IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA,	)	
Petitioner,	)	
v.	)	**CASE NO. SC03-410**
SUN-SENTINEL, INC.,	)	
Respondent.	)	
_____ /		

REPLY BRIEF OF THE DEPARTMENT OF CHILDREN AND FAMILIES, STATE OF FLORIDA

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I. THE TRIAL COURT LACKED PERSONAL JURISDICTION

A. The department's motion to change venue did not waive its objection to personal jurisdiction because the motion was not a request for affirmative relief.

Notwithstanding the express provision in Florida Rule of Civil Procedure 1.140(b) that "no defense or objection is waived by being joined with other defenses or objections," Sun-Sentinel contends that the Department waived its objection to personal jurisdiction by simultaneously moving to dismiss or change venue. (Answer Brief at 28-30). Sun-Sentinel attempts to reconcile the inconsistency between its position and the express terms of Rule 1.140 by asserting that the rule permits a defendant to raise a "mere objection" of improper venue but not to file a "motion to *transfer* venue." (Answer Brief at 29) (emphasis in original). According to Sun-Sentinel, a motion to transfer requests affirmative relief from the court and is therefore inconsistent with an objection to personal jurisdiction, whereas a "mere objection" to venue seeks no affirmative relief and therefore does not constitute waiver.[1]

This artificial and hypertechnical distinction between the assertion of a defense by objection and assertion by motion finds no support in Rule 1.140 or the cases

[1]To the extent Sun-Sentinel suggests that the Department's motion sought affirmative relief because it contained a prayer for attorneys' fees, this suggestion was rejected in *Heineken v. Heineken*, 683 So. 2d 194, 197-98 (Fla. 1st DCA 1996).

applying it. Rule 1.140 provides that the defenses of lack of personal jurisdiction, improper venue, and lack of service, among others, "may be made by motion at the option of the pleader." Fla. R. Civ. P. 1.140(b). Further, the portion of the rule protecting against waiver expressly applies to defenses raised by motion: "No defense or objection is waived by being joined with other defenses or objections in a responsive pleading *or motion*." *Id.* (emphasis added). Thus, Rule 1.140(b) expressly permits a venue objection to be raised by motion without waiver of a simultaneous objection to personal jurisdiction. This approach is consistent with the purpose of the rule, which is to encourage quick presentation of defenses and eliminate the need for successive motions. *See* Fla. R. Civ. P. 1.140, *Author's Comment-1967.*

None of the cases applying Rule 1.140(b) have limited its application to defenses that are raised by "mere objection" rather than by motion. Indeed, in one of the primary cases relied upon by Sun-Sentinel and the Fourth District in support of waiver, this Court held that a defendant did not waive his objection to personal jurisdiction by simultaneously filing a motion to declare prior judgments void. *See Babcock v. Whatmore*, 707 So. 2d 702, 705 (Fla. 1998) (motion for relief from judgments raised affirmative defenses which could be joined or pled in the alternative with jurisdictional challenge). *See also Roby v. Nelson*, 562 So. 2d 375, 377 n.1 (Fla. 4th DCA 1990) (personal jurisdiction not waived by simultaneous filing of motion to transfer venue); *M.T.B. Banking Corp. v. Bergamo Da Silva*, 592 So. 2d 1215 (Fla.

3d DCA 1992) (personal jurisdiction not waived when raised with other defenses in motion for judgment on the pleadings); *Montero v. DuVal Federal Sav. & Loan Ass'n.*, 581 So. 2d 938, 939 (Fla. 4th DCA 1991) (objection to service not waived when raised in motion to quash service of process and joined with motion to set aside default judgment). *See also Mason v. Hunton*, 816 So. 2d 234, 235 (Fla. 5th DCA 2002) ("A party is free to assert defenses or take other defensive actions in a motion while maintaining a personal jurisdiction defense."). If Sun-Sentinel is correct that a defendant waives an objection to personal jurisdiction by simultaneously raising an enumerated Rule 1.140(b) defense in the form of a motion, then all of these cases, including this Court's decision in *Babcock*, were wrongly decided.

