IN THE SUPREME COURT,
STATE OF FLORIDA

CASE NO.: 67,195

CITY OF ORLANDO,

Petitioner,

vs.

ROLAND E. DESJARDINS, et ux., et al.,

Respondents.

_____/

RESPONDENTS' ANSWER BRIEF

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NOTE

For purposes for this appeal, the following references will be used. Petitioner, CITY OF ORLANDO, shall be referred to as Petitioner or by name. Respondents, ROLAND D. DESJARDINS or FRANCES C. DEJARDINS, shall be referred to as Respondents or by name.

ISSUES

ISSUE I

WHETHER THE FIFTH DISTRICT COURT OF APPEALS' DECISION RENDERED JUNE 3, 1985 IN REFUSING TO RETROSPECTIVELY APPLY FLORIDA STATUTE 119.07 (3) (o) (1984) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF CITY OF NORTH MIAMI HERALD PUBLISHING CO., 468 So. 2d 218 (Fla. 1985) AND OTHER CASES.

ISSUE II

WHETHER CHAPTER 119, FLORIDA STATUTES (1983) CAN BE INTERPRETED TO CREATE A CONFLICT WITH FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-101 AND ETHICAL CONSIDERATIONS 7-7 AND 7-8.

ISSUE III

WHETHER THE REQUEST TO PRODUCE WAS IMPROPERLY MADE UNDER 119.021, FLORIDA STATUTES (1983).

STATEMENT OF THE CASE AND FACTS

The Respondents accept as true and accurate the Petitioner's Statement of the Case and Facts.

SUMMARY OF ARGUMENT

Florida Statute 119.07 (3) (o) (1984) was enacted to take effect as of October 1, 1984. Because the Request to Produce the CITY OF ORLANDO'S litigation file in the present case was served on July 23, 1984, this statute is not applicable to exempt that disclosure while the litigation is pending. It is a well established rule of construction that in the absence of a clear legislative expression to the contrary, a statute will operate prospectively. This Rule specifically applies to those instances where the retrospective operation of the provisions added by an amendment affect substantive rights. Seddon v. Harpster, 369 So. 2d 662 (Fla. 2nd DCA 1979) cert. question unanswered, approved, 403 So. 2d 409 (Fla. 1981).

In Orange County vs. Florida Land Company, 450 So. 2d 341, 343, (Fla. 1981), review denied, 458 So. 2d 273 (Fla. 1984), the Fifth District Court of Appeal specifically held that access to public records is a matter of substantive law. As a result, Florida Statute 119.07 (3) (o) affects a substantive right and therefore cannot be given retroactive application to exempt from disclosure the documents requested by the Respondents on July 23, 1984.

Furthermore, the decision of this Court in City of North Miami v. Miami Herald Publishing Company, 468 So. 2d 218 (Fla.

1985) does not stand for the proposition that F.S. 119.07 (3) (o) will be applied retroactively but rather just the opposite. In the present case, as opposed to the City of North Miami case, we have a clear record as to the status of the case and a proper public records request before October 1, 1984, the effective date of the amendment. In addition, Petitioner's reliance on City of North Miami v. DeLapp, 472 So. 2d 543 (Fla. 3rd DCA 1985), is inappropriate and mistaken as to the retroactive application of the amendment under review because the facts of that case do not indicate either the date of the request to produce or the documents requested.

In Fleeman v. Case, 342 So. 2d 815 (Fla. 1976) the Supreme Court of Florida insisted as a condition to retroactive application that a declaration to that effect be made in the legislation under review. Therein, this Court indicated that debate as to legislative intent concerning retroactive application was best left to the floor of the legislature. Consequently, this Court should not now examine any such debate but should determine retroactive applicability from the language of the amendment itself, which as presently written declares no such intention.

For the foregoing reasons, this Court must deny the retroactive application of Florida Statute 119.07 (3) (o) and instead uphold the Respondents' Request to Produce, which was proper in that it did not ask for matters not encompassed under

the Public Records Act such as notes by the attorneys designated for their own personal use or as preliminary guides for later formalizing a document.

