UA 2-3-58 017

IN THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
NOV 21 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.,

Petitioner,

v.

NEWS-JOURNAL CORPORATION,

Respondent.
_____/

CASE NO. 90,835

DISTRICT COURT OF APPEAL, FIFTH DISTRICT
CASE NO. 96-260

BRIEF OF AMICUS CURIAE, FLORIDA HOSPITAL ASSOCIATION, IN SUPPORT OF PETITIONER, MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

William A. Bell
FLORIDA HOSPITAL ASSOCIATION
Florida Bar No. 0197653
Post Office Box 469
Tallahassee, Florida 32302-0469
(850) 224-8127

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STATEMENT OF INTEREST OF FLORIDA HOSPITAL ASSOCIATION

The Florida Hospital Association ("FHA") has been granted the status of amicus curiae in support of the Petitioner.

FHA is the primary organization of hospitals in the State of Florida, with its membership including approximately 250 hospitals, varying in size and forms of ownership. The principal objective of the FHA is to promote its members' ability to provide comprehensive, efficient, and high quality health care to the people of Florida.

Among the membership of FHA are many corporations which provide health care services pursuant to lease arrangements with hospital authorities very similar to the lease under scrutiny in the instant case. FHA believes that the trial court's summary judgment in favor of Memorial Hospital-West Volusia, Inc., was well reasoned and reached the correct conclusion. The district court's reversal, if affirmed, would have a drastic and adverse impact on the ability of those similarly situated member hospitals to provide high quality, cost effective health care to the general public, and particularly to Florida's indigent population.

STATEMENT OF THE CASE AND FACTS

FHA adopts in its entirety the statement of case and facts as set forth in the initial brief of Petitioner, Memorial Hospital-West Volusia, Inc.

The parties on appeal and the entities closely involved in the transactions at issue in this case will be identified in the same fashion as in Petitioner's brief, to wit:

Petitioner, Memorial Hospital-West Volusia, Inc., will be referred to as "Hospital Corporation";

Respondent, News-Journal Corporation, will be referred to as "Publishers";

Memorial Health Systems, Inc., will be referred to as "MHS";

West Volusia Hospital Authority will be referred to as "Authority."

SUMMARY OF ARGUMENT

The trial court's thorough analysis of the undisputed facts of this case and its faithful adherence to the test set forth in News and Sun Sentinel Company v. Schwab, Twitty and Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1993), was correct, and its ruling should be affirmed. The Fifth District's focus on the single factor of the Authority's divestment of its health care provider status in favor of Hospital Corporation emasculated Schwab's totality of the factors test and yielded an erroneous result.

As recognized by even the Fifth District, the legislative intent of §155.40 was to allow public hospitals to become more competitive in the health care marketplace, so that the provision of health care services to the public would in turn be enhanced. Perhaps the most critical element in a hospital's financial viability in today's economic environment is the confidentiality of its planning strategies and financial deliberations. The opinion below mandates public scrutiny of these very items, effectively defeating the purpose of §155.40.

The opinion also invades the contracting parties' right to bargain for the specific terms of the lease. Operation in the sunshine is not one of the requirements of the statute. The parties were therefore free to include or exclude this provision in the lease. Subjection to the open government laws was a specifically negotiated, and rejected, term of the lease. The

Fifth District's ruling has the unlawful effect of retroactively imposing a new, substantive requirement of the lease.

Nor is the effect of the ruling below limited to the case at bar. Many hospitals in Florida operate pursuant to similar §155.40 lease arrangements. At the very least, the Fifth District's opinion, if affirmed, would cause similarly situated hospitals to suffer the same competitive disadvantages as Hospital Corporation. It is also likely that the opinion would serve as a springboard for renegotiating, or even abrogating, some existing leases. Additionally, future transactions under §155.40 -- whether by lease or the newly enacted option of sale to private corporations -- will most certainly be chilled. Simply put, what prudent, private corporation would in today's economic environment, knowingly undertake the operation of an enterprise whose every business strategy will be open to the scrutiny of the general public and its competitors?

