

IN THE SUPREME COURT OF FLORIDA

BOARD OF TRUSTEES,
JACKSONVILLE POLICE
AND FIRE PENSION FUND,

Case No.: SC13-1315

Petitioner,

L.T. Case No.: 1D12-587

vs.

CURTIS W. LEE,

Respondent.

RESPONDENT'S ANSWER BRIEF

On Review from the First District Court of Appeal

MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.

Robert M. Dees

Florida Bar No. 714399

14 East Bay Street

Jacksonville, Florida 32202

Tel: (904) 357-3660

Fax: (904) 357-3661

Primary: rdees@milamhoward.com

Secondary: hdurham@milamhoward.com

Secondary: sshipps@milamhoward.com

Attorneys for Respondent

Curtis W. Lee

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
LEE IS ENTITLED TO AN AWARD OF ATTORNEYS’ FEES BECAUSE THE PENSION FUND UNLAWFULLY REFUSED ACCESS TO PUBLIC RECORDS	7
A. Standard of Review.....	7
B. Public agencies that violate the Public Records Act are liable for attorneys’ fees regardless of intent.....	7
C. The District Court correctly applied this Court’s decision in <i>PHH</i>	9
D. The 1984 Amendment to § 119.12, Fla. Stat., changed the fee standard from “unreasonable” refusal to “unlawful” refusal.....	14
E. Some agencies and courts have misapplied this Court’s decision in <i>PHH</i>	15
F. Responses to statements or arguments in the Pension Fund’s Initial Brief.....	17
G. This Court should reverse the District Court’s denial of appellate attorneys’ fees.....	21

CONCLUSION.....	24
CERTIFICATE OF SERVICE	25
CERTIFICATE OF COMPLIANCE	25

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
<i>Alston v. City of Rivera Beach</i> , 882 So. 2d 436 (Fla. 4th DCA 2004)	17
<i>Althouse v. Palm Beach County Sheriff's Office</i> , 92 So. 3d 899 (Fla. 4th DCA 2012).....	16, 17
<i>B&S Utilities, Inc. v. Baskerville-Donovan, Inc.</i> , 988 So. 2d 17 (Fla. 1st DCA 2008).....	12, 13, 14
<i>Board of Trustees v. Lee</i> , 110 So. 3d 443 (Fla. 1st DCA 2013).....	3
<i>Board of Trustees v. Lee</i> , 113 So. 3d 1 (Fla. 1st DCA 2013).....	4, 17
<i>Brunson v. Dade County School Board</i> , 525 So. 2d 933 (Fla. 3d DCA 1988).....	9, 10
<i>Downs v. Austin</i> , 559 So. 2d 246, 248 (Fla. 1st DCA 1990).....	19, 22, 23
<i>Grapski v. City of Alachua</i> , 31 So.3d 193, 196 (Fla. 1st DCA 2010).....	7
<i>Greater Orlando Aviation Auth. v. Nejame</i> , 4 So. 3d 41 (Fla. 5th DCA 2009).....	4, 16, 17, 24
<i>Hewlings v. Orange Co., Fla.</i> , 87 So. 3d 839 (Fla. 5th DCA 2012).....	23
<i>Knight-Ridder, Inc. v. Dade Aviation Consultants</i> , 808 So. 2d 1268 (Fla. 3d DCA 2002).....	16
<i>Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund</i> , 113 So. 3d 1010 (Fla. 1st DCA 2013).....	4, 17
<i>Lilker v. Suwannee Valley Transit Authority</i> , 133 So. 2d 654, 655 (Fla. 1st DCA 2014).....	14

<i>National Collegiate Athletic Ass’n. v. The Associated Press</i> , 18 So. 3d 1201 (Fla. 1st DCA 2009).....	12
<i>New York Times Co. v. PHH Mental Health Servs., Inc.</i> , 616 So. 2d 27 (Fla. 1993)	passim
<i>News & Sun-Sentinel Co. v. Palm Beach County</i> , 517 So.2d 743 (Fla. 4th DCA 1987)	passim
<i>Office of the State Attorney for the Thirteenth Judicial Circuit of Fla. v. Gonzalez</i> , 953 So. 2d 759, 765 (Fla. 2d DCA 2007).....	13, 15
<i>State Farm Fire & Cas. Co. v. Palma</i> , 629 So. 2d 830 (Fla. 1993)	23
<i>Times Publ’g Co., Inc. v. City of St. Petersburg</i> , 558 So. 2d 487 (Fla. 2d DCA 1990).....	12
<i>WFSH of Niceville v. City of Niceville</i> , 422 So. 2d 980 (Fla. 1st DCA 1982).....	16
<i>WFTV, Inc. v. Robbins</i> , 625 So.2d 941 (Fla. 4th DCA 1993)	12, 13

