IN THE FLORIDA SUPREME COURT

THE NEW YORK TIMES COMPANY, d/b/a THE LEDGER, and LAKELAND LEDGER PUBLISHING CORP., a Florida corporation, d/b/a THE LEDGER,

Petitioners,

v.

CASE NO. 78,559

PHH MENTAL HEALTH SERVICES, INC., a Florida nonprofit corporation, and CARL STRANG, as the Records Custodian of PHH Mental Health Services, Inc.,

Respondents.

ON REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF THE NEW YORK TIMES COMPANY d/b/a THE LEDGER, and LAKELAND LEDGER PUBLISHING CORP., a Florida corporation, d/b/a THE LEDGER

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

Statement of the Case and of the Facts

The Ledger seeks review of a Second District Court of Appeal decision absolving PHH of liability for attorneys' fees under the Public Records Act on the ground that PHH's status as an entity subject to the disclosure requirements of the Public Records Act "was not so readily apparent" as to render "unlawful" PHH's refusal to permit public inspection of its records.[1]

Pursuant to the Florida Public Records Act, Chapter 119 of the Florida Statutes, the Ledger made a demand upon PHH to inspect certain of its records. PHH refused and filed a declaratory judgment action seeking a determination whether it was subject to the Act's disclosure requirements. The Ledger countersued seeking court-ordered compliance with Chapter 119 and an award of attorneys' fees and costs. The trial court determined that PHH was an entity acting on behalf of Tri-County Mental Health, Inc., a public agency of the State of Florida, and accordingly ordered PHH to make its records accessible to the public in accordance with Chapter 119. The trial court also awarded the Ledger its attorneys' fees and costs pursuant to § 119.12, Fla. Stat. (1987). PHH appealed both orders.

In an opinion issued May 24, 1991, the Second District Court of Appeal affirmed the trial court's determination that PHH was an entity subject to the Public Records Act but reversed the order requiring PHH to pay the Ledger's attorneys' fees. As the appeals court noted,

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[1] Respondents PHH Mental Health Services, Inc. and Carl Strang, its custodian of records, are referred to collectively in this brief as "PHH." Petitioners The New York Times Company d/b/a The Ledger and Lakeland Ledger Publishing Corp. d/b/a The Ledger are referred to collectively herein as "The Ledger."

Chapter 119's attorneys' fees section provides:

> If a civil action is filed against an agency to enforce the provisions of this chapter and if the court determines that such agency unlawfully refused to permit a public record to be inspected, examined, or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

§ 119.12(1), Fla. Stat. (1987)(emphasis added).[2] As the appeals court further noted, "there are cases from this court and others which hold that attorneys' fees under Chapter 119 are awardable even if the agency's refusal to allow inspection of the records was the result of a good faith belief that it was not required to do so. See Times Publishing Co. V. City of St. Petersburg, 559 So.2d 487 (Fla. 2d DCA 1990); News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987)."

However, the Second District held that "[a]lthough, the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc., ... that conclusion was not so readily apparent that we can say with any degree of certainty that PHH's initial refusal to hand over its records was unlawful." Thus, despite the cases the court cited and the explicit, mandatory language of the statute itself, the Second District created a kind of "good faith" or "reasonable doubt" exception to an agency's liability for attorneys' fees in a Public Records Act case.

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[2]This section is unchanged in the 1989 version of the statutes. The Second District denied a separate motion pursuant to § 119.12(2), Fla. Stat. (1987), for attorneys' fees for the appeal, even though the statute requires an award of fees when an agency appeals an order requiring it to permit inspection of records and the order is affirmed.

The Ledger's Motion for Rehearing, Rehearing En Banc and for Certification, filed on June 10, 1991, was denied on August 6, 1991. Thereafter, on September 4, 1991, the Ledger timely filed its Notice of Intent to Seek Discretionary Review in this Court.

Summary of Argument

The Ledger seeks this Court's review of the Second District's decision pursuant to Article V, section 3(b)(3) of the Florida Constitution (1980), in that, on the issue of attorneys' fees, the decision expressly and directly conflicts with decisions of other district courts of appeal and of this Court on the same question of law. The Fourth District Court of Appeals has expressly held that there is no "good faith" or exception to the Public Records Act's provision of attorneys' fees for a party successful in obtaining court eenforcement of the Act's disclosure requirements.

