IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-410

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA

Petitioner,

vs.

SUN-SENTINEL, INC.,

Respondent.
_____/

BRIEF OF RESPONDENT SUN-SENTINEL ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The sole issue before the Court is whether a Florida citizen seeking access to the public records of DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCF") must travel to Tallahassee to obtain them. Respondent, SUN-SENTINEL, INC., the publisher of the South Florida Sun-Sentinel newspaper ("the SUN-SENTINEL"), filed a petition under Florida Statutes § 119.07(7)(2001) in an ongoing criminal proceeding in the Circuit Court of the Fifteenth Judicial Circuit (Palm Beach County) for access to DCF records relating to minor children in the custody of DONALD and AMY HUTTON who were criminally charged with child neglect. Slip op. at 1.

The SUN-SENTINEL invited DCF to participate by electronically sending it a facsimile copy of the petition. The following day, DCF moved to dismiss the petition asserting, among other things, that venue was exclusively in Leon County. The trial court denied the motion, and DCF appealed.[1]

On February 19, 2003, the Fourth District affirmed the trial court. Regarding the venue issue now before this Court, it said:

> We find no error with the trial court's denial of a change of venue. Although it is true that ordinarily a state agency has a common law right under the general venue statute to be sued only in the county where it has its headquarters -- in this instance, Leon County -- that right does not apply here. One of the permissible bases for venue under the general venue statute is the place where the property in litigation is located. *In this case, the documents to*

[1] Petitioner also asserted insufficiency of process and lack of jurisdiction of the Palm Beach circuit court. Those arguments were likewise rejected by the trial court, as well as the Fourth District, which held that DCF waived its right to challenge the sufficiency of service by seeking the transfer of venue.

> *which access is sought are being maintained by DCF here in Palm Beach county.*

Id. (footnote omitted & emphasis added) Significantly, the Fourth District observed that the SUN-SENTINEL was not seeking a judgment against DCF, any state agency or the State of Florida either for money or its official, non-record-keeping policies. It only sought to exercise its right of access to public records maintained within the jurisdiction of the circuit court already hearing the ongoing Hutton matter. Id. at 1-2. Noting that the "home court" venue privilege is a "judicially created embellishment on the general venue statute," the court found that based on the facts before it, there was no policy motivating its adoption in this particular case. Id. at 2. As a policy matter, it said that it would "severely burden the right of access to public records" if citizens were required "to tread their way to Tallahassee to bring a judicial proceeding just to settle the right to do so", and that no such burden was ever intended by the public records laws of this state. Id. The court therefore concluded that:

> [T]he correct use of the general venue statute in a case involving access to public records entirely located in one county is that such an action may be brought where the records are being kept and where access is denied.

Id. at 3. This petition followed.

STANDARD OF REVIEW

The standard of review is *de novo.*

SUMMARY OF ARGUMENT

DCF asserts that the decision is in conflict with a decision of the First District, yet the case identified is cited only in the dissenting opinion of the decision below, and a dissent cannot serve as a basis for asserting conflict. DCF contends, however, that the dissent correctly states the law and that the majority has improperly extended an exception to its venue argument. The contention is without merit because the Fourth District did not decide this case on the basis of an *exception* to DCF's rule of law regarding venue.

Rather, it correctly held that DCF's venue contention simply did not apply.

DCF concludes by contending that the Fourth District's decision directly affects a class of constitutional and state officers. The contention likewise has no merit. No duties, powers, validity, formation, termination or regulation of any class of constitutional or state officers is even at issue, much less affected.

ARGUMENT

I

This Court's determination of conflict jurisdiction is constrained by the "four-corners" of the *majority* opinion. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). In this case, it is clear from the majority opinion that jurisdiction does not exist. While DCF contends that the decision below conflicts with Jacksonville Electric Authority v. Clay County Utility Authority, 802 So. 2d 1190 (Fla. 1st DCA), rev. dismissed, 821 So. 2d 293 (Fla. 2002), that decision is neither cited nor discussed in the majority's analysis. Instead, it is referenced only in the dissent. Because a "dissent" is not a "decision" on which conflict can be based, an "express and direct" conflict cannot be shown from a dissenting opinion. Philip J. Padovano, FLORIDA APPELLATE PRACTICE § 3.10 at 53 (West 2003); Reaves, supra; Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Tacitly acknowledging this fact, DCF asserts that there is a "misapplication conflict". It argues that Jacksonville Electric recognizes only three exceptions to the "home court" venue privilege and that the public records request in this case does not fall into any of the exceptions. The argument is misleading and ignores the very basis for the Fourth District's holding, which was limited to a public records request *made within an ongoing action where the records were actually located*. The petition for public records was not filed "against" DCF. Rather, it was filed in the ongoing Hutton matter to establish "good cause" in that proceeding, and DCF was invited to participate. As such, the Fourth District determined that the "home court" venue privilege had no application at all, so it was unnecessary to deal with any exceptions.

In Jacksonville Electric, a local utility filed suit against the city electric authority in Clay County. The city electric company moved for a change of venue and the motion was denied. On appeal, the First District reversed. In its opinion, the court said that while a governmental agency has a "home court" venue privilege to be sued in the county where it maintains its principal headquarters, the privilege is not absolute. It then identified the three exceptions to the rule -- waiver by statute, judicial discretion where the governmental entity is an alleged joint tortfeasor, and the so-called "sword wielder" doctrine, which is triggered where a plaintiff's constitutional rights are endangered by a state agency. Id. at 1192.

