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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,131

Lower Tribunal No. 90-1402

NEWS AND SUN-SENTINEL COMPANY,
a Delaware corporation
d/b/a THE FORT LAUDERDALE
NEWS AND SUN-SENTINEL COMPANY,
and
JOSEPH C. NUNES

Petitioners

v.

SCHWAB, TWITTY & HANSER
ARCHITECTURAL GROUP, INC.,
a Florida corporation
and
PAUL M. TWITTY,
individually and as an officer
and director of Schwab, Twitty &
Hanser Architectural Group, Inc.

Respondents

INITIAL BRIEF OF PETITIONERS NEWS AND SUN-SENTINEL COMPANY AND JOSEPH C. NUNES

On Review from the Distict Court of Appeal, Fourth District State of Florida

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PREFACE

This is Petitioners' Initial Brief on the merits. The record will be generally referred to as (R._____). The Appendix will be generally referred to as (App.____). All emphasis in this brief is supplied by the writer.

STATEMENT OF THE FACTS AND OF THE CASE

The decision to be reviewed is the affirmance of the trial court's finding that Respondents were not agencies as defined in Fla. Stat. 119.011(2) which would mandate the production of documents generated in the performance of Respondents' service contract with the School District of Palm Beach County, Florida. (R. 165-168)

Petitioners/Appellants (hereinafter referred to as Petitioners) NEWS AND SUN-SENTINEL COMPANY [NSS], is a Delaware corporation d/b/a The Fort Lauderdale News and Sun-Sentinel. Petitioner is a newspaper of general circulation in both Broward and Palm Beach Counties. Petitioner JOSEPH C. NUNES [NUNES] is employed by NSS as one of its reporters.

Respondents SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC. and PAUL M. TWITTY [Respondents] are a private corporation and officer of the private corporation, respectively, who had contracted with the Palm Beach County School District, a political subdivision of the State of Florida. Respondents had contracted to provide architectural services for the construction of certain school building facilities to be built by the Palm Beach School District. (R. 166). Respondents were paid for the professional services they rendered with public funds from the School District, payments being authorized by the Palm Beach County School Board.

On April 12, 1990 Petitioner NUNES, on behalf of the NSS, wrote to Respondent TWITTY requesting that he be allowed to

inspect, pursuant to Chapter 119, Florida Statutes, all files pertaining to the following Palm Beach County School District projects: Limestone Creek Elementary School; Lighthouse Elementary School; Cypress Trails Elementary School; Indian Pines Elementary School; Citrus Cove Elementary School; Del Prado Elementary School and Canal Point Elementary School. (R. 8). This initial request was narrowed further by Petitioner's attorney to include only Indian Pines Elementary School and Limestone Elementary School. (R. 9). Respondents refused the requested production stating that they were not an agency or agencies within the meaning of the definition set forth in Fla. Stat. 119.011(2).

Petitioners filed their Petition for Production of Documents Pursuant to Florida Statute 119 with a demand for immediate hearing. (R. 1-9). The cause was heard by Circuit Judge Richard B. Burk in the Fifteenth Judicial Circuit in and for Palm Beach County on May 1, 1990. At the conclusion of the hearing held on May 1, 1990, Judge Burk ruled that the Respondents were not agencies within the statutory definition and did not have to produce the records. (R. 165-168).

A transcript of those proceedings was made and is part of the record for the Court's review. (R. 97-164).

The Order entered by Judge Burk on May 9, 1990 was a Final Order with prejudice on the issues raised by Petitioners in their Petition for Production of Documents.

Petitioners filed their appeal with the Fourth District

Court of Appeals on May 25, 1990. The Fourth District Court of Appeal, after oral argument by counsel for the respective parties, rendered its opinion on December 5, 1990 (App. 1-3) affirming the trial court's finding that respondents were not agencies within the definition of Fla. Stat. 119.011(2) and certifying the following question for review to the Florida Supreme Court:

> Does a corporation act on behalf of a public agency when hired by a county to perform professional architectural services for the construction of a school so as to be subject to the provisions of Chapter 119 of the Florida Statutes?

This Court has accepted the certified question for review.

