SUPREME COURT OF FLORIDA

CASE NO. 87,222
CIRCUIT COURT CASE NO. CF 90-1569A1

GEORGE JAMES TREPAL,

Appellant,

v.

THE COCA-COLA COMPANY,

Appellee.
_____/

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA**

ANSWER BRIEF OF THE COCA-COLA COMPANY

MITRANI, RYNOR & GALLEGOS, P.A.
Pamela A. Chamberlin
Fla. Bar No. 444006
Karen Williams Kammer, P.A.
Fla. Bar No. 771200
2200 SunTrust International Ctr.
One Southeast Third Avenue
Miami, Florida 33131
305/358-0050

Attorneys for Appellee The Coca-Cola Company

W. Joseph Thesing, Jr.
Georgia Bar No. 740105
Litigation Counsel
The Coca-Cola Company
P.O. Drawer 1734
Atlanta, Georgia 30301
404/676-2121

Of Counsel

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STATEMENT OF THE CASE

In February 1991, Defendant George Trepal was convicted of first-degree murder, attempted murder and product tampering in connection with the poisoning of Peggy Carr and her family with thallium-laced bottles of Coca-Cola. On direct appeal, this Court affirmed his conviction and death sentence in June 1993.

Almost two years later, the Capital Collateral Representative (the "CCR") mailed a letter on Defendant's behalf to The Coca-Cola Company (the "Company") asking it to provide him with "all files related to" the investigation of the tampering incident, including "financial records pertaining to the investigation" and "transcripts of trial(s), hearings and/or other proceedings generated as a result of this investigation." R. 76; A. 1.[1] The Company responded promptly to the CCR's request and, in a letter dated February 27, 1995, wrote that "[w]hatever relevant information [it] had in this matter was turned over to Florida prosecuting authorities some years ago". R. 31; A.3.

Defendant then filed a "Motion To Compel Disclosure Of Documents Pursuant To Chapter 119.01 Et Seq., And Chapter 57.081, Florida Statutes" on May 18, 1995 (the "Motion to Compel"). Defendant directed his Motion to the Company, as well as to the Polk County clerk, sheriff, and state attorney, and the Florida

[1] References to the record on appeal here (that is, in connection with Defendant's informal document request of the Company) will be reflected by "R." followed by the page number as in "R. 1". References to the appendix attached to this answer brief will be reflected by "A." followed by the page number as in "A. 1".

Attorney General. Only that portion of the Motion directed to the Company is the subject of this appeal.

At a hearing October 20, 1995, the trial court provided Defendant with the opportunity to present whatever argument and/or evidence he believed supports his position that Chapter 119, Florida Statutes, applies to The Coca-Cola Company. The court denied Defendant's Motion, finding under the analysis set forth by this Court in News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992), that the Company was not acting on behalf of a public agency and thus Florida's Public Records Act does not apply. R. 117 - 22. The court entered a written order November 3, 1995, and De'fendant filed a "Notice of Appeal." R. 144 - 49. Because no "appeal" to this Court from the circuit court lies in these circumstances, the Company filed a Motion to Dismiss Appeal for Lack of Jurisdiction on April 22, 1996, and a motion to toll time for serving this answer brief, both of which are still pending.

STATEMENT OF FACTS[2]

In a neighborhood feud turned deadly, Peggy Carr and members of her family were hospitalized with thallium poisoning in October 1988. Trepal v. State, 621 So.2d 1361, 1364 (Fla. 1993). After an extensive investigation, authorities traced thallium to Coca-Cola bottles found in the Carrs' home. Id.

Alarmed at the possibility of product tampering, the Polk County Sheriff's Office contacted the local **Coca-Cola** bottling plant who in turn notified Company executives in Atlanta. R. 6 - 7; Trial Trans. 3379 - 80[3]; A. 45 - 46. The Company moved swiftly to respond to the emergency, mobilizing its crisis team to collect facts and monitor public reaction. Trial Trans. 3380 - 81; A. 46 - 47. Company representatives travelled to Polk County to offer authorities whatever help the Company could provide, as **was** standard Company practice, but did not control or influence the authorities' investigation. Trial Trans. 3381, 3384 - 85; A. 47, 50 - 51. The Company also flew samples police had collected and from **area** bottling plants to an FBI laboratory in Washington, D.C., and arranged for local and federal officials to tour a local bottling plant. Trial Trans. 3382 - 84; A. 48 - 50. In an effort to

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[2] Curiously, Defendant omits any statement **of facts from** his initial brief, but chooses instead to include various facts in his argument without record citation.

