

IN THE SUPREME COURT OF FLORIDA

**NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION,**

Petitioner,

Case No.: SC09-1909

vs.

THE ASSOCIATED PRESS, ET AL.,

Respondents.

**PETITIONER NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S
MOTION FOR EXPEDITED REVIEW**

Petitioner, the National Collegiate Athletic Association (“NCAA”), pursuant to Fla. R. App. P. 9.300 and Section VI of this Court’s Internal Operating Procedures, hereby moves to expedite review of this proceeding. Specifically, the NCAA requests that the Court expedite review of the NCAA’s pending Motion for Emergency Stay and, should the Court grant review, accelerate the deadline for the submission of the NCAA’s merits brief to October 28, 2009, or such other deadline deemed appropriate.

I. Introduction and Procedural Posture

On October 1, 2009, the First District Court of Appeals entered its decision affirming the trial court. The NCAA timely sought rehearing and/or certification from the First District Court of Appeals and moved for a stay of the court’s

mandate to allow the NCAA to seek review in this Court. The court denied both motions on October 12, 2009 without directing the clerk to issue a mandate. Under Fla. R. App. P. 9.340(a), the mandate would ordinarily issue fifteen days later, or October 27, 2009. However, Counsel for the NCAA discovered that the First District issued its mandate *sua sponte* prior to the close of business on October 13, 2009, only by reviewing the electronic docket. The NCAA then filed its Notice to Invoke the Jurisdiction of this Court and Request for Emergency Stay at the opening of the Clerk's office the next day, October 14, 2009.

Respondents filed their Opposition to the Stay Motion the same day. In addition, on October 14, 2009, this Court entered its Order designating this as a high profile case. On October 16, 2009, the Clerk instructed Respondents to file additional copies of their Opposition as required by the High Profile Order. The NCAA's Motion for Emergency Stay was therefore not fully briefed until the afternoon of October 16th and remains pending at the time of this filing.

As noted in the NCAA's Stay Motion, one issue before the Court is the propriety of the trial court's order to compel the NCAA to disclose private, confidential information the NCAA believes should not be subject to the Public Records Act. Respondents opposed the Stay Motion largely on the circular argument that it should be denied as moot, even as they claim prejudice for further delay of documents they contend have already been released by FSU. Respondents

did not, however, assert in their opposition that the NCAA's Motion was made in bad faith or that this Court does not have the authority to grant the stay requested.

Since that time, counsel for Respondents has contacted counsel for the NCAA and demanded immediate disclosure of the documents prior to any ruling from this Court. Respondents claim that the NCAA has been in violation of the Act since the moment the First District Court of Appeals issued its Mandate without warning on October 12, 2009, and have refused the NCAA's request that no action be taken until such time as the Court decides the pending motion. This morning, on October 20, 2009, counsel for Respondents contacted the undersigned and indicated she would file a motion against the NCAA if they did not receive the documents by noon.

Respondents' demand places the NCAA in a quandary. Florida law is at best unclear on whether the pendency of the NCAA's Motion for Emergency Stay tolls its obligation to produce the documents ordered by the trial court. *See* Fla. R. App. P. 9.310(b) and (3); Section 119.11(2) Fla. Statutes; *see, e.g., Clark v. Walton*, 347 So.2d 670 (Fla.App.4th Dist. 1977). If accepted, Respondents' position would mean that this Court is without authority to enter a stay pending review of any Public Records Act case once a District Court of Appeals issues a mandate. Where, as here, the lower court does so immediately without waiting the

ordinary fifteen day period prescribed by Fla. R. App. P. 9.340(a), this Court would never be able to grant meaningful review of a case under the Act.

