Electronically Filed 07/12/2013 01:37:10 PM ET

RECEIVED, 7/12/2013 13:38:39, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT
STATE OF FLORIDA

Case No.

First DCA Case No. 1D12-587

BOARD OF TRUSTEES,
JACKSONVILLE POLICE AND
FIRE PENSION FUND,

Petitioner

v.

CURTIS W. LEE,

Respondent

_____/

PETITIONER'S JURISDICTIONAL BRIEF UNDER RULE 9.030(a)(2)(A)(iv)

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SUMMARY OF THE ARGUMENT

At issue in this petition is whether to resolve a conflict between the First District Court of Appeal and the Third, Fourth, and Fifth Districts on entitlement to attorneys fees under Section 119.12, Florida Statutes, when the trial court determined that there had been no unlawful refusal to permit inspection of public records and the agency had a reasonable, good faith belief in its legal position. This Court should accept jurisdiction to resolve an express and direct conflict on the following question:

> Whether attorney's fees are proper under Section 119.12 when the agency's violation was neither "knowing, willful, nor done with malicious intent" and the trial court found that the agency "did not unlawfully refuse to permit inspection and copying of the records at issue."[1]

The Court should also accept jurisdiction to review whether the First District has misapplied and improperly limited this Court's decision in *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993) to *only* apply the good faith exception to *private* entities which are in doubt as to their status under Chapter 119. *See Lee v. Board of Trustees*, 2013 WL 1715460 *1 (Fla. 1st DCA

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[1] The Defendant never "refused" to permit access to public records. Rather, the parties' dispute involved the payment of hourly charges for a public employee to safeguard large volumes of records requested for inspection while Plaintiff decided which documents he wanted to copy. As described by the trial court, the violations involved two "honest, technical mistakes" regarding charges. "Accordingly, the court cannot find that the violations in this case amount to an 'unlawful refusal.' " 12/19/11 Order at p. 4.

2013). Here too the First District's decisions are in conflict with the Third, Fourth, and Fifth Districts' application of *PPH*. The trial court specifically observed that "[u]nfortunately, the courts have been less than clear on this issue." 12/19/11 Order at p. 2.

STATEMENT OF THE CASE AND FACTS

The underlying dispute in this case arose out of multiple broadly worded and extensive public record requests that involved a large volume of records ultimately requiring 8 hours to assemble. 6/24/11 Order at p. 4 & 10. The trial court described the request as "similar to a discovery request" which could have included "conceivably, every document in every employee's file." 6/24/11 Order at p. 10 & 12. Following a two-day bench trial, the trial court entered its Final Declaratory Judgment on June 24, 2011. Out of eight findings made by the trial court, only two findings were in Plaintiff's favor.[2] The trial court specifically rejected six allegations where the Defendant acted properly when faced with "vaguely stated" public records requests. At all times the trial court found that the Defendant acted in good faith.

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[2] Among other things, the Final Declaratory Judgment found that $326.40 was a reasonable and lawful special service charge and that cost estimates were reasonable given the broad public records requests at issue. Nevertheless, the trial court held that Defendant mistakenly violated the Public Records Act (1) by failing to adequately explain that a $27.66 per hour charge for employee time was only for "extensive" time, and (2) by charging a separate hourly fee to supervise Plaintiffs' inspection of records. 6/24/11 Order at p. 4 & 6.

First, the trial court found that the Defendant violated Chapter 119 by not explaining that an hourly charge for employee time only applied to "extensive" time spent responding to records requests. The trial court noted:

> . . . the court does not find that this violation of the Public Records Act was knowing or willful on the part of the Pension Fund. Instead, it appears that it was a **simple mistake or oversight in communicating the precise legal standard for assessing a special service charge** related to copying public records, rather than a violation that originated from a policy or standard practice on the part of the Pension Fund.

June 24, 2011 Order at p. 6 (emphasis added).

