IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

Case No.: 5D14-2951

KNIGHT NEWS, INC.,

Appellant,

v.

THE UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES and JOHN C. HITT,

Appellees.

ON APPEAL FROM FINAL ORDERS OF THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT, ORANGE COUNTY, FLORIDA

Lower Tribunal Case No.: 2013-CA-2664-O

APPELLANT'S RESPONSE IN OPPOSITION TO UCF'S MOTION FOR APPELLATE ATTORNEYS' FEES

Robert Rivas, Esq.
SACHS SAX CAPLAN, P.L.
660 East Jefferson Street
Suite 102
Tallahassee, FL 32301

Justin S. Hemlepp, Esq.
J.S. HEMLEPP, P.A.
12157 West Linebaugh Avenue
Suite 388
Tampa, FL 33626

Attorneys for Appellant Knight News, Inc.

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PRELIMINARY STATEMENT

Appellant Knight News, pursuant to Rules 9.300(a) and 9.410(5), Florida Rules of Appellate Procedure, hereby submits this memorandum in opposition to Appellee UCF's September 2, 2015 "Motion for Order Awarding Entitlement to Appellate Attorneys' Fees on [Knight News's] Sunshine Act Counts." The motion is referred to herein as the "**Fees Motion**".

INTRODUCTION

UCF's Fees Motion really is a stealth prayer for sanctions and an unauthorized second answer brief masquerading as a Rule 9.400 motion for attorneys' fees. This is at minimum UCF's seventh written threat of sanctions against Knight News or its counsel during this case. And, for the seventh time, UCF's threat is procedurally barred and substantively meritless.

RELEVANT BACKGROUND

I. UCF Never Once Served A Motion For Sanctions Before Filing The Fees Motion

a. The First Sanctions Threat Was Not Via Motion

UCF's counsel on February 20, 2013 sent correspondence to Knight News's trial counsel threatening to seek sanctions in response to a draft complaint previously sent as a courtesy. R2-363 ("[P]lease understand the University will seek reimbursement of its attorneys' fees and costs from your client pursuant to Fla. Stat. 286.011(4) and 57.105, as well as the Court's inherent powers."). No motion was attached to the correspondence.

b. The Second Sanctions Threat Also Was Not Via Motion

After the Complaint was filed, UCF's counsel on March 1, 2013 "respectfully remind[ed]" Knight News's trial counsel of Florida Bar Rule 4-3.6 concerning "prejudicial extrajudicial statements" with a "substantial likelihood of prejudicing an

adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on the proceeding." R2-394. The correspondence also threatened UCF would move for sanctions if the "defamatory and frivolous" claims against Appellee Hitt, UCF's president, were not "dismissed . . . immediately." R2-395, 398 (citing § 57.105(4), Fla. Stat.; *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002)). No motion was attached to the correspondence.

c. The Third Sanctions Threat Was Filed Before Service

UCF's March 13, 2013 Motion to Dismiss and Alternative Motion for Final Judgment sought an award of sanctions under Section 57.105 and *Moakley*. R2-337. UCF accused Knight News of "harassing" the university's president — relying on the law of qualified immunity in Section 1983 federal civil rights cases to support the proposition. R2-319-21. The motion was not served before it was presented to the trial court, and Knight News moved to strike. R2-436-38.

d. The Fourth Sanctions Threat Was Filed Before Service

UCF's July 11, 2013 Amended Omnibus Response to Alternative Writ of Mandamus and Show Cause Order and Motion for Summary Judgment sought sanctions under Section 57.105, Florida Statutes. UCF argued Knight News sought a "special constitutional right of access" to Student Conduct Board meetings, "which explains why [it] stands alone in its invasion

quest." R3-604. UCF again asserted Knight News was "harassing" Appellee Hitt and did not serve the motion before presenting it to the trial court. R3-630. Knight News again moved to strike. R3-637-39.

e. The Fifth Sanctions Threat Was Rejected

UCF, in an October 22, 2013 filing attempting to justify its continued refusal to file an answer to Knight News's Complaint, again sought sanctions. R3-651, 655-56. UCF also stated Knight News was "stubborn" to demand a responsive pleading. R3-655. The trial court ordered UCF to answer and did not award sanctions. R4-703-04. UCF's November 4, 2013 Answer did not mention attorneys' fees. R3-662-701.

f. The Sixth Sanctions Threat Remains Unresolved and Was Filed Before Service

UCF's August 14, 2014 Motion for Awarding Entitlement to Attorneys' Fees also sought 57.105 sanctions. R9-1698-1702. Again, UCF referred to Knight News as "stubborn" and labeled as "silly" its argument that the Student Conduct Board's interim suspension hearings are governed by the Sunshine Law. R9-1700, 1702. The motion was not served before it was presented to the trial court and has yet to be resolved. Knight News responded in opposition to the motion. R9-1746-55.

g. The Seventh Sanctions Threat Is the Fees Motion Which Was Filed Before Service

Finally, on September 2, 2015, UCF filed the appellate Fees

Motion now under consideration. The Fees Motion was not previously served. UCF asserts a fee entitlement under Sections 57.105 and 286.11, Florida Statutes, as well as *Moakley.* Fees Motion, at 1, 3-5. The claims are procedurally based on the notice provided by the threats listed above. *Id.*, at 2-5. They are substantively based on UCF's Sunshine Law arguments, including two issues raised by UCF for the first time on appeal in the Fees Motion.

UCF's first new argument is that a single person chairs the Student Conduct Board's interim suspension hearings and, accordingly, those hearings are exempt from the Sunshine Law. *Id.*, at 3, 5. UCF's second new argument is that FERPA or a state public records exemption requires closure of Student Conduct Board hearings.[1] *Id.*, at 4.

UCF further states that it has "repeatedly put [Knight News] on written notice of the key legal authorities ultimately relied upon" by the trial court, which rejected the "baseless" Sunshine Law claims. *Id.*, at 3, 5. Knight News hereby responds in opposition.

LEGAL STANDARD

Motions for appellate attorneys' fees "shall state the grounds on which recovery is sought . . ." Fla. R. App. P.