SUMMARY OF ARGUMENT

The Trial Court erred and committed reversible error when it found that the Respondents were not agencies within the meaning of Fla. Stat. 119.011(2) Both the Trial Court and the Fourth District ignored the clear intent of the broad definition adopted in the Statute and disregarded the fact that the records sought had been generated by the Respondents in performance of a service contract with a governmental agency for which services the Respondents had been paid with public funds. The opinion of the Fourth District should be quashed, the Respondents declared to be agencies within the statutory definition, the records ordered produced, and attorneys' fees for the lower court action and the appeals should be awarded to Petitioners.

ARGUMENT

THE DISTRICT COURT ERRED IN IT'S AFFIRMANCE OF THE TRIAL COURT'S RULING THAT THE RESPONDENT WAS NOT AN AGENCY WITHIN THE MEANING OF FLA. STAT. 119.011(2) AND IN DENYING PETITIONERS' PETITION FOR PRODUCTION OF RECORDS. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE.

The requested records are those records generated by Respondents in the performance of their service contract(s) with the School District for construction of school facilities. The parties stipulated that:

a) SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC., had contracts with the School Board of Palm Beach County, Florida to provide professional architectural services relative to the construction of Indian Pines Elementary School and Limestone Creek Elementary School;

b) SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC., was paid by the School Board of Palm Beach County, Florida for professional architectural services pursuant to the contracts; (R. 165-166).

The Court found:

(a) That there are contracts between SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC., and the School Board of Palm Beach County, Florida for the employment of architects to perform architectural services associated with the construction of schools.

(b) That the providing of educational facilities by the School Board is a governmental function but that the architectural services for designing is not a governmental function. (R. 166-168).

Petitioners contend that as a consequence of contracting with and performing under their contract with the School District the Respondents are an "agency" as defined in Fla. Stat. 119.011(2). The records generated by Respondents on the subject construction projects are, therefore, within the purview of Fla. Stat. 119 and come within the definition of a public record as delineated by Fla. Stat. 119.011(1). The professional services of the Respondents in performing the service contract were an integral part of the School District's process for implementing its decision to expand its educational facilities.

Respondents deny that they are an agency as defined by Fla. Stat. 119.011(2) and maintain, that as professional independent contractors the records generated by their performance of their service contract with the public entity are exempted from the requirements of the Florida Public Records Act (Fla. Stat. 119). Respondents seek to cloak as private the files and records they generated as a result of the performance of the service contract. If Petitioners' request is denied the public's statutory and constitutional right to know what is transpiring during public construction and what expenses are being incurred by the public agency are barred. Without access to the records, Petitioners will only be able to recount

unconfirmed allegations and hearsay. Public inspection of the records is critical because the public has a right to know why and how public funds for the School District construction are being administered and how the public business is being conducted and at what cost. Petitioners should not have to rely upon either the self-serving pronouncements of Respondents, solely the District files or unconfirmed allegations made by third persons.

Fla. Stat. 119.011(2) states as follows:

> (2) "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate 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. (Emphasis added).

All records in the custody of a corporation such as Respondents that have been generated as a result of work performed pursuant to a grant contract, paid for by public funds, must be immediately produced for inspection and copying when requested, unless there is a specific statutory exemption which the agency shows applies to those records. Fla Stat. 119.01(1); Fla. Stat. 119.011(2); Rose v. D'Alessandro, 380 So.2d 419 (Fla. 1980); Byron, Harless, Schaffer, Reid and Associates v. State ex rel. Schnellenberg, 360 So.2d 83 (Fla. 1st DCA 1978), rev'd on other grounds, 379 So.2d 633 (Fla. 1980); Wait v. Florida Power & Light Co., 372 So.2d 420, 422 (Fla. 1979); Bludworth v. Palm

Beach Newspaper, Inc., 476 So.2d 775, 779, n.1 (Fla. 4th DCA 1985), rev. denied, 488 So.2d 67 (Fla. 1986); State ex rel. Cummer v. Pace, 118 Fla. 496, 159 So. 679, 681 (Fla. 1935).

