

IN THE SUPREME COURT OF FLORIDA

BOARD OF TRUSTEES,
JACKSONVILLE POLICE
AND FIRE PENSION FUND,

Petitioner,

vs.

CURTIS W. LEE,

Respondent.

Case No.: SC13-1315

L.T. Case Nos.: 1D12-587,
16-2010-CA-000667

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RESPONDENT'S JURISDICTIONAL 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
Email: rdees@milamhoward.com

Attorneys for Respondent
Curtis W. Lee

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STATEMENT OF THE CASE AND FACTS

Respondent objects to Petitioner's statement of the case and facts since it is based on Petitioner's interpretation of the record and the trial court's order, not the First District's recitation of facts. As this Court stated in *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986), "conflict between decisions must be express and direct, i.e. it must appear within the four corners of the majority's decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction."

The only relevant fact set forth in the First District's decision is that the trial court denied Respondent's motion for attorneys' fees even though it determined that Petitioner violated the Public Records Act.

SUMMARY OF ARGUMENT

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. The First District correctly applied this Court's holding in *New York Times Co. v. PHH Mental Health Svcs., Inc.*, 616 So. 2d 27 (Fla. 1993), and held that the good faith exception only applies to private entities who are, in good faith, unsure of their status as an agency. There is no good faith exception for entities that are clearly public agencies.

Petitioner cites the following four cases as being in express and direct conflict with the First District in this case: (i) *Knight-Ridder, Inc. v. Dade Aviation Consultants*, 808 So. 2d 1268, 1269 (Fla. 3d DCA 2002); (ii) *Althouse v. Palm Bch. Co. Sheriff's Ofc.*, 92 So. 3d 899, 901 (Fla. 4th DCA 2012); (iii) *Alston v. City of Riviera Bch.*, 882 So. 2d 436 (Fla. 4th DCA 2004); and (iv) *Greater Orlando Aviation Auth. v. Najame, Lafay, et al.*, 4 So. 3d 41, 43 (Fla. 5th DCA 2009).

Respondent does not believe that *Dade Aviation*, *Althouse*, or *Alston* expressly and directly conflict with the First District in this case. However, it does appear that *Najame* conflicts with this Court's decision in *PHH* and the First District's decision in this case.

The First District's clear and concise application of *PHH* in this case should clarify Florida law that there is no good faith exception under § 119.12, Fla. Stat., for an entity that is clearly a public agency. However, if this Court exercises its discretion to review this case, Respondent will request this Court to reverse the First District's denial of Respondent's motion for attorneys' fees in the appeal below. Even though the First District correctly determined that the trial court erred in denying Respondent's motion for attorneys' fees at the trial level, the First District denied Respondent's motion for attorney's fees incurred in establishing in this appeal his entitlement to fees in the trial court.

ARGUMENT

I. Respondent agrees that this Court has conflict jurisdiction

The First District's decision does not conflict with *Dade Aviation* because Dade Aviation Consultants was a private entity that may have been subject to the good faith exception for certain private entities established by this Court in *PHH*. *Althouse* appears to conflict with *PHH* and this case because it talks about the good faith exception in a case against a county sheriff. However, *Althouse* appeared *pro se*, so attorneys' fees were not actually at issue. The two-sentence decision in *Alston* does not provide enough substance to determine whether the holding conflicts with *PHH* and this case.

On the other hand, it does appear that *Nejame* conflicts with *PHH* and this case. The agency in *Najame* 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 *Dade Aviation*, which involved a private entity, and *WFSH of Niceville v. City of Niceville*, 422 So. 2d 980 (Fla. 1st DCA 1982), which involved a different statutory standard for awarding attorneys’ fees. Prior to an amendment in 1984, Section 119.12, Fla. Stat. (1982), provided for attorneys’ fees only if an agency “unreasonably” refused inspection of public records. Since *Nejame* denied attorneys’ fees against an entity that violated the Public Records Act and was clearly a public agency, it conflicts with *PHH* and this case.

II. If this Court accepts review of this case, it should reverse the First District’s denial of attorneys’ fees for successfully appealing the trial court’s refusal to award attorneys’ fees

If this Court accepts discretionary jurisdiction in this case, it can review any issue in the case. Respondent will request that this Court reverse the First District’s denial of his motion for attorneys’ fees on appeal in this case.

As this Court stated in *PHH*:

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. 616 So.2d at 29.

The First District erred in denying Respondent's motion for attorneys' fees incurred in this case to establish his entitlement to attorneys' fees in the trial court.

CONCLUSION

This Court has discretion to review this case. If this Court chooses to review this case, Respondent requests that the Court reverse the denial of Respondent's motion for attorneys' fees on appeal.

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
rdees@milamhoward.com

Attorneys for Respondent
Curtis W. Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Robert D. Klausner, Esq. and Shaun H. Malvin, Esq., Klausner & Kaufman, P.A., 10059 N.W. 1st Court, Plantation, Florida 33324, on this 2nd day of August, 2013.

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