Moreover, the Second District's decision runs expressly counter to this Court's prohibition on court-created, non-statutory public policy exceptions to the provisions of the Public Records Act and, indeed, the policy the Second District implemented is a harmful one. The Second District's decision creates incentive for records custodians in its jurisdiction to rush to the courthouse upon receipt of a Chapter 119 records request and requires citizens who lose courthouse foot races with such agencies to bear involuntarily the costs of judicial elucidation of a law enacted for the public's special benefit. Based on the express and direct conflict between the district courts of appeal's interpretations of § 119.12 and because of the clear hazard the decision presents to citizens wishing to monitor

private agencies conducting the public's business -- with the public's tax dollars -- this Court should accept this case for review.

Arsument

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND OF THIS COURT ON THE SAME QUEBTION OF LAW.

Florida's Public Records Act, requiring that public records be open for personal inspection by any member of the public at all times, applies to all **"agencies,"** which term as statutorily defined includes both government agencies and private entities "acting on behalf of" government agencies. § 119.011(2), Fla. Stat. (1987). Having determined that PHH was an agency required to make its records available to the public, the Second District Court of Appeal's decision absolving PHH of liability for the Ledger's attorneys' fees in this Chapter 119 case on the ground that PHH's status was "not so clear" expressly and directly conflicts with the Fourth District Court's decision in News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987).

In News and Sun Sentinel the Fourth District expressly held that the good faith of an agency's conduct in withholding public records is not a factor in whether the party prevailing in a suit to enforce the Public Records Act is entitled to recover attorneys' fees. There, a newspaper requested the Palm Beach County Volunteer Fire-Rescue Department to produce pursuant to Chapter 119 documents pertaining to

toxic substances and other hazardous materials.[3] The fire department refused the Chapter 119 request on the basis of §442.118(5), Fla. Stat. (1985), "which appears to permit disclosure of these documents only to fire suppression and fire inspection divisions, emergency medical service providers, and law enforcement agencies." Id. at 743. The newspaper filed suit seeking a writ of mandamus directing disclosure of the records, and the fire department counterclaimed seeking a declaratory judgment. The trial court ruled that the records were not exempt from the Public Records Act but declined to award the newspaper its attorneys' fees. On appeal of the denial of attorneys' fees, the Fourth District stated, concerning § 119.12:

> Implicit both in the ruling of the trial court and in the position taken by the [fire department] is the proposition that use of the term "unlawfully" by the legislature indicates an intention to engraft a "good faith" or "honest mistake" exception on the requirement that attorney's fees be imposed upon the agency which incorrectly refuses a request to inspect, examine or copy a public record. The trial court postulates that in a case where the statute or where conflicting statutes do not speak expressly to the postulated question, the holding of the trial court establishes new law which was not previously in existence; thus, even if the holding is adverse to the withholder, the withholding did not violate any law in existence prior to the court's holding; in other words, it could not have been "unlawful."

News and Sun-Sentinel, 517 So.2d at 743.

The Fourth District expressly rejected this reasoning, stating that "[t]he court having found that the newspaper was entitled under the law to disclosure of the documents which it requested, it follows

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[3]Another statute, §442.118(1), Fla. Stat. (1985), required that employers report the presence of such substances "to the person responsible for the administration and direction of a fire department" of certain governmental units.

that disclosure was unlawfully refused and the newspaper is entitled to its reasonable attorney's fees." Id. at 744. Thus, in the Fourth District, a requester of public records is entitled to attorneys' fees where the agency incorrectly refuses to provide the records; there is no "good faith" or "honest mistake" exception. Nevertheless, the Second District concluded such an exception exists, because the statute contains the word "unlawfully," apparently treating that word as an intent requirement. Moreover, that PHH's status as an agency subject to the Public Records Act was "not so clear" is the exact reasoning the Second District employed in reversing the award of attorneys' fees to the Ledger. The Second District's decision is precisely the opposite of the Fourth District's in **News and** Sun Sentinel; the disharmony is irreconcilable.[4]