[1] These issues were raised repeatedly below and in the Initial Brief, at 43-50.

9.400(b). The rule itself is not a basis for an attorneys' fee award; there must be "grounds." *See United Servs. Auto. Ass'n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000).

Importantly, an award of attorneys' fees is in derogation of the common law, and any provision for such fee-shifting is construed strictly. *See Montgomery v. Larmoyeux*, 14 So. 3d 1067, 1071 (Fla. 4th DCA 2009).

ARGUMENT

I. UCF Is Procedurally Barred From An Award of Attorneys' Fees By Statute, Rule and Common Law

UCF is barred by statute, rule and common law from making a claim for sanctions or attorneys' fees here.

a. UCF Did Not Serve Its 57.105 Motion Before Filing

UCF's claim for sanctions pursuant to Section 57.105, Florida Statutes, is procedurally barred. It is black-letter law that, before filing a 57.105 motion with a court, the movant must serve the motion on the opposing party and allot a 21-day safe harbor to correct the challenged filing. § 57.105(4), Fla. Stat. (2014).

"Service" of a "motion" is a condition precedent to "filing" of a "motion" for 57.105 sanctions. *Id.* UCF's repeated threats do not count. *See id.; Montgomery*, 14 So. 3d at 1071 (The statute "could not be clearer in its requirement that a motion seeking sanctions may not be filed with or presented to

the court within twenty-one days of service of the motion."); *Matte v. Caplan*, 140 So. 3d 686, 690 (Fla. 4th DCA 2014) (holding "strict compliance with [e-service rules] is required before a court may assess [57.105] attorney's fees").

Knight News has repeatedly brought to UCF's attention the "key legal authorities" salient to this issue. *See, e.g.*, R2-436; R3-637; R9-1750-51. Still, not once has UCF served a 57.105 motion in this case before presenting it to a court. Accordingly, such sanctions cannot be awarded.

b. *Moakley* Sanctions Are Unavailable In A Sunshine Law Case

UCF invokes this Court's inherent authority to sanction bad faith conduct in an attempt to recover fees. But a court cannot rely on its inherent sanctions authority when a governing statute exists, and the Sunshine Law expressly governs here.

In *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002), the Florida Supreme Court recognized a trial court's inherent authority to sanction counsel for "bad faith" conduct. *Id.*, at 226. But that authority is subservient to two factors.

First, "if a specific statute or rule applies, the trial court should rely on the applicable rule or statute rather than on inherent authority." Id. at 227 (citing *Chambers v. Nasco*, 501 U.S. 32, 50 (1991)). Second, a finding of bad faith must be based on a "specific finding as to whether counsel's conduct . .

. constituted or was tantamount to bad faith." Id. (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980)).

Here, a statute expressly governs, so UCF's *Moakley* claim fails. Specifically, Section 286.011(4), Florida Statutes, provides:

> Whenever . . . the court determines that the defendant or defendants to such action acted in violation of this section, [t]he court shall assess a reasonable attorney's fee against such agency, and 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.

The court therefore has discretion to award fees to a prevailing Sunshine Law defendant, but only if the plaintiff acted in bad faith or frivolously – just like a *Moakley* sanction. The parallel with *Moakley* presumably explains the complete absence of even one reported appellate decision reviewing a *Moakley* sanction in a Sunshine Law case.

Knight News has repeatedly brought to UCF's attention the "key legal authorities" salient to this issue, *see*, *e.g.*, R2-437-38; R3-637-38; R9-1751-52, yet again UCF seeks *Moakley* sanctions. They cannot be awarded.

c. UCF Served No Rule 9.410(b) Motion Before Filing

Insofar as UCF's Fees Motion is actually a motion for sanctions under Section 57.105, *Moakley*, or otherwise, the motion is improper under the appellate rules. Rule 9.410,

Florida Rules of Appellate Procedure, governs whenever a party seeks "an award of attorneys' fees as a sanction against another party or its counsel pursuant to general law." Fla. R. App. P. 9.410(b)(1).

Such a motion must be served on the party upon which sanctions are sought 21 days before it is filed with the Court. Fla. R. App. P. 9.410(b)(3). Only if, after service of the motion, the challenged filing is left uncorrected for 21 days may the movant file the motion with the Court. Fla. R. App. P. 9.410(b)(3).

Here, UCF served no motion on appeal indicating its intent to seek sanctions under Rule 9.410 pursuant to Section 57.105, *Moakley*, or otherwise; setting forth the basis for its sanctions request; or identifying the claim or claims it challenged. UCF's failure to comply with this rule renders sanctions unavailable.

d. UCF Did Not Plead For A Fee Award In Its Answer

The Florida Supreme Court has held that "a claim for attorney's fees, whether based on statute or contract, must be pled." *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991). "[I]f not pled, a claim for attorney's fees is waived." *Caufield v. Cantele*, 837 So. 2d 371, 377 (Fla. 2002) (citing *Stockman*, 573 So. 2d at 837-38).

Here, UCF pled no claim for fees in its November 4, 2013 Answer. R3-662-701. The Answer also sets forth no basis for a

fee award, no reason why Knight News should be obligated to pay such an award and does not even allege UCF is obligated to pay its attorneys any fees at all. *Id.*

The *Stockman* court "recognize[d] an exception" to the strict pleading requirement where a party "claims entitlement to attorney's fees, and [the other party] by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement . . ." 573 So. 2d at 838. But the exception does not apply here because Knight News has objected each time UCF presented a claim for fees. *See, e.g.*, R2-438; R3-638-39; R9-1752-53. Nonetheless, UCF again seeks a fee award to which it has no entitlement.

II. **UCF Improperly Raises New Substantive Appellate Arguments In Its Fees Motion**

UCF raises two new substantive arguments in its Fees Motion that are absent from its Answer Brief: first, that a single person chairs the Student Conduct Board's interim suspension hearings which therefore are exempt from the Sunshine Law, Fees Motion, at 3, 5, and, second, that either FERPA or a state public records exemption requires closure of Student Conduct Board hearings. *Id.*, at 4.