AUTHORITIES

§ 119.07(1)(c), Fla. Stat.	18
§ 119.12, Fla. Stat.	passim
§ 59.46, Fla. Stat.	22
§ 627.428, Fla. Stat.	23
Article I Section 24 of the Florida Constitution	19
Chapter 119, Fla. Stat. (2009) (the “Public Records Act”)	passim

PRELIMINARY STATEMENT

Respondent Curtis W. Lee was the plaintiff in the trial court and the appellant in the First District, and is referred to as “Lee”. Lee is a resident of Jacksonville. Petitioner Board of Trustees, Jacksonville Police & Fire Pension Fund, was the defendant in the trial court and the appellee in the First District, and is referred to as the “Pension Fund”. The Pension Fund is a public agency in Jacksonville.

The record citations used in this brief are references to the record in the First District that was transmitted to this Court. References to the Pension Fund’s Initial Brief will be cited as (IB at ____). References to the Pension Fund’s Appendix to Initial Brief will be cited as (PF App. at ____). References to Lee’s Appendix to Answer Brief will be cited as (Lee App. at ____). All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Lee's Statement of the Case and Facts

Lee sued the Pension Fund for its failure to produce public records under Chapter 119, Fla. Stat. (2009) (the "Public Records Act"), and sought attorneys' fees after prevailing in the case. The issue in this case is whether an entity that is clearly a public agency is liable for attorneys' fees if it is found to have violated the Public Records Act, regardless of whether the agency had a good faith belief in its position.

Following a bench trial held on March 18 and 24, 2011, the trial court entered a declaratory judgment determining that the Pension Fund had violated the Public Records Act in refusing to produce public records. (Lee App. 00015) The trial court found that the Pension Fund is unquestionably an agency, and that the records Lee requested are public records. (Lee App. 00001 – 00002) The trial court held that the Pension Fund violated the Public Records Act by refusing to produce its records unless Lee agreed to pay (1) an hourly service charge for copying records regardless of how long it took, and (2) \$35.00 per hour for someone to watch him look at the records. (Lee App. 00014) The trial court held that these unlawful conditions were not rendered moot by other conditions the court found were lawful. (Lee App. 00013)

Based on the trial court's determination that the Pension Fund had violated the Public Records Act, Lee filed a motion to award attorneys' fees and costs. (R:6-35) Lee's fee claim was then in the amount of \$35,060.00 (R:7). Lee also filed an affidavit in support of his motion for fees showing that the Pension Fund had spent over \$160,000.00 in attorneys' fees as of April 30, 2011, in defending this lawsuit. (R:1-5) Both numbers are significantly higher now.

Although the trial court held that Lee was the prevailing party and granted his motion for costs, the trial court denied Lee's motion for attorneys' fees. (R:81-84) The trial court denied attorneys' fees based on its determination that the Pension Fund's violations of the Public Records Act were not knowing, willful, or done with a malicious intent. *Id.* Lee timely appealed to the First District. (R:94-97)

The Pension Fund had previously appealed the Final Declaratory Judgment determining that it violated the Public Records Act. Lee cross-appealed the Final Declaratory Judgment to the extent that it determined that some of the Pension Fund's actions were not violations of the Public Records Act. Those issues were the subject of the appeal in Case No. 1D11-4458. This Court has taken judicial notice of the Record in 1D11-4458. The First District affirmed the Final Declaratory Judgment on the merits without opinion. *Board of Trustees v. Lee*, 110 So. 3d 443 (Fla. 1st DCA 2013). The First District also affirmed without

opinion the trial court's order awarding costs in favor of Lee, which the Pension Fund had separately appealed. *Board of Trustees v. Lee*, 113 So. 3d 1 (Fla. 1st DCA 2013).

