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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,

vs.

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.

ON REVIEW FROM THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, STATE OF FLORIDA

INITIAL BRIEF OF RESPONDENTS SCHWAB, TWITTY & HANSER ARCHITECTURAL GROUP, INC. AND PAUL M. TWITTY

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PREFACE

The Respondents, Schwab, Twitty & Hanser Architectural Group, Inc. and Paul M. Twitty will collectively be referred to as "Schwab & Twitty" or "Respondents". The Petitioners, News and Sun-Sentinel Company and Joseph C. Nunes will be referred to collectively as "Sun-Sentinel" or "Petitioner." Palm Beach County School Board, Palm Beach County School District and School District are terms used interchangeably to refer to the public agency in this Brief.

The following symbols will be used:

'R. ' -- Record on appeal.

'App. ' -- Appendix

'Brief ' -- Reference to Petitioner's Brief with page number

STATEMENT OF THE FACTS AND OF THE CASE

In addition to Petitioner's Statement of the Facts and of the Case Respondents add and clarify the following.

Respondent, Schwab & Twitty, is a private corporation in the business of rendering professional architectural services (R. 12). Schwab & Twitty had a Contract to provide professional architectural services associated with the construction of Indian Pines Elementary School and Limestone Creek Elementary School with the Palm Beach County School Board. (R. 166).

The SUN-SENTINEL has requested and reviewed all of the records from the Palm Beach County School District relating to the Indian Pines Elementary School and Limestone Creek Elementary School (R. 146). The SUN-SENTINEL has made a complete review of all records maintained by the School District on the particular schools in question.

On May 24, 1990, a hearing was set before the Honorable Judge Richard Burk to determine Schwab & Twitty's Motion to Strike Petitioner's filing of the Contracts. (R. 169-171). After oral argument, the Court held that the Notice of Filing served by the Petitioners under certificate date of May 4, 1990 be striken from the record. The court Order was entered on June 19, 1990. (R. 174-175). The Contracts between Schwab & Twitty and the Palm Beach County School District were not introduced into evidence at the hearing on May 1, 1990.

The Fourth District Court of Appeal in its opinion specifically stated: "we hold that the architectural firm was not an agency "acting on behalf of" a public agency.". The Fourth District Court of Appeal went on to certify the following question to be of great public importance:

> 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 THE ARGUMENT

Florida Statute Section 119.01 states that the policy of this state is to have all state, county and municipal records open for public inspection by any person. Section 119.011(1)(2) defines public records to include those records made or received in connection with the transaction of official business by an agency. The Statute further states that an agency may be any private agency, person, partnership, corporation or business entity acting on behalf of any public agency. (emphasis added) The trial court and the Fourth District Court of Appeal were correct in finding that Schwab & Twitty was not an agency within the meaning of Florida Statute Section 119.011(2).

There is no dispute that Schwab & Twitty is a private entity and that its sole connection with the School District is a contractual relationship. There is no law or authority which supports the proposition that merely by contracting with a governmental agency a corporation acts on behalf of the agency.

The contractual relationship of Schwab & Twitty and the School District was simply for professional architectural services. Schwab & Twitty acted as designer, interpreter and final arbitrator between the owner (School District) and the contractor. At no time did Schwab & Twitty act on behalf of the School District during the construction of either of the two schools in question. The responsibility of architecturally designing a new

school is not in the decisional framework of when to build a school, how large a school to build, which grades it will house, and where it will be located.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE TRIAL COURT'S RULING THAT THE RESPONDENTS WERE NOT AN AGENCY WITHIN THE MEANING OF FLA. STAT. 119.011(2) AND CORRECTLY DENIED PETITIONER'S PETITION FOR THE PRODUCTION OF RECORDS. THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

The trial court entered an Order on May 9, 1990 which found, ordered and adjudged that for purposes of Florida Statute 119, Schwab & Twitty and Paul M. Twitty were not agencies of the School Board of Palm Beach County, Florida as defined in Florida Statute 119.011(2). The sole issue to be determined by the trial court was simply whether or not the Appellees were an agency within the definition of the statute. This issue was recognized early by the trial court in a pronouncement from Judge Burk. (R. 114).