The competitive crippling of these hospitals will inevitably result in their diminished ability to provide high quality, efficient health care services to the population at large, and particularly to indigent patients. This result is precisely the opposite of what the legislature intended by enacting §155.40. The Fifth District's opinion must be reversed.

ARGUMENT

I. THE DISTRICT COURT REVERSIBLY ERRED IN ITS APPLICATION OF THE SCHWAB TEST TO THE UNDISPUTED FACTS OF THIS CASE

FHA will not here engage in a wholesale reiteration of the facts before the Court or the application of the "totality of the factors" test enunciated by this Court in News and Sun-Sentinel Company v. Schwab, Twitty and Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992). Hospital Corporation and Publisher will provide the Court with a thorough analysis of the same.

Suffice it to say that FHA strongly concurs with the trial court's well reasoned and faithful application of the Schwab test to the facts of this case, and with its conclusion that Hospital Corporation is not acting on behalf of the Authority, nor is it under the Authority's dominion and control. The ultimate holding that Hospital Corporation is not subject to the Public Records Law or the Sunshine Law is the correct one.

Even the most casual, comparative reading of Schwab and the Fifth District's opinion, News-Journal Corporation v. Memorial Hospital-West Volusia, Inc., 695 So.2d 418 (Fla. 5th DCA 1997), reveals that the district court did not employ the same faithful adherence to this Court's precedential decision as did the trial court. In reversing the trial court, the appellate court inexplicably found that the majority of the Schwab criteria examined were not met by the lease transaction at bar, but nonetheless held that the Schwab "totality of the factors" test had

been met. The end result was that the court below reduced the "totality of the factors" test to a "single factor" test, contrary to the established authority of this Court[1] and other appellate decisions which have relied on a Schwab-like analysis. For a more indepth review of this aspect of the opinion, FHA commends to the Court the analysis offered by fellow amicus curiae, The Association of Community Hospitals and Health Systems of Florida, Inc.

As discussed more thoroughly below, it is readily foreseeable that the appellate court's opinion, if affirmed, will have an adverse impact -- both immediate and future -- on many of FHA's members, and in turn, on the health and welfare of our state's neediest citizens. This amicus brief will focus on the overriding policy considerations inherent in the determination to be made by this Court.

II: SUBJECTING HOSPITAL CORPORATION TO THE PUBLIC RECORDS ACT AND THE SUNSHINE LAW WOULD IMPAIR THE EXPRESS LEGISLATIVE INTENT OF SECTION 155.40, FLORIDA STATUTES

The statute under consideration in this case, §155.40, Florida Statutes (1982), as amended, is now 15 years old. By the time the Authority found itself operating a failing public hospital in 1994 and elected to choose one of the reorganization options of §155.40, the market forces surrounding the provision of health care to the

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[1]The Court recently reaffirmed the efficacy of the totality of the factors test in Trepal v. State of Florida, 22 Fla.L.Weekly S-170a (Fla., March 27, 1997), wherein the Court held that a trial court's application of the test to facts elicited in an evidentiary hearing must be affirmed if there is any competent, substantial evidence supporting the ruling.

public had radically changed from those at play in 1982. See generally, M. Noether, Competition Among Hospitals, 74 (1987)(results of a study on the extent, form, and effect of competition among hospitals); Baker, The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry, 51 Law & Contemp.Probs. 93, 97-99 (1988); Bryant, Should Not-For-Profit Organizations be Exempt From Antitrust Laws?, Healthcare Fin.Mgmt., June 1988, at 70, 71.