The fees inquiry is measured against an objective standard ("unlawfully"), not the claimed subjective bona fides of the agency in resisting disclosure. Thus, there is no meaningful distinction between News and Sun-Sentinel and this case by which their holdings can be reconciled. The fire department in that **case** withheld records based upon an untested exemption; PHH withheld its records based on its untested status under the Public Records Act. Compliance with the Public Records Act is mandatory, not discretionary, even where the agencies' erroneous legal conclusions about the applicability of the

[4]The Third District Court of Appeal relied on News and Sun Sentinel in reversing a denial of attorneys' fees in Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3d DCA 1988). There the appeals court rejected as irrelevant the trial court's finding that the School Board did not act "unreasonably" in withholding **its** records. The law in the Third and Fourth Districts thus stands diametrically opposed to the law in the Second.

Act are in "utter good faith." Mills v. Doyle, 407 So.2d 348, 350 (Fla. 4th DCA 1981).[5]

The Second District's creation of a "good faith/reasonable belief" exception for PHH in this case also expressly conflicts with the extensive authority from this Court and the other district courts of appeal holding that courts may not create non-statutory public policy-based exceptions, exemptions or qualifications to provisions of the Public Records Act. Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979)(court not free to recognize public policy based litigation-related privileges as exemptions from Public Records Act disclosure mandate where legislature had not expressly provided for same).[6] while the Second District may believe a private entity should

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[5]As the Fourth District noted in News and Sun-Sentinel, § 119.12 prior to 1984 specified that attorney's fees were to be awarded only when a court found that an agency "unreasonably refused" to permit inspection of public records. That version of the statute was amenable to a "good faith" exception. See, e.g., News-Press Publishing Co. v. Gadd, 432 So.2d 689 (Fla. 2d DCA 1983); WFSH of Niceville v. City of Niceville, 422 So.2d 980 (Fla. 1st DCA 1982). However, in 1984, in connection with other changes to the Act to broaden and simplify access to public records, the Legislature amended § 119.12, changing the criterion for assessing attorneys' fees from an unreasonable refusal to an unlawful refusal. News and Sun-Sentinel, 547 So.2d at 744. Section 119.12 now requires only that the refusal to turn over records have been contrary to what the law required; the agency's state of mind or view of what the law required is irrelevant for this purpose. Moreover, a fact emphasized by the Second District in its opinion -- PHH's preemptive filing of a declaratory judgment action -- fails as a meaningful distinction between PHH and the volunteer fire department in News and Sun Sentinel, because it ignores the mandatory, non-discretionary language of the statute -- which requires only that records be withheld contrary to the law to trigger liability for attorneys' fees.

[6]See also Tribune v. Cannella, 458 So.2d 1075 (Fla. 1984); Douglas v. Michel, 410 So.2d 936 (Fla. 5th DCA 1982), certified questions answered, 464 So.2d 545 (Fla. 1985)(courts without authority to create exemptions to Public Records Act); Rose v.

not be required to pay its opponents' attorneys' fees in a suit to have its status under the Public Records Act declared, the court is not permitted to create any exception to the Act based on its concept of wise policy. Id. at 424. Moreover, the decision rests on distinctions between governmental and private agencies not contained in the statute. The decision clearly conflicts with this Court's holding in Wait and the cases which follow it.

II. THIS COURT SHOULD ACCEPT JURISDICTION TO REVIEW THE SECOND DISTRICT'S DECISION.

The attorneys' fees provision of Chapter 119 serves the important policies behind the Act.[7] As the Fourth District noted in News and Sun-Sentinel,

> The attorney's fees provision may be viewed by the records keeper as a penalty for noncompliance. In one sense this is accurate and this it may have a tendency to motivate the records holder to be more responsive and careful when a request for disclosure is made. It is at the same time a means of compensating members of the public where a request for disclosure is frustrated when no specific exemption is involved. Clarification of particular applications of the public records law accrues to the benefit of the agency and the public. It is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by court order at

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D'Alessandro, 380 So.2d 419 (Fla. 1980)(same); News-Press Publishing Co. v. Wisher, 345 So.2d 646 (Fla. 1977); State ex rel. Cummer v. Pace, 118 Fla. 496, 159 So. 679 (1935); 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).

