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FILED
SID J. WHITE
OCT 16 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs. 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
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

RESPONDENTS' BRIEF ON JURISDICTION

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DAVID A. MANEY, ESQUIRE
Fla. Bar No. 092312
NANCY HUTCHESON HARRIS, ESQUIRE
Fla. Bar No. 518750
MANEY, DAMSKER & ARLEDGE, P.A.
Post Office Box 172009
606 East Madison Street
Tampa, Florida 33672-0009
(813) 228-7371

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STATEMENT OF THE CASE AND FACTS

The Petitioners, The New York Times Company d/b/a The Ledger, and Lakeland Ledger Publishing Corp., a Florida corporation, d/b/a The Ledger, (hereinafter "The Ledger"), seek to have reviewed the decision of the Second District Court of Appeal, dated May 24, 1991. Petition for Rehearing was denied on August 6, 1991.

The Petitioners were the original Defendants below, and the Appellants before the Second District Court of Appeal.

The Respondents, PHH Mental Health Services, Inc., a Florida nonprofit corporation, and Carl Strang, as the Records Custodian of PHH Mental Health Services, Inc., (hereinafter PHH"), were the original Plaintiffs in the trial forum and were the Appellees before the Second District Court of Appeal.

The Respondents appealed the Final Judgment entered by the Circuit Court of the Tenth Judicial Circuit of the State of Florida, in and for Polk County, finding that PHH was an entity acting on behalf of Tri-County Mental Health, Inc., a public agency of the State of Florida, and ordering PHH to pay the attorneys' fees and costs of The Ledger. 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 award to The Ledger of its attorneys' fees.

The Ledger seeks review that part of of the decision of the Second District Court of Appeal reversing the Trial Court's award to The Ledger of its attorneys' fees based on its belief that the decision expressly and directly conflicts with decisions of other District Courts of Appeal and of this Court. In particular, The Ledger suggests that the Second District court of Appeal Court of Appeal's May 24, 1991 decision is in direct and express conflict with the "good-faith-doesn't-matter" cases in other Districts of the State of Florida. The Ledger also suggests that the Second District Court of Appeal's May 24, 1991 Opinion is in direct conflict with this Court's cases holding that courts may not create non-statutory, public policy-based exceptions to the provisions of the Public Records Act.

Although the Second District Court of Appeal held that it could not consider PHH's initial refusal "unlawful," there is nothing to suggest in its Opinion that "good faith" would exempt a clearly delineated but recalcitrant "agency" from responsibility for attorneys' fees. Moreover, there is nothing to suggest in the decision that the Court is creating an exception or qualification to responsibility for attorneys' fees. Instead, the Second District Court of Appeal simply recognized the "unlawful refusal" qualification already expressly provided for by the Legislature.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeals' decision of May 24, 1991 ~~does not~~ expressly and directly conflict with the decisions of other District Courts of Appeal and of this Court on the issue of attorney's fees in Public Records Act cases. The Second District's decision that PHH did not "unlawfully refuse" to permit a public record to be inspected, examined or copied was based upon the reasonable uncertainty of the nature of PHH, and the efforts of PHH to promptly seek judicial resolution due to its uncertainty. The Second District's decision distinguishes, rather than conflicts, with the Fourth District Court of Appeal's decision that there is no "good faith" exception to the Public Records Act provision of attorney's fees. Specifically, the Fourth District's opinion was based upon a public records case involving a clearly delineated public entity in contrast to the patently uncertain nature of PHH. Moreover, the "agency" analyzed by the Fourth District Court of Appeal made no effort to seek judicial resolution, or confirmation of the "lawfulness" of its refusal to allow inspection of its records, unlike the facts considered by the Second District Court of Appeal.

The Second District does not promote a "race to the courthouse," but, rather, promotes an inquiry of whether it is reasonable for the existing agency to question, or resist, a

public records request, Chapter 119 of the Florida Statutes is not designed as a strict liability statute, which is exemplified through the legislature's inclusion of the qualifier "unlawful refusal" before an attorney's fee award can be made.

The Second District Court of Appeal's decision is not in express or direct conflict with the decisions of other District Courts of Appeal and of this Court, and, therefore, this Court should not accept this case for review.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL'S DECISION DOES NOT EXPRESSLY *AND* DIRECTLY CONFLICT WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND OF THIS *COURT* ON THE SAME QUESTION OF LAW.

Chapter 119, Fla. Stat. (1987). commonly known as the Public Records Act, and particularly subsection 119.12(1), limits an award of attorneys' fees to those cases in which the following circumstances are present:

> If the 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, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees. (Emphasis added.)