The new arguments are improper, untimely, waived and cannot be considered. The appellate rules delineate the contents required of briefs, on the one hand, Fla. R. App. P. 9.210(a-d),

and motions, on the other. Fla. R. App. P. 9.300(a), *see also* Fla. R. App. P. 9.400(b), 9.410.

When it comes to the substantive issues on appeal, the Appellant gets the last word. *See* Finn Pressly, "Reply Briefs: Rules and Protocol in the Battle for the Last Word," 80 Fla. Bar J. 3, p. 48 (March 2006) *available at* https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/4551FFD9E0F8CA8A8525712300593FC4 (hereinafter, **"The Last Word"**) (quoting Fla. R. App. P. 9.210(a) ("The only briefs permitted to be filed by the parties in any one proceeding are the initial brief, the answer brief [and] a reply brief . . .")).

UCF's attempt to raise new substantive issues in the Fees Motion is improper. It is well settled that substantive appellate arguments must be made in the briefs. Courts will not even consider new arguments raised by an appellant in a reply brief. *See, e.g., Mercury Ins. Co. of Florida v. Coatney*, 910 So. 2d 925, 927 n. 2 (Fla. 2005) ("[W]e do not consider issues raised for the first time in an appellant's reply brief.").

It follows, then, that an appellee may not raise new issues via motion, let alone one filed after the reply brief. Any substantive arguments not raised by UCF in its Answer Brief are waived. Accordingly, this Court should refuse to consider the

newly raised arguments.[2]

III. A Sanctions Award For UCF Requires Bad Faith Or Frivolity

Notwithstanding the foregoing, any fee award in favor of UCF must be predicated on a finding of bad faith or frivolity that is absent here.

a. No Bad Faith Conduct Exists To Justify Sanctions Under *Moakley* or Chapter 286

Under both *Moakley* and Section 286.011(4), Fla. Stat. (2012), a movant may seek sanctions for another party's or counsel's "bad faith conduct." A court awarding such sanctions must make specific factual findings of bad faith. *Moakley*, 826 So. 2d at 226.

Neither *Moakley* nor Section 286.011(4) define "bad faith," but Florida's District Courts of Appeal have in other contexts. A theme emerges: "wrongdoing" and "dishonesty;"[3] "fraud,"

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[2] Alternatively, Knight News submits that this memorandum is an ample response to the new arguments. *See* Fla. R. App. P. 9.300(a). In fact, since the Rules lack any explicit direction concerning how to challenge improperly raised arguments, "Judge Richard Orfinger of the Fifth District suggested filing a motion to strike that also seeks leave to file a limited response to the newly added issue." *See* "The Last Word," at 48. Knight News elects not to file a not-explicitly authorized motion to strike. Instead, it only argues in response to the Fees Motion. *See id.*

[3] *Espirito Santo Bank of Florida v. Agronomics Finance Corp.*, 591 So. 2d 1078. 1079-80 (Fla. 3d DCA 1991); *Triple R Paving, Inc. v. Broward County*, 774 So. 2d 50 (Fla. 4th DCA 2000) (quoting Black's Law Dictionary 134 (7th ed. 1999)).

deception, "sinister motive," "furtive design," and "ill will;"[4] "actual malice."[5]

There is no evidence in this record to suggest either Knight News or its counsel have advanced the Sunshine Law claims with anything but good faith. UCF therefore bases its bad faith allegation solely on that fact that Knight News "stubbornly" declined to acquiesce to threat-laden demands that the lawsuit be dismissed lest Knight News and its counsel be subjected to sanctions that, as discussed *supra*, are not even on the menu.

UCF's claim for bad faith sanctions should be rejected.

b. No Frivolous Claims Exist to Justify Sanctions Under Section 57.105 or Chapter 286

A party also may seek sanctions under both Sections 57.105 and 286.011(4) for frivolous Sunshine Law claims. *See Visoly v. Sec. Pacific Credit Corp.*, 768 So. 2d 482 (Fla. 3d DCA 2000). But the bar is high. The Supreme Court explained:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its

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[4] *Vogel v. Vandiver*, 373 So. 2d 366 (Fla. 2d DCA 1979) (quoting Black's Law Dictionary 176 (4th ed. 1951)).

[5] *Parker v. State of Fla. Brd, of Regents*, 724 So. 2d 163 (Fla. 1st DCA 1998) (quoting *Ford v. Rowland,* 562 So. 2d 731, 734 (Fla. 5th DCA 1990)).

> character may be determined without argument or research.

Treat v. State ex rel. Mitton, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (Fla. 1935).

UCF argues that Knight News's Sunshine Law claims "were filed and maintained in bad faith, and were frivolous for failure to present justiciable issues of fact or law." Fees Motion, at 5. Knight News disagrees and refutes *infra* each of the substantive issues raised in UCF's Fees Motion.

This memorandum, not to mention the many briefs already submitted on appeal and below, makes plain the justiciable issues raised in the Sunshine Law claims, Knight News's meritorious positions concerning those claims and why UCF's allegations of frivolity themselves are frivolous.

i. Clearly Established Law Requires That UCF's Student Conduct Board Hearings Be Open To The Public

UCF argues in the Fees Motion that the Student Conduct Board is not a decision-maker but instead is a "fact-finding and advisory" panel such as those discussed in cases such as *Knox v. Dist. Sch. Brd. Of Brevard*, 821 So. 2d 311 (Fla. 5th DCA 2002). Fees Motion, at 2, 4.

UCF also argues that the Student Conduct Board interim suspension hearings are presided over by one person and cannot – for that reason – be subject to the Sunshine Law. *Id.*, at 3, 5.

UCF additionally relies on *U.S. v. Miami Univ.*, 294 F. 3d 797, 821 (6th Cir. 2002), to support the proposition that "student disciplinary hearings have never been open to the public." Fees Motion, at 2.

Finally, UCF argues that the Student Conduct Board's hearings concerning the discipline of student *organizations* must be closed because FERPA includes students' *individual* discipline records in its definition of "education records." *Id.*, at 4.

Each of these arguments is meritless, and neither Knight News nor its counsel can be sanctioned for saying so.