Since Schwab & Twitty is a private corporation, the only method or means by which the trial court could have found that it was an agency under the definition contained in the Statute is by finding that Schwab & Twitty was "acting on behalf of any public agency". The "acting on behalf of" determination is the factual determination which was made by the trial court in favor of Schwab & Twitty when it found in its findings and fact:

> 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.

c) That the School Board's building program is funded by the government but that, the governmental entity, in this case the Palm Beach County School Board, does not regulate the architectural activity.

d) The School Board may generally say how it wants to approve the appearance of the buildings but that the architectural responsibility is a professional one and is not a governmental function.

e) That the particular entity in question in this case, Schwab, Twitty & Hanser Architectural Group, Inc., has not been created by a governmental entity, ie. the School Board, to perform a governmental function. (R. 166,167).

The trial court conducted a very analytical approach to its findings of fact in its Order and in particular looked at the Public Records Act which states in pertinent parts:

Section 119.01--General State policy on public records:

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

* * *

Section 119.011--Definitions:
(1) Public records means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other materials, regardless of physical form or characteristic, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. (emphasis added)

(2) Agency means any state, county, district, authority, or municipal office, 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)

The Petitioner, Nunes, is an investigative reporter of the Fort Lauderdale News and Sun-Sentinel Company seeking all of the records of Schwab & Twitty with relation to the construction of Indian Pines Elementary School and Limestone Creek Elementary School. The Petitioners claim that Schwab & Twitty is subject to the Florida Public Records Act. The Petitioners contend that it is critical that they review the records of Schwab & Twitty 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. (Brief 6 and 7). Petitioners fail to recognize that they have already reviewed the records of the School District in order to obtain information as to why and how public funds by the School District are being administered and how the public business is being conducted. The School District records as to the Indian Pines Elementary School, Limestone Creek Elementary School and others were made available to the newspaper investigator upon his request. (R. 146). As a public agency, the School District had the responsibility to maintain records and comply with the Public Records Act. Schwab & Twitty, however, is a private entity having a contractual relationship with the School District and does not fall within the Public Records Act.

The Petitioners in their Brief attempt to convince this Court that Schwab & Twitty must find a specific statutory exemption which applies to it in order to not be required to produce the records. (Brief 7). The Petitioners throughout their Brief argue that Schwab & Twitty must find an exemption under the Statutes, or, in some manner, convince this Court that they are exempt from the operation of the Statute. The argument that Schwab & Twitty must prove exemption appears in the Petitioner's Brief repeatedly (Brief 6, 7, 8, 9, 11, 12, and 13).

Petitioners are in error when they place the burden upon the Respondents to prove that they are exempt from the Statute, because, as the trial court found, and as the Respondents contend, Schwab & Twitty simply does not fall under the Statute since the Petitioners did not meet the threshold burden of proving that Schwab & Twitty was "acting on behalf of" the School District of Palm Beach County. As the trial court ruled, Schwab & Twitty was not an agency within the meaning of the statute; and, therefore, need not find an exemption to the statute because the statute was not applicable to Schwab & Twitty. The Petitioners simply did not carry their burden of proving at the trial court that Schwab & Twitty was acting on behalf of the School District in carrying out its function of providing professional architectural services to the School District.

The Petitioners make certain statements and representations in their Brief which are simply not supported by the Record at the trial court. The Petitioners make the specific representation that "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". (Brief 6). There is simply no evidence whatsoever that the activities of Schwab & Twitty was an integral part of the School District process for any decision the School Board might have made to build certain facilities of a certain size, at a certain location, for a certain number of pupils.

The Contracts between Schwab & Twitty and the School District were not entered into evidence by the Petitioners, and the only references to those Contracts in the Record are contained in the Memorandum of Law of Defendants in Opposition to Production of Documents Pursuant to Florida Statute 119. (R. 12-29). The portions of the Contracts referenced in the Memorandum of Law submitted by Respondents certainly do not indicate in any respect that the services performed by Respondents under the Contracts were an integral part of any decision making process of the School Board relative to expanding its educational facilities. The Petitioners cite no reference in the record for the quoted pronouncement at page 6 of their Brief.

