Filing # 15897697 Electronically Filed 07/14/2014 06:59:26 PM

RECEIVED, 7/14/2014 19:03:53, John A. Tomasino, Clerk, Supreme Court

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 INITIAL BRIEF

By: ROBERT D. KLAUSNER
Florida Bar No. 244082
STUART A. KAUFMAN
Florida Bar No. 979211
ADAM P. LEVINSON
Florida Bar No. 055344

KLAUSNER, KAUFMAN, JENSEN &
LEVINSON
Attorneys for Petitioner
10059 N.W. 1st Court
Plantation, Florida 33324
Telephone: (954) 916-1202
Fax: (954) 961-1232

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CITATIONS

PAGE

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

STATUTES

TABLE OF CITATIONS
(Continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

INTRODUCTION[1]

This case involves a direct and express conflict between the decisions of four courts (this Court, together with the Courts of Appeal for the Third, Fourth and Fifth Districts) and the First District Court of Appeal concerning the interpretation of the attorney's fee provision of the Public Records Act, Section 119.12, Fla. Stat.

The present case involved multiple requests for thousands of documents at the Jacksonville Police and Fire Pension Fund, many of which contained confidential data protected from disclosure under various exceptions to the Public Records Act. The Agency, the Board of Trustees of the Jacksonville Police and Fire Pension Fund (the Board or Fund), 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.

---

[1]Petitioner, Board of Trustees, Jacksonville Police and Fire Pension Fund, will be referred to as "Petitioner," the "Pension Fund," or the "Board."

Respondent, Curtis W. Lee, will be referred to as "Respondent" or "Lee."

References to pages in the Record on Appeal in Case No. 1D12-587 will be designated as (R- _), followed by the page number in the record. References to pages in the Record on Appeal in Case No. 1D11-4458 will be designated as (R2- _), followed by the page number in the record. Transcript references will be from the record on Appeal in Case No.1D11-4458 and will be designated as (T- _).

Reference to the Appendix to this brief will be designated as (App. - _) followed by the Bates stamped page number in the Appendix.

This Court and the District Courts of Appeal for Third, Fourth and Fifth Districts found that fees were not appropriate when the agency had a reasonable or good faith belief in the correctness of its legal position. Contrary to the these rulings, the First District found this belief only applied when the agency had a doubt as to its status as an agency subject to the statute.

In its jurisdictional brief, the Board asked the Court to 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."[2]

The Board suggested that 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] 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.' " (R- 84)

2) whether a public entity's good faith[3] 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.

STATEMENT OF THE CASE AND FACTS

The Parties

Petitioner, Board of Trustees, is responsible for administering the Jacksonville Police and Fire Pension Fund pursuant to Article 22, Jacksonville City Charter, and Chapters 112, 175, and 185, Florida Statutes. Respondent, Curtis W. Lee, is a resident of Jacksonville, Florida, and was formerly a licensed attorney in the State of New York. (R-11).

[3] "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.*

Lee's November 23, 2009, Public Records Request to the Pension Fund

Lee first submitted a written public records request to the Pension Fund on November 23, 2009. (T-43-44; R2-1380). This request was very broad in scope and, on its face, appeared to request practically every document the Pension Fund had received or produced in a one year period. (T-199; T-283; R2-1380). John Keane ("Keane"), the Pension Fund's Executive Director and Administrator (T-229), testified that there could be thousands of documents responsive to just the first bullet point in Lee's November 23, 2009 public records request. (T-283).

On November 30, 2009, Keane responded to Lee's letter. (T-44; R2-1381). Keane advised Lee that the request was extensive, that the cost of fully responding would be considerable, and suggested that Lee may want to narrow the scope of his request. (T-111; T-113; T-233-34; T-283-84; R2-1381). While Keane's November 30, 2009, letter informed Lee that he would be provided with an estimate of the fees associated with responding to his request (R2-1381), Lee sent a letter to Keane dated December 2, 2009, in which he stated that perhaps they could discuss the fees when Lee visited the Pension Fund's office. (T-112; T-232; T-284; R2-1382). Lee ultimately visited the Pension Fund's office on December 14, 2009, in order to inspect documents gathered in response to his November 23, 2009 request. (T-233; T-285).

