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IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC13-1315

First DCA Case No. 1D12-587

BOARD OF TRUSTEES,
JACKSONVILLE POLICE AND
FIRE PENSION FUND,

Petitioner

v.

CURTIS W. LEE,

Respondent

_____/

PETITIONER'S REPLY BRIEF

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I. Introduction[1]

The Third, Fourth and Fifth Districts have properly concluded that where a record custodian acted in good faith and a technical violation of Chapter 119 was not knowing, willful or done with malicious intent, the violation does not constitute an unlawful refusal to permit inspection of a record. In contrast, the First District erroneously construed this Court's holding in *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So.2d 27 (Fla.1993), to conclude that any violation, regardless of "good faith" or the lack of any previous guidance on the specific subject leading to the violation, constitutes an "unlawful refusal" yielding attorney's fees.

The Third, Fourth and Fifth Districts' position is supported by the 2007 amendment to Chapter 119.07(1) and public policy. Lee's Answer Brief failed to address the public policy concerns raised in the Initial Brief, failed to provide substantive analysis of the decisions in conflict with the First District and failed to provide an alternative legislative rationale for the 2007 amendment to Chapter 119.07(1).

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[1] In this Reply, the Answer Brief will be referred to as (AB at p.#), whereas references to the Amicus Brief will be designated as (AM at p.#).

For the reasons set forth below, this Court should adopt the reasoning of the Third, Fourth and Fifth Districts and hold that Chapter 119 does not include a strict liability standard. Contrary to the First District's flawed analysis on this subject, courts should continue to consider an agency's good faith efforts to comply with a request.

II. *PHH Mental Health Services* Supports Using a Good Faith Analysis When Determining Whether an Agency Violated Chapter 119 by Unlawfully Refusing Permission to Inspect Records

Lee erroneously argues that this Court's decision in *PHH Mental Health Services, Inc.* prohibits a good faith analysis of a Chapter 119 violation. (AB at 11). On the contrary, *PHH* only dealt with a very specific and limited issue, whether a private entity that refuses access to its records is liable for attorney's fees when it had a good faith belief that it is not an agency within the meaning of Chapter 119. *PHH* is clear that once an unlawful refusal is determined by the trial court, and the entity is "clearly an agency within the meaning of Chapter 119," attorney's fees are appropriate. The last sentence of *PHH* also makes clear that courts cannot award attorney's fees without first determining that a refusal is unlawful. *PHH* simply did not address whether a good faith analysis is appropriate for public agencies, as that issue was not before the Court.

In Lee's analysis of conflicting cases, the Answer brief gives only a passing reference to the Third District's opinion in *Knight-Ridder, Inc. v. Dade Aviation Consultants*, 808 So.2d 1268 (Fla. 3d DCA 2002). The Third District held 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." *Id*. at 1269. Based on that holding, the Third District reversed the trial court's denial of attorney's fees. The District Court awarded fees to Knight-Ridder, explaining that due to Dade Aviation's "stonewalling" of Knight-Ridder in its production, it exhibited bad faith. Of particular importance is that the Third District relied on *PHH* for its analysis.

The Fifth District also relied on *Knight-Ridder* in its opinion in *Greater Orlando Aviation Auth. v. Nejame, Lafay, Jancha, Vara, Barker,* 4 So.3d 41 (Fla. 5th DCA 2009). There, the Fifth District held that the Aviation Authority did not act unreasonably or in bad faith in refusing production, based on a conflicting federal rule prohibiting release of the subject material. *Id.* at 43. Lee asserts in his Answer that *Nejame* did not cite to *PHH*, but in fact, it relied on *Knight-Ridder*, which in turn relied on *PHH*. (AB at 16).

Lee further asserts that the Fourth District misconstrued "the *PHH* distinction" as well. Again, a district court found attorney's fees due and owing

when an agency "did not provide evidence of a reasonable or good faith belief" in its refusal to permit inspection of records. *Althouse v. Palm Beach County Sheriff's Office*, 92 So.3d 899 (Fla. 4th DCA 2012). The agency in *Althouse* summarily refused production, without providing any reasonable explanation. Like the Fifth District, the Fourth District relied on *Knight-Ridder*, ruling that to avoid liability for attorney's fees, the public entity must have had a reasonable or good faith belief in "the soundness of its position in refusing production." *Id*. at 901.