In Donner v. Edelstein, 415 So.2d 830 (3rd DCA, 1982) the District Court held that the records generated by a private attorney retained by the City of Miami to represent it in pending litigation were clearly public records. The Public Records Act in effect, under the rationale of Donner, overrode any attorney-client privilege that may have existed under Fla. Stat. 90.502. Respondents in the case at bar do not enjoy any statutory privilege that would operate to exempt disclosure of their records. Which is to say, there is no basis in fact or law to confer an exemption on Respondents when one of the more sanctified privileges, attorney-client, was overridden by the operation of the Florida Public Records Act. Respondents' argument simply cannot stand muster when it is contrasted with the rationale of the Donner case and its progeny.

The parties have stipulated that SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC. is a private corporation and that PAUL M. TWITTY is an officer of said corporation. The Respondents entered a service contract with the School District for the purpose of performing or assisting in the performance of official agency business. As a result of their participation in the performance of official agency business, pursuant to their contract, the Respondent did generate records that were intended to perpetuate, communicate, and formalize knowledge as it

pertained to their performance of their contract with the School District. To hold that because the Respondents have elected to label themselves "independent contractors" is sufficient to exempt them from the statutory definition of "AGENCY" would allow both Respondent and School Board to circumvent the clear intent of the Legislature in its adoption of the broad definition of "AGENCY." If the legislature had intended to exempt private corporations, independent contractors and individuals who contract with public agencies from the operation of the Florida Public Records Act the broad definition set forth in Fla. Stat. 119.011(2) would neither have been needed nor enacted. There is no "independent contractor" privilege that would exempt Respondents from the definition of "agency" under the Statute. The conjuring of an "independent contractor" exemption by the legerdemain of Respondents is illusory even under the most charitable review. State and local government is big business and businesses such as Respondents vie for the lucrative government funded contracts. If Respondents intend to partake of the feast then they must conform to the dress requirements enacted by the legislature to regulate such affairs, to wit: be subject to and comply with the Florida Public Records Act. Clearly, the intent of the Florida Legislature in Fla. Stat. 119.011(2) was to bring any private agency, person, partnership, corporation, or business entity acting on behalf of, providing service to, and, being paid by a public agency within the purview of the Public Records Act and public scrutiny.

Some of the critical factors in determining whether or not a private entity has become an agency within the statutory definition are: has the private entity been delegated any governmental responsibilities and functions, or, has the entity received any public funds, or, does the private entity participate or assist in the decision making process within the governmental agency. In Fritz v. Norflor Construction Co., 386 So.2d 899 (5 DCA Fla., 1980) it was held that an engineering corporation performing contract services for the City as a City Engineer in the operation of the City Water Treatment Plant was an "agency" within the meaning of Florida Statute 119. In Byron, Harless, Schaffer, Reid and Associates v. State ex rel. Schnellenberg, 360 So.2d 83 (Fla. 1st DCA 1978), rev'd on other grounds, 379 So.2d 633 (Fla. 1980), a consultant who had been employed by contract to conduct an employment search to fill the position of a managing director of a municipal electrical authority was held to be an "agency" under the Florida Public Records Act.

In Fox v. News Press Publishing Co., Inc., 545 So.2d 941, 943 (2 DCA Fla., 1989), a towing company that had contracted with the City to remove wrecked and abandoned automobiles from public streets and public property pursuant to certain city ordinances that the City had enacted under its police power was held to be an "agency" within the meaning of the statute. In the case at hand the School District in fulfilling one of its governmental purposes by building educational facilities did

contract with Respondents for professional services to assist the District in successfully fulfilling that purpose. The School District obviously elected to contract with a private corporation to provide certain professional services as opposed to hiring its own architects "in-house" as government employees to provide the needed services. The fact that the governmental agency has elected to contract out for an essential professional service does not operate to exempt the private corporation from the public scrutiny that flows from the Public Records Act. Were it otherwise the specter of potential abuse of the public treasury starts to come into focus.

The Respondents were compensated for all work performed pursuant to their contract with public funds. (R. 166). Under the terms of their contracts, as recited in Respondents' Memorandum of Law, (R. 12-29) the Respondents had to follow directions and instructions from the owner. (R. 16, Article I) Respondents' legerdemain notwithstanding they were not the contractual "ombudsman" as they depicted themselves in argument to the trial court. (R. 113).