The First District reversed the order denying fees based on this Court's decision in *New York Times Co. v. PHH Mental Health Servs., Inc.*, 616 So. 2d 27 (Fla. 1993), and held that Lee was entitled to be reimbursed his attorneys' fees regardless of whether the Pension Fund's violations were intentional.¹ The Pension Fund filed a notice to invoke conflict jurisdiction in this Court. Lee agreed in his jurisdictional brief that this Court has conflict jurisdiction based on express and direct conflict between the First District's decision in this case, *Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, 113 So. 3d 1010 (Fla. 1st DCA 2013), and *Greater Orlando Aviation Auth. v. Nejame*, 4 So. 3d 41 (Fla. 5th DCA 2009). This Court accepted jurisdiction on June 18, 2014.

Lee's Response to Pension Fund's Statement of the Case and Facts

Pages one through eleven of the Pension Fund's Statement of the Case and Facts relate to the Pension Fund's characterization of the underlying determination that it violated the Public Records Act, and not to the attorney's fee issue at issue here. Although most of the Pension Fund's allegations in that section of its initial

¹ On remand, the trial court entered a final judgment for attorneys' fees, which the Pension Fund has also appealed in Case No. 1D14-2468.

brief are not relevant, Lee will respond to some misstatements by the Pension Fund.

The Pension Fund's statement at page one of its brief that it "was found by the trial court, and affirmed by the First District Court of Appeal, to have acted in good faith and not to have withheld or refused to provide any public records" (IB at 1) is not true. The term "good faith" does not appear in the Final Declaratory Judgment. (Lee App. 00001 – 00014) Moreover, the trial court specifically found that "Plaintiff was advised that he could not view the documents until" he agreed to terms that the trial court determined were unreasonable or unlawful (Lee App. 00002).

The Pension Fund's statements that "[t]he Defendant never 'refused' to permit access to public records" (IB at 2, note 2) and that "the trial court specifically found that Defendant did not refuse to provide access to records" (IB at 3) are untrue for the same reason. The Pension Fund refused access to its records unless Lee agreed to conditions the trial court found violated the Public Records Act.

The Pension Fund's statement that "Lee made a multitude of unsubstantiated accusations of ethical and criminal misconduct" against various persons (IB at 7), is unsupported. The trial court specifically stated that it "makes no finding one way or the other on that issue" (Lee App. 00009). Also, such events occurred

after the Pension Fund's violations in December 2010 and January 2011, so they could have no bearing on the issues before this Court.

SUMMARY OF ARGUMENT

The First District correctly held that Lee is entitled to an award of attorneys' fees under § 119.12, Fla. Stat., which states that a trial court "shall" award attorneys' fees against a public agency that has "unlawfully refused" access to public records. Since the trial court found that the Pension Fund violated the Public Records Act, its refusal of access to the records was unlawful.

This Court specifically held in *New York Times Co. v. PHH Mental Health Servs, Inc.*, 616 So. 2d 27 (Fla. 1993), that there is a distinction under § 119.12, Fla. Stat., between entities that are clearly public agencies, and private entities who have reasonable doubt whether they are acting on behalf of an agency. This Court, in *PHH*, established an exception for attorney fee liability for private entities with "good faith" doubt about their status under the Public Records Act. This Court said that the good faith exception applies only to such private entities, and not to entities that are clearly public agencies. The First District correctly held that the good faith exception does not apply to the Pension Fund, since it is clearly a public agency.

Some public agencies, such as the Pension Fund in this case, continue to argue that *PHH* applies to them and they are not liable for attorney's fees for

violating the Public Records Act unless their violations were intentional or in bad faith. This Court should affirm the First District’s decision and clarify that a public agency is liable for attorney’s fees for Public Records Act violations, regardless of intent.

ARGUMENT

LEE IS ENTITLED TO AN AWARD OF ATTORNEYS’ FEES BECAUSE THE PENSION FUND UNLAWFULLY REFUSED ACCESS TO PUBLIC RECORDS

A. Standard of Review

Whether there is a “good faith” exception for public agencies’ liability for attorneys’ fees under § 119.12, Fla. Stat., is a question of law subject to *de novo* review. See, *e.g.*, *Grapski v. City of Alachua*, 31 So.3d 193, 196 (Fla. 1st DCA 2010).

B. Public agencies that violate the Public Records Act are liable for attorneys’ fees regardless of intent

Lee was entitled to an award of attorneys’ fees because the trial court determined that the Pension Fund violated the Public Records Act. Since the Pension Fund is unquestionably a public agency, its violation of the Public Records Act entitles Lee to be reimbursed for his attorneys’ fees, regardless of whether the violations were intentional. The First District correctly held that a public agency that violated the Public Records Act is liable for attorneys’ fees regardless of whether its violations were unintentional or in good faith.