Schwab & Twitty contends that the mere contractual relationship with the School District does not make it an agency within Florida Statute 119.011(2). Although there are no cases in the State of Florida which specifically address the right of an investigative reporter to access the records of an architect who has contracted with the School District for the performance of architectural services, this court has addressed the issue of agency within Florida Statute 119.011.

In the case of Schwartzman v. Merit Island Volunteer Fire Department, 352 So.2d 1230 (4th DCA 1977), the Fourth District Court of Appeal considered factors which enabled it to determine whether a Volunteer Fire Department was an agency within the meaning of Florida Statute 119.01. Judge Burk at the trial level had reviewed the Schwartzman case and made specific reference to it in his Order of May 9, 1990. (R. 167) Judge Burk specifically considered and inquired of counsel for the Petitioners whether or not the elements existing in the Schwartzman case existed in the Schwab & Twitty case. The Fourth District Court of Appeal and Judge Burk looked at factors, such as: the sole entrustment of the county duty for fire fighting to this organization, county funding, co-mingling of county funds with a common bank account, and activities performed on county owned property. In light of all those factors, the Fourth District Court of Appeal found that the volunteer fire department

was in fact acting on behalf of a public agency and its records were opened for inspection. The Fourth District Court of Appeal was concerned with the application of its finding and specifically stated that "this opinion was limited to the organization and the facts of this case and should not be interpreted to subject all civic and charitable organizations to the Public Records Act". Id. at p.1232.

The Petitioners cite and rely upon the case of Byron, Harless, Schaffer, Reid and Associates v. State exrel. Schnellenberg, 360 So.2d 83 (Fla. 1st DCA 1978), rev'd on other grounds, 379 So.2d 633 (Fla. 1980). However, the Respondents contend that the case of Parson and Whitmore v. Metropolitan Dade County, 429 So.2d 343 (3rd DCA 1983) is a case that more directly applies to the facts in question. It is also noteworthy that the Third District Court of Appeals in the Parsons & Whitmore case certainly had the benefit of the Byron decision to guide it in deciding Parsons & Whitmore, and Parsons & Whitmore is actually an application of the principles of Byron to the case of an independent contractor dealing by contract with a public agency. The Third District Court of Appeals in Parsons and Whitmore v. Metropolitan Dade County followed the reasoning and factors used in the Schwartzman case. The Third District Court of Appeals held that the engineering and construction firms and their affiliates who respectively contracted to construct, manage, and

operate a solid waste facility for the county, did not act on behalf of the county within the meaning of the Public Records Act. An entity does not act on behalf of the government agency merely by entering into a business contract with the county. Therefore the records did not fall within the Public Records Act.

Additionally, the court in Parsons reviewed four factors considered by Federal Courts in determining an entity's relationship with government activity; including:

1. Whether the entity performs a governmental function,

2. The level of governmental funding,

3. The extent of governmental involvement or regulation,

4. Whether the entity was created by the government.

Judge Burk in his analysis of the factors to be considered in determining whether or not Schwab & Twitty acted on behalf of the Palm Beach County School Board specifically addressed each of the issues noted in the Byron case, the first being whether the entity, Schwab & Twitty, performs a governmental function. Schwab & Twitty does not perform a governmental function or duty. The School District has the duty of planning schools, planning the facilities, and the needs for the various facilities (ie. where to build the schools, how big, how many students, and how many classrooms). The School District is in the business of decision making and policy implementation. The

private firm of Schwab & Twitty is solely in the business of providing architectural services. The services contracted for are not an integral part of the School District's process for a decision. Architectural services are not a function of the School District. In contracting with Schwab & Twitty, the School District has not delegated a duty or decision-making process.