Prior to Lee's December 14, 2009 visit to the Pension Fund's office, Richard Cohee ("Cohee"), the Pension Fund's Deputy Executive Director (T-172), spent eight hours gathering documents responsive to Lee's request. (T-209; T-285-86; R2-1391; R-1397). A photograph that accurately represents the documents gathered by Cohee in response to Lee's November 23, 2009, public records request was admitted into evidence at trial. (T-209; T-286-87; R2-1398).

When Lee visited the Pension Fund's office on December 14, 2009, he was presented with two forms that he was requested to sign. (T-52-53; R2-1391-92). One form was Lee's promise to pay a $326.40 fee for time spent by Cohee gathering responsive documents.[4] (R2-1391). The other form was Lee's acknowledgment that he would be responsible for paying $27.66 per hour for future time spent by a Pension Fund's staff member related to his request. (R2-1392). Lee would have been permitted to review the documents gathered in response to his request that day as long as he promised to pay. (T-124-25; T-234). However, Lee did not believe that he was required to pay any service charge and refused to sign the forms. (T-52-54; T-234; T-240-41). Lee did not review any records on December 14, 2009. (T-52-54; T-240-41).

---

[4] As proof of its reasonable policy, the Pension Fund only sought to charge Lee for one-half of the actual hours Cohee expended at his base hourly rate of pay, without charging for employee benefits, for gathering documents in response to Lee's November 23, 2009 public records request. (T-126; T-209-10; T-235; R2-1391; R2-1397).

After numerous communications between Lee and the Pension Fund, counsel for the Pension Fund sent Lee a letter dated January 12, 2010. (R2-1399-1400). In this letter, the Pension Fund's counsel explained:

> Given the small size of the Fund staff and the large population served, it is impossible to assign one of the regular staff members to you for the extended time period you have requested. Your earlier email indicated a desire to spend approximately 8 hours on a single day reviewing the records. Accordingly, the Fund is prepared to hire a trained individual to be present while you examine the records. You will be responsible for the cost of that person, estimated to be $35.00 per hour, plus the cost of the staff time to assemble the requested documents and examine them to make sure that exempt material is removed.
>
> . . . The other alternative is to provide for inspection of the records on a Saturday when either Mr. Keane or Mr. Cohee may be present. Their hourly rates are considerably more costly than the temporary employee. Should you finish your review earlier, any savings of employee time will be refunded.

(R2-1399-1400).

Lee, however, repeatedly refused to pay the estimated hourly wages for an employee to supervise his inspection of the Pension Fund's records. (R2-1393-95; R2-1534-35). After tendering payment to the Pension Fund for $326.40 in August 2010, Lee received responses to his records requests. (T-148; T-245; R2-1419).

Procedural History[5]

The instant case was commenced by Lee, then acting *pro se,* filing a Complaint for Mandamus on or about January 15, 2010, in the Circuit Court for the Fourth Judicial Circuit. (R2-01-02). Without the trial court having issued an alternative writ of mandamus as required by Fla. R. App. P. 9.100, Lee served the Board with a summons and a copy of his Complaint, contrary to established law regarding the proper procedure for seeking a writ of mandamus. In response to Lee's improper service on the Pension Fund, on February 4, 2010, the Fund filed a Motion to Quash Service of Petitioner's Complaint for Mandamus. (R2-95-98). Within this time frame, Lee made a multitude of unsubstantiated accusations of ethical and criminal misconduct against Pension Fund employees and agents, circuit court judges, and

[5] There were three separate proceedings in the First District Court of Appeal arising from this case. The first, Case No. 1D11-4458, involved an appeal and a cross-appeal on the merits of the trial court decision. That decision was per curiam affirmed, without opinion. The second, Case No. 1D12-0587, involved an appeal by Lee of the order denying attorney fees. That is the case before this Court. The third, Case No. 1D12-0818, involved an appeal of the order granting court costs to Lee which was resolved by the *per curiam* affirmance on the merits. All three cases were consolidated at the district level for purposes of the record and for travel as they stem from the same circuit court case. The Petitioner has filed, contemporaneously with this brief, a motion to take judicial notice of the record in 1D11-4458, as it is necessary for a complete understanding of the facts of this case.

court personnel.[6] On May 21, 2010, Circuit Judge James H. Daniel entered an Order Granting Motion to Quash Service of Complaint. (R2-722). On May 27, 2010, Judge Daniel entered an Order Denying Alternative Writ of Mandamus. (R2-723-26).