Ethical canons 7-7 and 7-8 and Disciplinary Rule 7-101 do not conflict with the Public Records Act. At the time of this Public Records Request, Florida specifically allowed production of the Petitioner's litigation file. In point of fact, the intent of the legislature in passing Florida's Public Records Act was to provide "Government in the Sunshine." The CITY OF ORLANDO, as a municipal corporation created by the State, has only those rights conferred on it by the State. Consequently, the CITY'S attorney cannot now enlarge those rights in his representative capacity and exempt from production documents specifically open to disclosure under the Act. As such, this statute cannot be said to conflict with the Canons of Ethics since it serves to promote settlement and fulfill the attorney's ethical obligations to the Courts and his ultimate clients, the residents of the CITY.

The CITY OF ORLANDO cannot argue that the request to produce was served on the wrong party. The CITY'S attorney of Record is the custodian of the litigation file and the proper person to receive a Public Records request to produce same.

From the foregoing discussion, it is apparent that the

Respondent's Request to Produce was properly served on the appropriate party before the effective date of Florida Statute 119.07 (3) (o) such that the Respondent's Request to Produce must be upheld.

ARGUMENT

ISSUE I

WHETHER THE FIFTH DISTRICT COURT OF APPEALS DECISION RENDERED JUNE 3, 1985 IN REFUSING TO RETROSPECTIVELY APPLY FLORIDA STATUTE 119.07 (3) (o) (1984) EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF CITY OF NORTH MIAMI vs. MIAMI HERALD PUBLISHING CO., 468 So. 2d 218 (Fla. 1985) AND OTHER CASES.

There is no such conflict as Petitioners misconstrue the application and effect of City of North Miami vs. Miami Herald Publishing Co., 468 So. 2d 218 (Fla. 1985) and City of North Miami vs. DeLapp, 472 So. 2d 543 (Fla. 3rd DCA 1985). In City of North Miami, the issue was whether the attorney-client privilege embodied in Chapter 90 exempted written communications between lawyers and governmental clients from disclosure as public records. This Court in that opinion stated that it did not but indicated that Florida Statute 119.07 (3) (o) might exempt written communications between lawyers and governmental clients. However, this Court in ruling on that case was unable to determine the applicability of that section in that the specific communications were not contained in the record nor was the Court informed of the status of the litigation.

It should be noted here, that in this case presently under appeal as opposed to the City of North Miami, we have a clear record as to the status of the case and a proper public records

request before the effective date of the amendment on October 1, 1984. This is of importance, because although the litigation was pending in City of North Miami, this Court was unable to determine the applicability of Florida Statute 119.07 (3) (o). Contrary to the Petitioners belief, the City of North Miami opinion does not stand for the proposition that F.S. 119.07 (3) (o) will be applied retroactively but rather, just the opposite.

In addition, the Petitioner's reliance on City of North Miami vs. DeLapp, supra, is of little help because that opinion fails to state either the date of the request to produce or the documents requested. For the foregoing reasons, the Petitioner's reliance on City of North Miami and City of North Miami vs. DeLapp, is inappropriate and mistaken as to the retroactive application of Florida Statute Section 119.07 (3) (o).

The Petitioner attempts to justify the retroactive application of Florida Statute 119.07 (3) (o) by indicating that the statute is remedial or procedural in nature and therefore does not fall within the constitutional prohibition against retrospective application. Village of El Portal vs. City of Miami Shores, 362. So. 2d 275, 278 (Fla. 1978); City of Lakeland vs. Cantinella, 129 So. 2d 133, 136, (Fla. 1961). The Petitioner further tries to strengthen this argument by

indicating that remedial or procedural changes are retroactively applicable to cases pending on direct appeal. Heillmann v. State, 310 So. 2d 376, 377, (Fla. 2nd DCA). These cases do not apply because F.S. 119.07 (3) (o) affects a substantive right.

It is a well established rule of construction that in the absence of a clear legislative expression to the contrary, a law is presumed to operate prospectively. Seddon v. Harpster, 369 So. 2d 662 (Fla. 2nd DCA 1979), certified question unanswered, approved, 403 So. 2d 409 (Fla. 1981); Walker and Laberge, Inc. v. Halligan, 344 So. 2d (Fla. 1977); Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Fulley v. Morris, 339 So. 2d 215 (Fla. 1976); State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983). This rule specifically applies to those instances where the retrospective operation of provisions added by an amendment affect existing rights. Seddon v. Harpster, supra.

