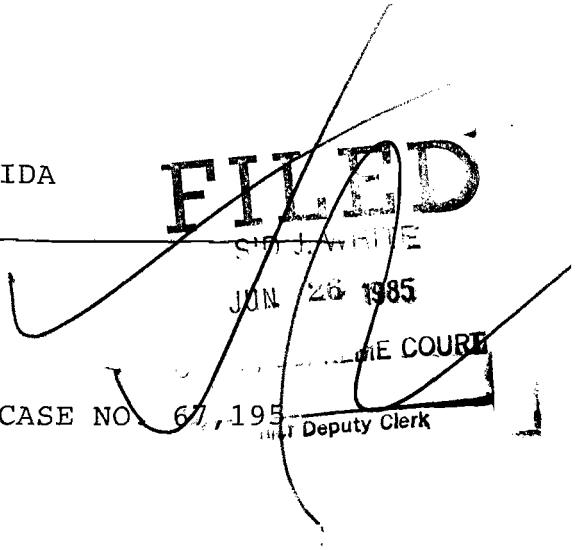
IN THE SUPREME COURT OF FLORIDA



CITY OF ORLANDO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 67,195
	)	
ROLAND E. DESJARDINS, et ux., and THOMAS M. McFARLAND, et al.,	)	
	)	
Respondents.	)	

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

Table of Citations	ii, iii
Statement of the Case and Facts	1
Summary of Argument	2
Argument on Jurisdiction	3-6
I. THE FIFTH DISTRICT COURT OF APPEAL'S DECISION RENDERED JUNE 3, 1985 EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF CITY OF NORTH MIAMI V. MIAMI HERALD PUBLISHING COMPANY, 10 FLW 183 (Fla. 3/28/85), HENDELES V. SANFORD AUTO AUCTION, INC., 364 So.2d 467 (Fla. 1978) AND OTHER CASES.	
Argument on Jurisdiction	7
II. JURISDICTION OF THIS COURT CAN ALSO BE BASED UPON IMPLIED UPHOLDING OF THE VALIDITY OF FLA. STAT. §119.07.	
Argument on Jurisdiction	8
III. STATEMENT REGARDING WHY JURISDICTION SHOULD BE ACCEPTED.	
Conclusion	9
Certificate of Service	10

TABLE OF CITATIONS

CASE	PAGE
City of North Miami v. Miami Herald Publishing Company 10 FLW 183 (Fla. 3/28/85)	2,4,8
Demko's Globe Coast Trailer Park, Inc. v. Palm Beach County 218 So.2d 745 (Fla. 1969)	6
Florida East Coast Railway Company v. Rouse 194 So.2d 260 (Fla. 1966)	3
Hendeles v. Sanford Auto Auction, Inc. 364 So.2d 467 (Fla. 1978)	2,3
Ingerson v. State Farm Mutual Automobile Insurance Company 272 So.2d 862 (Fla. 3d DCA 1973)	3
Pappadakos v. Simmon 461 So.2d 1020 (Fla. 3d DCA 1985)	3
United Yacht Brokers, Inc. v. Gillespie 353 So.2d 574 (Fla. 4th DCA 1977) mod. 377 So.2d 668	6
Van Meter v. Murphy 287 So.2d 740 (Fla. 1st DCA 1973)	3
RULES OF APPELLATE PROCEDURE	
Florida Rule of Appellate Procedure 9.120	1
Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) and (iv)(1985)	1,2,6,8,9
CONSTITUTION	
Article V, Section 3(b)(3), Constitution of Florida	1,2,8,9
FLORIDA STATUTES	
Fla. Stat. 119.07 subsection (3)(a)	2,8,9
Fla. Stat. 119.07(3)	3
Fla. Stat. 119.07(3)(o)	4
Fla. Stat. 119.07	5,6,9

FLORIDA STATUTES	PAGE
Fla. Stat. 119.07 (1983)	6
Fla. Stat. 119.07(3)(o)(1984)	7,9

STATEMENT OF THE CASE AND FACTS

Documents referred to in the Appendix will be designated by the symbol (A.). Respondents, Roland E. DesJardins and Frances C. DesJardins' First Amended Complaint against the Petitioner, City of Orlando, alleged that negligent traffic signal maintenance caused injury to Roland DesJardins (A. i-iv). A Request to Produce was served on July 23, 1984 (A. v-vii). A Response to Request for Production was served by Petitioner on August 17, 1984 (A. viii). A Statement Regarding Demand for Public Records Disclosure was served on December 7, 1984 (A. ix-xii).

A hearing on Petitioner's objections was held on December 7, 1984 and the Petitioner was ordered to produce attorney/client documents (A. xiii). The Petitioner served a Notice of Appeal and a Petition for Common Law Certiorari on January 4, 1985 (A. xiv-xxiv).