Following the filing of an Amended Complaint, a bench trial was conducted on March 18, 2011, and March 24, 2011. Both the Pension Fund and Lee submitted written closing arguments. (R2-1238-82; R2-1283-1300). On June 24, 2011, Judge Daniel entered a Final Declaratory Judgment. (R2-1301-1314). With respect to Lee's November 23, 2009 public records request, the Court found that the Pension Fund's charge of $326.40 was reasonable. (R2-1304). In making this determination, the

---

[6]While noting Lee's repeated actions in making unsubstantiated allegations of wrongdoing is relevant to demonstrating the reasonableness of the conditions imposed by the Pension Fund upon Lee's access to its records, it is not necessary to embark upon a lengthy discussion of each individual allegation. The record in this case is replete with dozens of inflammatory and accusatory communications from Lee. An abundance of evidence and testimony establishes Plaintiff's repeated and unsubstantiated accusations of misconduct, and otherwise rude and hostile behavior, against judicial staff (T-155-57; T-159; R2-1536-37; R2-1539; R2-1545-46; R2-1547-48; R2-1549), members of the Pension Fund's Board of Trustees (T-129-31; T-137; T-142; T-155-56; R2-1401-02; R2-1403-04; R2-1410-11; R2-1414-15; R2-1544), the Pension Fund's executive officers (T-119-22; T-126-27; T-130; T-137; T-141; T-146; T-160-61; R2-1393-95; R2-1403-04; R2-1410-11; R2-1414-15; R2-1550), Florida Bar counsel (T-144-45; R2-1558), and the Pension Fund's counsel (T-129-30; T-140; T-142; T-146; T-154-55; T-159; R2-1401-02; R2-1405-07; R2-1414-15; R2-1539; R2-1541; R2-1543; R2-1547-48; R2-1552-57). Lee himself has admitted that he is difficult to deal with and that some of his language was "over the top." (T-159; T-163). Despite this behavior, the Fund conducted itself in accordance with the law.

Court specifically noted that Lee "presented a **broad** public records request to the Pension Fund dated November 23, 2009." (R2-1302) (emphasis added). The Court twice noted that Lee's November 23, 2009 was extensive, finding that it was "broadly worded and sought a large number of records" and that it "was broadly worded in a manner **similar to a discovery request** in a legal action." (R2-1304) (emphasis added).

The Trial Court's Findings on the Merits

The Court ruled for the Fund on all but two discrete matters. The Court found that the Pension Fund's condition requiring Lee to agree to pay $27.66 per hour for a Pension Fund employee's future time spent related to his records request was inconsistent with Chapter 119. (R2-1306). The Court found, in pertinent part:

> As to the requirement that Plaintiff sign a form agreeing to pay $27.66 per hour for Ms. Gorman's time to make copies, the imposed condition was inconsistent with the law under Chapter 119. §119.07(4)(d), Fla. Stat., allows a public agency to assess a special service charge for making copies, over and above the actual cost for duplication, but only 'if the nature of volume of public records requested to be inspected or copied . . . is such as to require the extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency.' An agency cannot assess a special service charge every time there is a request to copy public records. As with inspections, the copy request must require 'extensive clerical or supervisory assistance.' This was not explained to the Plaintiff and he was, instead, given information that he would have to pay $27.66 per hour no matter what and told this before he ever determined what, if anything, he wanted to copy.

> However, 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 charged related to copying public records, rather than a violation that originated from a policy or standard practice on the part of the Pension Fund. . . .

(R2-1306).