[3] References to the transcript of testimony taken at Defendant's murder trial will be reflected by "Trial Trans." followed by the record page number as in "Trial Trans. ____". Because Defendant cites only portions of the testimony of certain Company executives, in the interest of clarity and completeness, the Company directs the Court to those witnesses' entire testimony here.

determine how thallium could appear in sealed Coca-Cola bottles without altering the drink's appearance and thus discover the possible source of the contamination (including whether it might have occurred during the bottling process), the Company conducted tests in its own laboratory over the course of several months. Trial Trans. 3388 - 89, 3403 - 19; A. 54 - 55, 69 - 85. Contamination at the plant was ruled out. Trial Trans. 3385; A. 51.

In the meantime, law enforcement authorities continued with their own investigation. In late 1989, Defendant moved from his home next to the Carrs', and rented it to undercover law enforcement officers. The officers found a container of thallium and a bottle-capping machine, among other things, in Defendant's garage. Trepal, 621 So.2d at 1364 - 65.

At Defendant's trial for murder, attempted murder and product tampering, the state presented numerous witnesses and physical evidence to establish Defendant's guilt. On the witness stand, iaw enforcement officials described what they recovered from the victims' and Defendant's respective homes, and recounted the history of animosity between the neighbors as well as numerous statements Defendant had made tying him to the crime. Trepal, 621 So.2d at 1364 - 65. The state also called Company representatives as witnesses who testified about their response upon learning poison had been found in their product, and their efforts to determine the source and clear the Company's name. Trial Trans. 3376 - 3433, 3112 - 45; A. 42 - 99, 8 - 41. In 1991, Defendant was convicted and sentenced to death.

Almost two years after this Court affirmed Defendant's conviction and sentence on direct appeal, the CCR mailed a letter to the Company asking it to send the CCR copies of all of the Company's files "related to" the investigation into the Coca-Cola tampering, including all "financial records" and "transcripts". R. 76; A. 1. The Company promptly responded, advising the CCR it had turned over to law enforcement authorities " [wlhatever relevant information" it had "some years ago". R. 31; A. 3. Although Defendant never served the Company with process, Defendant then filed his Motion to Compel, asserting the Company -- by virtue of its cooperation with authorities -- "assumed a law enforcement role " and thus became a public agency whose documents are "public records" subject to disclosure under Florida's Public Records Act. R. 3, 9 - 10. He further contends the Company could not assert any statutory exemption because the documents, "having been used publicly in open court to the State's advantage, are not exempt" under the Act. R. 12.

At a hearing October 20, 1995, the CCR argued that because the Company had conducted some testing it "assume[d] a role that a state agent [sic] would assume" and thus was a public agency for purposes of the statute. R. 87. The CCR also urged the trial court to consider the criminal nature of the underlying litigation, and further contended that the Company's laboratory tests "were done at the requests [sic] of the Polk County Sheriff's Office". R. 91 - 92, 94. Although given an opportunity to introduce evidence supporting his contention the Company is subject to Chapter 119, the CCR instead produced several unauthenticated

letters and an excerpt from a book written by the undercover officer who had discovered the thallium in Defendant's garage, all of which lacked the requisites for admissibility. R. 96 - 102. The CCR then asserted the Constitution demands the Company give Defendant whatever documents it has. R. 103 5. The trial court asked the CCR whether it had any evidence the Company's testing was a "deliberate" attempt by law enforcement to circumvent the Public Records Act, and the CCR responded there was none. R. 94 - 96.

Relying on this Court's opinion in Schwab, the trial court denied Defendant's Motion to Compel as to the Company. Using Schwab's "totality of factors" test, the court ruled the Company was not an "agency" for purposes of Chapter 119 and thus the CCR's letter did not request disclosure of "public records". R. 117 - 21. The court also noted the criminal discovery process is available to Defendant, and expressly rejected Defendant's contention that criminal defendants have a special right of access to documents of private entities such as the Company. R. 146. The Court subsequently entered a written order. R. 144 - 47; A. 4 - 7.