In Orange County vs. Florida Land Company, 450 So. 2d 341, 343, (Fla. 1981), review denied, 458 So. 2d 273 (Fla. 1984), the Fifth District Court of Appeal specifically held that access to Public Records is a matter of substantive law rather than practice and procedure. See Also City of Tampa v. Titan Southeast Construction Corporation, 535 F. Supp. 163 (M. D. Fla. 1982). Based on the foregoing, it is apparent that Florida Statute 119.07 (3) (o) cannot be given retroactive application because of its impairment of a substantive right, to wit:

Access to Public Records. The inappropriateness of retroactive application of Florida Statute 119.07 (3) (o) can be further substantiated by the rule concerning applicable laws for a case on appeal.

While as a general rule it is true that disposition of a case on appeal is made in accordance with the law in effect at the time of the appellate Court's decision rather than the law in effect at the time the judgment appealed was rendered, this rule is not applicable when a substantive right is altered. Hendeles vs. Sanford Auto Auction, Inc., 364 So. 2d 467 (Fla. 1978). As already stated, because access to public records has been found to be a matter of substantive law under Orange County v. Florida Land Company, Supra, this Court has no choice but to deny the retroactive application of Florida Statute Section 119.07 (3) (o) and allow for the disclosure of the documents requested in the trial below.

The Petitioner's final argument on this first issue, attempts to examine the legislative history of Florida Statute 119.07 (3) (o) in order to ascertain the legislature's intent as to the retroactive applicability of that statute. Such examination is unecessary because the amendment affects access to public records which has been found to be a substantive right. Subsequently, there is no need to scrutinize the record to determine if the amendment is remedial and thereby justifying

retrospective application.

A statute is presumed to be prospective in nature unless the legislature manifests a contrary intention in the statute itself. In Fleeman v. Case, 342 So. 2d 815 (Fla. 1976), the Supreme Court insisted as a condition to retroactive application that a declaration to that effect be made in the legislation under review. See also Seitz v. Duval County School Board, 366 So. 2d 119 (1979) (Fla. 1st DCA) 100 B.N.A. L.R.M. 2623, Cert. Den. 375 So. 2d 911 (Fla.) (refusing to retroactively apply a statute under review where it contained no such expressed language even though it was argued that such statute was remedial). Based on these cases, this Court cannot look into the legislative intent as to retroactive application of Florida Statute 119.07 (3) (o), but must examine the language of the statute itself, which in its present form has no express declaration that it should be given such application. This Court should avoid judicial intrusions into the domain of the legislative branch and restrict retroactive application of statutes to those situations where a declaration of retroactive application is made expressly in the legislation under review.

For all of the foregoing reasons, it is the Respondents' contention that the Fifth Circuit Court of Appeal correctly denied the retrospective application of Florida Statute 119.07 (3) (o) and that the Petitioner should produce the requested documents.

ISSUE II

WHETHER CHAPTER 119, FLORIDA STATUTES (1983) CAN BE INTERPRETED TO CREATE A CONFLICT WITH THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-1Ø1 AND ETHICAL CONSIDERATIONS 7-7 AND 7-8.

There is no conflict between the canons of ethics and Florida Law. The State of Florida, through its legislature, has chosen government in the Sunshine. At the time of this public records request Florida specifically allowed production of the Petitioner's litigation file.

The prejudice which the Petitioner argues befalls the governmental client in this respect is a necessary incident of a democratic government. The State creates municipal corporations and these corporations have only those rights conferred upon them by the State. The attorney in undertaking representation of such a client does not bestow on a municipal corporation any greater rights than the state has given it. The law in effect at the time of the request to produce herein specifically required public disclosure of the documents requested of the CITY OF ORLANDO. Therefore, the CITY'S legal representative cannot now contend that such disclosure is improper.

Governmental entities are not created to justify their own existence. THE CITY OF ORLANDO as a municipal corporation represents and is owned by every resident in the City, including

the Respondents herein. The City was created to serve its citizens not itself. Counsel for the CITY represents its inhabitants and not just the legal fiction of the corporate entity. Consequently, the canons of ethics require any such attorney to keep in mind his status as an officer of the court and who he really represents. Does not a government attorney in a comparable criminal situation have an ethical duty to fully disclose to the Court and to opposing counsel cases that are opposed or do not support his position? Should not a government attorney dealing with substantial matters of property rights have less an obligation than those government attorneys when dealing with loss of liberty for an individual? Respondents would answer that the CITY OF ORLANDO as a municipal corporation, working for the benefit of its citizens, has an obligation to each of its citizens to disclose all matters pursuant to its government in the Sunshine Policy.