Although Sun-Sentinel continues to rely heavily upon the Second District's decision in *Hubbard v. Cazares*, 413 So. 2d 1192 (Fla. 2d DCA 1981), *rev. denied*, 417 So. 2d 329 (Fla. 1982), in support of its assertion that a motion to transfer venue constitutes a request for "affirmative relief," Sun-Sentinel fails to acknowledge the important distinctions between *Hubbard* and the present case. The defendant in *Hubbard* sought a discretionary change in venue because she believed she could not receive a fair trial where the action was brought, whereas the Department sought to change venue because it was "improper" – a defense specifically enumerated under Rule 1.140(b). Thus, the discretionary relief sought by the *Hubbard* defendant's motion to transfer venue was "affirmative" as opposed to the purely defensive measure

taken by the Department. Additionally, unlike this case, the *Hubbard* defendant's motions challenging jurisdiction and venue were not filed simultaneously. Given these distinctions, *Hubbard* is inapplicable to this case.

Furthermore, even in the absence of the foregoing critical distinction, the Second District's conclusion in *Hubbard* that a motion to transfer venue pursuant to Section 47.101(1)(b), Florida Statutes constitutes a request for affirmative relief which waives an objection to personal jurisdiction has never been reviewed by this Court. Although this Court has reviewed (and approved) the prefatory holding in *Hubbard* that an objection to personal jurisdiction may be waived by seeking affirmative relief, *see Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998), *Babcock* does not address the second holding in *Hubbard* regarding venue. This Court can and should now address this question, especially in light of the fact that several decisions following *Hubbard* have, expressly or impliedly, called its reasoning into question. *See Roby v. Nelson*, 562 So. 2d 375, 377 n. 1 (Fla. 4th DCA 1990) (rejecting contention that defendant waived defense of lack of personal jurisdiction by simultaneously filing motion to transfer venue); *Dimino v. Farina*, 572 So. 2d 552, 555 (Fla. 4th DCA 1990) ("[I]t seems apparent that the *Hubbard* decision incorrectly classified a motion for change of venue as a request for affirmative relief.");[2] *Heineken*

[2]Sun-Sentinel's suggestion that this Court's decision in *Babcock* overruled this portion of *Dimino* is incorrect. *Babcock* disapproved *Dimino* solely on the issue of

v. Heineken, 683 So. 2d 194, 199 n.7 (Benton, J., concurring) (Fla. 1st DCA 1996) (noting that a motion to change venue might logically be seen as a defensive maneuver rather than a request for affirmative relief).

This Court should disapprove any reading of *Hubbard* that suggests a motion to transfer venue waives an objection to personal jurisdiction, because such a reading is irreconcilable with the express provisions of Rule 1.140(b).

B. The trial court could not adjudicate Sun-Sentinel's petition without having obtained personal jurisdiction over the Department.

Sun-Sentinel contends that it even if the Department did not waive its objection to personal jurisdiction, the objection was not meritorious because Sun-Sentinel had no obligation to serve the Department with the petition seeking access to its confidential records. In support of this contention, Sun-Sentinel emphasizes the fact that Section 119.07(7)(a) does not expressly require service of process and also contends that the statute does not confer any "substantive rights" upon the Department to object to disclosure on its own behalf.

These arguments are irrelevant to the question of whether service of process is

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whether a request for affirmative relief could ever constitute waiver of a timely objection to personal jurisdiction. 707 So. 2d at 704 and 705 n.7. The *Babcock* Court had no occasion to consider whether a Rule 1.140(b) defensive motion to transfer venue constitutes a request for affirmative relief, because the motion at issue in *Babcock* was a motion for relief from prior judgments, not a motion to change venue.

required. Sun-Sentinel sought an order requiring the Department to disclose records that the Department is statutorily prohibited from disclosing. In order to afford the Department due process in adjudicating Sun-Sentinel's request for this relief, the trial court had to have personal jurisdiction over the Department. *See, e.g., Valdosta Milling Co. v. Garretson*, 54 So. 2d 196, 197 (Fla. 1951) (judgment entered against defendant without service of process was void). In order to obtain personal jurisdiction over the Department, Sun-Sentinel had to personally serve the Department with the petition. *See, e.g., Johnson v. Clark*, 198 So. 842, 844 (Fla. 1940) (where defendant was not personally served, no valid judgment could be entered against her). As this Court explained in *Valdosta Milling Co.*, while this requirement may seem technical, service of process "is not only technical, it is the gist of due process, it is fundamental to fair trial, it is the dynamo that activates the impartial administration of justice." 54 So. 2d at 197. For this reason, the Florida Rules of Civil Procedure and Florida Statutes require service of process upon the commencement of any action. *See* Fla. R. Civ. P. 1.070; Fla. Stat. § 48.031 (2001). Sun-Sentinel seeks to discard the universal requirement of service of process, and substitute in its place an approach that would only require service when the relief sought is based upon a statute containing an express service requirement and when the relief sought implicates a "substantive right." This approach would seriously jeopardize defendants' due process right to notice and an opportunity to be heard. Many, perhaps most, statutes