Accordingly, an award of attorneys' fees in a Public Records' Act action must include each of the following elements:

1. A civil action must have been filed to enforce the Public Records Act;

2. The action must have been filed against an "agency," as defined by the Public Records Act; and

3. The "agency" must have "unlawfully refused to permit" inspection of its records.

[Emphasis added].

If any one element is absent, then an award of attorney's fees is error.

The Second District Court of Appeal affirmed the Trial Court's decision that PHH is an "agency," that is, a private entity acting on behalf of a public agency, Tri-County Mental Health, Inc. However, the Second District Court of Appeal determined there was no "unlawful refusal" by PHH to permit inspection of its records. The Second District Court of Appeal described the factors it considered in distinguishing its decision from the good-faith-doesn't matter-cases; stating on page 3 of its Opinion:

> Here, however, PHH instituted a declaratory action immediately after receiving the records request in order to determine its susceptibility to Chapter 119. PHH was confronted with the problem of simply not knowing whether the law was applicable to it because PHH was not denominated a public agency by law and its status - i.e., whether it was acting on behalf of a public agency - was in doubt requiring judicial clarification. Although the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc., as is noted above, 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. We are guided in our conclusion by our opinion in Fox v. News-Press Publishing Co., Inc., 545 So.2d 941 (Fla. 2d DCA 1989), in which the entity's unclear status and its swift action seeking judicial resolution of whether it acted on behalf of a public agency were significant factors in the decision to reverse the trial court's award of attorney's fees.

The Second District's finding that PHH did not "unlawfully refuse" to permit inspection was based upon legal principles established originally in Glen Fox and Alligator Towing and

Recovery, Inc. v. News-Press Publishing Co., Inc. d/b/a Ft. Myers News-Press, 545 So.2d 941 (Fla. 2nd DCA 1989). In that case, the Second District Court of Appeal confirmed the lower court's finding that Alligator Towing and Recovery, Inc. (hereinafter "Alligator Towing") was an agency as defined by Chapter 119.011(2), but reversed the order of attorney's fees against Alligator Towing. The Court determined that the fees were improperly awarded since it could not find that (1) Alligator Towing unlawfully refused the records inspection; and could not find that (2) civil action was required to be filed by News-Press Publishing Co., Inc. to permit the inspection. Ibid, 944.

This decision, as well as the Second District's decision in Alligator Towing, distinguishes, not conflicts with, the "good-faith-doesn't-matter" cases, such as the case cited throughout The Ledger's Jurisdictional Brief, News and Sun-Sentinel Co. v. Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987) and Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3rd DCA 1988). In each of those cases, public records requests were made to "pure" public agencies such as the Dade County School Board and the Palm Beach Fire and Rescue Department. (See, Fox at 944). Furthermore, in each of those cases, the "pure'' public agencies refused to comply with the public records requests, requiring in each instance the filing of a lawsuit by the party seeking inspection. In neither case

did the "pure" public agency seek judicial resolution of whether it should allow inspection of its records, in contrast to the prompt response of Alligator Towing and PHH.

The facts of Glen Fox and Alligator Towing and Recovery, Inc. v. News-Press Publishing Co., Inc., supra, are virtually identical to the facts of the PHH case. Like Alligator Towing, PHH filed promptly a suit for declaratory judgment setting forth its uncertainty as to whether it should or should not produce the records requested by The Ledger. Both Alligator Towing and PHH thought they were private entities outside of the scope of the Public Records Act. Alligator Towing did not know whether its contract with the City of Fort Myers under which it was the City's exclusive towing company, had placed it under the aegis of the Public Records Act. Fox at 942. News-Press Publishing Co., Inc., like The Ledger, responded to the declaratory action filed by Alligator Towing, with a counterclaim for writ of mandamus. Ibid at 942.

The award of attorneys' fees againt Alligator Towing was reversed by the Second District Court of Appeal based on its finding that Alligator Towing did not unlawfully refuse the public records request since it should not have been held to the same level of knowledge as "pure public agencies," The Second District Court of Appeal looked upon the understandable uncertainty of both Alligator Towing and PHH as a factor which prevented any finding of "unlawful refusal" of a records inspection.

In News and Sun-Sentinel the Fourth District held there could be no good faith exception to an award of attorneys' fees under the Public Records Act. However, in that case, the agency who refused the Chapter 119 request was the Palm Beach Volunteer Fire-Rescue Department. Under the analysis of Fox and PHH, the Fire Department would have been looked upon as a "true or pure" public agency in sharp contrast to patently unclear natures of Alligator Towing or of PHH. At no time does the May 24, 1991 Opinion abolish the good-faith-doesn't-matter analysis for "pure or true" public agencies. Instead, the Second District Court of Appeal distinguishes its rationale for finding "lawful refusal" based upon the reasonable uncertainty of PHH as to its public or private nature.