1. The Student Conduct Board Is No Mere Fact-Finder or Adviser

The Student Conduct Board is not a "fact finding," "advisory" panel. It is a Sunshine Law-governed "board" vested with the power to make "decisions" as to whether organizations are "in violation" or "not in violation" of UCF's Organizational Rules of Conduct. UCF conceded it is powerless to punish an organization without the Board first finding the accused is "in violation." Therefore, the The Board's "decisions" define the scope, if any, of disciplinary action available to UCF.

a. A Bright Line Exists Between Decision-Making Boards And Fact-Finding, Advisory Panels

The Fourth District examined the principal Florida cases distinguishing between fact-finding and advisory panels, on the

one hand, and decision-making boards and commissions, on the other, in *Dascott v. Palm Beach Cnty.*, 877 So. 2d 8, 11-13 (Fla. 4th DCA 2004).

In *Dascott*, a case similar to this one, the court considered a county employee's termination "after proceedings before a pre-termination conference panel convened pursuant to county ordinance." *Id.*, at 9. The employee "objected to the closing [to the public] of the panel's deliberations, claiming that the [Sunshine Law] required the panel's deliberations to be public." The appellate court agreed with the employee. *Id.*

The employee was served "with a notice of intent to terminate her employment . . ." *Id.* The notice advised that the directors of two county departments, or their designees, would "attend the conference as neutrals and will assist in arriving at a final decision as to whether to terminate . . ." *Id.* The employee's department head also attended the conference and had been delegated by the County Administrator the "sole power" to terminate the employee. *Id.*, at 9-10. The notice, hearing and termination all were conducted pursuant to the procedures set forth in the county's administrative code. *Id.*, at 11.

The *Dascott* court described the challenged pre-termination hearing:

> During the hearing, appellant was questioned by members of the panel, and her attorney questioned appellant's supervisor and

> another witness. The panel then instructed appellant and her attorney to leave the room while they deliberated as to whether the proposed termination action should be upheld or modified. Pursuant to the county rules, the department head made the final decision to uphold the recommended termination.

Id.

The country's administrative code gave no decision-making authority to the pre-termination panel. *Id.*, at 13. "Nevertheless . . . the department head deliberated with the panel to determine whether to terminate appellant . . . [T]he affidavits suggest consultation and advice." *Id.* This consultation alone, notwithstanding the department head's "sole power" to terminate without regard to the panel's recommendation, created a Sunshine Law-governed panel:

> We see little distinction between "advice" and "recommendations" in the context of this pre-termination panel. It appears to us that the conference panel assists in determining whether to terminate an employee. Therefore, they participated in the decision-making authority delegated to the department head, and their meeting was subject to the Sunshine Act.

Id.

The *Dascott* court ruled for the employee, and its legal analysis naturally began with the Sunshine Law itself, Section 286.011(1), Florida Statutes. The law requires that any "board or commission" meeting "at which official acts are to be taken" be open to the public. *Id.* In "cases where the courts held the

Sunshine Act applicable, the committee or panel had been delegated some decision-making authority." *Dascott*, 877 So. 2d at 12.

The court reached this conclusion after considering the Florida Supreme Court's seminal Sunshine Law opinion, *Wood v. Marston,* 442 So. 2d 934 (Fla. 1983), as well as those of *Bennett v. Warden,* 333 So. 2d 97 (Fla. 2d DCA 1976), *Cape Publications, Inc. v. City of Palm Bay,* 473 So. 2d 222 (Fla. 5th DCA 1985), *Krause v. Reno,* 366 So. 2d 1244 (Fla. 3d DCA 1979), *City of Sunrise v. News & Sun-Sentinel Co.,* 542 So. 2d 1354 (Fla. 4th DCA 1989), and *Knox,* 821 So. 2d 311. These cases neatly outline the differences between decision-making boards and those that only investigate and advise.

The Supreme Court's *Wood* decision is the polestar. In *Wood*, the court considered whether "a search committee for a new law school dean was subject to the" Sunshine Law. *Dascott*, 877 So. 2d at 11 (citing *Wood*, 442 So. 2d at 936). "[T]he power to appoint a dean was vested in the president of the university subject to a provision of the university constitution that required the president to consult with a committee of the college faculty in making the appointment. *Id.* (citing *Wood*, 442 So. 2d at 936-37). The president was not required to accept the panel's recommendations. *Id.* (citing *Wood*, 442 So. 2d at 937).

The search committee in *Wood* "had both a 'fact-gathering'

role in the solicitation and compilation of applications and a decision-making role in determining which applicants to reject from further consideration." *Id.* (citing *Wood*, 442 So. 2d at 938). The *Wood* court explained that "[i]n deciding which of the applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university through the faculty as a whole." *Wood*, 442 So. 2d at 938.

The *Wood* court ultimately "held that application of the Sunshine Act depended on the decision-making nature of the act performed, not the make-up of the board or its proximity to the final decisional act." *Dascott*, 877 So. 2d at 11 (citing *Wood*, 442 So. 2d at 941). Therefore, "[w]here the board or committee, regardless of its make-up, is delegated decision-making authority by a public official, its meetings and deliberations are subject to the Sunshine Act." *Id.*, at 12 (citing *Wood*, 442 So. 2d at 941).

Similarly, in *Krause*, the Sunshine Law applied because "the public official had delegated to an advisory committee the task of screening applicants and recommending the top four or five to the city manager." *Dascott*, 877 So. 2d at 12 (citing *Krause*, 366 So. 2d at 1244).

Conversely, where panel's meetings are "not decision-making in nature, but were held for the purpose of 'fact-finding' to

assist a public official in the execution of his or her duties," those meetings are not subject to the Sunshine Law. *Id.*, at 12 (citing *Wood*, 442 So. 2d at 941 (approving *Bennett*, 333 So. 2d 97)).

For instance, the Second District in *Bennett* considered a panel created by a university president to discuss working conditions. The panel made no recommendations and only engaged in fact-finding. *Bennett*, 333 So. 2d at 98-100. Because the panel made no decisions or recommendations, the *Bennett* court found it was not governed by the Sunshine law, and on that basis the Supreme Court approved of the *Bennett* ruling. *Wood*, 442 So. 2d at 941 (citing *Bennett*, 333 So. 2d at 100).