In an opinion filed April 25, 1985 the Fifth District Court of Appeal denied the Petition for Writ of Certiorari (A. xxv-xxvii). After the Fifth District Court of Appeal denied a Request for Rehearing or Clarification, a Notice to Invoke Discretionary Jurisdiction was timely filed on June 14, 1985 (A. xxviii). The Petitioner, City of Orlando, seeks to invoke the discretionary jurisdiction of this court pursuant to Rule of Appellate Procedure 9.120, 9.030(a)(2)(A)(i) and (iv)(1985) and Article V, Section 3(b)(3), Constitution of Florida.

SUMMARY OF ARGUMENT

This court has jurisdiction of this case pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) and (iv)(1985) and Article V, Section 3(b)(3), Constitution of Florida because of conflict with other opinions and the decision inherently passes upon the validity of a state statute.

Both the 1983 and 1984 versions of Fla. Stat. §119.07 (3)(a) protect from disclosure all public records which are "presently provided by law to be confidential." Since the legislature used the term "presently provided by law" it clearly intended to apply the law at the time the determination of exemption is made or at the time of appeal. It is noteworthy that the legislature used the past tense in subsection (o) and did not restrict the protection of attorney/client documents to specific dates of creation.

Florida law clearly establishes that the disposition of a case on appeal should be made in accordance with law in effect at the time of the appellate decision. Furthermore, City of North Miami v. Miami Herald Publishing Company, 10 FLW 183 (Fla. 3/28/85) remanded a case which arose prior to the effective date of subsection (o) for application of subsection (o) (p. 184). The Florida Supreme Court obviously believes that subsection (o) is to be applied retroactively and the Writ of Certiorari was erroneously denied.

ARGUMENT ON JURISDICTION

I. THE FIFTH DISTRICT COURT OF APPEAL'S DECISION RENDERED ON JUNE 3, 1985 EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF CITY OF NORTH MIAMI V. MIAMI HERALD PUBLISHING COMPANY, 10 FLW 183 (Fla. 3/28/85), HENDELES V. SANFORD AUTO AUCTION, INC., 364 So.2d 467 (Fla. 1978) AND OTHER CASES.

The discretionary jurisdiction of the Supreme Court is sought pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(i) and (iv)(1985) and Article V, Section 3(b)(3), Constitution of Florida. The instant opinion expressly and directly conflicts with a decision of another District Court of Appeal or the Supreme Court on the same point of law. The decision under appeal is also a decision which expressly declares valid a state statute (A. xxv-xxvii).

Of great importance is subsection (3)(a) of Fla. Stat. §119.07 which states in both the 1983 and 1984 versions:

> "All public records which are presently provided by law to be confidential...whether by general or special law, are exempt from (disclosure)." (Emphasis supplied).

The reference to "presently provided by law" is a clear and express mandate to apply the law at the time of the determination of exemption or at the time of appeal. The term "presently" cannot and should not be ignored by the courts and this term should be given its natural and logical meaning--at the present time or now. If the legislature intended the act to apply to the law at the time of creation of the records, it would have so specified. However, the legislature did not make any such limitation. Furthermore, there is no

basis whatsoever for reading such a limitation into the statute in direct opposition to the use of the term "presently."

The opinion of the Fifth District Court of Appeal thus expressly and directly conflicts with the principles of Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Florida East Coast Railway Company v. Rouse, 194 So.2d 260 (Fla. 1966); Pappadakos v. Simmon, 461 So.2d 1020 (Fla. 3d DCA 1985); Van Meter v. Murphy, 287 So.2d 740 (Fla. 1st DCA 1973) and Ingerson v. State Farm Mutual Automobile Insurance Company, 272 So.2d 862 (Fla. 3d DCA 1973). Those cases specifically hold that the disposition of a case on appeal should be made in accordance with the law in effect at the time of the Appellate Court decision rather than the law in effect at a prior time. In Florida East Coast Railway Company the Supreme Court quashed a District Court of Appeal opinion when it failed to consider a change in the law prior to appeal. Van Meter held that the Appellate Court should apply a statute which first became effective during the pendency of an appeal. Ingerson held that where a statute was changed during pendency of a trial the law as so changed controls the decision of the case. Pappadakos reversed a circuit court for failure to take into consideration a law effective October 1, 1984, which was passed five months subsequent to the entry of the Order under appeal. There is clear conflict with these decisions because of the failure of both the trial court and the Fifth District Court of Appeal to apply the law as it existed "presently" as required by Fla. Stat. §119.07(3).

In City of North Miami v. Miami Herald Publishing Company, 10 FLW 183 (Fla. 3/28/85), a case filed in 1983 (83-688), this court construed the application of the 1981 Public Records Act to attorney/client communications. There the Supreme Court expressed a willingness to apply Fla. Stat. §119.07(3)(o) effective October 1, 1984 to those communications which occurred long prior to its enactment (p. 184). If the Supreme Court had agreed that there could be no application of subsection (o) to documents generated prior to October 1, 1984 then it would have specifically stated that position. Furthermore the remand for consideration of subsection (o) would not have been done if it had no retroactive application.

