

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, FIFTH DISTRICT

Case No. 5D14-2951
L.T. Case No. 2013-CA-002664-O

Knight News, Inc.,

Appellant,

vs.

The University of Central Florida Board of
Trustees, and Dr. John C. Hitt, (collectively,
“UCF”),

Appellee.

**UCF’S MOTION FOR ORDER AWARDING ENTITLEMENT TO
APPELLATE ATTORNEYS’ FEES ON KNI’S SUNSHINE ACT COUNTS**

UCF, pursuant to the Court’s inherent powers, Fla. R. App. P. 9.400(b), and §§ 286.011(4) and 57.105(1), *Fla. Stat.*, respectfully requests this Honorable Court render an Order awarding entitlement to appellate attorneys’ fees in favor of UCF on Counts XIV, XV, XVI and XVIII of Plaintiff KNI’s Complaint, and in support states:

1. UCF prevailed on sixteen of the seventeen counts asserted by Plaintiff/Appellant Knight News, Inc. (“KNI”). This motion is directed to the four (4) counts asserted by KNI under Florida’s “Government in the Sunshine” Act, Chapter 286, *Fla. Stat.* (hereinafter “Sunshine Act Counts”).

2. KNI's Sunshine Act Counts sought a permanent mandatory injunction requiring UCF to (i) open to the public all future student organization disciplinary hearings, and (ii) prepare and produce disciplinary hearing minutes for KNI's inspection.¹ KNI further sought a declaratory judgment providing that (i) UCF's hearing regulations are unconstitutional due to closure of the hearings, and (ii) any actions taken by UCF at a certain fraternity's disciplinary hearings held in 2012 are null and void.²

3. Prior to KNI's filing of the trial court action, UCF provided KNI with written notice of legal authorities and factual information showing that KNI's Sunshine Act Counts are unsupportable by necessary material facts or the application of existing law to those material facts, such as:

- *Knox v. Dist. Sch. Bd. of Brevard*, 821 So. 2d 311, 315 (Fla. 5th DCA 2002) (“A Sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties.”); and
- *U.S. v. Miami Univ.*, 294 F.3d 797, 821 (6th Cir. 2002) (“Student disciplinary proceedings have never been open to the public[.]”).³

4. Shortly after KNI filed suit, UCF again informed KNI of salient legal authorities and information, and cautioned KNI to “please understand that this letter shall serve as [UCF's] notice of intent to seek an award of attorneys' fees

¹ R. 57 (Compl. at pg. 48 (Count XIV)).

² R. 59 (Compl. at pg. 50 (Count XV)); and R. 61 (pg. 52 (Count XVI)).

³ See R. 1704-1709.

under Fla. Stat. § 57.105(4) and *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002).”⁴

5. During the course of the trial court action, UCF filed dispositive motions seeking the dismissal with prejudice of KNI’s Sunshine Law Counts, together with an award of attorneys’ fees pursuant to the Court’s inherent powers, Fla. Stat. § 57.105(4) and *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002).

6. All the while, KNI refused to voluntarily dismiss its baseless Sunshine Act Counts, and went so far as to seek and receive an Order compelling the depositions of two (2) UCF employees plus a student, which KNI never even set.⁵

7. By Order dated July 15, 2014, the trial court rendered a partial summary final judgment in favor of UCF on all of KNI’s Sunshine Act Counts, and reserved jurisdiction to award UCF’s attorneys’ fees and taxable costs upon proper motion, (hereinafter, “July 15th Order”).⁶ Of particular note, the trial court found and determined that:

- “At hearing, KNI acknowledged its lack of supporting authority for the proposition that a ‘meeting’ can consist of a single person for purposes of § 286.011(1). Hr’g Tr. at 34:6-8, May 14, 2014.”
- “UCF’s interim suspension hearings are presided over by a single university employee, and therefore do not constitute ‘meetings’ for purposes of § 286.011(1), Florida Statutes.”

⁴ See R. 1712-1717.

⁵ See R. 1718-1720.

⁶ See R. 1721-1731.

- “Chapter 286 does not require public access to UCF’s formal panel hearings because such panel members are generally not subject to the Sunshine Law, and merely serve a fact-finding and advisory function in assisting UCF’s Director of OSRR in fulfilling his or her duties as the ultimate decision maker in disciplinary cases. *See Knox v. Dist. Sch. Bd. of Brevard*, 821 So. 2d 311, 314-15 (Fla. 5th DCA 2002).”
- “UCF’s student organizations are comprised of university students, and Florida’s public universities ‘may not release a student's education records without the written consent of the student to any individual, agency, or organization, except in accordance with and as permitted by the FERPA. . . . ‘Under a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university.’ *U.S. v. Miami Univ.*, 294 F.3d 797, 812 (6th Cir. 2002).”

8. On August 14, 2015, UCF timely moved the trial court for an award of attorneys’ fees and costs against KNI, which has not yet been ruled on.

9. The Court is vested with broad discretion to assess an award of appellate attorneys’ fees and costs against KNI if the Court finds that its Sunshine Act Counts were filed or maintained in bad faith, or frivolous. § 286.011(4), *Fla. Stat.* (the Court “may assess a reasonable attorney’s fee against the individual filing such an action if the court finds it was filed in bad faith or was frivolous.”).

10. Additionally, § 57.105, *Fla. Stat.* provides that:

Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim ... at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim ... when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim ...; or

(b) Would not be supported by the application of then-existing law to those material facts.

§ 57.105(1)(a) & (b), *Fla. Stat.* See also, *Yakavonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615, 618 (Fla. 4th DCA 2006); *Moakley*, 826 So. 2d at 227 (“We thus hold that a trial court possesses the inherent authority to impose attorneys' fees against an attorney for bad faith conduct.”).

11. Prior to and throughout this action, KNI was repeatedly put on written notice of the key legal authorities ultimately relied upon in the trial court’s July 15th Order, and at the parties’ summary judgment hearing, KNI admitted its lack of supporting authority for the proposition that a single person can *meet with themselves* for purposes of § 286.011(1), *Fla. Stat.*⁷

12. Under the totality of circumstances, UCF respectfully submits that KNI’s Sunshine Act Counts were filed and maintained in bad faith, and were frivolous for failure to present justiciable issues of fact or law.

WHEREFORE, UCF respectfully requests this Honorable Court to render an Order awarding entitlement to appellate attorneys’ fees and costs in favor of UCF on Counts XIV, XV, XVI and XVIII of Plaintiff KNI’s Complaint, and directing the trial court to assess the amount thereof upon proper motion by UCF.

⁷ See R. 1729, at n. 28.

Alternatively, UCF respectfully requests that the Court enter an order directing the trial court to make a determination as to the entitlement to appellate attorneys' fees⁸ and, if an entitlement is found, to make a determination as to the amount.⁹

Respectfully submitted this 2nd day of September, 2015.

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⁸ This Court could also appoint the trial court to act as its special master for the purpose of determining entitlement to appellate attorneys fees. Such a determination would presumably be made by the trial court at the time the trial court hears and determines UCF's motion filed for attorney fees incurred in the trial court. [R. 1698-1740].

⁹ Of course, any such orders would be subject to this Court's review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via e-mail this 2nd day of September, 2015, as follows:

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