SUMMARY OF ARGUMENT

The question before the Court is whether the Company is an "agency" under Florida's Public Records Act whose documents therefore become "public records" merely because the Company cooperated with law enforcement authorities in connection with the thallium contamination of its soft drink. Although the Act extends its reach to private entities who act "on behalf of" government agencies, the Company did not do so here. Applying the "totality of factors" test this Court announced in Schwab, the trial court correctly ruled Chapter 119 does not apply. Contrary to Defendant's assertion, no one factor is dispositive, including the fact that Defendant is a criminal defendant seeking material with which **to collaterally** attack his conviction and death sentence. Nor is it dispositive that the Company cooperated with law enforcement or testified on the state's behalf. This simply is not a public records matter. Because the Company did not act "on behalf of" a state agency, its records are not "public records" under the statute and thus the Defendant's letter requesting certain documents is of no effect.

Defendant's constitutional and "fairness" arguments are equally unavailing. The Company was under no process of the court and thus there is nothing to "compel", constitutionally or otherwise. For the reasons discussed more fully below, this Court should affirm the circuit court's order denying Defendant's motion to compel.

ARGUMENT

THE TRIAL COURT CORRECTLY RULED THAT FLORIDA'S PUBLIC RECORDS ACT, CHAPTER 119, FLORIDA STATUTES, DOES NOT APPLY TO DEFENDANT'S REQUEST FOR DOCUMENTS FROM THE COCA-COLA COMPANY.

In his initial brief, Defendant proffers two theories, each of which he contends requires the Company to provide him with documents relating to the thallium contamination of its soft drink: one, that Florida's Public Records Act (Chapter 119, Florida Statutes) applies to the Company, and two, that the Constitution and "fairness" demand such disclosure. Defendant's Brief at 4. However, despite Defendant's protestations, the Public Records Act simply does not govern here, for the Company did not act "on behalf of" any state agency as contemplated under the Act. Nor can Defendant use the Constitution or some notion of fair play to "compel" production of documents from a non-party under no process of the court. Accordingly, the trial court properly denied his Motion to Compel.

A. In Cooperating With Law Enforcement Authorities, The Coca-Cola Company Did Not Act "On Behalf Of" Any State Agency.

Defendant asserts the Company "assumed a law enforcement role" by virtue of its cooperation with Polk County authorities, and further that authorities "delegated" such role to the Company. Defendant's Brief at 5. Defendant relies principally upon the Company having flown samples police had collected and from local bottling plants to an FBI laboratory, and the Company's having undertaken to conduct its own tests to determine how its soft drink was contaminated. Defendant's Brief at 6, 12, 19 n.5. However,

none of that activity renders the Company a Chapter 119 agency as a matter of law.

Chapter 119 defines an agency as

> any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

Section 119.011(2), Florida Statutes (1995). Clearly, the Public Records Act does not limit its reach to such traditional public agencies as the Department of Health and Rehabilitative Services, the Department of Corrections, and the like. Rather, the Act also governs private concerns when they act "on behalf of" a public agency. Such provision ensures the state cannot circumvent Chapter 119 by delegating certain functions to a private entity. Schwab, 596 So.2d at 1031; Times Publishing Company, Inc. v. City of St. Petersburg, 558 So.2d 487, 492 - 3 (Fla. 2d DCA 1990).

In delineating the circumstances under which a private entity falls under the purview of Chapter 119, this Court in Schwab adopted the "totality of factors" test previously used in the district courts. Such factors include:

* the level of public funding;
* whether funds are commingled;
* whether the activity was conducted on publicly owned property;
* whether the services for which the agency contracted are an integral part of the agency's chosen decision-making process;

* whether the private entity is performing a governmental function or one which the agency otherwise would perform;

* the extent of the agency's involvement with, regulation of, or control over the private entity;

* whether the public agency created the private entity;

* whether the public agency has a substantial financial interest in the private entity; and

* for whose benefit the private entity is functioning.