Importantly, the Supreme Court noted "there is no implication that any number of intermediary steps would shelter the [*Bennett*] committee from public scrutiny if it were to perform certain official acts *which would shape or limit the final action* taken by the Board of Trustees." *Wood*, 442 So. 2d at 941 (emphasis added).

Another such fact-finding panel was examined by this Court in *Knox,* cited repeatedly by UCF. *See*, *e.g.*, Fees Motion, at 2. In *Knox*, a staff-appointed panel that reviewed and recommended job candidates was challenged. 821 So. 2d 311, 312-13 (Fla. 5th DCA 2002). But the *Knox* panel was not mandated by law and made no decisions. Its recommendations did not limit the staff's

authority and it sent to the actual decision maker – along with its recommendations – every submitted job application. *Dascott*, 877 So. 2d at 14 (citing *Knox*, 821 So. 2d at 314-15). Such "advisory panel[s]" are not subject to the Sunshine Law. *See id.; accord Cape Publications, Inc.,* 473 So. 2d 222 (panel delegated no authority that merely advised staff not subject to the Sunshine Law).

In another fact-finding case, *City of Sunrise*, a mayor's meeting with an employee and the department head was found not subject to Sunshine Law because the mayor had sole authority to terminate the employee. 542 So. 2d at 1356. "Because there was no delegation of the mayor's authority to any other body, the meeting was not required to be public." *Dascott*, 877 So. 2d at 12 (citing *City of Sunrise,* 542 So. 2d at 1356).

The Sunshine Law is not convoluted. It embraces "the collective inquiry and discussion stages . . . as long as such inquiry and discussion is conducted by any committee or other authority appointed and established by a governmental agency, and relates to any matter on which foreseeable action will be taken." *Wood*, at 442 So. 2d 939-40 (quoting *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (Fla. 1974)).

As the Supreme Court reaffirmed in *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010), "[w]here the committee has been delegated decision-

making authority, the committee's meetings must be open to public scrutiny, regardless of the review procedures eventually used by the traditional governmental body."

"The law is quite clear." *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988). "An ad hoc advisory board, even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law." *Id.*

b. The Student Conduct Board Is A Decision-Maker

The Student Conduct Board makes decisions and recommendations just like the boards evaluated in *Wood*, *Dascott*, and *Krause* when exercising the duties and authorities delegated to it by the Legislature, through the Board of Governors, and UCF itself. Therefore the Board's hearings are governed by the Sunshine Law and must be open to the public.

Section 1001.706(3)(g), Florida Statutes (2012), requires the Board of Governors to institute for state universities an anti-hazing policy and enforcement procedure. Section 1001.706(3)(h), Florida Statutes (2012), allows the Board of Governors to "establish a uniform code of conduct and appropriate penalties for violations of its regulations by . . . student organizations . . ."

The Board of Governors therefore required each state university to establish a committee to conduct hearings to adjudicate allegations of conduct code violations. Fla. BOG Reg. 6.0105. The regulations expressly refer to the results of such hearings as "decisions" and "recommendation[s]." Fla. BOG Regulation 6.0105(j) ("The *decisions* of any university hearing or review forum must be presented to the student in writing . . .") (emphasis added); Fla. BOG Regulation 6.0105(k) ("If the *decision* of a university hearing or review forum in a disciplinary proceeding constitutes a *recommendation* to a university official for official action . . .") (emphasis added).

The University consequently promulgated UCF Regulation 5.011(3)(i) (2012), defining the Student Conduct Board, as well as UCF Regulation 5.012 (2012) ("Organizational Rules of Conduct"), and UCF Regulation 5.013 (2012) ("Organizational Conduct Review Process; Sanctions; Appeals").

UCF Regulation 5.011(3)(i) (2012) defines the Student Conduct Board:

> The term "Student Conduct Board" means any person or persons authorized by the Director of the [UCF Office of Student Rights and Responsibilities] or designee to *determine* whether a student organization has violated the Organizational Rules of Conduct and, if so, to *recommend* sanctions that may be imposed. Board members are selected through an annual application and interview process

> with the exception of the justices from the Student Government Association Judicial Council. All Student Conduct Board members, including justices, receive extensive training from the Office of Student Conduct.

Id. (emphasis added). UCF's training materials explain that the Student Conduct Board's role, *inter alia*, is to "*[d]ecide* on finding of 'in violation' or 'not in violation.'" R1-307 (emphasis added).

UCF Regulation 5.013 (2012) sets forth the Student Conduct Board's procedural rules. When an incident such as hazing is reported, UCF reviews the report and consults with the parties. UCF Reg. 5.013(1)(a) (2012). "In unusual cases," UCF may place the organization on "interim suspension." If so, the organization is entitled to an "interim suspension hearing" before the Student Conduct Board. *Id.* Notice of the hearing is sent to the charged student organization. UCF Reg. 5.013(1)(b) (2012).

If the Student Conduct Board decides at the interim hearing that the suspension is warranted, the organization remains suspended until a formal panel hearing. UCF Reg. 5.013(1)(a) (2012). Notice of this hearing also is sent to the charged student organization. UCF Reg. 5.013(2)(d) (2012).

The Student Conduct Board's interim suspension hearings and formal panel hearings are conducted pursuant to the same

procedures.[6] R1-25, 281, 284-87, 297-310; UCF Reg. 5.013(3) (2012). The panel is composed of two UCF faculty or staff members and two student justices from the SGA Judicial Council.[7] UCF Reg. 5.011(3)(i), 5.013(3)(a)(1) (2012). Another UCF employee acts as the Student Conduct Board's advisor. UCF Reg. 5.013(3)(a)(2) (2012).