The Second District of Appeal is not creating a "good-faith-reasonable-belief" exception. It is simply recognizing that the uncertainty of the public nature of an entity may make its refusal to permit inspection "lawful," instead of "unlawful."

The decision of the Second District Court of Appeal does not expressly and directly conflict with this Court's decisions relating to the creation of non-statutory public policy-based exceptions to the Public Records Act. Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979). The Second District Court of Appeal is acting upon the qualification expressly included in the statute by the Legislature, that of "unlawful refusal." The Legislature did not intend the Public Records Act to be a prevailing party or strict liability statute.

CONCLUSION

For the foregoing reasons, there is no need far this Court to exercise its jurisdiction and accept this case for review.

Respectfully submitted,

DAVID A. MANEY, ESQUIRE
Fla. Bar No. 092312
NANCY H. HARRIS, ESQUIRE
Fla. Bar No. 518750
MANEY, DAMSKER & ARLEDGE, P.A.
Post Office Box 172009
606 East Madison Street
Tampa, Florida 33672-0009
(813) 228-7371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail, this 11th day of October, 1991, to George K. Rahdert, Esquire, Patricia Fields Anderson, Esquire, and Alison M. Steele, Esquire, Rahdert & Anderson, 535 Central Avenue, St. Petersburg, Florida, 33701, counsel for Petitioners.

Attorneys

APPENDIX

MAY 24 1991

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

PHH MENTAL HEALTH SERVICES, INC., a Florida nonprofit corporation, and CARL STRANG, as the Records Custodian of PHH Mental Health Services, Inc.,	)	
Appellants,	)	
v.	)	Case Nos. 89-02892 90-00405 90-01489
THE NEW YORK TIMES COMPANY, d/b/a THE LEDGER, and LAKELAND LEDGER PUBLISHING CORP., a Florida corporation, d/b/a THE LEDGER,	)	
Appellees.	)	

Opinion filed May 24, 1991.

Appeal from the Circuit Court for Polk County; Robert E. Beach, Associate Judge,

David A. Maney and Nancy Hutcheson Harris of Maney, Damsker & Arledge, P.A., Tampa, and J. Hal Connor, Jr. of Summerlin, Connor & Cline, Winter Haven, for Appellants.

George K. Rahdert of Rahdert & Anderson, St. Petersburg, for Appellees.

FRANK, Acting Chief Judge.

PHH Mental Health Services ha5 appealed from an order requiring it to make its records accessible to the public under the disclosure requirements of chapter 119 of the Florida statutes. The trial court determined that PHH was acting on behalf of Tri-County Mental Health, Inc., a public agency. The resolution of that question was dependent upon an assessment of the factual setting and we are unwilling to disturb the trial court's determination in the absence of an abuse of discretion which, on the record before us, we do not find to have occurred. We affirm that aspect of the trial court's order. PHH has also appealed from an order requiring it to pay attorneys' fees and costs. We reverse the attorneys' fees order.

The trial court, having determined that PHH acted on behalf of an agency within the meaning of section 119.011(2), Florida Statutes (1987), and was required to reveal its records upon reasonable request, concluded that the New York Times Company and the Lakeland Ledger Publishing Corporation were entitled to attorneys' fees pursuant to section 119.12, Florida Statutes (1987). The relevant statutory language provides that:

> 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.

We recognize that 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, 558 So. 2d 487 (Fla. 2d DCA 1990); News and Sun-Sentinel Co. v. Palm Beach County, 517 So. 2d 743 (Fla. 4th DCA 1987). Here, however, PHH instituted a declaratory action immediately after receiving the records request in order to determine its susceptibility to Chapter 119. PHH was confronted with the problem of simply not knowing whether the law was applicable to it because PHH was not denominated a public agency by law and its status - i.e., whether it was acting on behalf of a public agency - was in doubt requiring judicial clarification. Although, the trial judge correctly determined that PHH was, indeed, acting on behalf of Tri-County Mental Health, Inc., as is noted above, 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. We are guided in our conclusion by our opinion in Fox v. News-Press Publishing Co., Inc., 545 So. 2d 941 (Fla. 2d DCA 1989), in which the entity's unclear status and its swift action seeking judicial resolution of whether it acted on behalf of a public agency were significant factors in the decision to reverse the trial court's award of attorneys' fees.

Accordingly, we affirm that portion of the trial court's judgment declaring PHH to be acting on behalf of Tri-

County Mental Health, Inc. and ordering PHH to make its records available to the public. Consistent with the policy announced in Fox, we reverse the award of attorneys' fees to the New York Times Company and Lakeland Ledger Publishing Corporation.

HALL and PATTERSON, JJ., Concur.