Schwab, 596 So.2d at 1031 (and cases cited). This Court expressly rejected the contention that any one factor controls, contrary to the position Defendant urges the Court to adopt here, and recognized each situation is "unique". Id. at 1032. In Schwab itself, after examining the various factors, the Court determined the architectural firm there was not an agency subject to Chapter 119. Id. at 1033. Schwab had contracted with the school board to provide architectural services for construction of a school. The school board neither created the firm nor regulated it, the firm's architectural services were not an integral part of the board's decision-making process, the board had not delegated responsibility it otherwise would have assumed, and the firm performed for its own economic benefit, not necessarily the public welfare, among other things. Id. at 1032 - 33. That Schwab received public money was not dispositive; it received public funds in consideration for the services it performed. Id. at 1032.

1. The trial court correctly applied the "totality of factors" test this Court announced in Schwab.

Although Defendant acknowledges Schwab is the applicable standard, he nevertheless misapplies it. Defendant's Brief at 26 - 28. Schwab **clearly** demonstrates the trial court properly found Chapter 119 does not apply to the Company here.

The only 'connection' between the Company and any state agency is the Company's dual role as witness and victim. The Company receives no public funding, R. 118, and thus there is no commingling of private and public funds. R. 118. The activity at issue -- conducting tests to determine how the poison may have been introduced, and flying samples to an FBI laboratory -- occurred on private, not public, property. R. 118. Polk County **law** enforcement authorities did not "regulate" or exert "control over" the Company,[4] and the government here neither created the Company nor maintains any financial interest in it. R. 120. Further, it is undisputed that the Company undertook such testing for its own economic benefit in addition to any public good that also may have

[4] Indeed, any suggestion they did is fallacious. Defendant argues an officer's trial testimony establishes the sheriff's office asked the Company to conduct some tests. Defendant's Brief at 19. Even so, merely asking for assistance by no means constitutes exerting control. There is no evidence the Company conducted its tests in a manner the state prescribed rather than according to its own testing protocols. Further, that the state may have asked for assistance or that the Company may have offered it is, by itself, insufficient as a matter of law to transform the Company from a private entity into a Chapter 119 "agency". Schwab, 596 So.2d at 1031 - 32 (rejecting single factor approach).

accrued,[5] particularly given the "nature of the public reaction" incident to suspected product tampering. R. 121. Although the court assumed, for purposes of the hearing, the tests the Company conducted to be "something the government normally does",[6] R. 119, that alone is not dispositive.

It also is not dispositive -- or even "critical", as Defendant insists -- that this issue happens to arise in the context of a criminal prosecution. Defendant's Brief at 27. Although the factors listed in Schwab are not exhaustive, the "totality of factors" test by definition precludes the favoring of one factor over others. And, most importantly, there is absolutely no evidence in the record -- nor can Defendant produce any -- demonstrating the state delegated the testing to the Company in an effort to hide the results from public scrutiny and thus circumvent the Public Records Act. R. 94 - 96. Schwab, 596 So.2d at 1031; Times Publishing, 558 So.2d at 492.

Defendant would have this Court find that every corporate witness in a criminal proceeding automatically becomes a Chapter 119 "agency" simply by virtue of cooperating with authorities or providing testimony deemed helpful to the prosecution. Such is not and never has been the law. The cases upon which Defendant relies are inapposite. While it is true this Court has recognized a

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[5] The circuit court expressly rejected Defendant's contention that the Company's interest ended after it had determined it was not the source of the contamination. R. 121.

[6] In this regard, Schwab speaks in terms of "services contracted for". Schwab, 596 So.2d at 1031. Here, however, there is no contract and no contention one ever existed.

criminal defendant collaterally attacking his conviction has a right to public records, see Defendant's Brief at 27 - 28, the cases cited involve true Chapter 119 agencies, not private concerns whose elevated status as a public agency is manufactured out of whole cloth,

Ordering disclosure in these circumstances would chill future corporate cooperation with law enforcement. Private entities would hesitate before agreeing to cooperate with authorities in potential product tampering situations, fearing such cooperation automatically would render them subject to Chapter 119. Where, as here, public health and safety may be at stake, the danger of such hesitation may be immeasurable.