Schwab & Twitty pursuant to the terms of its contract acts as a neutral party between the School District and the contractor. The specific terms of the contract between Schwab & Twitty and the School District state in pertinent parts:

> "Section 1.5.9--The Architect shall be the interpreter of the requirements of the Contract Documents and the judge of the performance thereunder by both the Owner and Contractor..."
>
> Section 1.5.10--...In the capacity of interpreter and judge, the Architect shall endeavor to secure faithful performance by both the Owner and the Contractor, shall not show partiality to either, and shall not be liable for the result of any interpretation or decision rendered in good faith in that capacity. (R. 15-16)

The specific terms of the contract clearly show that the architect acts as an independent party apart from the School District and does not act 'on behalf of' the School District. The contract terms show that the owner has the ability to bring in another person to act 'on its behalf'. Additionally, the architect contracts to act as a neutral party. He cannot be acting on behalf of anyone if he is a designated judge, jury and ar-

bitrator. The scenario painted by Petitioners creates a conflict of interest. Schwab & Twitty cannot perform under the terms of the Contract and act 'on behalf of' the School District.

The second factor addressed by the Federal Courts is the level of governmental funding. Judge Burk specifically addressed this issue to counsel for the parties at the hearing. (R. 125). In the case at hand, there is no level of governmental funding. There is a direct contractual relationship to pay Schwab & Twitty for performances of architectural services used by the School District. The payments received from the School District by Schwab & Twitty are the same as any other client paying for professional architectural services rendered.

The third factor addressed by the Federal Courts is the extent of governmental involvement or regulation. There is no direct regulation by the School District over the work done by Schwab & Twitty. Schwab & Twitty serves as interpreter, judge, jury and arbitrator with respects to the design, intent and the compliance by the owner and contractor. It is clear that they are neither an agent of the contractor nor the School District. Judge Burk also asked for comment on this factor at the hearing. (R. 127).

The fourth factor addressed by the Federal Courts is whether the entity was created by the government. Clearly the private architectural firm of Schwab & Twitty is not government created. Schwab & Twitty's business is not even an adjunct of a

government function, duty or obligation. Likewise, Judge Burk asked for comment from counsel on this factor at the hearing. (R. 128).

As clearly stated in Parsons, "we are unaware of any authority which supports the proposition that merely by contracting with a governmental agency a corporation acts 'on behalf of' the agency." Parsons at 346. The Respondents did not perform any essential governmental function or participate in any decisional process which is the duty and obligation of the School District so as to render its records open to public inspection.

The Petitioners attempt to distinguish the Parsons' decision based upon the fact that, in Parsons', the private entities still retain title to the solid waste facility. The private entities in the Parsons' decisions were under a contractual requirement to convey title to the county of the facility, but that simply had not yet occurred. A factor of more significance is that the court found that, even though one of the private entities had contracted to manage and operate the facility upon its completion and purchase by the county, the court still did not find that this private entity was acting on behalf of Dade County.

In the case of Fox v. News Press Publishing Company, Inc., 545 So.2d 941 (Fla. 2nd DCA 1989), the publishing company sought the records of Alligator Towing who contracted with the

government authority. In that case, it was clear that the city police department had an obligation by statute to remove vehicles from the street. They chose to delegate that precise duty and governmental police function to a third party. The contract assigned to Alligator Towing required that it:

a) Remove vehicles from the streets and other property of the city only as directed by an authorized representative of the police department;

b) Charge for such services only at the rate set by the city ...;

c) Maintain public liability insurance with the city named as additional insured;....

e) Operate at specified hours . . .;

f) Possess specified equipment meeting specific criteria set by the city;

g) Inventory the personal property of any towed vehicle with a police officer and provide the police department with a copy of such inventory.

Alligator Towing, in the Fox case, assumed a clear and undisputed governmental duty to remove abandoned and wrecked vehicles from the public streets. Unlike the case at bar, Schwab & Twitty has not assumed any clear governmental duty to perform architectural services. The facts in the Fox case as cited above show that there was a delegation of a governmental duty (the

towing of abandoned vehicles) delegated by the city to Alligator Towing. The city dictated the charge for services and dictated precisely which vehicles needed to be removed at what time. The facts went so far as to have the city as a named insured along with Alligator Towing. This is not the situation with the Respondents, Schwab & Twitty.

