrial discovery tools cannot and should not be countenanced by this Court.

CONCLUSION

For the reasons stated above, the PETITIONERS respectfully request this Court to do the following:

1. Answer the certified question in the affimative.

2. Reverse the decision of the District Court of Appeal in the instant case and in the case of Miami Herald Publishing Company v. City of North Miami, Case No. 64,944.

3. Reverse the Third District Court of Appeal's Order disallowing the work product privilege and overrule and/or modify this Court's previous decision in Wait v. Florida Power & Light Company, 372 So.2d 420 (Fla. 1979) to allow public entities a word product privilege.

4. Order that the RESPONDENTS' original Petition for Writ of Mandamus be discharged and/or dismissed denying access to the requested documents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the PETITIONER'S Main Brief with attached Appendix was mailed this 29th day of June, 1984 to: MIRIAM DONNER, P. O. Box 1232, Hallandale, Florida 33009; and ARTHUR MORBURGER, P.O. Box 1232, Hallandale, Florida 33009.

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