IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA
CIVIL DIVISION

KNIGHT NEWS, INC.,
Petitioner,

v. Case No: 19-CA-925-O

THE UNIVERSITY OF CENTRAL FLORIDA BOARD OF TRUSTEES,
Respondent. /

MOTION TO STRIKE SUR-REPLY
AND ALTERNATIVE RESPONSE TO STATUS HEARING BRIEF

Petitioner Knight News hereby moves to strike Respondent UCF's Status Hearing Brief and Sur-Reply in support of its February 7, 2019 Response to Alternative Writ of Mandamus and, alternatively, responds thereto.

1. UCF's sur-reply is an unsanctioned and belated amendment or supplement to its February 7, 2019 response brief. UCF's return to the Alternative Writ of Mandamus was due on February 7, 2019, not more than three weeks later on March 1, 2019.[1] Any new arguments UCF raised are waived.

2. In *Bal Harbour Village v. State ex rel. Giblin*, 299 So. 2d 611, 617-18 (Fla. 3d DCA 1974), Appellants' alleged "they should have been given an opportunity to amend their return." The District Court disagreed. "While mandamus is subject to the ordinary rules of pleading, it is a direct and speedy remedy. The petitioners were entitled to a decision upon the

[1] Notably, this Court's local rules suggest that a "brief" for the March 5, 2019 status hearing would have been due no later than 2:30 p.m. on February 28, 2019--three business days before the hearing.

sufficiency of the return. No error is demonstrated upon the refusal to grant leave to file an amended or supplemental return." *Id*. (citation omitted).

3. Here, UCF did not even ask for leave to amend or supplement its return. In fact, UCF alleges in the sur-reply that it "did not elect to show cause" in response to the Alternative Writ. That of course begs the question what the purpose of its three legal briefs filed in this case is if not to explain--i.e., show cause--why it never had to comply with Knight News's September 25, 2018 public records request to begin with.

4. UCF simply is trying to pile more into its cornucopia of unpersuasive reasons it believes this case is moot and again confuse the procedure and burdens in mandamus cases. But Knight News already addressed these arguments in its Reply to UCF's Response to the Alternative Writ.

5. However, as UCF continues to state in court filings and elsewhere that it is unaware of any remaining "live controversy" in this case, here is a list of at least some unresolved matters--factual, legal or mixed questions that remain quite ripe for adjudication.

a. Did Knight News's September 25, 2018 public records request trigger a responsibility for UCF to disclose the records identified in the Alternative Writ?

b. Is a public record's status as "not readily available" an exemption to the Public Records Act?

c. Did UCF disclose all public records pursuant to the Alternative Writ?

d. Why is the audio recording of the April 3, 2014 Finance and Facilities Committee meeting incomplete, and did UCF make sufficient efforts to locate a complete record?

e. Is Section 119.12, Florida Statutes, as amended in 2017, unconstitutional, facially or as applied?

6. Even in mandamus, mootness doctrine is not complicated. "Once a cause of action for mandamus is sufficiently pled, the plaintiff is entitled to a judicial determination of the rights at issue." *Consumer Rights, LLC v. Bradford County*, 153 So. 3d 394, 397 (Fla. 1st DCA 2014). This is true even if the agency produced requested public records after the action for mandamus relief was filed, because the question remains whether the agency violated Chapter 119 by unlawfully refusing to produce the records in the first place. *See id.* at 398. Thus, when such "a dispute as to at least one of the allegations" remains, it would be "error for the trial court to dismiss the complaint . . . by determining without a hearing that mandamus was moot because" UCF ultimately disclosed records "to respond to the request." *See id.* (citing *Meadows Community Ass'n, Inc. v. Russell–Tutty*, 928 So. 2d 1276, 1279 (Fla. 2d DCA 2006)).

7. In *Meadows* the court rejected a mootness argument raised on the basis that one remedy originally sought may no longer be needed—because the "availability of a remedy . . . is reached after, not before, the determination of a plaintiff's rights." *See id.* at 1279-80. The "prospect that the determination may not lead to the relief sought by the plaintiff will not thwart the action." *Id.*

8. Here, like in the public records mandamus action in *Consumer Rights*, both Knight News and UCF are in need of a "judicial determination of the rights at issue" with regard to UCF's duties under Florida's Constitution and Public Records Act.

9. For instance, Knight News and UCF disagree over whether UCF can lawfully refuse to disclose public records by invoking UCF's novel "not readily available" exception or

by exercising "discretion" to pretend to search for records responsive to a request in a manner that appears to qualify as a misdemeanor.