Student Conduct Board hearings proceed in accordance to UCF Regulation 5.013(3)(c) (2012). The charges are read, and the student organization pleads "in violation" or "not in violation." UCF Reg. 5.013(3)(c)(1-2) (2012). Next, UCF presents its evidence, then the organization makes an opening statement. UCF Reg. 5.013(3)(c)(3-4) (2012). The Board then questions the student organization. UCF Reg. 5.013(3)(c)(5) (2012). Next both sides may call witnesses, beginning with UCF. UCF Reg. 5.013(3)(c)(6-7) (2012). The Board then may ask further questions of the student organization, which subsequently may make a closing statement. UCF Reg. 5.013(3)(c)(8-9) (2012).

After the hearing, the Board retires for a non-minuted "[d]eliberation (in confidential executive session)." UCF Reg.

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[6] UCF's argument that the Student Conduct Board's interim suspension hearings are chaired by one person and therefore are not subject to the Sunshine Law is discussed separately *infra*.

[7] Justices of SGA's Judicial Council are appointed by the SGA president and confirmed by the Student Senate. §§ 306.1, 400.1, UCF Student Body Stat. The justices are members of the Student Conduct Board pursuant to both UCF Regulation 5.013(3)(a)(1) and Section 507.1(A), UCF Student Body Statutes.

5.013(3)(c)(10) (2012). The Board's finding and recommended sanction then is announced. UCF Reg. 5.013(3)(c)(11) (2012).

The director of UCF's Office of Student Rights and Responsibility then must accept or reject the finding of "in violation" or "not in violation." R4-746.; *accord* UCF Reg. 5.013(3)(a)(3) (2012). If the director, or their designee, accepts a finding of "not in violation," he or she must "dismiss the case." And if the director rejects a finding of "not in violation," he or she must "remand the case to the panel for rehearing" with a written explanation "for record and guidance purposes." *Id*.

The director can remand the case to the Student Conduct Board *ad infinitum* until the desired result is obtained, but each time a written explanation must accompany the remand. *Id*. Finally, if the director decides to "approve, mitigate/decrease or increase" the sanctions recommended by the Student Conduct Board, again "a written statement for record purposes" of the "basis" for the decision must be submitted. *Id*. UCF has no authority to reverse the Student Conduct Board's findings of "in violation" or "not in violation" or to administer a disciplinary sanction upon an organization found "not in violation." UCF Reg. 5.013(3)(a)(3) (2012).

These procedures establish as a matter of law that the Student Conduct Board is no mere fact-finding and advisory body

as described in *Knox*, *Bennett*, or *City of Sunrise*. The Student Conduct Board is an integral part of the decision-making process and exercises delegated authority. It makes discipline "decisions" that limit government action and makes sanctions "recommendation[s]" that shape subsequent punishments.

The Student Conduct Board therefore is Sunshine Law-governed "board," and its hearings must be open to the public.

2. Interim Suspension Hearings Must Be Open to the Public Even If Chaired By Only One Person

UCF argues that a single person chairs interim suspension hearings and, accordingly, those hearings are exempt from the Sunshine Law. *Id.*, at 3, 5. But even if only one person chairs the interim hearings they nonetheless would still be governed by the Sunshine Law for two reasons.

First, the Student Conduct Board still is making decisions in exercise of its delegated authority. Second, the private "deliberations" of the chair with representatives of UCF's Office of Student Rights and Responsibilities (**"OSRR"**) in closed-door "executive session" creates a Sunshine board.

Interim suspension hearings are chaired by UCF's vice president of student development and enrollment services or his or her designee. UCF Reg. 5.013(1)(a) (2012). The chair is referred to as an "Interim Suspension Hearing Officer," and here it was UCF employee Jeff Novak. R1-284, 289.

UCF Regulation 5.011(3)(i) (2012) defines the "Student Conduct Board" as "any *person or persons* authorized by the Director of the OSRR or designee to determine whether a student organization has violated the Organizational Rules of Conduct and, if so, to recommend sanctions that may be imposed." UCF Reg. 5.011(3)(i) (2012) (emphasis added). In other words, any "person" that is empowered to determine that an organization has violated the code *is* the Student Conduct Board.

The Sunshine Law does not always apply to only one member of a board. *See Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988). "However, if a board has delegated its decision-making authority to a single individual . . . the Sunshine Law may apply." Office of the Florida Attorney General, Government-in-the-Sunshine Manual at 19 (Vol. 35 2013) (**"Sunshine Manual"**) (citing *Town of Palm Beach*, 296 So. 2d at 477; Op. Atty. Gen. Fla. 89-39 (1989) (county commissioners' aides not subject to the Sunshine law unless they have been delegated decision-making functions or are acting in place of the board or its members)).

The Attorney General has issued several opinions explaining that the delegation of board authority to an individual member triggers the Sunshine Law.[8] Ultimately, "[t]he Sunshine Law does

[8] *See, e.g.*, Op. Atty. Gen. Fla. 74-294 (1974) (member of a board delegated authority to negotiate lease on behalf subject

not provide for any 'government by delegation' exception; a public body cannot escape the application of the Sunshine Law by undertaking to delegate the conduct of public business through an alter ego." *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 359 (Fla. 4th DCA 1973), *certified question answered sub nom., Town of Palm Beach*, 296 So. 2d 473; *see News-Press Publishing Company, Inc. v. Carlson*, 410 So. 2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate authority to act on their behalf or upon which foreseeable action will be taken, the delegate is subject to the Sunshine Law).

Here, the Student Conduct Board's authority is delegated to a hearing officer for purposes of interim disciplinary action. UCF cannot evade application of the Sunshine Law through such delegation. *Town of Palm Beach*, 296 So. 2d at 477 (Sunshine Law is construed "so as to frustrate all evasive devices").

And though any suspension affirmed by the hearing officer at an interim hearing is by its nature "interim," the suspension nonetheless is a "decision" with the actual effect of maintaining sanctions against a student organization until a

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to the Sunshine Law); Op. Atty. Gen. Fla. 74-84 (1974) (hearing or investigatory proceeding conducted by board member on behalf of the entire board must be held in the sunshine); Op. Atty. Gen. Fla. 93-78 (1993) (board member delegated the authority to reject certain options from further consideration by the board is performing a decision-making function that must be conducted in the sunshine); Op. Atty. Gen. Fla. 10-15 (2010) (special magistrate subject to the Sunshine Law when exercising board's delegated decision-making authority).

formal panel makes the final disciplinary decision. UCF Reg. 5.013(1)(a) (2012). A Board decision to rescind an interim suspension also is a "decision."