The Courts have repeatedly held that Fla. Stat. 119 should be liberally construed to give effect to the legislative intent of opening up the operations of government to public scrutiny. Public inspection of public records is mandatory under Chapter 119. Mills v. Doyle, 407 So.2d 348, 350 (Fla. 4th DCA 1981) ("disclosure of public records is not a discretionary act; it is a mandatory act"). This Court has said that only an

explicit statutory exemption enacted by the Florida Legislature may exempt public records from mandatory inspection. Rose, supra, 380 So.2d at 420; Wait, supra, 372 So.2d at 424. In Morgan v. State, 383 So.2d 744, 746 (Fla. 4th DCA 1980) the Court said: "only the Legislature can create exceptions to the Public Records Act; the Courts may not find exceptions by implication." See also State ex rel. Veale v. City of Boca Raton, 353 So.2d 1194 (Fla. 4th DCA 1977), cert. denied, 360 So.2d 1247 (Fla. 1978) ("'provided by law' means provided by statute law"); Bludworth, supra, 476 So.2d at 779 n.1 (courts cannot create "any judicial exceptions to disclosure").

The District Court in reaching its decision relied on the case of Parsons and Whittemore, Inc. v. Metropolitan Dade County, 429 So.2d 343 (Fla. 3rd DCA 1983). In Parsons it was held that the mere act of entering into a business contract with a governmental agency did not mean that the private corporate entity had "acted on behalf of" the governmental agency, in that instance, the County. There are important factual distinctions in Parsons. There the private entity had contracted to construct a facility to which it still retained title at the time of the controversy. It does not appear that the private entity had received any public funds. The records request occurred during the course of an action predicated upon an anticipatory breach of contract and during the pendency of certain arbitration proceedings between the county and the private corporation. In essence, Parsons held that the private corporation had not yet

performed any essential governmental function, and, indeed at that point in the proceedings it had not. The factual scenario of Parsons is not remotely analogous to the case at hand. Respondents had 1.) contracted to provide and had provided architectural services which included consultation, contract interpretation, compliance with contract terms; and, 2.) had been paid with public funds for services rendered. (R. 16). To the extent that Parsons could be viewed as authority creating an exemption to Fla. Stat. 119.011(2) when private corporations perform and are paid pursuant to the terms of a contract with a government agency it should be disapproved and its holding limited to the facts peculiar to it.

In the case at hand all facts necessary to place Respondents within the statutory definition of "agency" are present. The Respondents had contracted with the governmental agency for the purposes of providing architectural services in the building of educational facilities in Palm Beach County; the Respondents had performed under the contract; the Respondents were paid with public funds for their performance. Petitioners have a clear legal right to inspect Respondents' records generated in the performance of their contract with the Palm Beach County School District.

CONCLUSION

The Respondents should be declared an agency within the definition of Fla. Stat. 119.011(2) and should be required to produce for inspection and/or copying all records generated in the performance of their contract with the Palm Beach County School District.

WHEREFORE, Petitioners pray the Court for a decision that:

A. Answers the certified question in the affirmative;

B. Quashes the Opinion of the District Court with directions to reverse the Trial Court's Order;

C. Holds that the Respondents are agencies within the definition of the Statute and as such are subject to the provisions of the Florida Public Records Act;

D. Remands the cause to the District Court with directions that judgment be entered on behalf of the Petitioners and ordering the Respondents to produce the records generated by the performance of their contract with the School District for inspection and copying;

E. Grants Petitioners' Motion to Assess Attorneys' Fees and Costs incurred at Appellate and Trial Court levels and remands the cause to the Trial Court for further proceedings to determine the amount of those attorneys' fees and costs;

F. And for such other relief as the Court may deem just and proper under the facts and circumstances of the cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing **Initial Brief of Petitoners News and Sun-Sentinel Company and Joseph C. Nunes** with the attached Appendix has been provided by U.S. Mail to Donald J. Freeman, Esquire, 1400 Centrepark Boulevard, Suite 909, West Palm Beach, FL 33401 and Louis R. McBane, Esquire, Northbridge Tower, 19th Floor, 515 North Flagler Drive, West Palm Beach, FL 33401 on this 22nd day of January, 1991.

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