10. And now, UCF's sur-reply, at 4, demonstrates the parties also disagree over whether Knight News is bound by the same restrictive specificity requirements applicable to death row inmates alleging prosecutors failed to deliver "records relating to a capital defendant's case . . . to the postconviction repository." *Wyatt v. State*, 71 So. 3d 86 (2011) (explaining a separate process created under "Section 27.7081 and rule 3.852 pertain[s] only to the production of records for capital postconviction defendants"). Capital cases are different. Knight News is not a death row defendant.

11. This case falls squarely within all three scenarios that Florida's Supreme Court instructs prevent dismissal on mootness grounds. "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). While a moot case will "generally" be dismissed, "Florida courts recognize at least three instances in which an otherwise moot case will not be dismissed":

> (i) When the questions raised are of great public importance;
> (ii) When the questions are likely to recur; or
> (iii) When collateral legal consequences that affect the rights of a party flow from the issue to be determined.

Id.

12. The compliance and constitutional questions raised in this case, which rides along with UCF's $38 million scandal that continues to rock now three branches of state government, are no doubt of great public importance.

13. Considering this is Knight News's fourth open government lawsuit against UCF, and Knight News is in possession of unsubmitted evidence that UCF continues to engage in the

same bizarre interpretations of records requests from Knight News and others, the questions are not just likely to again occur, they are again occuring right now. To the extent the Court wants to review this evidence, Knight News asks for leave to take the time to file it fully and correctly.

14. Further, Knight News's entitlement to fees, costs and a determination of the constitutionality of a state statute are legal consequences collateral to the merits of this dispute.

15. Another collateral legal consequence Knight News would suffer by leaving the question of whether UCF violated the law unresolved is a loss of evidence to establish entitlement to injunctive relief. *Daniels v. Bryson*, 548 So. 2d 679, 681 (Fla. 3d DCA 1989) (recognizing a court "may enjoin violations of [the Public Records Act] where one violation has been found if it appears that the future violations bear some resemblance to the past violation or that danger of violations in the future is to be anticipated from the course of conduct in the past").

16. Here, depriving Knight News of a declaration that UCF's conduct violated the law -- despite UCF having "asserted it was entitled to" behave how it has -- would affect Knight News's rights to obtain injunctive relief in order to fulfill its Fourth Estate role in covering UCF's ongoing scandal. *See id.*

17. Four court orders from the Ninth Circuit and Fifth District are there for all to see, and they all say or affirm that UCF violated the Public Records Act. *Knight News, Inc. v. Univ. Cent. Fla. Bd. Of Trs.*, 2016 WL 7129592, 44 Media L. Rep. 2210 (Fla. 9th Jud. Cir. Aug. 11, 2016) (Trial Order), aff'd per curiam, 227 So. 3d 600 (Fla. 5th DCA 2017) (video of oral argument *available at* http://www.5dca.org/ArchivedOAs/2017/Aoa06-08-17.pdf (appellee's argument begins at 16:20)); *Knight News, Inc. v. Univ. Cent. Fla. Bd. Of Trs.*, 200 So. 3d 125

(Fla. 5th DCA 2016) *granting reh'g and withdrawing*, 41 Fla. Law Weekly D897 (Fla. 5th DCA 2016).

18. UCF has not corrected its behavior, and there is no evidence it will stop its policy and practice of ignoring the Public Records Act.

19. Accordingly, there is no merit to UCF's brazen, unsupported assertion that "[a]ny declaration or injunction issued by this Court would be useless and have no practical effect." Sur-Reply, at 8.

20. This Court's efforts are not useless; this Court undoubtedly has the authority to declare that UCF violated the Public Records Act and issue any corrective or punitive orders it deems necessary in light of the circumstances, especially considering Knight News pleaded for this Court to grant any relief it deems just and proper. And, moreover, this Court's ruling would not just guide the Parties' behavior in the future, but it also may influence the behavior of public records requesters and agencies statewide. This dovetails neatly with the fact that the issues in this action are of great public importance.

21. To be clear, Knight News believes that all issues in this case remain in dispute because UCF has failed to submit any sworn testimony to support its counsels' assertions. That is unless UCF's failure to do so or its failure to file an Answer in response to the Alternative Writ renders all Knight News's allegations admitted.

22. Ultimately, this Court has seen zero evidence, sworn or otherwise, that UCF's disclosures pursuant to the Alternative Writ are complete. The incomplete audio recording is an incontrovertible example. And UCF's assertion it need not make such an evidentiary showing is simply wrong.