The Court, additionally, ruled that the Pension Fund "violated the Public Records Act by insisting that Plaintiff pay $35.00 per hour in advance for a Pension Fund employee to remain with the Plaintiff at all times while he inspected the documents compiled in response to his November 23, 2009 request." (R2-1308). In making this ruling, the Court found that "none of the documents produced in response to the November 23, 2009 request have been identified as originals in need of a 'heightened degree of protection from alteration or destruction.'" (R2-1309). The Court went on to find as follows:

> Although the proposed $35.00 charge was in violation of Chapter 119, the court again finds that the Pension Fund's actions did not amount to a knowing or willful violation. The Pension Fund did not have any case law that was on point to provide guidance and its reliance on the opinion of the Attorney General found at *Op. Att'y Gen. Fla.* 2000-11 was reasonable. The court's determination that the Pension Fund violated the Public Records Act is based upon the court's determination that the reasoning employed by the Attorney General in *Op. Att'y Gen. Fla.* 2000-11 should be confined to situations where the records are originals or incapable of being replaced. This legal issue was a matter of first impression in an area of the law that must be judged on a case-by-case

> basis. Simply because the court has come to a different interpretation and application of the law under such circumstances does not, in any way, rise to the level of a willful violation.

(R2-1310).

The Board appealed and Lee cross-appealed on the respective issues in which each did not prevail. The District Court of Appeal affirmed the decision on the merits without opinion. (Case No. 1D11-4458).

The Attorney's Fee Proceedings

On September 15, 2011, Lee filed a Motion for attorneys' fees under Section 119.12, Fla. Stat. (R-6-35). The Pension Fund filed a memorandum of law in opposition to Lee's motion for fees. (R-72-80). The trial court held a hearing on December 15, 2011. (R-36-37; R-100-129) and on December 19, 2011, entered an order denying Lee's motion for fees. (R-81-84). The trial court found that 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." (R-81) (emphasis added).

Lee moved for rehearing on his motion for attorneys' fees (R-85-90), which was subsequently denied by the trial court (R-91). On January 31, 2012, the trial court entered its Final Judgment as to Costs, providing Lee with entitlement to collect costs incurred in the underlying action. (R-92-93). On February 15, 2012, Lee filed a Notice of Appeal, challenging the trial court's denial of his motion for attorneys' fees. (R-94-97).

The First District Court of Appeal reversed the order denying fees based on a 1984 amendment to Section 119.12, Fla. Stat. which removed the word "unreasonably." *Lee v. Board of Trustees*, 113 So.2d 1010 (Fla. 1st DCA 2013). The First District found, in conflict with its earlier affirmance of the trial court order finding no refusal to provide records that the Board was liable for fees because it failed to disclose records. *Id*. at 1010. The Board timely invoked the conflict jurisdiction of this Court which accepted jurisdiction on June 18, 2014.

SUMMARY OF THE ARGUMENT

A public agency is not liable for attorneys fees when it does not "unlawfully refuse" to produce records and otherwise acts reasonably and in good faith. The Supreme Court and the Third, Fourth, and Fifth Districts correctly interpret Section 119.12, Florida Statutes, to deny attorneys fee when the trial court determined that the agency had a reasonable, good faith belief in its legal position and there was no

unlawful refusal to permit inspection of public records. This Court should abide by its own precedent, adopt the reasoning of the Third, Fourth and Fifth District and reverse the First District Court of Appeal's decision below.

The First District 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*, 113 So. 3d 1010 (Fla. 1st DCA 2013). In so holding, the First District erroneously relied upon a 1984 amendment to Section 119.12 which removed the necessity of a showing that an agency "unreasonably" refused inspection of public records. The First District, however, ignored a 2007 amendment to Section 119.07(1)(c) that unambiguously inserted "good faith" and "reasonable" efforts back into the Sunshine Law. The First District's erroneous decision below interprets Section 119.12 in a vacuum, without reference to the foundational requirements in Section 119.07(1)(c), thereby improperly rendering the 2007 amendment meaningless.