Second, the trial court found that the Defendant violated the Public Records Act by seeking to charge Plaintiff for an employee's time supervising his inspection of public records.[3] The trial court determined that the documents produced did not contain irreplaceable original documents, and therefore the Defendant could not charge for staff supervision.[4]

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[3] Section 119.07(1)(a) provides that inspection shall be permitted at reasonable times, under reasonable conditions "under supervision by the custodian of the public records." *See also* §119.07(2)(b)("The custodian of public records shall provide safeguards to protect the contents of public records from unauthorized remote electronic access or alteration...").

[4] The trial court acknowledged that this legal issue was a matter of "first impression" and that the Defendant's reliance on the Attorney General Opinion found at Op. Att'y Gen. Fla. 2000-11 was reasonable. 6/24/11 Order at p. 10.

Plaintiff sought fees under Section 119.12, Florida Statutes. The trial court denied Plaintiff's fee request because it had:

> "already determined, based upon the evidence presented at trial, that neither of the two Chapter 119 violations on the part of the PENSION FUND were knowing, willful or done with a malicious intent, the court finds that the PENSION FUND *did not unlawfully refuse to permit inspection and copying of the records at issue* and that Plaintiff is not entitled to an award of fees under § 119.12, Fla. Stat." 12/19/11 Order at p. 4 (emphasis added).

The First District reversed the December 19 decision denying fees, despite the trial court's finding that there was no unlawful refusal. The trial court's earlier decision on the merits was affirmed without opinion.[5]

A motion for rehearing and alternatively to certify the case to this Court on the basis of conflict and as a question of great public importance was denied.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review decisions of the district courts that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law" Fla. R. App. P. 9.030(a)(2)(A)(iv). *See also* Art. V, § 3(b)(3), Fla. Const.

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[5] The Final Declaratory Judgment of 6/24 was affirmed without opinion. The 12/19 Order Denying Fees was reversed by the First District and gives rise to conflict jurisdiction.

The principal situations justifying jurisdiction are (1) the announcement of a rule of law that conflicts with a rule previously announced by this Court; or (2) the application of a rule of law to produce a different result in a case which involves "substantially the same controlling facts" as a prior case. *Wallace v. Dean*, 3 So. 3d 1035, 1039 n. 4 (Fla. 2009); *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

The First District Court of Appeal in the present case announced a rule of law that conflicts with the decisions of the Third, Fourth and Fifth District Courts of Appeal. The present case also presents conflicting results arising from factually similar situations, where an agency had a reasonable, good faith belief in the soundness of its legal position. *Wallace,* at 1039, n. 4.

The underlying standard of review should the Court accept jurisdiction is *de novo*. *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012)(holding that entitlement to fees under §119.12 is reviewed *de novo*).

ARGUMENT

The Decision of the First District Court of Appeal Expressly and Directly Conflicts with decisions of other District Courts of Appeal.

An express and direct conflict exists between the First District's decision below and *Knight Ridder, Inc. v. Dade Aviation Consultants*, 808 So. 2d 1268, 1269 (Fla. 3d DCA 2002); *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 901

(4th DCA 2012); *Alston v. City of Riviera Beach*, 882 So. 2d 436 (Fla. 4th DCA 2004); and *Greater Orlando Aviation Auth. v. Nejame, Lafay, et al.*, 4 So. 3d 41, 43 (Fla. 5th DCA 2009). This conflict is worthy of resolution by this Court given budgetary pressures on the public fisc, the frequency of public record requests, the growing complexity and volume of public records generated over time, and the importance of the underlying Public Records Law in Florida.

In *New York Times Co. v. PHH Mental Health Services*, 616 So. 2d 27 (Fla. 1993), this Court determined that good faith uncertainty as to the application of the Public Records Law did not create liability for fees. According to the Court, "statutory vagueness and lack of judicial guidance" as to a private contractor's status as an agency within the meaning of Chapter 119 was both "reasonable and understandable." *Id.* at 30. "Therefore, *PHH* did not 'unlawfully' refuse to produce its records and an award of attorney's fees was not proper." *Id.*

In the present case, uncertainty existed following a series of vague and voluminous public records requests as to the applicable procedures involving records custodian supervision of the inspection process, which supervision is required under Section 119.07(1). The trial court concluded that Defendant had a good faith belief in the correctness of its position and refused to award fees. Nevertheless, the First District reversed the trial court's determination that Defendant did not "unlawfully

refuse" to permit inspection and copying of records and was therefore not entitled to fees under Section 119.12.

