OA 6-1-92

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.

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

Respondents.

CASE NO.: 78,559

DISTRICT COURT OF APPEAL
SECOND DISTRICT NOS.:
89-02892
90-00405
90-01489

ON REVIEW FROM THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

PETITIONERS' REPLY BRIEF

Kenneth A. Richieri, Esq.
New York Times Company
229 West 43rd Street
New York, NY 10036
(212) 556-1234

Co-Counsel for Petitioners

George K. Rahdert, Esq.
Fla. Bar No.: 213365
Kenneth A. Guckenberger, Esq.
Fla. Bar No.: 0892947
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, FL 33701
(813) 823-4191

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes:

ARGUMENT

I. SINCE PHH WAS AN AGENCY SUBJECT TO CHAPTER 119, ITS FAILURE TO COMPLY WITH THE LEDGER'S PUBLIC RECORDS REQUEST ENTITLES THE LEDGER TO RECOVER ITS ATTORNEYS' FEES EXPENDED IN ENFORCING THE PUBLIC RECORDS ACT.

PHH's entire argument in section I of its Answer Brief requires an analysis of the "culpability" of the party which refused to comply with a records request. However, this position has no basis in the statute, which states:

> Attorney's fees.
>
> (1) 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 attorney's fees.
>
> (2) Whenever an agency appeals a court order requiring it to permit inspection of records pursuant to this chapter and such order is affirmed, the court shall assess a reasonable attorney's fee for the appeal against such agency.

§ 119.12, Fla. Stat. (1987) (emphasis supplied).

The absence of a statutory "good faith'' exception is emphasized by the Legislature's 1984 amendment when the word "unlawfully" replaced "unreasonably" to define the entitlement to fees. See Ch. 84-298, Laws of Florida. PHH's interpretation would make the 1984 amendment a nullity.

The Fourth District Court of Appeal closely analyzed this

change in News and Sun-Sentinel **v.** Palm Beach County, 517 So.2d 743 (Fla. 4th DCA 1987). Citing the legislative history of the amendment, "Open Government Laws -- Enforcement; Sunset," Committee on Judiciary, staff summary, May 2, 1984,[1] the court rejected the very argument PHH makes here. The Fourth District employed a simple analysis: when an agency withholds records it was not entitled to withhold, it has done so "unlawfully." The Act admits of no good faith exception. None is presently contained in the statute and the Legislature deleted the "reasonableness" language susceptible to that interpretation.

In addition, the policies behind the Act itself weigh against the creation of a good faith exception. As the Fourth District observed:

> 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.

News and Sun-Sentinel at 744. The fact that the "enforcer" of the Act in this instance is a newspaper able to withstand the expenses of litigation rather than an individual member of the public, makes no difference where this policy is concerned. Impediments **and** disincentives to a newspaper's access to public records ultimately impair the interest of the public, who in large part depend on the media for information about governmental and quasi-governmental

---

[1] The Ledger's search of the legislative history produced no additional information beyond what the Fourth District cited in Sun-Sentinel.

activities. See State ex. rel. Miami Herald Publishing Co. v. MacIntosh, 340 So.2d 904 (Fla. 1977). Creation of a "good faith" exception to attorneys' fees liability affects not only the Ledger here, but every member of the public who may seek to review a Chapter 119 agency's records in the future.

PHH asserts in Past I-A of its Answer Brief that because it was uncertain of its status, it did not "unlawfully refuse" the Ledger's records request.[2] However, the trial court in its factual determination (R-208) and the Second District in its opinion, 582 So.2d 1191, both agree that PHH is an entity acting on behalf of a public agency, and therefore, its records are subject to the Ledger's Chapter 119 request. The only logical conclusion is that fees are due and owing to the Ledger, since it prevailed. In fact, the trial court awarded fees on this basis (R-76). To impose a second "culpability" analysis as the Second District did in the instant case and in Fox and Alligator Towing v. News-Press Publishins Co. Inc., 545 So.2d 941 (Fla. 2d DCA 1989), is logically unsound and is not supported by the language of the statute. The Ledger asks this Court to resolve the conflict in the district courts in favor of the Fourth District's analysis in News and Sun-Sentinel v. Palm Beach County, supra. This analysis is the only one which gives effect to the 1984 amendment to § 119.12 and the

---

[2] PHH's application of the test for "agency" (Answer Brief pp. 20-25) uses the standard test recently propounded by this Court in News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., Case No. 77,131, 17 FLW S156 (March 5, 1992). This analysis is irrelevant for purposes of this appeal, which concerns strictly the attorney's fees provision of Chapter 119.

well-recognized public purpose of the Act.