The Second District has also hinted at a degree of flexibility in the unlawful refusal analysis. In *Office of the State Attorney for the Thirteenth Judicial Circuit of Florida v. Gonzalez*, 953 So.2d 759 (Fla. 2d DCA 2007), which Lee relies on, the Second District affirmed an order finding the State Attorney unlawfully refused to provide a public record when it took longer than 90 days to comply with the request. *Id.* at 762. In a footnote, the Court commented on the imprecise language used by the trial court. The Second District stated, "[t]he final judgment used the terminology 'unlawful delay.' More precisely, the delay must be unjustifiable and thus amount to an 'unlawful refusal.'" *Id*. at fn.4. Although Lee relies on the Second District's opinion refusing to adopt a good faith analysis, the language of the footnote suggests a reliance on reasonableness in determining whether an unlawful refusal has occurred. A delay in permitting access to records is not the

equivalent of a statutory exemption, so even under the Second District's analysis, a court considering whether a delay is "unjustifiable" must by necessity weigh the reasonableness of an agency's actions.

The line of logic that runs through these cases traces its roots to *PHH*, which articulated that good faith uncertainty as to the application of Chapter 119 did not create liability for fees. Where an agency makes a good faith effort to comply with a public records request, but is thwarted by events beyond its control or a simple lack of guidance on the particular facts, it is reasonable to find that the agency did not "unlawfully refuse" to permit inspection of its records. The First District's erroneous reliance on *PHH's* dicta has created a standard of strict liability that does not conform to the legislative paradigm envisioned by the legislature.[2] It is also significant that this Court decided *PHH* in 1993, long before the Florida Legislature inserted a good faith requirement into the Public Records Act with a 2007 amendment to Chapter 119.07(1) discussed below.

[2] See Initial Brief, at 26, where the Board discussed the different levels of culpability enshrined in the statute.

III. The 2007 Amendment to Chapter 119.07(1) Changed the Treatment of Public Records Requests

The Florida Legislature's 2007 amendment to Chapter 119.07(1) changed the manner in which the law requires records custodians respond to public records requests. The 2007 amendment was a public policy determination regarding the underlying obligation of a custodian in responding to a request. The post-2007 law requires a custodian to respond to requests in "good faith," which the statute defines as making "reasonable" efforts to obtain and provide requested records. *See* § 119.07(1)(c), Fla. Stat. As argued in the Initial Brief, pursuant to the 2007 amendment, a court must now consider the good faith efforts of a custodian in determining whether an agency "unlawfully refused to permit a public record to be inspected or copied." § 119.12, Fla. Stat.

Contrary to Lee's attempts to re-frame the Board's argument, the Board is not asserting that an exemption to a finding of an unlawful refusal was created in the 2007 amendment. The Board's position is that the 2007 amendment necessarily informs the determination of whether an unjust refusal has occurred, requiring courts to consider the good faith efforts of a custodian to comply with the request. To the extent that a strict liability standard ever governed Chapter 119, the 2007 amendment removed it. Stated succinctly, the question before this Court, which is a question of first impression in Florida, should be:

> Is the 2007 amendment adding a "good faith" requirement, which is defined as including "reasonable" efforts to comply with a public records request, incompatible with strict liability?

For the reasons set forth in the Initial Brief and herein, the answer is yes, the amendment's "good faith" requirement is fully incompatible with a strict liability standard. Pursuant to the 2007 amendment, courts must consider whether an agency made a good faith effort to comply with the request, which includes considering whether reasonable efforts were made to obtain the record.

Time and again, Florida courts have found "reasonable efforts" incompatible with strict liability standards. *See U.S. v. Stevens*, 994 So.2d 1062, 1066 n.2 (Fla. 2008) ("Strict liability does not concern itself with whether the actor exercised reasonable care."); *Raskin v. Community Blood Centers of S. Fla.*, 699 So.2d 1014, 1016 (Fla. 4th DCA 1997) ("Interpreting the statute to require that a plaintiff must prove the defect alleged is detectable or removable by a *reasonable use* of scientific procedures affords blood suppliers protection from *strict liability* for contaminants it cannot detect or remove, while maintaining liability for defects that can be detected or removed.") (emphasis added); *Cain v. Brown*, 569 So.2d 771, 772 (Fla. 4th DCA 1990) (landlord's duty of reasonable care in connection with premises liability is not equivalent to strict liability). If, based on the facts before it, a trial court determines that a records custodian made a good faith effort to comply

with a public record request, then the custodian did not unlawfully refuse the request and attorney's fees should not be awarded.