The First District Court of Appeal opinion below expressly and directly conflicts with the Third District's holding in *Knight Ridder* 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." *Knight Ridder, Inc. v. Dade Aviation Consultants*, 808 So. 2d 1268, 1269-70 (Fla. 3d DCA 2002)(citing *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993)).

The Fourth District Court of Appeal in *Althouse v. Palm Beach County Sheriff's Office* adopted the reasoning in *Knight Ridder* and found that the Sheriff owed attorneys fees under 119.12 because it "did not provide evidence of a reasonable or good faith belief" in its legal position. *Althouse*, 92 So.3d 899, 902 (Fla. 4th DCA 2012). *See also Alston v. City of Riviera* Beach, 882 So. 2d 436 (Fla. 4th DCA 2004)(denying fees for city's failure to disclose public records given City's "a good faith and reasonable belief").

Similarly, the Fifth District denied a request for fees involving a public aviation authority where the agency "did not act unreasonably or in bad faith." *Greater Orlando Aviation Authority v. Nejame, Lafay, et al.*, 4 So. 3d 41, 43 (Fla. 5th DCA

2009)(overruling public agency's refusal to provide document based on exemption but declining to award fees).[6] Thus, a direct and express conflict exits between the First District and the Third, Fourth, and Fifth Districts.

The Court should also accept jurisdiction to review whether the First District has misapplied and improperly limited this Court's decision in *New York Times Company v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993). Unlike the other District Courts of Appeal cited above, the First District in the instant case interpreted *PHH's* good faith exception to *only* apply to *private* entities which are in doubt as to their status under Chapter 119. Yet, this Court in *PHH* did not limit the good faith exception to private entities. To the contrary, the *PHH* opinion repeatedly emphasized that its analysis applied to *unlawful refusals* to allow inspection of records. *PHH* at 29 & 30.[7]

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[6] *See also Stanfield v. Salvation Army*, 695 So. 2d 501, 503 (Fla. 5th DCA 1997)(denying fees where Salvation Army acted on the good faith belief that it was not subject to the public records law); *Harold v. Orange County*, 668 So. 2d 1010, 1012 (Fla. 5th DCA 1996)(denying fees where the private entity's status as an agency was unclear and thus there was no unlawful refusal). While *Stanfield* and *Harold* involved private entities acting as contractors, there is no question that the Palm Beach Sheriff's Office, City of Riviera Beach and the Greater Orlando Aviation Authority are public agencies in the cases cited above.

[7] In so holding, this Court disapproved decisions which would permit the award of fees "without a determination that the refusal was unlawful." *Id.* at 30.

The First District in the instant case held that "when agency status is not in doubt" there is no comparable good faith requirement. In so holding the First District cited and misapplied a single sentence of dicta in *PHH* that "refusal by an entity that is clearly an agency within the meaning of Chapter 119 will always constitute unlawful refusal." However, the First District overlooked the question of what constitutes a "refusal" and ignored conflicting decisions by the other Districts. More importantly, the First District's holding creates uncertainty in the law as to the following underlying questions:

1) what constitutes an "unlawful refusal" when a public entity is not actively or intentionally withholding records;

2) whether a public entity's good faith[8] and reasonable beliefs should automatically be treated the same as an intentional refusal; and

3) whether fees should be imposed when the trial court specifically found that Defendant did not refuse to provide access to records and acted reasonably, in what the trial court termed a "matter of first impression" regarding custodian supervision procedures.

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[8] "Good faith" is repeatedly mentioned in Section 119.07(1)(c) which requires a custodian of public records to acknowledge requests promptly and respond to such requests in good faith. A good faith response includes "making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed." *Id.*

Accordingly, conflict jurisdiction is warranted to provide needed clarity for the thousands of governmental agencies in Florida on these issues.

CONCLUSION

Petitioner, Board of Trustees, Jacksonville Police and Fire Pension Fund, respectfully prays that this Honorable Court accept jurisdiction in this matter to resolve an important conflict on an issue that is likely to reoccur across the state.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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