Even so, the 1982 legislature was sufficiently foresighted and concerned about the continued viability of public hospitals to recognize that economic and competitive relief was needed. This recognition is apparent from the resource management options set forth in the initial legislation, and has become even more obvious in the 1996 amendment to the statute, which authorizes the outright sale of a public hospital to a for-profit or not-for-profit Florida corporation. See, Chapter 96-304, Laws of Florida. The legislature's penultimate motivation in providing these alternatives to the public hospitals is expressed in the opening phrase of the statute: "In order that citizens and residents of the state may receive quality health care ..." §155.40(1) (emphasis added).

This strong statement of legislative purpose mirrors the principal objective of FHA, which is to promote its members' ability to provide comprehensive, efficient, and high quality health care to all the people of our state, including the indigent

population. The increasingly tense economic environment in which health care is currently being provided is, from a public policy perspective, of particular concern to those hospitals which provide health care services to the indigent population. Without the ability to remain competitive and fiscally sound -- goals which are manifest in, and readily available through, the correct application of §155.40 -- facilities such as Hospital Corporation will be hamstrung in their endeavors to meet the important societal obligation of caring for the state's most needy patients.

Interestingly, the Fifth District Court of Appeals has itself recognized the purpose behind §155.40. In Jess Parrish Memorial Hospital, Inc. v. City of Titusville, 506 So.2d 22, 23 (Fla. 5th DCA 1987), the court observed as follows:

> Apparently this statute was passed to help the hospitals better compete with the private hospitals; it gave the board of the hospital the authority to enter into management contracts and otherwise have "outside", presumably more efficient, assistance in the running of the business of a hospital.

Nor is §155.40 alone in its recognition of the need for competitive equity among hospitals. Our elected officials have historically acknowledged the market forces which impact health care providers. By way of example only, in the Health Facilities and Health Services Planning Act, §381.493, et seq. (1980), the legislature specifically stated that "[i]t is intended that strengthening of competitive forces in the health services industry be encouraged." Section 381.493(2). Hospitals were included in the definition of "health care facilities" covered by the Act.

Section 381.493(3)(c). As another example, in the Florida Health Care Responsibility Act of 1988, §§154.301-154.316, Fla. Stat. (1988), the legislature recognized the inequity of certain hospitals bearing a disproportionate burden of caring for the indigent population.

Thus, there is but one conclusion which may be drawn from the initial language of §155.40, its subsequent amendments, decisional authority interpreting §155.40, and the statements of legislative purpose which have historically motivated other health care statutes. The legislature's concern for the provision of quality health care to the citizens of Florida, and particularly the indigent population, prompted it to provide public hospitals with alternatives which, depending on the unique circumstances of each hospital, can enhance the health care provider's ability to survive in the increasingly competitive marketplace.

With this understanding, the Authority, which was operating a nearly defunct hospital in 1994, accepted the legislature's invitation and leased the facility to Hospital Corporation, at great expense to both Hospital Corporation and its private, "parent" corporation, MHS. For Hospital Corporation to now be successful in its revitalization of this facility and continue providing quality health care services to its patients, Hospital Corporation must be accorded the competitive equity for which MHS bargained.

Of utmost importance to the success of this venture -- and that of any hospital or other business enterprise -- is the

practice of long-range planning and the development of prudent economic strategies, which are private matters obviously rendered ineffective by public disclosure. MHS, which manages two other not-for-profit hospitals, recognized this elementary business principle. The record below indisputably indicates that MHS would not have consummated the deal with the Authority if operation "in the Sunshine" and subjection to the Public Records Law were to be the consequences of the lease transaction. Yet as revealed in Publishers' complaint, it is just such competitively sensitive information which Publisher seeks by asserting these "open government" provisions against Hospital Corporation.

It is important to note that §155.40, as amended, contains detailed instructions regarding the terms under which such a lease may be effective, but contains no reference whatsoever to the application of the Public Records Law or the Sunshine Law to the new entity. The legislature has shown in other health related statutes that it knows very well how to impose an "open government" requirement if it so intends. See, e.g., §624.91, Fla. Stat., the Florida Healthy Kids Corporation Act, which established a private, not-for-profit corporation dedicated to providing preventive health care services to school children. The Act very specifically outlined the corporations duties, established the composition of the state official-appointed board of directors, and addressed the application of the Public Records Law to the corporation.