"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. 3rd DCA 1979). Governmental entities are treated differently because they are different. The prompt and proper resolution of claims and providing full access to all resources and reserves accumulated at the citizens direct expense is a laudible motive deserving of support and proper recognition.

The government should have an obligation through all of its representatives, including any attorneys hired to represent it, to provide all information that it can gather and generate to its beneficiaries, the citizens. The whole truth should be given not just that which we want the jury to be given. Any impediment to full disclosure of the truth of all legal theories, of all witnesses, of all relevant matters, will only encourage the financially superior govermental litigant to beat his opponent with his financial weapon. The government has recognized this and set as its objective the equalization of the parties in dispute resolutions or in seeking information for legitimate purposes.

The Public Records Law by its very definition is discriminatory in requiring public agencies to open their records. Its operation is also discriminatory but done to serve a very important governmental objective, that of government in the Sunshine. Consequently, the Public Disclosure Act cannot be said to conflict with the canons of Ethics. On the contrary, it promotes settlement and thereby fulfills the attorney's ethical obligations to the Courts and to his clients.

ISSUE III

WHETHER THE REQUEST TO PRODUCE WAS IMPROPERLY MADE UNDER 119.Ø21 FLORIDA STATUTES (1983)

The Respondent's herein served their request upon the Division of Risk Management, The CITY OF ORLANDO, FLORIDA, in care of attorney Steven F. Lengauer, attorney of record for Petitioner. The Respondent served the attorneys of record in an abundance of caution to observe all ethical considerations and not to communicate directly with the another attorney's client. According to Florida Rule of Judicial Administration 2.Ø6Ø (1), the papers served upon an attorney are binding upon the client. Therefore, the papers served upon attorney Lengauer were properly served on the CITY OF ORLANDO and more specifically upon the CITY'S proper authorized representative maintaining the litigation file, to wit: their Attorney of Record.

The Respondent's have fully complied with the Public Record's Act in an ethical fashion as delineated above and should not now be penalized for some alleged technical impropriety. In point of fact, the matter has previously been addressed by the Third District Court in State Department of Highway Safety v. Kropff, 445 So. 2d 1Ø68 (Fla. 3rd DCA 1984). The procedure adopted herein to initiate the public records request was modified to accommodate and take into consideration

that the CITY OF ORLANDO was represented by legal counsel. As a result, the Respondents believe that the Request to Produce was properly and cautiously directed to the proper party.

CONCLUSION

Florida Statute Section 119.07 (3) (o) (1984) was enacted to take effect as of October 1, 1984. This statute affects a substantive right and cannot therefor be given retroactive application to deny requests to produce made prior to October 1, 1984. The case law is clear, that when application of legislation would affects a substantive right (access to public records), it should only be applied prospectively. Because a Respondents' Request to Produce was served prior to October 1, 1984, Florida Statute 119.07 (3) (o) does not apply.

The Canons of Ethics do not create a conflict with the Public Records Act. At the time of this Request to Produce, the State of Florida chose to provide access to documents contained within a governmental entities litigation file. The CITY OF ORLANDO, as a municipal corporation created by the State and having only those rights conferred upon it by the state, cannot enlarge its rights because of its legal representation. In that regard, the Public Records Act does not conflict with the Canons of Ethics but will serve to promote settlement and fulfill the attorney's ethical obligation both to the Courts and to his ultimate clients, the citizens of Orlando.

The Respondents properly served their request to produce the CITY OF ORLANDO'S litigation file on the CITY'S attorney, the obvious custodian of such documents. For the foregoing reasons, it is apparent that the Respondents' Request was properly served before October 1, 1984, and therefor the District Court's decision must be upheld.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondents' Answer Brief has been furnished by mail delivery to STEVEN F. LENGAUER, ESQUIRE, of PITTS, EUBANKS, HANNAH, HILYARD & MARSEE, P.A., Post Office Box 20154, Orlando, Florida 32814-0154 this 5TH day of March, 1986.

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