PHH's second argument (Part I-B) is also based on the assumption that "unlawful refusal" did not occur, but unlike the first argument, which was based on PHH's uncertainty, this argument proceeds from the assumption that the court did not make a separate finding that PHH's response to the Ledger's request was an "unlawful refusal." In support of this argument, PHH cites a case that pre-dates the 1984 amendment to § 119.12, News-Press Publishins Co., Inc. v. Gadd, 432 So.2d 689 (Fla. 2d DCA 1983).[3] Comparing the language of Gadd and the Second District's decision in Fox, (itself an anomaly in the case law) with the language of two cases awarding fees when the Chapter 119 agencies violated the statute -- Times Publishins Co. v. City of St. Petersburg, 558 So.2d 487 (Fla. 2d DCA 1990) and Brunson v. Dade County School Board, 525 So.2d 933 (Fla. 3d DCA 1988) -- PHH confuses the issues, mixing legal apples with legal oranges. PHH argues that "'lawfulness' and 'seasonableness' have been (used) interchangeably."[4] If this is so, the 1984 amendment eliminating "unreasonably" refusing access as the test for fee entitlement ends the inquiry. However, only Fox and the case currently on appeal have found a "good faith" or "reasonableness" exemption to the Public Records Act fee provision since it was amended in 1984. All other Florida cases since the 1984 amendment have found that fee liability necessarily accompanies a Chapter 119 violation. Times

[3] See Answer Brief, pp. 30-31.

[4] See Answer Brief, p. 31.

Publishing, supra; Brunson, supra; Sun Sentinel v. Palm Beach County, supra; Downs v. Austin, 559 So.2d 246 (Fla. 1st DCA 1990).

The case cited on page 32 of PHH's Answer Brief supports the Ledger's position. The court in Times Publishing Co. v. City of St. Petersburg, 558 So.2d at 495, stated in clear and concise terms, that even if access is denied based on a good faith but mistaken belief that the documents withheld are exempt from Chapter 119, fee liability follows. PHH suggests a double-standard for "unlawful" conduct. In PHH's estimation, although its refusal to disclose records was "unlawful" in the sense that it failed to comply with the state law according to the courts below, its actions were not necessarily "unlawful" for fee purposes which, according to PHB, requires a separate and distinct determination of "unlawfulness." The Ledger submits that this cannot be the meaning of the statute, especially considering the 1984 change which was intended to eliminate this exact type of analysis. The Legislature's failure to use "prevailing party" language,[5] which PHH finds revealing, is of no consequence given the language the Legislature did use, and that which it replaced. The entire purpose of the 1984 amendment was to eliminate the "good faith" issue from fee awards.

---

[5] In fact, the only case to explicitly use the "prevailing party" language indicated that § 119.12 does intend to benefit "prevailing parties." Davis v. Sarasota County Public Hospital Board, 519 So.2d 75 (Fla. 2d DCA 1988). In Davis, the court refused to award fees to a public records plaintiff because he did not "prevail" at either the trial or appellate levels. By contrast, the Ledger prevailed in the instant case on the merits both at the trial court and district court levels.

a.

If a party violates Chapter 119, then its refusal to produce its records must ipso facto be unlawful. There is nothing in the statute to provide for a separate factual determination concerning "lawfulness" of a refusal.

II. THE LEDGER ENFORCED THE PUBLIC'S RIGHT OF ACCESS UNDER CHAPTER 119 BY FILING ITS COMPLAINT FOR WRIT OF MANDAMUS AND INJUNCTIVE RELIEF AND DEFENDING PHH'S DECLARATORY ACTION, THUS SATISFYING 5119.12's "CIVIL ACTION" REQUIREMENT.

The Ledger filed a complaint seeking a writ of mandamus and injunctive relief to vindicate the public's rights under Chapter 119. In Part II of the Answer Brief, PHH argues that the Ledger's action, which the trial court consolidated with PHH's previously-filed declaratory action, was unnecessary, and thus PHH is not liable for the Ledger's attorneys' fees.

PHH's analysis is flawed for several reasons. First, it suggests a dichotomy between units of government and private entities acting on their behalf. Chapter 119 treats both equally. If PHH is correct, private entity agencies will be able to avoid fee awards while government agencies will not, because government officials cannot bring declaratory judgment actions to determine whether they must comply with a Public Records Act request. See Department of Revenue v. Markham, 396 So.2d 1120 (Fla. 1981) (public official may only seek a declaratory judgment when he is willing to perform his office but is prevented from doing so by others.); Askew v. City of Ocala, 348 So.2d 308 (Fla. 1977)(City of

Ocala's request for declaratory judgment on applicability of the "Government in the Sunshine Law" denied because such action lacked a justiciable controversy).

In fact, the statute sets forth the procedures by which the Act operates. A member of the public requests records; the agency responds by providing them or stating its reasons and grounds for withholding them. There is no express provision for an agency to delay compliance to seek court advice. The statute, in fact, appears to assume that all actions brought pursuant to the Act will be actions to enforce compliance. The procedural scheme contained in the statute thus explains why the language of § 119.12 is not the standard "prevailing party" language.

Even if this Court holds that an "offensive action" must indeed be initiated by a public records requester to entitle the recovery of fees, the Ledger's action seeking a writ of mandamus and injunctive relief qualifies. It was necessary to enforce PHH's compliance with Chapter 119 in this case. PHH's declaratory action, standing alone, provides no enforcement mechanism that would make PHH comply with the Act. PHH argues: "There is nothing to suggest that PHH would have refused the court's direction upon receiving the results of the Declaratory Judgment action." (Answer **Brief,** p.40) First, this statement acknowledges that declaratory actions alone have no enforcement mechanism. Moreover, just as there is nothing to suggest PHH would not comply with the court's decision, there is no guarantee that PHH would comply. Therefore, the Ledger was required to file the mandamus/injunction action to

ensure compliance with the Act by PHH. Even under PHH's analysis that defending a Chapter 119 lawsuit is not enough to gain fees, the filing of the mandamus/injunction action as an enforcement mechanism to the Chapter 119 suit meets any "civil action'' requirement.