[7] Statutes enacted for the public's benefit, such as the Public Records Act, are to be construed broadly in favor of the public. City of Miami Beach v. Berns, 245 So.2d 38 (Fla. 1971); Tober v. Sanchez, 417 So.2d 1053 (Fla. 3d DCA 1982). The Public Records Act's attorneys' fees provision was intended as a tool for enforcement of the Act and should be liberally construed to promote the values the Act serves. Downs v. Austin, 559 So.2d 246, 247 (Fla. 1st DCA 1990), citing Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145, 1148 n. 4 (Fla. 1985).

> least have his attorney's fees reimbursed for that endeavor. The public should not be required to underwrite clarification of a law passed for its special benefit. Should we engraft onto the term "unlawfully refused" either a good faith or an honest mistake exception, the salutary effect of the 1984 amendment would be seriously diluted.

Id. at 744.

The Second District's decision harms the public and the policies underlying the Public Records Act by encouraging agencies to file declaratory judgment suits in response to records requests, as a means of avoiding an assessment of attorneys' fees. As such, the cautionary value of the attorneys' fees provision is turned against the public instead of records custodians. Not only will the public be forced to underwrite exposition of the Act, the public will be forced to do so unwillingly. The Second District has made a sword of declaratory judgment actions, fear of which is bound to discourage all but the wealthy from exercising their rights and privileges under Chapter 119. The decision accords entities acting on behalf of government agencies a daunting power to discourage public records requests.

The Second District's decision also establishes for private entities acting on behalf of public agencies a safe harbor from attorneys' fees liability not available to public agencies themselves. The law does not permit public officials to file declaratory judgment actions to obtain court rulings concerning their obligations to comply with the Sunshine laws. Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977)(upholding dismissal of public officials' declaratory judgment action as circumvention of Sunshine Law's consequences); see also Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981). Thus, public officials and agencies will always be liable for attorneys' fees where they unlawfully withhold public records and are sued.

However, private entities acting on their behalf can avoid such liability by reaching the courthouse before the person who requested records. This distinction, clearly drawn by the Second District's emphasis on PHH's preemptive-strike lawsuit, is wholly without foundation in the statute. Indeed, there is no basis in any provision of Chapter 119 for drawing any distinction between government "agencies" and private entity "agencies." The Second District's distinction merely endorses fruitless litigation as a stall tactic to Chapter 119 disclosure. There simply is no reason, statutory or otherwise, the Ledger's counterclaim did not satisfy § 119.12's threshold requirement of a civil action filed to enforce the provisions of the public records act nor any reason the ultimate outcome of the counterclaim may be avoided by the simple expedient of having been first to reach the clerk's office with a suit.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction and accept this case for review.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the forgoing was furnished by regular United States Mail to: David A. Maney, Esquire and Nancy Hutcheson Harris, Esquire, Post Office Box 172009, Tampa, Florida 33672-0009, and J. Hal Connor, Jr., Esquire, Post Office Drawer 798, Winter Haven, Florida 33882 this 16 day of September, 1991.

George E. Rahdert, Esquire

APPENDIX

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

AUGUST 6, 1991

PHH MENTAL HEALTH SERVICES,
INC., etc., et al.,

Appellants,

v.

Case Nos. 89-02892
90-00405
90-01489

THE NEW YORK TIMES COMPANY,
d/b/a THE LEDGER, et al.,

Appellees.
_____/

Counsel for appellees having filed a Motion for Rehearing, Rehearing En Banc, and for Certification, upon consideration, it is ordered that the motion is hereby denied.

Appellees' Motion to Amend Motion for Rehearing, for Rehearing En Banc and for Certification is denied.

A TRUE COPY
ATTEST:

WILLIAM A. HADDAD, CLERK
SECOND DISTRICT COURT OF APPEAL

c: David A. Maney, Esq. and
Nancy Hutcheson Harris, Esq.
J. Hal Connor, Jr., Esq.
George K. Rahdert, Esq. and
Alison M. Steele, Esq.

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