that create a cause of action do not contain an express service requirement. Nor do claims brought under common law theories. Under Sun-Sentinel's reasoning, none of these claims would require service of process. It is also unclear what would satisfy Sun-Sentinel's definition of a "substantive right." Precisely because such a case-by-case approach cannot be certain to comply with due process requirements, Florida's civil procedure rules and statutes do not call for any discrimination in their application.

The fundamental requirement of due process cannot be avoided by procedural gamesmanship. Thus, Sun-Sentinel's claims that the petition was filed in an existing criminal proceeding, or that the Department was a de facto party to the criminal proceeding by virtue of its capacity as a "division of the State" do not relieve Sun-Sentinel of its duty to give the Department formal notice that Sun-Sentinel sought access to the Department's confidential records. Even if Sun-Sentinel's petition is not deemed a new "action," service is still required because the petition constitutes a claim brought against a new party. *See, e.g.*, Fla. R. Civ. P. 1.180(a) (service of summons and complaint required for third party claim).[3] There is simply no support for Sun-Sentinel's implausible assertion that the State Attorney's participation in the criminal

[3]The fact that in an earlier unrelated case, *State v. Deeson*, the Department itself filed a Section 119.07(7)(a) petition in an existing criminal proceeding is irrelevant to the issue of service in this case. The Department's petition in *Deeson* did not require the involvement of any new parties to the proceeding, whereas Sun-Sentinel's petition in this case sought relief from the Department, a non-party.

case was tantamount to participation by the Department, as the State Attorney and the Department are totally unrelated agencies that reside in different branches of government. *Cf. Pirez v. Brescher*, 584 So. 2d 993, 995 (Fla. 1991) (notice of claim given to county attorney's office did not constitute notice to sheriff). Article V of the Florida Constitution does not authorize the State Attorney to represent the executive branch, and there can be no contention that he was in fact doing so in this case.

Finally, Sun-Sentinel's suggestion that the court could have ordered the State Attorney to disclose its copy of the Department's confidential records, without any participation by the Department (Answer Brief at 21 n.18), reflects a fundamental misunderstanding of the manner in which the Public Records Act is administered. This Act imposes the duty of disclosing a public record on persons who have "custody" of the public record. *See* Fla. Stat. § 119.07(1)(a) (2001). Therefore, a public record request–and any action seeking to require disclosure of a public record–must be filed against the record custodian. *See Mintus v. City of W. Palm Beach*, 711 So. 2d 1359, 1361 (Fla. 4th DCA 1998). In order to have "custody" of a public record, a person must have "supervision and control over the document or legal responsibility for its care, keeping, or guardianship." *See id.* One having temporary possession of a document does not necessarily have "custody" if he does not also have supervision, control, and legal responsibility for the document. *Id.* In this case, although the State Attorney's office may have had temporary possession of

the Department's records, the State Attorney's office was not the custodian of the records sought and therefore could not have been ordered to release them.

In sum, the Department is the entity responsible for creating and maintaining the records, is familiar with their confidential contents, and is responsible for providing access to the records in the event a Section 119.07(7)(a) petition is granted. Thus the Department is a necessary and appropriate party to any proceeding involving the adjudication of a petition seeking access to records pursuant to this subsection. Because Sun-Sentinel never served the Department, the trial court did not have jurisdiction to adjudicate the petition and the Department's motion to dismiss should have been granted.

II. THE HOME VENUE PRIVILEGE IS APPLICABLE TO A PETITION FOR ACCESS TO THE DEPARTMENT'S RECORDS REGARDING ABUSE AND NEGLECT

The Fourth District's opinion also erred by affirming the denial of the Department's motion to dismiss or change venue pursuant to the home venue privilege.