2. **The record is devoid of any evidentiary** basis **for finding the Company to be an "agency" under the Public Records Act.**

Defendant contends the trial court's finding that the Company was not acting on behalf of any state agency is "not supported by competent or substantial evidence, and in fact is totally contrary to the evidence." Defendant's Brief at 18. However, the trial court considered all evidence properly before it. Indeed, much of what Defendant characterizes **as** evidence is not: the prosecutor's argument at a pre-trial hearing and opening statement at trial (Defendant's Brief at 9 - 10, 20 - 22), or the CCR's argument below (Defendant's Brief at 15), all of which Defendant cites in support of his position. Other material Defendant sought to introduce below -- a book excerpt and certain

letters[7] -- is inadmissible on **hearsay grounds** or lacking foundation. R. 99, 102. Defendant had ample opportunity to present competent, admissible evidence in support of his position, but failed to do so. See R. 97 - 103.

B. The Documents Defendant Seeks Thus Are Not "Public Records" Under Chapter 119.

A "public record" under Chapter 119 is any document

> made or received pursuant to law or ordinance or in connection with the transaction of official business by any **agency.**

Section 119.011(1), Florida Statutes (1995) (emphasis added). The key is that the documents be made or received in connection with "agency" business. If the entity is not **an** "agency" under the statute, then its documents cannot be "public records" and the Act does not apply. Because, as demonstrated above, the Company was not acting on behalf of any state agency and itself is not a Chapter 119 agency, the documents Defendant seeks from the Company are not "public records". Accordingly, Chapter 119 does not apply here. While Chapter 119 is to be construed broadly to effectuate its purpose of promoting open government, **a** court cannot manufacture a statutory right of disclosure where none plainly exists. See Wait v. Florida Power & Light Co., 372 So.2d 420 (Fla. 1979).

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[7] One such document upon which Defendant relies (see Exhibit C to Defendant's Motion to Compel) actually is **a copy** of **an** FDA investigator's notes concerning inspection of a Coca-Cola bottler's plant in Tampa. It is not, as Defendant describes it, a report of "the various testing performed by The Coca-Cola Company." R. 74.

C. Neither The Constitution Nor Some Notion Of Fairness Requires A Contrary Result.

Defendant takes the remarkable position that a non-party -- under no process of the court -- must provide him with company documents because "fair play" and the Constitution somehow require it. Defendant's Brief at 17 - 18, 30. Defendant relies upon the Fifth, Sixth, Eighth and Fourteenth amendments, and argues the information constitutes Brady material and is essential to his ability to confront witnesses. R. 104. He **also** argues he has been sentenced to death, R. 104 - 05, and nondisclosure would deny him due process, R. 105. However, the Constitution does not operate in a vacuum, nor does any notion of "fair play".

Affirming the circuit court's order would not deny Defendant due process. Defendant's Brief at 30. There is no evidence Defendant was unable to cross-examine witnesses at trial -- including Company representatives. Defendant **also** had the opportunity to introduce his own evidence to refute that which the state introduced. Since the trial and this Court's opinion affirming his conviction and sentence, Defendant has submitted public records requests to the Polk County sheriff, the state attorney, and the office of the Florida attorney general -- all true public agencies -- and has been provided with responsive material. The criminal discovery rules are also open to Defendant if he chooses to employ them. There is absolutely no impediment to his gathering information relevant to the preparation of any collateral attack on his conviction and sentence.

CONCLUSION

For the reasons discussed above, this Court should affirm the circuit court's denial of Defendant's motion to compel The Coca-Cola Company to provide Defendant with the company documents described in Defendant's letter.

MITRANI, RYNOR & GALLEGOS, P.A.
Pamela A. Chamberlin
Fla. Bar No. 444006
Karen Williams Kammer, P.A.
Fla. Bar No. 771200
2200 SunTrust International Ctr.
One Southeast Third Avenue
Miami, Florida 33131
305/358-0050

By: _____
Attorneys for Appellee
The Coca-Cola Company

W. Joseph Thesing, Jr.
Georgia Bar No. 740105
Litigation Counsel
The Coca-Cola Company
P.O. Drawer 1734
Atlanta, Georgia 30301
404/676-2121

Of Counsel

CERTIFICATE OF SERVICE

I certify a true copy of the foregoing Answer Brief of The Coca -Cola Company **was** served by mail this 24th day of April, 1996, on:

Todd G. Scher
Assistant CCR
Office of the Capital Collateral Representative
1533 South Monroe Street
Tallahassee, Florida 32301
Attorneys for Appellant

Carol Ditmar
Assistant Attorney General
Department of Legal Affairs
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607

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