Section 119.12, Fla. Stat. (2009) states:

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 or copied, the court shall assess and award, against the agency responsible, the reasonable costs of enforcement including reasonable attorneys' fees.

Florida law is clear as to how § 119.12, Fla. Stat., is to be applied in this case. A public agency, such as the Pension Fund, is always liable for attorneys' fees under § 119.12, Fla. Stat., if a court determines that the agency violated the Public Records Act. The only exception to this strict liability for attorneys' fees is where a public records request is made to a private entity that has a good faith belief that it is not subject to the Public Records Act. See, *New York Times Co. v. PHH Mental Health Servs, Inc.*, 616 So. 2d 27 (Fla. 1993). In *PHH*, this Court specifically stated that the "good faith" exception to awards of legal fees under the Public Records Act does not apply to entities, such as the Pension Fund, that are clearly public agencies.

Since the Pension Fund is unquestionably a public agency, its refusal to produce records, which the trial court determined violated the Public Records Act, was unlawful for purposes of the attorneys' fee provision in § 119.12, Fla. Stat. The First District correctly applied the distinction this Court established in *PHH*

between public agencies and private entities that have reasonable uncertainty about whether the Public Records Act applies to them.

C. The District Court correctly applied this Court's decision in *PHH*

PHH involved a private company that provided planning and coordination of mental health care services to a public agency. In response to a public records request for its corporate records, PHH filed a declaratory judgment action asking the trial court to determine whether PHH was acting on behalf of a public agency, and therefore subject to the Public Records Act. The trial court found that PHH was acting on behalf of the agency, and therefore subject to the Public Records Act. The court also awarded attorneys' fees against PHH.

On appeal, the Second District affirmed the determination that PHH was subject to the Public Records Act, but reversed the attorney fee award because PHH was not denominated a public agency by law, and its status prior to the declaratory judgment was unclear. This Court accepted review based on alleged conflict between the Second District's decision and *Brunson v. Dade County School Board*, 525 So. 2d 933 (Fla. 3d DCA 1988), and *News & Sun-Sentinel Co. v. Palm Beach County*, 517 So.2d 743 (Fla. 4th DCA 1987). This Court affirmed, drawing a distinction between an entity that is clearly a public agency, and a private entity that has a good faith uncertainty as to whether it is acting on behalf of a public agency.

This Court defined the issue in *PHH* as:

[W]hether a private entity acting on behalf of a public agency is responsible for attorneys' fees . . . when that entity reasonably and in good faith denies a Chapter 119 request to inspect records because the private entity's status as an agency . . . is unclear.

PHH, 616 So.2d at 28.

This Court held that attorney's fees were properly awarded in *Brunson* and *Sun-Sentinel* because those cases involved entities that were clearly public agencies.

The Third District in *Brunson* reversed the trial court's denial of attorneys' fees after the trial court had determined that the school board's refusal was not "unreasonable". The Fourth District in *Sun-Sentinel* held that a fire department's good faith but mistaken belief that the documents requested were exempt from disclosure still constituted unlawful refusal under § 119.12, Fla. Stat. In approving those decisions, this Court stated that:

Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general policy is followed The purpose of this statute is served by decisions like *Brunson* and *Sun-Sentinel* in which a unit of government that unquestionably meets the statutory definition of an agency refuses to allow the inspection of its records.

PHH, 616 So.2d at 29.

Also, this Court stated that:

In the conflict cases cited, there was no uncertainty as to the “agency” status of the entities involved. Thus, any refusal by the school board or the fire-rescue department was not lawful, and attorneys’ fees were properly awarded in those cases.

PHH, 616 So.2d at 30.

In further emphasizing the distinction between public agencies and private entities, this Court stated that:

However, § 119.12(1) was not intended to force private entities to comply with the inspection requirements of Chapter 119 by threatening to award attorney’s fees against them. If it is unclear whether an entity is an agency within the meaning of Chapter 119, it is not unlawful for that entity to refuse access to its records.

Conversely, refusal by an entity that is clearly an agency within the meaning of Chapter 119 will always constitute unlawful refusal.

PHH, 616 So.2d at 29.

The fundamental holding in *PHH* was that there is a distinction between an entity that is clearly a public agency, and a private entity that may or may not be determined to be acting on behalf of a public agency. The Pension Fund attempts to erase that distinction and have public agencies treated the same as private entities for purpose of attorney’s fees, contrary to the holding of *PHH*.