As a threshold matter, the parties dispute the appropriate standard of review to be applied to this ruling. Sun-Sentinel's blanket assertion that "venue is reviewed for an abuse of discretion" (Answer Brief at 8) fails to acknowledge the authorities which hold that venue determinations made as a matter of law are subject to *de novo* review. *See Dive Bimini, Inc. v. Roberts*, 745 So. 2d 482, 483-84 (Fla. 1st DCA 1999);

PricewaterhouseCoopers LLP v. Cedar Resources, Inc., 761 So. 2d 1131, 1133 (Fla. 2d DCA 1999). Like the defendants in *Dive Bimini* and *PricewaterhouseCoopers*, the Department alleged that venue was "improper" (as opposed to merely inconvenient), and the trial court decided the venue issue as a matter of law. There are no factual issues on appeal. Accordingly, this Court's review of the venue determination is *de novo*.[4]

A. Application of the home venue privilege to Sun-Sentinel's petition is consistent with Florida's public records law.

Sun-Sentinel and its amici argue that application of the home venue privilege to petitions brought under Section 119.07(7)(a) impermissibly burdens the public's right of "virtually unfettered" access to public records.

The right of Florida's citizens to view the records of their government is well established. *See,* Art. I, § 24, Fla. Const.; Fla. Stat. § 119.07(1)(a) (2001). However, the same constitutional provision that confers the right of access to public records also simultaneously grants the legislature authority to exempt certain records from disclosure. *See* Art. I, § 24(c), Fla. Const. The records sought in Sun-Sentinel's

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[4]The parties' disagreement on this issue reflects the core dispute in this case over whether the home venue privilege is a discretionary doctrine to be applied on a case-by-case basis, as the trial court and Fourth District held in this case, or whether it is a compulsory doctrine to be applied absent waiver or identified exception, as the First District held in *Jacksonville Elec. Auth. v. Clay County Util. Auth.*, 802 So. 2d 1190, 1192 (Fla. 1st DCA 2002).

petition fall squarely within the scope of one such statutory exemption, and at no time has Sun-Sentinel challenged the validity of this exemption. Therefore, although Sun-Sentinel and its amici seek to characterize this case as involving access to "public records," it is more appropriately characterized as involving access to records that are unquestionably *exempt* from the public record. The "right" to view exempt records is, at best, qualified.

Moreover, Floridians' right to view public records does not exist in a vacuum; it exists for the express purpose of permitting citizens to evaluate government conduct. *See, e.g., Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997) (purpose of Public Records Act is to "allow Florida's citizens to discover the actions of their government"). Therefore, although abuse and neglect records are ordinarily exempt from disclosure due to privacy interests, the legislature enacted an exception to this exemption in order for citizens to "adequately evaluate the actions of the Department of Children and Family Services and the court system" in protecting the vulnerable adults and children of this state. Fla. Stat. § 119.07(7)(a) (2001).

In order to advance the overriding purpose of Section 119.07(7)(a)--evaluation of the Department's action--petitions brought under this section should be adjudicated in one place: the county of the Department's headquarters. The Department's conduct can only be meaningfully evaluated if subjected to consistent standards and

scrutiny. As the home venue cases emphasize, such consistency cannot be ensured by litigation in courts throughout the state.

Additionally, Sun-Sentinel and its amici dramatically overstate the "burden" on public records access imposed by application of the home venue privilege. Unlike the rules or conditions struck down in the cited cases, application of the privilege does not "restrict or circumvent" the public's right of access to public records. *See Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984) (city could not automatically delay release of personnel files to provide notice to affected employee), *appeal dismissed sub nom., DePerte v. Tribune Co.*, 471, U.S. 1096 (1985); *Davis v. Sarasota County Public Hosp. Bd.*, 480 So. 2d 203 (Fla. 2d DCA 1985) (hospital required to disclose complete records, not mere extract of records), *rev. denied*, 488 So. 2d 829 (Fla. 1986); *State ex rel. Davidson v. Couch*, 158 So. 103, 105 (Fla. 1934) (city required to assist requester in deciphering records where records not understandable without explanation or "code book"). The challenged "policy" in the present case, the long-standing common law home venue privilege, does not restrict access to any records or require a petitioner to jump through any procedural hoops beyond those contained in the statute. Application of the venue privilege simply specifies the venue in which the statutory procedure is to occur.