This procedural question is not merely academic, because the NCAA faces both Respondents' twice repeated threats of contempt and attorneys' fees under the Act and, at the same time, extremely serious legal and practical consequences if it complies with those demands. For example, as is now apparent, FSU has released student-education information the NCAA believes is protected by federal and state law. That information has been widely disseminated in the news media and on the internet, including the identity of students implicated in the cheating scandal.¹ The NCAA does not now wish to further compound any such injury by potential redisclosure of FERPA information. *See* 20 U.S.C. § 1232(g) (b)(1) and (b)(4)(A); 34 CFR § 99.33. 34 CFR § 99.33(a)(1) and (b) (prohibiting redisclosure of FERPA information by third-party recipients).

For these reasons, the NCAA faces the dilemma of complying with Respondents' demand for immediate disclosure of NCAA records prior to this

¹ Part of the difficulty here is that, while the Plaintiffs *did* agree that portions of the documents at issue contained information protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and the trial court made its public records findings based on its review of partially redacted documents, it is anything but clear whether FSU's release was redacted as intended and not in possible violation of FERPA, as it failed to redact the identity of at least two FSU students and one IQ score from a 600 page transcript (that has now been posted on the internet in its entirety by the news media).

Court's ruling a motion that was only fully briefed as of the afternoon of October 16, 2009. The NCAA respectfully submits it should not be punished for its good faith effort in requesting a stay which the Respondents have already responded to on the merits. That stay was requested at the earliest opportunity, literally overnight, after the NCAA first learned, on its own accord, that the First District had issued its mandate.

Accordingly, the NCAA is in urgent need of guidance from this Court as to how it should proceed, and to relieve the NCAA of the burden of having to speculate as to whether and when disclosure is required. Should the Court deny the Motion for an Emergency Stay, the NCAA is prepared to immediately proceed accordingly and provide Respondents the documents they seek.

II. Conclusion

The NCAA recognizes the need for timely resolution of all proceedings under the Public Records Act and it does not, by seeking review in this Court or by its request for a stay, seek to cause undue delay. At the same time, given the importance of the issues presented, the NCAA respectfully requests the Court grant expedited review of this matter, including the issuance of an accelerated briefing schedule and a stay of the decision below pending final resolution of this appeal or, in the alternative, a temporary stay to allow the Court such sufficient time as it deems necessary to rule pending motions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail and Electronic Mail to Gregg D. Thomas, Esquire, Carol Jean LoCicero, Esquire, Rachel E. Fugate, Esquire, Thomas, LoCicero & Bralow PL, P.O. Box 2602, Tampa, FL 33602, George Freeman, Esquire, The New York Times Company, 620 Eighth Avenue, New York, NY 10018, Michael J. Glazer, Esquire, Ausley & McMullen, P.O. Box 391, Tallahassee, FL 32302, George Gabel, Esquire, Holland & Knight LLP, 50 North Laura Street, Suite 3900, Jacksonville, FL 32202, David S. Bralow, Esquire, 220 E. 42nd Street, Suite 400, New York, NY 10012, representing Appellees The Associated Press; Cape Publications, Inc., Collier County Publishing LLC, First Amendment Foundation; Florida Press Association; Lakeland Ledger Publishing Corporation, Media General Operations, Inc., Miami Herald Media Company, Morris Publishing Group LLC, News-Journal Corporation, NYT Management Services Inc., Orlando Sentinel Communications Company, Multimedia Holdings Corporation; Scripps Howard Broadcasting Company, Scripps Treasure Coast Publishing LLC, Sun-Sentinel, Inc., Tampa Bay Television, Inc., Federated Publications, Inc. WJXX, Gannett River States Publishing Corporation; and WTSP, William E. Williams, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Betty Steffens, Florida State University, 211 Westcott Building, Tallahassee, FL 32306-

1470, Representing Appellee Florida State University Board of Trustees and T.K. Wetherell and Peter Antonacci, Esquire, GrayRobinson, PA, P.O. Box 11189, Tallahassee, FL 32302-3189, Representing Appellee GrayRobinson, P.A. this _____ day of October, 2009.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief has been typed using the Times New Roman 14-point font, and therefore complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2), and that the foregoing has been filed pursuant to the requirements of this Court's October 14, 2009 High Profile Case Order.

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