IV. Policy Considerations Support the Third, Fourth and Fifth Districts

Reasonable minds would not differ on whether intentional or bad faith violations of Chapter 119 are worthy of a fee award. However, where hyper-technical violations of the law are concerned, this Court has already spoken on the matter, admonishing Florida courts to "avoid [and] not foster a hyper-technical application of the law." *Simpson v. State*, 418 So.2d 984, 986 (Fla. 1982). In addition to discouraging litigation over hyper-technical violations of the Public Records Law, public policy prefers to balance the interests of the citizens with agencies subject to the Law.[3] The countervailing policy of making mass requesters bear the cost of document production balances the public right of access to records with the ability of government agencies to conduct business. "Florida has long

[3] Recognizing that this Court is not governed by Chapter 119, comprehensive amendments to Rule 2.420 were undertaken in 2010, which implicate some of the same policy considerations. *See In re Amendments to Florida Rule of Judicial Administration 2.420*, 31 So.3d 756, 758 (Fla. 2010) ("The goal of the comprehensive amendments to rule 2.420 is to balance the public's constitutional right to access to court records with the courts' responsibility to protect from public access court records that are confidential.")

required those who seek records to defray the extraordinary cost associated with their request." *Bd. of Cty. Comm's of Highlands Cty. v. Colby*, 976 So,2d 31, 35 (Fla.2d DCA 2008). The statute is imbued with the concept of a reasonable balancing of interests, and there is no reason why a good faith analysis of an unlawful refusal should not be included.

Lee exaggerates public policy concerns, arguing that "expanding the good faith exception to public agencies would strongly discourage private citizens from pursuing their rights under Chapter 119." (AB at 19). Amicus exaggerates further, claiming a good faith analysis would require "the successful litigant to prove the *malafides* of the agency [and] would add a difficult question of fact to the burden of the citizen." (AM at 8). Lee and Amicus' reasoning is flawed for two reasons. First, giving consideration to the good faith efforts of public entities to comply with Chapter 119 encourages public agencies to put forth their best effort to provide access to the records, especially where the request creates confusion, doubt or plain impossibility to comply.[4]

Second and more importantly, allowing the courts to consider good faith in determining whether an agency unlawfully refused to permit inspection of records

[4] Such as a previous injunction prohibiting compliance as in *Brunson v. Dade County School Board*, 525 So.2d 933 (Fla. 1988), or a conflicting federal rule prohibiting compliance as in *Nejame*, 4 So.3d at 42.

discourages abuse of the Public Records Act. In *Gonzalez*, the Second District recognized the mischief that could be played with the Act when it declined to set a bright line rule establishing a certain number of days of delay in delivering records, to constitute an unlawful refusal. The Court explained that a party could simply make a request and then "sit on its laurels," allowing the proper amount of time to pass so that it could seek a fee award. *Gonzalez,* 953 So.2d at 765. In essence, the Court was explaining that stratagem and maneuvering around the technical aspects of the act runs contrary to public policy.

Lee argues further that a good faith analysis 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." (AB at 20). Amicus is more blunt in their analysis of the issue, explaining that virtually all litigation pursuant to Chapter 119 is conducted by attorneys working on a contingency fee basis. (AM at 7). A "contingency fee agreement" is one in which the fee is made contingent on the outcome of the matter upon which the services are rendered. *Brickell Place Condo Assoc., Inc. v. Joseph H. Ganguzza & Assoc., P.A.*, 31 So.3d 287 (Fla. 3d DCA 2010). Without a strict liability standard, according to Amicus, attorneys would be discouraged from taking cases because evaluating the risk would be more difficult. (AM at 8).

Contrary to Lee and Amicus' legal industry-centered concerns, the Florida Legislature's objective in the creation of chapter 119 was to "insure to the people of Florida the right to freely gain access to governmental records." *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA1985). The harm created by a strict liability standard is that it encourages more litigation than it does openness. Where a plaintiff purposefully requests voluminous records from an agency, acts in a hostile manner with agency staff and then files myriad claims against the agency hoping to succeed on at least one, a good faith exception would level the proverbial playing field. Abusive plaintiffs gain an unfair advantage under a strict liability regime by asserting multiple claims, where success on just one technical violation would yield attorney's fees. Strict liability runs counter to the policy of Chapter 119 and does not serve the legislative intent behind the creation of the statute or the 2007 amendment.[5] Strict liability also seems to assume bad faith, which is directly at odds with the long standing presumption that government officers are presumed to act in accordance with law. *Hillsborough County Aviation Authority v. Taller & Cooper, Inc*,. 245 So.2d 100 (Fla. 2d DCA 1971).