Based on *PHH*, there are three possible scenarios regarding awards of attorneys’ fees when a court determines that an entity has violated the Public

Records Act. First, if the entity is unquestionably a public agency, as is the Pension Fund, its violation of the Public Records Act automatically entitles the requesting party to recover attorneys' fees. Second, if a private entity is determined to have violated the Public Records Act, and the private entity did not have a good faith belief that it was not subject to the Public Records Act, the private entity is liable for attorneys' fees. *See, National Collegiate Athletic Ass'n. v. The Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009) (remanded for determination whether NCAA had good faith belief it was not subject to Public Records Act); *Times Publ'g Co., Inc. v. City of St. Petersburg*, 558 So. 2d 487 (Fla. 2d DCA 1990) (newspaper awarded attorneys' fees against the Chicago White Sox for its violation of the Public Records Act). Third, attorneys' fees are not awarded against a private entity that has a good faith belief that it is not subject to the Public Records Act. *PHH*, 616 So. 2d at 30; *B&S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008).

For the most part, courts have correctly applied *PHH*. For example, in *WFTV, Inc. v. Robbins*, 625 So.2d 941 (Fla. 4th DCA 1993), the court reversed the trial court's denial of attorneys' fees under § 119.12, Fla. Stat. The trial court denied WFTV's request for attorneys' fees based on its finding that the defendant supervisor of elections did not intentionally violate the Public Records Act. The Fourth District reversed, citing this Court's language in *PHH* that "refusal by an

entity that is clearly an agency within the meaning of chapter 119 will always constitute unlawful refusal.” *WFTV*, 625 So.2d at 943 (citing *PHH*, 616 So.2d at 29).

Similarly, the court in *Gonzalez, supra*, 953 So. 2d at 759, affirmed an award of attorneys’ fees in favor of a criminal defendant and against the state attorney, who had failed to respond to a public records request. The state attorney argued that its failure to provide records was simply a mistake. The court found for the criminal defendant, agreeing with *Sun-Sentinel* and refusing to “engraft onto the term ‘unlawfully refused’ either a good faith or an honest mistake exception.” 953 So. 2d at 765 (citing *Sun-Sentinel*, 517 So. 2d at 744).

The First District addressed the *PHH* distinction between attorney fee awards against public agencies and private entities in *B&S Utilities, supra*, 988 So. 2d at 23. In *B&S Utilities*, the court held that an engineering company which served as owner’s representative on a municipal water system project was subject to the Public Records Act. The court affirmed the denial of attorneys’ fees because the engineering company was not clearly a public agency.

Citing to *PHH*, the court stated that “[o]ur Supreme Court has placed a definitive gloss on Section 119.12, Florida Statutes (2006)” *B&S Utilities*, 988 So. 2d at 23. The court quoted § 119.12, Fla. Stat., and emphasized the words “unlawfully refused”, followed by a quote from *PHH*, that “[i]f it is unclear

whether an entity is an agency within the meaning of chapter 119, *it is not unlawful* for that entity to refuse access to its records.” *Id.* (emphasis in original) The court held that, since the engineering company’s status as an agency “was genuinely in doubt”, that company had not “unlawfully refused” to permit inspection of its records. *Id.* See also *Lilker v. Suwannee Valley Transit Authority*, 133 So. 2d 654, 655 (Fla. 1st DCA 2014) (reversing denial of attorneys’ fees based on trial court’s determination that agency’s Public Records Act violation was not willful).

The “definitive gloss” the court described in *B&S Utilities* is the distinction discussed above between entities that are clearly public agencies and private entities genuinely in doubt as to whether records in their possession are subject to the Public Records Act. The Pension Fund’s argument ignores that distinction by attempting to expand the good faith exception so that it would apply to public agencies.

D. The 1984 Amendment to § 119.12, Fla. Stat., changed the fee standard from “unreasonable” refusal to “unlawful” refusal

Section 119.12, Fla. Stat., was amended in 1984 to require an attorneys’ fee award when an agency “unlawfully refused to permit a public record to be inspected or copied.” Prior to 1984, the statute required attorneys’ fees to be awarded only when an agency “unreasonably refused” access to records. The purpose of the amendment was to broaden and simplify access to public records.