Sun-Sentinel's assertion that adjudication of Section 119.07(7)(a) petitions in the Department's home county will result in impermissible delay is similarly overstated

and unsubstantiated. First, the portion of *Cannella* quoted by Sun-Sentinel ("[D]elay, no matter how short, impermissibly interferes with the public's right [of access] . . .) refers to the disclosure of nonexempt records, not exempt records such as the ones at issue here. 458 So. 2d at 1079. Because the Department's abuse and neglect records are exempt from disclosure and may only be viewed upon a court order finding "good cause," there will always be more delay in obtaining access to these records than in obtaining access to nonexempt records. Further, Sun-Sentinel does not explain why it believes that there will be additional delay merely because a petition is required to be filed in Tallahassee. Florida attorneys may appear in any state court, pleadings can be filed by mail, and parties can appear by telephone. And it appears from the reported decisions dealing with Section 119.07(7)(a) petitions that most, if not all, such petitions are not filed by members of the public who will be "chilled" by the requirement of going to Tallahassee, but instead are filed by newspapers, television stations and radio stations represented by law firms that regularly appear in courts statewide.[5]

B. Application of the home venue privilege to Sun-Sentinel's petition is supported by the policies underlying the privilege.

[5]*See, e.g.*, Exhibits A-E of Amici Brief. Indeed, Sun-Sentinel asserts that it sought the Department's records in this case "as a surrogate for the public." (Answer Brief at 19 n.14).

Sun-Sentinel and amici contend that the home venue privilege does not apply to Section 119.07(7)(a) proceedings because, according to Sun-Sentinel and amici, the Department does not have any role, right or interest in such proceedings and is merely a passive custodian of the records sought.[6] This characterization is incorrect.

First, the Department actively participates in good cause proceedings, expressing its views regarding the potential effect of disclosure of its abuse and neglect records on the affected parties. As the entity that conducts the investigations and prepares the records, it is intimately familiar with the records' contents. It is also the participant most familiar with the individuals involved. In many cases the affected children are in the Department's custody, thus imposing a duty upon the Department to speak up for the children's best interests. The Department also has significant experience dealing with the effect of disclosure upon affected parties, and the courts often seek the Department's input on these issues.

Additionally, as addressed in Section II.A. of this brief and emphasized by Sun-Sentinel and the amici, the purpose behind allowing disclosure of abuse and neglect records goes beyond the release of individual records. The overriding purpose behind

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[6]Contrary to the assertions of Sun-Sentinel and amici, the Department has not described its role in good cause proceeding as "passive." As discussed below, the Department takes an active role in good cause proceedings. The Department has, however, described its conduct *prior* to the filing of a Section 119.07(7)(a) petition as passive in the context of addressing whether its conduct constituted "sword-wielding" as it relates to proper venue.

the release is to evaluate the performance of the Department. Thus, viewed collectively, Section 119.07(7)(a) petitions are indeed actions implicating the Department's policies, rules, and conduct which should be handled in a centralized, uniform manner so as to maximize consistency. Centralized litigation also furthers the second policy underlying the home venue privilege--reduced state expenditure.

C. **The sword-wielder exception is inapplicable.**

Finally, Sun-Sentinel's contention that the sword-wielder exception to the home venue privilege should apply in this case because the Department's procedural defenses to Sun-Sentinel's petition caused a delay of the adjudication of the merits of the petition is without merit. It is improper to consider conduct occurring in the course of litigating a lawsuit for purposes of evaluating whether the lawsuit was filed in the proper forum in the first instance. *See Air South, Inc. v. Spaziano,* 547 So. 2d 314 (Fla. 4th DCA 1989) (venue determined by facts at time lawsuit is filed).

CONCLUSION

The Department respectfully requests that this Court vacate the decision by the Fourth District that affirms the trial court's orders denying the Department's motions to dismiss, and grant such further relief as the Court deems appropriate.

Respectfully submitted,

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I hereby certify that the type size and style used in this brief is 14-point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

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