Moreover, the First District's decision below amounts to a judicially created and punitive strict liability standard. Using attorney's fees as a sanction penalizing "good faith" action by public agencies is contrary to the design of Chapter 119 and overlooks the fact that Chapter 119 already contains a detailed penalty in Section

119.10. The Legislature is well capable of creating a strict liability statute and has done so in such diverse areas as workers' compensation, water quality and prohibited blood alcohol levels while operating a motor vehicle.

Accordingly, the Court should refuse to legislate and penalize governmental agencies who, while acting under the Sunshine Law, are genuinely in doubt, do not unlawfully refuse to produce records, and otherwise acts reasonably and in good faith.

STANDARD OF REVIEW

This case involves a judicial interpretation of Section 119.12, Fla. Stat. Judicial interpretations of statutes are pure questions of law subject to de novo review. *Johnson v. State*, 78 So.2d 1305, 1310 (Fla. 2012). Whether an agency's action concerning the Public Records Act was unreasonable so as to justify an award of fees against it under Section 119.12 is a question of fact for the trial court and will not be disturbed upon appeal unless the trial court's finding is unsupported by the evidence. *Woodfaulk v. State*, 935 So.2d 1225 (Fla. 5th DCA 2006).

ARGUMENT

ATTORNEYS FEES ARE NOT AVAILABLE UNDER SECTION 119.12 WHEN THE AGENCY ACTED ACT IN GOOD FAITH, ITS TECHNICAL 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".

A. The Decisions of this Court and the Third, Fourth, and Fifth District Courts of Appeal Support the Board

The First District's decision below conflicts with this Court's decision in *New York Times Company v. PHH Mental Health Services, Inc*., 616 So. 2d 27 (Fla. 1993) and the decisions in *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). The trial court decision denying fees should be affirmed and the First District's *per curiam* decision should be reversed.

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 this 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 Lee's vague and voluminous public records requests regarding the applicable procedure for records custodian supervision of the inspection process, which is required under Section 119.07(1). The trial court concluded that the Board had a good faith belief in the correctness of its position and refused to award fees. (R- 81-84). The First District affirmed the trial court's determination that the Board did not "unlawfully refuse" to permit inspection and copying of records. (App. 0018). While a *per curiam* affirmance is not *stare decisis*, it is the law of the case. *State, Commission on Ethics v. Sullivan*, 430 So.2d 928, 932 (Fla. 1st DCA 1983). Yet, despite affirming the trial court's conclusion that the Board did not unlawfully withhold records, the First District nevertheless held Lee was entitled to fees under Section 119.12. (App. 019). Such a finding of unlawfully held records is a specific statutory condition for the award of fees against an agency.

Contrary to the First District, the Third District in *Knight Ridder* held 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 adopted the reasoning of *Knight Ridder* in *Althouse v. Palm Beach County Sheriff's Office* 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)(indicating that the intent of Chapter 119 was to prevent agencies from denying access to public records "without a valid reason"). *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 "good faith and reasonable belief").[7]

The Fifth District likewise 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

---

[7] *Alston* describes the issue as whether record evidence supports the trial court's conclusion that the city had a good faith "and" reasonable belief. 882 So. 2d at 436. *Althouse* states the question as whether the Sheriff produced evidence of a reasonable "or" good faith belief in the soundness of his refusal to produce records. 92 So. 3d at 902. *See also Knight Ridder* at 1269 (framing the issue as "whether the public entity has a 'reasonable' *or* 'good faith' belief in the soundness of its position")(emphasis added).

but declining to award fees).[8]

In reaching a contrary result, 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). 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. *Id.* at 29 & 30.[9]

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

---

[8] *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.