The interim suspension hearings are governed by the Sunshine Law for a second reason. The closed-door "deliberations" between the hearing officer and the OSRR representatives create a Sunshine board. In fact, the interim suspension hearings are "on all fours" with the pre-termination conference in *Dascott*.

As described *supra*, in *Dascott* the sole decision maker was joined in a pre-termination conference by two other "neutral" officials. 877 So. 2d at 9-10. Here, too, no one meets "with themselves" at the interim suspension hearings, as alleged by UCF. Fees Motion, at 5. The hearing officer convenes a formal hearing with the charged organizations and the OSRR representatives (effectively, UCF's prosecutors). R1-26-27, 34, 284-87. And, just as in *Dascott*, the hearing officer and OSRR representatives retire for closed-door "deliberations." *Id*. The group later reconvenes to announce disciplinary decisions. *Id*.

The *Dascott* court observed that if "no evaluation and advice on the decision to terminate was given to the ultimate decision-maker at the time of his decision, then there was no

need for a closed-door deliberation."[9] 877 So. 2d at 14. The same principle applies here.

Since there was "no need for . . . deliberation" if no "evaluation and advice" was given by OSRR staff, it is clear the "staff gave advice on the ultimate decision" as to interim suspensions "during the closed-door session[s]." *See id*. "Whether or not the staff members voted on the . . . decision . . . the closing of the deliberations is a violation of [the Sunshine Law]. *See id*.

As a result, UCF's interim suspension hearings are subject to the Sunshine Law and therefore must be open to the public.

3. Student Conduct Board Hearings on Organizational Issues Do Not Involve "Student Discipline"

The claims at issue here are not about individual student discipline, they are about UCF's discipline of organizations. Accordingly, UCF's reliance on *U.S. v. Miami Univ.*, 294 F. 3d 797, 821 (6th Cir. 2002), a case about public access to individual student discipline hearings, is inapt.

UCF's student organizations are subject to "Organizational Rules of Conduct" that are completely separate from the "Rules

[9] "Deliberation" is defined as "a discussion and consideration by a group of persons . . . of the reasons for and against a measure." "Deliberation," Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/deliberation (last accessed Sept. 9, 2015).

of Conduct" applicable to individual students. *See* 5.007(1)(a) (2012) ("UCF Rules of Conduct shall apply to all undergraduate students, graduate students and students pursuing professional studies . . ."); UCF Reg. 5.011(1)(a-b) (2012) ("The organizational conduct regulations . . . shall apply to all student organizations of the University . . .").

In fact, student organizations can be held responsible not only for their organization's actions, but also for those of "inactive" members, pursuant to UCF's "Principles of Group Responsibility." UCF Reg. 5.011(4)(b) (2012). Those principles empower UCF to punish organizations for actions of even non-students, including alumni or guests, who never attended UCF but "allegedly violate an Organizational Rule of Conduct." *Id.*

UCF's contention that Student Conduct Board hearings on organizational discipline involve "student discipline" therefore is inaccurate, and *U.S. v. Miami* is thus distinguishable.

4. Neither FERPA Nor Any State Public Records Exemption Act to Close Any "Board or Commission" Meeting to the Public

A Sunshine Law-governed board must conduct its meetings publically even if documents deemed confidential or exempt from the Public Records Act may be discussed. *See Brd. of Public Instruction of Broward Cty. v. Doran*, 224 So. 2d 693, 697 (Fla. 1969) (affirming injunction against board after amending it to remove language permitting the closing of meetings concerning

"privileged" matters). There is no merit to UCF's argument to the contrary. *See* Fees Motion, at 4.

The Legislature codified the *Doran* holding. "An exemption from [the Public Records Act] does not imply an exemption from [the Sunshine Law]. The exemption from [the Sunshine Law] must be expressly provided." § 119.07(7), Fla. Stat. (2012).

Subsequently, the Florida Attorney General has construed the statute at least ten times.[10] Each of the Attorney General's opinions advances the strict interpretation of the Sunshine Law expected of the executive branch:[11] that no Sunshine meeting can be closed to the public absent an express statutory exemption – even if confidential or exempt documents are present or discussed at the meeting.[12]

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[10] Opinions of the attorney general are entitled to great weight. *See*, *e.g.*, *Pinellas C. Sch. Brd. v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002).

[11] Appellees are in the executive branch of state government. § 1001.71(3), Fla. Stat. (2012).

[12] *See* Op. Att'y Gen. Fla. 80-78 (1980) (county industrial development has "no statutory authority to close any of its meetings, regardless of the nature of matters discussed, and possesses no discretion to close any of its meetings"); Op. Att'y Gen. Fla. 80-99 (1980) (meetings between a DBPR office and various regulatory boards where examination items are discussed subject to Sunshine Law); Op. Att'y Gen. Fla. 83-52 (1983) (DBPR examination grade review hearings subject to Sunshine Law); Op. Att'y Gen. Fla. 91-45 (1991) (school board meetings where confidential student records are discussed are subject to the Sunshine Law); Op. Att'y Gen. Fla. 91-75 (1991) (school board meetings to consider confidential information relating to the investigation of a complaint against a public school employee

The Attorney General applied this rule to a school board meeting where confidential education records were to be discussed. Notwithstanding the presence of education records, the attorney general advised that "in the absence of a statutory exemption, at a meeting in which privileged material is discussed, the . . . Sunshine Law should be read to contain no exceptions." Op. Att'y Gen. Fla. 2010-04 (2010).

UCF nonetheless has continually argued, and the trial court held, that "assuming *arguendo* [the] disciplinary hearings fall within the scope of [the Sunshine Law], the Court concludes that § 1006.52(2) *effectually exempts* the hearings from open public access due to the disclosure of student education records during the course of the hearings." R-1629 (emphasis added).

No public board or commission can be "effectively exempt" from the Sunshine Law. *See* § 119.07(7), Fla. Stat. (2012). An exception to the Sunshine Law cannot be implied; it "must be expressly provided." *Id*.