Sun-Sentinel, 517 So. 2d at 744. Accordingly, refusal of access to public records by an entity that is clearly a public agency will always constitute an unlawful refusal, and there is no good faith or honest mistake exception. *See PHH*, 616 So. 2d at 29; *Gonzalez*, 953 So. 2d at 765.

The Pension Fund's argument for a good faith exception contradicts the plain language of § 119.12, Fla. Stat. If the Legislature had intended for public agencies to have a good faith exception, it would have said so. If that were the intent, the statute would say that a public agency is liable for attorneys' fees unless it had a good faith belief that the conditions it imposed on access to records were lawful. But the statute says "unlawfully refused," not "refused in good faith." Unlawful does not mean the same as lacking good faith. Unlawful means not in compliance with the law. The Pension Fund is "clearly an agency", and the trial court found that the Pension Fund's refusal of access violated the Public Records Act.

E. Some agencies and courts have misapplied this Court's decision in *PHH*

Some agencies, such as the Pension Fund in this case, continue to argue that they should not be required to pay attorneys' fees if their violations are unintentional, even though *PHH* stressed the distinction between entities that are clearly public agencies and those which are not. In addition, some courts have failed to apply the distinction this Court drew in *PHH* between public agencies and

private entities with reasonable doubt as to their agency status. *See e.g., Nejame*, 4 So. 3d 41, 43, *supra*. The agency in *Nejame* was the Greater Orlando Aviation Authority (“GOAA”), which is clearly a public agency. Although the Fifth District determined that GOAA had violated the Public Records Act, the court denied attorneys’ fees based on its determination that GOAA did not act unreasonably or in bad faith.

The Fifth District in *Nejame* did not cite to *PHH*. It only cited to *Knight-Ridder, Inc. v. Dade Aviation Consultants*, 808 So. 2d 1268 (Fla. 3d DCA 2002), which involved a private entity, and *WFSH of Niceville v. City of Niceville*, 422 So. 2d 980 (Fla. 1st DCA 1982), which involved the “unreasonably refused” standard in existence prior to the 1984 Amendment of § 119.12, Fla. Stat. *Nejame* conflicts with *PHH* and the First District’s decision in this case.

In addition, other cases have not carefully applied the *PHH* distinction. For example, the court in *Althouse v. Palm Beach County Sheriff’s Office*, 92 So. 3d 899 (Fla. 4th DCA 2012), quoted the statement from *Dade Aviation* that “[e]ntitlement to fees under the statute is based upon whether the public entity had a “reasonable” or “good faith” belief in the soundness of its position in refusing production.” *Althouse*, 92 So. 2d at 901 (quoting *Dade Aviation*, 808 So. 2d at 1270). *Althouse* appears to conflict with *PHH* and this case because it discusses the good faith exception in a case against a county sheriff. However, the Plaintiff

in *Althouse* appeared *pro se*, so attorneys' fees were not at issue. *See also Alston v. City of Rivera Beach*, 882 So. 2d 436 (Fla. 4th DCA 2004). *Alston* is a two-sentence decision which does not provide enough substance to determine whether the holding conflicts with *PHH* and this case.

Based on the continued arguments of agencies such as the Pension Fund that they are not liable for attorneys' fees for unintentional Public Records Act violations, and decisions such as *Nejame* failing to apply this Court's distinction in *PHH*, this Court should clarify that the limited good faith exception in *PHH* does not apply to entities that are clearly public agencies.

F. Responses to statements or arguments in the Pension Fund's Initial Brief

Initial Brief Section A

The Pension Fund's statement in section A of its Argument that "[t]he First District affirmed the trial court's determination that the Board did not 'unlawfully refuse' to permit inspection and copying of public records" (IB at 16) is not true. The First District reversed the trial court's determination that the Pension Fund had not "unlawfully refused" access to its records. *Lee*, 113 So. 3d at 1010. It held that the trial court erred in denying Lee's motion for fees based on the trial court's conclusion that the Pension Fund's violation were not knowing, willful, or done with a malicious intent. *Id.*

Initial Brief Section B

The Pension Fund argues in section B of its brief that a 2007 amendment to § 119.07(1)(c), Fla. Stat., which requires custodians of public records to respond to records requests in good faith, changes the meaning of “unlawful refusal” in § 119.12, Fla. Stat.