Furthermore, PHH argues The Ledger's action was unnecessary, specifically, that its response to the Ledger was not a refusal under the statute so as to justify the award of fees. It is hard to characterize PHH's reaction and subsequent correspondence as anything but a refusal. In its letter of July 28, 1988, PHH states its position clearly: "This group is not subject to the provisions of Chapter 119, Florida Statute." (R-21, 22) PHH now argues that its refusal to provide records, followed by its filing of a declaratory action, which caused considerable delay in compliance, did not amount to a refusal to disclose. But by choosing not to decide, PHH made a choice to withhold records about its husbandry of taxpayer-generated resources.

111. ADOPTION OF A "GOOD FAITH" STANDARD THREATENS THE PRIMARY ENFORCEMENT MECHANISM OF THE PUBLIC RECORDS ACT -- THE AWARDING OF ATTORNEYS' FEES.

The existence of a statute making attorneys' fees recoverable to those who prevail in Public Records Act litigation is the primary incentive for voluntary compliance with records requests. It is designed in part to induce compliance with the Act from often reluctant agencies. News and Sun-Sentinel v. Palm Beach County,

517 So.2d at 744. PHH's brief, however, appeals to sentiment in arguing that a showing of good faith confusion, or reasonable behavior, is enough to avoid the Act's most significant inducement to compliance. Such an approach undermines the entire enforcement scheme of the Act.

The adoption of a good faith standard below skews the legislative design of the Act, encouraging both requesters and agencies to be more litigious. As discussed in the Ledger's Initial Brief, the good faith standard dramatically increases the prospect of a sequester being sued in a declaratory action, when the statute was designed to encourage voluntary compliance. (Petitioners' Initial Brief, Part I-C, pp. 28-30.)

Beyond this litigation risk newly imposed on requesters, the Fox rationale, if adopted by this Court, creates a foot race to the courthouse. Requesters will learn that to preserve their rights to fees upon enforcement, they must be the first party to file suit. Similarly, agencies will see the opportunity to evade fee liability, delay compliance, and punish requesters through precipitous litigation.

Fox's assertion (Fox, 546 So.2d at 944; adopted by PHH, Answer Brief p. 29) that agencies acting on behalf of government should not be held to the ''same level of knowledge" as "pure public agencies" is a judicially-created exemption to the Act, in direct contravention of this Court's prohibition in Wait v. Florida Power & Liuht Co., 372 So.2d 420 (Fla. 1979)(courts should not create public policy exemptions to Public Records Act, but should only

consider structure and constitutionality of legislation, not its wisdom.) On grounds of Wait alone, this Court should reverse the attorneys' fees decision of the Second District in the instant case.

Apart from creating a judicially enacted exemption, the ~~Fox~~/~~PHH~~ standard of "culpability" has dire implications for the other policies underlying the Act. It will allow government agencies to deter or evade compliance with the Act by using private agencies acting on their behalf -- decreasing "pure public agency" functions and thereby reducing the availability of public records. This Court is asked to create a loophole in the Act, one that will surely grow as government increasingly privatizes its functions. Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 360 So.2d 83, 88 (Fla. 1st DCA 1978), affirmed in part, 379 So.2d 633 (1980)(legislative purpose of Chapter 119 to reach records of businesses acting on behalf of public agencies.) This is why Chapter 119 does not in fact contain a higher standard of culpability for private companies acting as Chapter 119 "agencies."

CONCLUSION

The courts of this State should apply and enforce section 119.12 of the Florida Statutes in a manner consistent with its language, purpose and legislative history. The decision below constitutes prohibited judicial legislation, the effect of which is to lessen compliance and increase litigation over a statutory duty enacted for the benefit of the public. This Court should restore

the **Legislature's** intent.

George K. **Rahdert**, Esq.
Fla. Bar **No.**: 213365
Kenneth A. Guckenberger, Esq.
Fla. Bar No.: 0892947
RAHDERT & **ANDERSON**
535 Central Avenue
St. Petersburg, **FL** 33701
(813) 823-4191
Counsel for Petitioners

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished to the office of David A. Maney, **Esquire,** and Nancy **Hutcheson, Esquire,** P.O. Box 172009, Tampa, Florida 33672-0009, and to J. Hal Connor, Jr., Esquire, P.O. Drawer 798, Winter Haven Florida 33882, by U.S. **Mail** this 7 day of May, 1992

George K. Rahdert, Esq.
Fla. Bar No.: 213365
Kenneth A. Guckenberger, Esq.
Fla. Bar No.: 0892947
RAHDERT & ANDERSON
535 Central Avenue
St. Petersburg, FL 33701
(813) 823-4191
Counsel for Petitioners