The court in Jacksonville Electric then went on to note a policy statement of this Court appearing in Board of County Commissioners of Madison County v. Grice, 438 So. 2d 392 (Fla. 1983), to the effect that a trial court has discretion to dispense with the "home court" venue privilege where dictated "by considerations of justice, fairness, and convenience under the circumstances of the case." Id. at 395; Jacksonville Electric, 802 So. 2d at 1194. It is evident from the opinion that the First District looked to find an applicable exception to the privilege. But given the facts before the court, it felt "constrained by prior case law" to enforce the rule and reverse. Id.[2]

Quite apart from the fact that Jacksonville Electric is mentioned only in the dissent, that case did not involve the type of relief requested here. As the Fourth District observed, the SUN-SENTINEL seeks no judgment for damages or declaratory relief against DCF binding that agency's policies and practices. That fact alone renders the "home court" venue privilege inapplicable. Slip Op. at 1-2. The underlying claim in this case is a petition asserting a constitutionally and legislatively protected right to gain access to public records located in Palm Beach County *and it directly concerns people who live in that county.* Moreover, an order enforcing access rights in this case cannot affect any record-keeping policy that applies

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[2] The First District certified as a question of great public importance whether trial court discretion would lie in the absence of one of the three exceptions. Judicial history discloses that the matter never reached this Court.

to DCF in some other venue, as each access proceeding stands on its own. Ironically, DCF itself has previously initiated public records matters outside of Tallahassee, see State v. Deeson, 30 Med. L. Rep. 1990 (Fla. 15th Cir. Ct. Dec. 18, 2001), and it has regional offices in places throughout the state that can *and do* handle such matters routinely. This, of course, is in keeping with the constitutional and statutory policy mandate of this state that public records laws are for the *public* good and convenience and are *presumptively open*. See Art. I, § 24, Fla. Const.; Florida Statutes § 119.01(1).[3]

In a creative attempt to establish a conflict, DCF zeroes in on the "sword wielder" doctrine, a rule of law never mentioned in either the majority opinion or the dissent. DCF nevertheless imputes the doctrine to the majority, and then in a "bootstrap" manner argues that it does not apply.[4] As mentioned, the facts of this case demonstrate that this is not a situation where the "home court" venue privilege applies at all, so there is no need to analyze *any* exception, much less one that is nowhere to be found in the decision under review. "Express and direct" conflict means exactly that. There is no such thing as "implied" conflict. But even if there were, DCF still would fail in its attempt to establish jurisdiction. The very mention of a public records request goes to the heart of public policy and constitutional rights of Florida citizens. When a

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[3] DCF denied access in *Palm Beach County* -- not Leon County. As the majority makes clear, everything implicit in the public records laws suggest that citizens who seek access to public records must not be inconvenienced and burdened with unnecessary travel. Slip op. at 2. Chapter 119 itself is couched in terms of this state's "policy" of open governmental records; that it is the "duty" of governmental agencies to produce them promptly and effectively; *and that any refusal of access warrants an expedited hearing*. Given this policy, it would be cynical to suggest that an agency maintaining records in Palm Beach County could avoid its obligation to produce its records there or that it could judicially trump a request therefor by forcing a venue change to Leon County.

[4] DCF contends that to be applicable, there must be an alleged violation of some constitutional right; that here there is none; that the state must be the initial "sword wielder"; and that here it was not.

request is refused, fundamental rights are directly impacted. Refusing access casts DCF as the "sword wielder" asserting a specious venue argument to delay or avoid access altogether. As DCF's own authorities make clear, a state agency may properly be sued in the county were the act complained of is being committed, see State Dep't of Labor & Emp. Sec. v. Lindquist, 698 So. 2d 299, 302 (Fla. 2d DCA 1997), and there is no distinguishing feature of this case to lead any court to a contrary result.

In a last-ditch effort to obtain conflict review, DCF asserts that the decision of the Fourth District interjects ambiguity into the "home court" venue privilege. To say the least, the authorities are consistent. First of all, each and every case cited by DCF recites the *same* definition of the privilege and the *same* definition of the "sword wielder" exception. Secondly, not a single authority -- either in holding or dictum -- describes a fact pattern like this one where the underlying action was already in existence; where the records were part and parcel of the existing action; where the records were requested in the existing action; and where access was then and there refused.[5] It would be contrary to Florida's fundamental policy of open government if state agency access matters like this one could be litigated only in Leon County. Clearly, the underlying public policy would be subverted by placing such a burden both on Florida citizens and the courts of Leon County. This Court should not countenance such a result.

II

In conclusory fashion, DCF contends that the decision below expressly affects the powers and duties of constitutional or state officers. In Spradley v. State, 293 So. 2d 697 (Fla. 1974), this Court held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test. It must "directly and, in some way, exclusively affect the duties, powers, validity, formation, termination, or

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[5] In fact, the sole duty imposed by the SUN-SENTINEL's request was on the trial court to determine the propriety of the SUN-SENTINEL's "good cause" petition, *an issue which turns on the privacy and fair trial rights of the parties to the suit* -- not *DCF*.

regulation of a particular class of constitutional or state officers." Id. at 701. In other words, any simple modification, construction or extension of some general principle or body of law is not enough.[6] In this case, the impact of the Fourth District's decision addresses a judicially created exception to a *venue* statute, and the holding is limited to the facts of this case. Moreover, the decision does not impact any *officer* of the agency. DCF's argument in this regard falls short of the requi-site jurisdictional basis under Art. V, § 3(b)(3), Fla. Const.

CONCLUSION

There is no basis for jurisdiction in this case. The request therefor must be denied.

[6] See Gerald Kogan & Robert C. Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 NOVA L. REV. 1151, 1222 (Winter 1994).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 8th day of April, 2003 to all counsel on the attached service list.

CERTIFICATE OF COMPLIANCE WITH FONT SIZE

The undersigned hereby certifies that the font of this brief is Courier New 12.

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