If the legislature had intended to change the “unlawfully refused” standard for awarding attorney’s fees in § 119.12, Fla. Stat., it would have amended that section, but it did not. While it is a violation of § 119.07(1)(c), Fla. Stat., for a custodian of public records to fail to respond to a records request in good faith, it is also a violation for a custodian to impose unreasonable or unlawful conditions on inspection of public records. In either case, an unlawful refusal has occurred.

Initial Brief Section C

The Pension Fund argues in section C of its brief that public policy favors its position that agencies should not be required to pay attorneys’ fees for Public Records Act violations if their actions are reasonable or in good faith. Of course, the legislature rejected that public policy determination when it changed the fee standard from “unreasonably refused” to “unlawfully refused” in the 1984 Amendment to § 119.12, Fla. Stat. In addition, this Court stated in *PHH* that:

Section 119.12(1) is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state’s general policy is followed. If public agencies are required to pay

attorney's fees and costs to parties who are wrongfully denied access to the records of such agencies, then the agencies are less likely to deny proper requests for documents. Additionally, persons seeking access to such records are more likely to pursue their right to access beyond an initial refusal by a reluctant public agency.

PHH, 616 So.2d at 29.

In addition, the court in *Downs v. Austin*, 559 So. 2d 246 (Fla. 1st DCA 1990), stated that:

[I]t 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 least have his attorney's fees reimbursed for that endeavor.

Downs, 559 So. 2d at 247 (citing *Sun –Sentinel*, 517 So. 2d at 247).

Expanding the good faith exception to public agencies would strongly discourage private citizens from pursuing their rights to public records under Chapter 119, Fla. Stat., and Article I Section 24 of the Florida Constitution. Private individuals, such as Mr. Lee, have no possible way to profit from filing actions to enforce the open government laws. The most they can hope for is to be reimbursed for their legal expenses if an agency unlawfully denies access to records.

For decades in Florida, citizens and media entities encouraged good and efficient government, and discouraged corruption, by forcing transparency and holding government accountable for its actions. That was the reason § 119.12, Fla.

Stat., was amended in 1984 to provide for awards of attorneys' fees where denial of access is determined to be unlawful. The Pension Fund's argument would create a gaping loophole in Floridians' ability to challenge reluctant agencies or to be able to afford to enforce their statutory and constitutional rights of access to public records. The fact that the Pension Fund paid its attorneys over \$160,000.00 to defend this case through April 30, 2011 (R:1-5) – almost five times the amount Lee sought shortly thereafter - shows the substantial resistance citizens can face when a public agency decides to vigorously oppose a public records request. The Legislature clearly did not, by the 1984 amendment, intend that citizens be denied attorney's fees if an unlawful denial was made in good faith, or was not intentional. Again, this Court also clearly stated that the good faith exception only applied to private entities, not public agencies.

Initial Brief Section D

The Pension Fund's argument in section D of its initial brief that § 119.12, Fla. Stat., does not impose strict liability for attorneys' fees is contrary to the plain language of the statute. If an agency refuses access to public records, and a court later determines that the refusal was unlawful, § 119.12, Fla. Stat. requires the agency to reimburse the requesting party for his or her attorneys' fees. Although the Pension Fund may consider it "punitive" to have to pay attorneys' fees if it "thought" it was right in denying access to records, it is punitive from the

standpoint of the requesting party to be forced to incur attorneys' fees to vindicate his position in court, but not be reimbursed.

The trial court stated that “[t]here is scant legal authority to guide public agencies on the question of whether they can require those requesting access to public records to pay for the costs to have someone observe the inspection....”

(R:83) The court made this statement as a reason to deny attorneys' fees. However, Lee submits that awarding attorneys' fees to a citizen, when that citizen has obtained clarification of the public records law, is highly appropriate because that citizen's actions have inured to the benefit of the public. *See Sun-Sentinel*, 517 So.2d at 744 (clarification of particular applications of the Public Records Act accrues to the benefit of the agency and the public, and it is appropriate that a member of the public successfully litigating to enforce disclosure should at least have his attorney's fees reimbursed).

G. This Court should reverse the District Court's denial of appellate attorneys' fees

Although the First District correctly held that Lee was entitled to recover attorneys' fees at the trial level and in defending the Pension Fund's appeal of the Final Declaratory Judgment finding that it had violated the Public Records Act, the First District denied Lee's motion for attorneys' fees in this appeal (1D12-587) in which he established his entitlement to attorneys' fees.