23. In *DeGregorio v. State,* 205 So. 3d 841 (Fla. 2d DCA 2016), the requestor alleged that the records custodian failed to provide all the records requested in response to the petition. The trial court accepted the custodian/attorney's unsworn assertion that all the records were produced and denied the petition for mandamus. The District Court reversed, finding that the trial court erred in relying on the attorneys' unsworn assertion and should have had an evidentiary hearing to adjudicate the disputed issue of material fact: whether all the records were turned over.

> When the petition and response create an issue as to whether counsel possessed the records, the circuit court cannot deny the petition without resolving the dispute based on evidence submitted by the parties. *See Radford v. Brock*, 914 So. 2d 1066, 1068 (Fla. 2d DCA 2005) (explaining that "[i]f the petition and answer to the alternative writ raise disputed factual issues, the circuit court must resolve these issues upon evidence submitted by the parties" and reversing where the parties disputed whether the respondents actually possessed the requested records); *Williams v. State*, 163 So. 3d 618, 620 (Fla. 4th DCA 2015) (reversing denial of mandamus petition when the response to the alternative writ did not resolve the factual issues alleged in the petition); *Perez v. State*, 980 So. 2d 1205, 1206 (Fla. 3d DCA 2008) ("If the petition and response raise disputed factual issues, the trial court should resolve them upon proper evidence, which may include undisputed affidavits." (citing *Radford*, 914 So. 2d at 1067)); *Johanson v. State*, 872 So. 2d 387, 388 (Fla. 4th DCA 2004) (reversing the denial of a petition for writ of mandamus and remanding to the circuit court for an evidentiary hearing where the parties disputed whether the requested records were in the State's possession).

Id. at 842. *See also Clay Co. Education Assoc. v. Clay Co. Sch. Bd.*, 144 So. 3d 708 (Fla. 1st DCA 2014) (reversing dismissal of mandamus petition where respondent only submitted unsworn response and factual issue of whether custodian possessed the records remained) (citing

Johanson v. State, 872 So. 2d 387 (Fla 4th DCA 2004) (reversing denial of mandamus petition based on unsworn response filed by state that it did not possess responsive records and *Radford v. Brock*, 914 So. 2d 1066, 1068 (Fla. 2d DCA 2005) (reversing dismissal of a mandamus action because the petition and answer raised a factual dispute as to who possessed the requested recording and stating "[i]f the petition and answer to the alternative writ raise disputed factual issues, the trial court must resolve these issues upon evidence submitted by the parties")).

24. All disputes in this case remain alive; this case is not moot; and UCF still bears the burden of proof. And UCF still refuses to explain why the April 2014 audio recording is incomplete. UCF's arguments are frivolous and made in bad faith. *See Moakley v. Smallwood*, 730 So. 2d 286 (Fla. 3d DCA 1999).

WHEREFORE, Petitioner Knight News respectfully requests that this Court strike UCF's "Status Hearing Brief and Sur-Reply" and award any other relief deemed by the Court to be just and proper.

Dated: March 4, 2019

Respectfully submitted,

J.S. HEMLEPP, P.A.

/s/ Justin S. Hemlepp
Justin S. Hemlepp, Esq.
Fla. Bar No.: 58991
4154 Laurel Oak Circle
Tallahassee, FL 32331
Telephone: (813) 438-6103
E-mail: jhemlepp@hemlepplaw.com
Attorney for Knight News, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of the foregoing was filed using the Florida Courts' e-filing portal and thereby sent via e-mail to those listed below.

Richard E. Mitchell, Esq.
Andy Bardos, Esq.
GRAYROBINSON, P.A.
301 East Pine Street, Suite 1400
Orlando, FL 32801
E-mail: rick.mitchell@gray-robinson.com
E-mail: maryann.hamby@gray-robinson.com
E-mail: andy.bardos@gray-robinson.com
E-mail: vanessa.reichel@gray-robinson.com
Attorneys for the UCF Board of Trustees

Assigned Attorney
FLORIDA OFFICE OF THE ATTORNEY GENERAL
E-mail: oag.civil.eserve@myfloridalegal.com

Kamilah Perry, Esq.
Executive Director/General Counsel
OFFICE OF THE STATE ATTORNEY, NINTH JUDICIAL CIRCUIT
415 North Orange Avenue
Orlando, FL 32801-1526
E-mail: kperry@sao9.org
E-mail: gacosta@sao9.org

Dated: March 4, 2019

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