[9] 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.

unlawful refusal." *Id.* at 29. Nowhere in the *PHH* decision did this Court determine that the good faith exception *only* applied to private contractors. Equally important, *PHH* reasoned that attorney fee awards served the purpose of Chapter 119 when the person seeking records was confronted by a "reluctant public agency." *Id.* at 29. That purpose is not served when there is no evidence that the public agency is acting "reluctantly"[10] or "stonewalling".[11]

B. The First DCA Opinion Ignores the Recent Legislative History of Chapter 119

The First District decision below is also flawed since its legislative history is incomplete. According to the First District's timeline, "the legislature removed the necessity of showing that an agency 'unreasonably' refused inspection of public records" in 1984. Nevertheless, the First District ignored the subsequent amendment

---

[10] For obvious reasons. there is not much federal case law interpreting Chapter 119. Yet, even prior to the 2007 amendment to Section 119.07(1)(c) Judge Corrigan understood that evidence is required to establish that a "reluctant public agency" "wrongfully denied access to it records. *Jackson-Shaw v. Jacksonville Aviation Authority.* 510 F.Supp.2d 691, 738 (M.D. Fla. 2007) (without evidence that the agency "ignored or otherwise failed to respond" to public records request there was no "unjustified delay" or "unjustified refusal" following an "inadvertent failure to include all documents in ... an otherwise timely and substantial response").

[11] The lack of good faith was readily transparent in *Knight Ridder* where the refusal to produce records amounted to a pattern of stonewalling and "flimsy" excuses. 808 So. 2d at 1270.

to the public records law in 2007.[12]

The current version of Section 119.07(1)(c), adopted by Chapter 2007-39, Laws of Florida provides as follows:

> A custodian of public records and his or her designee must acknowledge requests to inspect or copy records 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.

(emphasis added). The title of Chapter 2007-39, S.B. No. 1760, includes the following language:

> An act relating to public records....requiring custodians of public records and their designees to respond to requests to inspect and copy public records promptly and in *good faith....*

The 2007 amendments to Chapter 119 adopt only a "good faith" requirement, not a strict liability standard. The term "good faith response" was specifically defined as including "making reasonable efforts" to determine from other officers or employees if a record exists and at what location the record can be accessed. The Legislature is assumed to know the meaning of the words in the statute and to have

---

[12] Construction of Chapter 119 properly begins with Section 119.07 because the underlying obligation to respond to public records requests is set forth in Section 119.07(1). Courts do construe statutory phrases in isolation, but rather read statutes as a whole. *C.S. v. S.H.,* 671 So. 2d 260, 268 (Fla. 4th DCA 1996) citing *U.S. v. Morton,* 467 U.S. 822, 828 (1984).

expressed its intent by the use of those words. *Overstreet v. State,* 629 So. 2d 125, 126 (Fla. 1993). It is also presumed that the Legislature intends to change the law and alter the meaning of a statute when it amends a statute. *Mikos v. Ringling Bros. - Barnum & Bailey Combined Shows, Inc.,* 497 So. 2d 630, 633 (Fla. 1986). The First District's erroneous decision below interprets Section 119.12 in a vacuum, without reference to the foundational requirements in Section 119.07(1)(c), thus improperly rendering the 2007 amendment meaningless.

The trial court below specifically observed that "[u]nfortunately, the courts have been less than clear on this issue." (R- 82). Even the First District has acknowledged instances where at least one "learned" trial judge confessed "to a bit of frustration" in attempting to apply the Sunshine Law. *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17, 23 (Fla. 1st DCA 2008)(denying fees on behalf of a private contractor who acted in good faith and did not unlawfully refuse to produce records).

Accordingly, the Court should refuse the First District's decision to re-write Chapter 119 and penalize governmental agencies who act in good faith compared to their private counterparts, contrary to the clearly expressed intent of the Legislature. This Court in *PHH* and the various district courts of appeal decisions correctly concluded that when any entity acting under the Public Records Law is genuinely in

doubt as to the correctness of its legal position, does not unlawfully refuse to produce records, and otherwise acts reasonably and in good faith, fees are not available under Section 119.12. This result is particularly appropriate on the facts of this case where the trial court specifically found that the Board's actions were "honest, technical mistakes" not "knowing, wilful or done with malicious intent." (R- 83-4 and R2-1306). Moreover, the "simple mistake or oversight in communicating the precise legal standard for assessing a special service charge related to copying public records" involved a legal issue of "first impression in an area of the law that must be judged on a case-by-case basis." (R2-1310)