The Florida Supreme Court clearly intended trial courts and courts of appeal to determine whether or not subsection (o) applies based upon the type of specific communications and the status of litigation to which the communications pertain. The phrase "status of the litigation" (p. 184) is a clear reference to whether adversarial litigation was still pending--part of the exclusion carved out by subsection (o). The remand in City of North Miami also accomplishes the requirement of an in camera inspection which is a provision of subsection (3)(b) of the 1984 act.

It is also noteworthy that subsection (o) of the 1984 act does not contain a limitation of the date when a public record was prepared and subsection (o) uses the past tense frequently. There is absolutely no reference in subsection

(o) to protection of documents created after October 1, 1984 and if that was the legislature's intent it would have so specified. The erroneous statutory construction of Fla. Stat. §119.07 by both the trial court and the Fifth District leads to the anomalous and inconsistent result of protecting attorney/client documents generated before 10/1/84 when the request was made after 10/1/84 but authorizing production of the same documents merely because the request was made on or before 9/30/84. The disputed documents became "presently provided by law to be confidential" on 10/1/84 more than two months before first hearing was held.

II. JURISDICTION OF THIS COURT CAN ALSO BE BASED UPON IMPLIED UPHOLDING OF THE VALIDITY OF FLA. STAT. §119.07.

Although the opinion of the Fifth District Court of Appeal did not specifically address the equal protection and substantive due process arguments made by the Petitioner, the opinion nonetheless upheld the validity of the Public Records Act against these contentions since it applied Fla. Stat. §119.07 (1983) to the facts of this case. A determination of the statute's validity was inherent in the result reached by the lower court.

The cases of Demko's Globe Coast Trailer Park, Inc. v. Palm Beach County, 218 So.2d 745 (Fla. 1969) and United Yacht Brokers, Inc. v. Gillespie, 353 So.2d 574 (Fla. 4th DCA 1977) mod. 377 So.2d 668 authorize Supreme Court jurisdiction where a decision on the validity of a statute was necessary to entry of the lower courts' opinion. Obviously, if Fla. Stat. §119.07 had been declared unconstitutional as applied to the facts of this case, production of these documents would not have been ordered. In Demko's Globe Coast Trailer Park, Inc. the Florida Supreme Court accepted jurisdiction when the Appellant asserted unconstitutionality of a challenged trailer park act and the Appellate Court did not expressly pass upon the questions concerning the validity of the statute. Thus, this court also has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i)(1985) despite the refusal of the Fifth District Court of Appeal to resolve the constitutional challenge.

III. STATEMENT REGARDING WHY JURISDICTION SHOULD BE ACCEPTED.

It is vitally important for this court to give trial courts and Appellate Courts guidelines on how to apply Fla. Stat. §119.07(3)(o)(1984). This is a question which will frequently reoccur and urgently needs clarification. Attorneys representing hundreds of public entities must know what records will be privileged and what records will not be privileged so that they can communicate with their clients confidentially on sensitive matters. A clear uniform rule of application would prevent conflicting procedural decisions by trial courts all over the State of Florida in a vitally important area.

It is absolutely essential for governmental entities to enjoy the attorney/client privilege in an age when growing masses of people sue them daily. Allowing disclosure of sensitive and confidential attorney/client documents mortally wounds valid efforts of governmental entities to aggressively defend themselves against numerous questionable lawsuits. There is a genuine concern that if the Supreme Court fails to accept jurisdiction that future cases will further undercut the privilege in a fashion which the legislature never intended.

CONCLUSION

This Honorable Court has jurisdiction of this appeal pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(i) and (iv)(1985) and Article V, Section 3(b)(3), Constitution of Florida. Since both the 1983 and 1984 versions of Fla. Stat. §119.07(3)(a) exempt from disclosure all public records "which are presently provided by law to be confidential", the statute plainly authorizes retroactive application. The time for the determination of whether there was an exemption is the time of the hearing, not the time when the request for production was made. Since the Florida Supreme Court remanded for application of subsection (o) in a 1983 case which arose prior to the effective date of subsection (o) (October 1, 1984) this Honorable Court, in order to be consistent, should accept jurisdiction and order the same result in the instant case. Furthermore, the opinion of the District Court authorizes jurisdiction because it inherently upheld the constitutionality of Fla. Stat. §119.07 in the face of constitutional challenges by the Petitioner.

This Honorable Court should reverse the opinion of the Fifth District Court of Appeal, grant the Writ of Certiorari, quash the trial court Order requiring production of the litigation file and attorney/client privilege matters and remand the case to the trial court for an in camera inspection of attorney/client privilege documents and litigation documents as well as application of Fla. Stat. §119.07(3)(o)(1984).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on Jurisdiction has been furnished by (mail)/hand-delivery this 24th day of June, 1985 to William Fernandez, Esq., 1309 E. Robinson Street, Orlando, Fl 32801 and to Robert Mixson, Esq., P.O. Box 6086-C, Orlando, Fl 32853.

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