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subject to the Sunshine Law); Op. Att'y Gen. Fla. 92-56 (1992) (school board meeting where confidential student information is discussed subject to Sunshine Law); Op. Att'y Gen. Fla. 95-65 (1995) (health department district review committee meetings where confidential information is discussed subject to Sunshine Law); Op. Att'y Gen. Fla. 2004-44 (2004) (meetings of nonprofit corporation managing the correctional work programs of the Department of Corrections where confidential information is discussed subject to Sunshine Law).

UCF's invitation to invoke an antiquated, legislatively rejected concept and sanction Knight News for not conceding its applicability here should be rejected.

a. If The Presence Of Education Records Could Close A Meeting, And UCF Is Correct That SGA Records Are Education Records, Then SGA Could Not Function

As a preliminary matter, UCF offered no evidence to show confidential or exempt documents were discussed at the challenged Student Conduct Board hearings. And, as discussed *supra*, the presence of such documents during a board meeting does not make legal closing the meeting to the public.

But what if it did? And what if, also, UCF is correct that the redacted student government records complained of in this case also are education records? That would mean that any student government meeting at which a document with a student's name on it is present – for instance, a Student Senate bill listing its sponsors or a budget request listing committee members – must be closed to the public.

In fact, it's not even clear that the student government officials themselves could attend the secret meetings under the rule UCF proposes. Under such bizarre circumstances, there could be no functioning student government. The result makes plain the frivolousness of UCF's arguments.

CONCLUSION

UCF is not entitled to an award of attorneys' fees under any construction of any plausibly applicable fee-shifting law. Its fee claims not only are procedurally barred, but they also require a finding of bad faith or frivolity that cannot be divined from this record.

As described herein, UCF spent its litigation time raising legal claims with no factual basis rooted in principles with no discernable connection to the Sunshine Law and ridiculing Knight News for asserting its constitutional right to attend public meetings. UCF repeatedly accused Knight News and its counsel of filing "stubborn," "meritless," "frivolous," "absurd," "baseless" and "silly" claims that "defamed" and "harassed" the appellees and "wasted scarce public resources."

UCF even claimed Knight News's attempt to attend Student Conduct Board hearings amounted to the assertion of a "special constitutional right . . . which explains why [Knight News] stands alone in its invasion quest."

But Knight News does not stand alone. An Orlando CBS affiliate, two national organizations devoted to advancing open government and a free press, a Florida non-profit devoted to the same ideals, and a trade association that represents Florida's newspapers all have put their resources and reputations on the line as *amici curie* to help ensure Knight News succeeds in its

quest to enforce the public's right to government in the sunshine.

UCF "plainly attempted to lead the trial judge to a result that [Knight News] was needlessly forced to appeal" – a judgment it knew "or should know — is contrary to existing law." *See Forum v. Boca Burger, Inc.*, 788 So. 2d 1055, 1062 (Fla. 4th DCA 2001) *approved in part, disapproved in part Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005).

Knight News never argued, for example, that anyone could "meet with themselves." Fees Motion, at 5. UCF is correct that such a position would be "silly." *See* R9-1702. UCF also continually asserts in the face of expressly contrary authority that the presence of exempt records at a public meeting exempts the meeting from the Sunshine Law.

Meanwhile, UCF has with a straight face attempted to convince the judiciary that its Student Conduct Board is not actually a "board" and that the Board's "decisions" are not actually "decisions." Advancing such bunkum and balderdash is inexcusable; seeking sanctions in that light is astonishing.

On appeal, UCF has "persisted in trying to uphold th[e trial court's] patently erroneous decision." *See Boca Burger*, 788 So. 2d at 1063. Now, it wants to be rewarded for doing so. This Court should refuse to take the bait. UCF's Fees Motion should be denied.

WHEREFORE, Appellant Knight News respectfully requests that this Court enter an order denying UCF's Fees Motion and awarding to it any other relief deemed by the Court to be just and proper under the circumstances.

Dated: September 14, 2015

Respectfully submitted,

SACHS SAX CAPLAN, P.L.

/s/Robert Rivas
Robert Rivas, Esq.
Fla. Bar No.: 896969
660 E. Jefferson St., #102
Tallahassee, FL 32301
Telephone: (850) 412-0306
E-mail: rrivas@ssclawfirm.com; robrivas@aol.com; dwilkerson@ssclawfirm.com

J.S. HEMLEPP, P.A.

/s/Justin S. Hemlepp
Justin S. Hemlepp, Esq.
Fla. Bar No.: 0058991
12157 W. Linebaugh Ave., #388
Tampa, FL 33626
Telephone: (813) 438-6103
E-mail: jhemlepp@hemlepplaw.com

Attorneys for Appellant Knight News, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date below a true and correct copy of the foregoing was filed using the eDCA filing portal and sent via e-mail to:

Carol J. LoCicero, Esq.,
Mark R. Caramanica, Esq.
THOMAS & LOCICERO, P.L.
601 South Boulevard
Tampa, FL 33606
E-mail:
clocicero@tlolawfirm.com
E-mail:
mcaramanica@tlolawfirm.com

Attorneys for Amici Curiae The Student Press Law Center; First Amendment Foundation; Florida Press Association; Reporters Committee For Freedom of the Press; and WKMG-TV

Charles T. Wells, Esq.,
Richard E. Mitchell, Esq.
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, FL 32801
E-mail:
charles.wells@gray-robinson.com
E-mail:
rick.mitchell@gray-robinson.com
E-mail:
debi.robbins@gray-robinson.com

Attorneys for Appellees John C. Hitt and The UCF Board of Trustees

Jeffrey T. Kuntz, Esq.
GRAYROBINSON, P.A.
401 East Las Olas Blvd., Suite 1000
Fort Lauderdale, FL 33301
E-mail:
jkuntz@gray-robinson.com
E-mail:
daurand@gray-robinson.com

Attorney for Appellees John C. Hitt and The UCF Board of Trustees

Dated: September 14, 2015

/s/ Justin S. Hemlepp
Justin S. Hemlepp, Esq.

Attorney for Appellant Knight News, Inc.