C. Balancing the Public Policy Issues in this Case Favors the Board

While the Public Records Act, including its attorneys' fee provision in Section 119.12, is intended to assure public access to public records, it is certainly not intended to encourage litigation over hypertechnical issues, contrary to the common sense. *Simpson v. State,* 418 So. 2d 984, 986 (Fla. 1982) ("We should seek to avoid, not foster a hypertechnical application of the law."); *School Board of Palm Beach County v. Survivors Charter Sch., Inc.* 3 So. 3 1220, 1235 (Fla. 2009)("We are not required to abandon either our common sense or principles of logic in statutory interpretation."). *See also*, *Florida Dept. of Business and Professional Regulation*

v. Investment Corp. of Palm Beach, 747 So. 2d 374, 385 (Fla. 1999) (hypertechnical interpretations of a statute serve "no logical end").

If the Legislature intended Section 119.12 to serve as an immutable sanction for any dispute arising from the production of public records, the statute would say so. The objectives of the Public Records Act are not accomplished where the agency's actions are in good faith, as was the case below. *See Woodfaulk v. State*, 935 So. 2d 1225, 1227 (5th DCA 2006) (holding that fees under §119.12 are "only" justified when the court determines that the agency's refusal was "unreasonable" which is a factual question); *Jackson-Shaw, supra* (citing *Woodfaulk* and holding that the policy of using 119.12 as a sanction for the unlawful refusal to provide records was not applicable because an "inadvertent failure" did not equate to an "unlawful refusal").

Allowing an award of attorneys' fees when the trial court found that there was "no unlawful refusal" (R- 81, 84) would be contrary to the plain language and the intent of Section 119.12. Based on the Legislature's choice of language, the purpose of Section 119.12 is to encourage "responsible" and "reasonable" behavior. This objective is not served if the public agency is not acting in good faith. Indeed, the

term "reasonable" is repeatedly used throughout Chapter 119.[13]

Moreover, reasonable conditions are necessary to preserve the integrity of the public records and to offset, as permitted by the Legislature, the taxpayers' burden in responding to records requests. *See* §119.07(4)(providing for reasonable service charges based on the cost incurred); *see also* §§119.07(1)(f) & (2)(a)(discussing the treatment of confidential records and the duty to "provide safeguards to protect the contents of public records from unauthorized access").[14] Respondent's actions in this case amount to voluminous requests for virtually every record in the Board's possession.

The Public Records Act is designed to balance the public's right to access government records on the one hand with the ability of government agencies to conduct government business, ensure the security of the public's records, and to

---

[13] *See e.g.* §119.01(2) (requiring reasonable access to electronic records); §119.011(3)(d) (defining active investigations to capture "reasonable, good faith belief"); §119.035(1) (requiring "reasonable measures to ensure compliance"); §119.07(1)(a) & (c) (providing for inspection at reasonable times under reasonable conditions and requiring reasonable efforts to locate records); §119.071 (providing for written statements addressing reasonable efforts to protect identification and location information); §119.0713(2)(a) (describing active investigations by local government agencies as involving good faith and "reasonable dispatch");

[14] *See also Alston v. City of Riviera* Beach, 882 So. 2d 436 (Fla. 4th DCA 2004) and *Board of County Commissioners of Highlands County v. Colby,* 976 So. 2d 31, 35 (Fla. 2d DCA 2008)(discussed *infra*)

defray the cost associated with public records requests, on the other. *Fuller v. State ex. rel. O'Donnell*, 17 So. 2d 607 (Fla. 1944) (when a citizen applies to inspect public records, it is the custodian's duty to accommodate the applicant and at the same time safeguard the records).

As the Second District Court of Appeal noted in *Board of County Commissioners of Highlands County v. Colby,* 976 So. 2d 31, 35 (Fla. 2d DCA 2008), "Florida has long required those who seek [public] records to defray the extraordinary cost associated with their request." The Court went on to note that advance deposits are entirely permissible "given the legislature's determination that taxpayers should not shoulder the entire expense of responding to an extensive public records request." *Id.* at 37. The trial court properly recognized that an award of fees in this case, particularly in the absence of either precise statutory language or settled jurisprudence, would upset this legislative balance.