The Petitioners cite another case which demonstrates how a governmental agency has delegated a precise and clear governmental duty and responsibility to a third party. In Fritz v. Norflor Construction Co., 386 So.2d 899 (5th DCA 1980), the court found that Bowl Engineering was an agency under the Public Records Act insofaras it performed services for the city as the City Engineer relating to the treatment plant. The governmental agency in that case delegated a duty and responsibility to the engineering firm once they hired them as the City Engineer. Again, the city has delegated a function and obligation to a third party specifically designating them the city engineer. This opinion contains very little information concerning the facts which led the court to determine that the private firm acting as the City Engineer was an agency under the statute. The case simply states that it performed services for the city as City Engineer. Presumably there was a long-term contract between the city and the private engineering firm which required the private firm to perform many functions which in essence were governmental functions and responsibilities of the city. It is

the Respondents' position that the Parsons' case gives a great deal more guidance on the issue of agency with a written contract existing between a governmental body and a private entity.

Furthermore, the Second District Court of Appeal in News-press Publishing Company, Inc. v. Kaune, 511 So.2d 1023 (2nd DCA 1987) held that a physician who had a contract with the city to perform medical physical examinations of the city's fire fighters was not 'acting on behalf of' the city and was not an agent within the meaning of Florida Statute 119.011(2). The mere rendering of medical services for city employees under a contract did not make the physician an agent of the city and expose his records to the Public Records Act. This case is similar to the situation at hand. Schwab & Twitty is an independent professional architectural firm who has contracted with the Palm Beach County School District to provide architectural services. The mere rendering of architectural services should and does not make them an agency of the School District.

Petitioners have cited the cases of Morgan v. State, 383 So.2d 744 (Fla. 4th DCA 1980) Mills v. Dole, 407 So.2d 348 (Fla. 4th DCA 1981) and Bludworth v. Palm Beach Newspaper, Inc., 476 So.2d 775 (Fla. 4th DCA 1985) rev. denied 488 So.2d 67 (Fla. 1986) as authority permitting review of Schwab & Twitty's records pursuant to Florida Statute 119.011(2). In the case of Morgan the state attorney general had requested documents of the

employee of the Florida Board of Medical Examiner who acts as a records custodian and investigator of complaints for the Florida Board of Medical Examiners. The Fourth District Court of Appeal addressed the issue and came to the conclusion that the records sought by the Attorney General were exempt pursuant to another statute. This court did not find that the State Attorney General had the right to obtain records pursuant to Florida Statute 119 nor did it address the issue of agency. This case clearly dealt with a state agency requesting records of another state agency. There was no dispute that the Florida Board of Medical Examiners was an agency. Therefore, it is not on point in this situation.

In Mills, the Fourth District Court of Appeal ordered the School District employees to make its records available since there was no constitutional exemption of privacy applicable to the Public Records Act. The issue before the court was whether the Records Act violated the right of privacy to create an exemption under the Public Records Act. Again, the issue of agency was moot as the School District is clearly a governmental agency.

In Bludworth, the Fourth District Court of Appeal addressed whether the media has a right to all information furnished to a Defendant's counsel in a criminal investigation. The request was made by the news media to the State Attorney who is clearly a public agency under the Public Records Act. As in Morgan and Mills the issue before the court was not whether the en-

tity from whom the records were being requested was an agency within the meaning of Florida Statute 119. These cases are clearly not on point and do not resolve the issue on appeal in this case.

CONCLUSION

The Order on Petition for Production of Documents Pursuant to Florida Statute 119 and Demand for Immediate Hearing entered by Judge Burk on May 9, 1990, and the opinion of the Fourth District Court of Appeal filed December 5, 1990 affirming Judge Burk's ruling should further be upheld and affirmed.

The certified questions presented by the Fourth District Court of Appeal should be answered in the negative.

The Respondent's Petition for Attorney's Fees should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Respondents Schwab, Twitty & Hanser Architectural Group, Inc., and Paul M. Twitty has been provided by mail to Wilton L. Strickland, Esq., FERRERO, MIDDLEBROOKS, STRICKLAND & FISCHER, P.A., Post Office Box 14604, Fort Lauderdale, Florida 33302-4604 and to Louis R. McBane, Esq., BOOSE, CASEY, CIKLIN, LUBITZ, MARTENS, McBANE AND O'CONNELL, 515 North Flagler Drive, 19th Floor, West Palm Beach, Florida 33401 this 15 day of February, 1991.

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