[5] See Initial Brief, fn.13, where the Board citied to the numerous references to "reasonable" actions in Chapter 119.

V. The Board did not Unlawfully Refuse to Permit Inspection of the Subject Documents

Lee mistakenly asserts in his Answer Brief, the "First District reversed the trial court's determination that the Pension Fund had not "unlawfully refused" access to its records." (AB, p.17) (emphasis in original). Amicus erroneously claims that the trial court "held that the agency unlawfully refused to permit the requested records to be copied." (AM at 5). The record is clear that the trial court held in its order on the merits, that the Board's technical violations were not done knowingly, willfully or with malicious intent. (R.2-1306, 1310). In its order on fees, the court held it could not "find that the violations in this case amounted to an 'unlawful refusal.'" (R.81).

The Board and Lee filed cross appeals from the trial court's order on the merits which was *per curiam* affirmed by the First District, without opinion. *Board of Trustees v. Lee*, 110 So.3d 443 (Fla. 1st DCA 2013). A *per curiam* affirmance may not be *stare decisis*, but it is the law of the case. *State, Commission on Ethics v. Sullivan*, 430 So.2d 928, 932 (Fla. 1st DCA 1983). When an appellate court has decided an issue of law, the decision becomes the law of the case, binding not only on the trial court in subsequent proceedings in the same case, but with limited exceptions, it is also binding on the appellate court in future appeals in the same case. *Pompi v. City Of Jacksonville*, 872 So.2d 931, 932-33 (Fla. 1st DCA 2004)

(internal citations omitted), s*ee also Strazzulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965).

Contrary to binding precedent of this Court and its own, the First District followed *Lee's* affirmance of the merits with a reversal of the trial court on attorney's fees. *Lee v. Board of Trustees, Jacksonville Police and Fire Pension Fund*, 113 So.3d 1010 (Fla. 1st DCA 2013) ("*Lee II*"). After having affirmed the trial court's decision in *Lee*, the First District held in *Lee II* that attorney's fees must still be awarded. The First District explained that *any* finding of a violation of Chapter 119 constitutes a refusal, notwithstanding the trial court's reasoning to the contrary. The First District did not reverse the trial court's holding; it ordered a remedy for an offense that it had already affirmed did not exist.

VI. Lee's Request to Reverse the First District's Denial of his Appellate Attorney's Fees is not Properly Before this Court

Lee has asked this Court to reverse an order by the First District denying his motion for appellate attorney's fees. (AB at 23). The First District's order is without comment, so Lee assumed the denial was based upon the rule articulated by the First District in *Downs v. Austin*, 559 So.2d 246 (Fla. 1st DCA 1990), that Chapter 119 does not authorize attorney's fees for efforts expended to obtain fees.

Lee, therefore, advocates for a reversal of *Downs*, however Lee's argument is not properly before the Court.

This matter is before this Court pursuant to the Board's filing of its notice to invoke discretionary jurisdiction, based upon the conflict between the districts. Lee has attempted to invoke this court's jurisdiction in the manner of a cross-appeal. Florida Rule of Appellate Procedure 9.110(g) does not permit an appellee to obtain an appellate court's jurisdiction via a cross appeal "from every order or ruling made in the case which is adverse to the appellee." *Breakstone v. Baron's of Surfside, Inc.*, 528 So. 2d 437, 438 (Fla. 3d DCA 1988). A cross appeal "must necessarily 'piggy back' jurisdictionally on the notice of appeal, and is… confined to those trial court orders or rulings adverse to the appellee which either "merge" into or are an inherent part of the order or orders which are properly under review by the main appeal." *Id*. at 439. The matter of Lee's appellate attorney's fees is a distinct and separate issue from these proceedings and Lee did not file a notice to invoke the jurisdiction of this Court. *See Vasalinda v. Lozano*, 631 So.2d 1082, 1087 (Fla.1994) .

Conclusion

For the reasons set forth above, the Board respectfully urges this Court to reverse the First District Court of Appeal and reinstate the Circuit Court Order denying attorney's fees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 2, 2014, a true and correct copy of the foregoing was transmitted via electronic mail and US Mail to Robert M. Dees, Esq., Milam Howard Nicandri Dees & Gillam P.A., 14 E. Bay St., Jacksonville, Florida 32202, and Jonathan D. Kaney, Jr., Kaney and Olivari, P.L., 55 Seton Trail, Ormond Beach, FL 32176.

/s/ *Paul A. Daragjati*
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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).

/s/ *Paul A. Daragjati*
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