From its beginnings in the early 20th century, Florida has recognized a broad public records law. But, as Justice Taylor wrote in *State ex. rel. Davis v. McMillan*, 38 So. 666, 668 (Fla. 1905) "...while the public have this right, it must at all times be exercised *reasonably,* with a due regard to the rights and duties of the clerk." (emphasis added). For the same reason, the First District in *Florida Institutional Legal Services v. Florida Dept. of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991),

upheld as *reasonable* an administrative rule providing for special charges to persons making extensive public records requests.

D. Section 119.12 is Not a Strict Liability Statute

The First District's decision below amounts to a judicially created and punitive strict liability standard. If the Legislature had intended for the fee provision in Section 119.12 to be based on strict liability, regardless of the good faith and reasonableness of the agency's action, it could have done so. *Spence-Jones v. Dunn*, 118 So. 3d 261, 263, n. 3 (Fla. 3d DCA 2013). In fact, the Legislature has adopted strict liability statutes on several occasions. *See, e.g.*, *Turner v. PCR*, 754 So. 2d 683 (Fla. 2000)(Workers' Compensation statute, Section 440.11, is a strict liability law); *Aramark Uniform and Career Apparel v. Easton*, 894 So. 2d 20 (Fla. 2004)(Water Quality Assurance Act, Section 376.313, is a strict liability statute); *Sabree v. State,* 978 So.2d 840 9Fla. 4th DCA 2008)(blood alcohol level statute, Section 316.193, is a strict liability statute)

Using attorney's fees as a sanction penalizing "good faith" action by public agencies is contrary to the design of Chapter 119. The First District overlooks the fact that the Legislature included in Chapter 119 a detailed civil and criminal penalty section for violations of the statute, providing for a range of punishments depending on the violator's level of culpability. *See* §119.10(2). In fact, the First District itself

has held that Section 119.07, and the corresponding criminal penalties only permitted conviction for knowing and willful violations; not for mere negligence. *State v. Webb*, 786 So. 2d 602 (Fla. 1st DCA 2001).

The various levels of culpability articulated in Section 119.10, and the repeated use of the words "good faith" and "reasonable" throughout the entire statute confirm that the First District's establishment of strict liability for *any* violation runs contrary to the legislative intent, making the First District's construction of Section 119.12 erroneous and unnecessary.

CONCLUSION

Petitioner, Board of Trustees, Jacksonville Police and Fire Pension Fund, respectfully prays that this Honorable Court disapprove the First District's decision below and approve the decisions of the Third, Fourth and Fifth Districts as consistent with this Court's holding in *PHH Mental Health Services, Inc*. and the plain language of the legislature, and reinstate the trial court's order denying fees.

Respectfully submitted,
KLAUSNER, KAUFMAN, JENSEN AND LEVINSON
ROBERT D. KLAUSNER
Florida Bar No. 244082
ADAM P. LEVINSON
Florida Bar No. 055344
Attorneys for Petitioner
10059 N.W. 1st Court
Plantation, Florida 33324
Telephone: (954) 916-1202
Fax: (954) 961-1232

By: /s/ ROBERT D. KLAUSNER
ROBERT D. KLAUSNER
Fla. Bar. No. 244082
bob@robertdklausner.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic mail this **14th** day of July, 2014 to:

Robert M. Dees, Esquire
Milam Howard Nicandri Dees & Gillam P.A.
14 East Bay Street
Jacksonville, Florida 32202
rdees@milamhoward.com

Jonathan D. Kaney Jr., Esquire
Kaney & Olivari, P.L.
55 Seton Trail
Ormond Beach, Florida 32176
jon@kaneyolivari.com

By: /s/ ADAM P. LEVINSON
ADAM P. LEVINSON

CERTIFICATE OF COMPLIANCE

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

By: /s/ADAM P. LEVINSON
ADAM P. LEVINSON

W:\Wdocs\LLP\900342\GM\00051711.WPD