Lee filed a timely motion for attorneys' fees in the First District (Lee App., 00019 - 00024). The First District denied Lee's motion for attorneys' fees, but cited no reason for denying the motion. (Lee App., 00025). Lee filed a motion for rehearing as to denial of attorneys' fees (Lee App., 00026 - 00029). The First District denied Lee's motion for rehearing, again without citing a reason for denial (Lee App., 00030). The First District should have awarded attorneys' fees to Lee for establishing his entitlement to fees. Otherwise, he will not be made whole.

Section 119.12, Fla. Stat. (2009), provides that "[i]f 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 records to be inspected or copied, the court shall assess and award, against the agency responsible, the reasonable cost of enforcement, including reasonable attorney's fees." Since § 119.12, Fla. Stat., is one of "the provisions of this chapter", fees incurred to enforce the provisions of § 119.12, Fla. Stat. should be reimbursed.

In addition, § 59.46, Fla. Stat., provides that: "[i]n the absence of an expressed contrary intent, any provision of a statute . . . providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal."

Lee believes that the First District denied his motion for attorneys' fees based on language in *Downs v. Austin*, 559 So. 2d 246, 248 (Fla. 1st DCA 1990) in

which the court said that § 119.12, Fla. Stat., does not authorize attorneys' fees for efforts expended to obtain the statutory fee.

Lee submits that such ruling on attorneys' fees in *Downs* is inconsistent with the plain language of § 119.12, Fla. Stat., as well as this Court's subsequent decision in *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993). This Court in *Palma* held that, under the fee provision in § 627.428, Fla. Stat., attorneys' fees should be awarded for litigating the issue of entitlement to attorney's fees, but not for litigating only the amount of fees.

The fee provisions in § 119.12, Fla. Stat., and § 627.428, Fla. Stat. are substantially similar. Section 119.12, Fla. Stat., provides for an award of attorneys' fees in favor of a party who files suit under Chapter 119 and proves that an agency unlawfully refused access to public records. Similarly, § 627.428, Fla. Stat., provides for fees where an insured files suit against an insurer and is the prevailing party. There is no meaningful distinction in the language of § 119.12, Fla. Stat., and § 627.428, Fla. Stat., to support denial of attorneys' fees with respect to establishing entitlement to fees under § 119.12, Fla. Stat.

It does not appear that a case has directly addressed this issue since this Court's decision in *Palma*. However, the court in *Hewlings v. Orange Co., Fla.*, 87 So. 3d 839 (Fla. 5th DCA 2012), awarded attorneys' fees to a plaintiff who successfully appealed an order denying attorneys' fees under § 119.12, Fla. Stat.

Although the opinion only addresses the reasons for reversal of the denial of the plaintiff's motion for fees, the court's electronic docket shows that the Fifth District granted the plaintiff's motion for attorneys' fees on appeal. A copy of the docket is attached at Lee App., 00029.

CONCLUSION

Based upon the foregoing, Lee requests this Court to approve the First District's decision below, disapprove the Fifth District's decision in *Nejame* as contrary to *PHH*, and instruct the First District to grant Lee's motion for attorneys' fees for establishing his entitlement to such fees.

MILAM HOWARD NICANDRI
DEES & GILLAM, P.A.

By: s/ Robert M. Dees

Robert M. Dees
Florida Bar No.: 714399
14 East Bay Street
Jacksonville, Florida 32202
Tel: (904) 357-3660
Fax: (904) 357-3661
Primary: rdees@milamhoward.com
Secondary: hdurham@milamhoward.com
Secondary: sshipps@milamhoward.com

Attorneys for Respondent Curtis W. Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of August, 2014, the foregoing was filed with the Clerk of the Court via the Florida Court’s E-Filing Portal, which will notify and serve a copy of the electronic filing to:

Robert D. Klausner, Esq.
Stuart A. Kaufman, Esq.
Adam P. Levinson, Esq.
Klausner, Kaufman, Jensen and Levinson
10059 N.W. 1st Court
Plantation, Florida 33324

bob@robertdklausner.com
kkjllaw@robertdklausner.com
lorna@robertdklausner.com
adam@robertdklausner.com
paul@robertdklausner.com

Jonathan D. Kaney, Jr., Esq.
Kaney & Olivari, P.L.
55 Seton Trail
Ormond Beach, Florida 32176

jon@kaneyolivari.com

s/ Robert M. Dees

Attorney

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that the text of this Initial Brief complies with the font requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

s/ Robert M. Dees

Attorney