Where, as here, a statute is silent as to one public policy consideration but express in its statement of another (here,

facilitating the provision of health care services to the citizens of Florida), the Court may not assume the intended presence of the omitted item. This Court has repeatedly held that the judiciary may neither limit nor add to the words of a statute as placed there by the legislature. See, e.g., Chaffee v. Miami Transfer Company, Inc., 288 So.2d 209, 215 (Fla. 1974); State v. Barquet, 262 So.2d 431 (Fla. 1972); Ervin v. Collins, 85 So.2d 852 (Fla. 1956)(en banc). Instead, "[s]tatutes should be construed in light of the manifest purpose to be achieved by the legislation." Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So.2d 926, 929 (Fla. 1983). The opinion below accomplishes just the opposite result.

Ironically, if Publisher is successful in asserting the public's right to know, and the planning and financial decision making functions of Hospital Corporation are opened to public scrutiny, the welfare of the very constituents whose rights Publisher seeks to vindicate will ultimately suffer. The legislative purpose of §155.40 will be thwarted, because Hospital Corporation's ability to continue operating in an economically viable fashion and to provide quality health care services to the local indigent population will be greatly diminished.

III. IF THE FIFTH DISTRICT'S OPINION IS AFFIRMED, THE INTEGRITY OF MANY SIMILAR SECTION 155.40 LEASES WILL BE IMPAIRED, AND NEGOTIATIONS FOR FUTURE LEASES OR SALES WILL BE CHILLED.

Many of FHA's members operate pursuant to leases with hospital authorities similar to the one before the Court, although each

lease is of course tailored to meet the individual needs of the lessee hospitals. These hospitals, like Hospital Corporation, relied upon the law governing Chapter 119 and §286.011, Florida Statutes, and Article I, §§24(a) and (b) of the Florida Constitution, when negotiating the leases. The established law which guided the Authority, MHS and Hospital Corporation included the following:

1. The expression of legislative intent in §155.40;

2. The historical expressions of the legislature in favor of competition among health care providers and in strong support of the provision of quality health care services to the indigent population;

3. The absence of any reference to the Public Records Law or the Sunshine Law among the very specific instructions of §155.40;

4. The points to be considered under the "totality of the factors" test approved by the Court in Schwab, supra;

5. Sarasota Herald-Tribune Company v. Community Health Corporation, Inc., 582 So.2d 730 (Fla. 2nd DCA 1991), which outlined circumstances under which a not-for-profit lessee under §155.40 would be subject to the open government laws;[2] and

[2]In Sarasota Herald Tribune, unlike the case at bar, hundreds of thousands of dollars in grants and a $300,000 non-collateralized loan were given by the Sarasota County Public Hospital Board to the not-for-profit lessee, and the board of directors of the hospital board and the corporation substantially overlapped, so that the public entity could "substantially influence policy and financial decisions of the corporation." 582 So.2d at 732.

6. The general principle of law that parties are free to negotiate at arms length the terms of their contract. See, e.g., Lugassy v. Independent Fire Insurance Co., 636 So.2d 1332, 1335 (Fla. 1994), quoting Wechsler v. Novak, 157 Fla. 703, 708, 26 So.2d 884, 887 (1946)("Competent persons have the utmost liberty of contracting ...").

Well before the Authority/Hospital Corporation transaction, a 1989 Attorney General's opinion admirably summed up the law relating to the negotiation of §155.40 leases:

> [T]he applicability of the Government in the Sunshine Law and the Public Records Law to the private not-for-profit organization leasing the facilities of a county hospital pursuant to s.155.40 F.S., would appear to depend upon the powers and duties imposed upon the not-for-profit corporation under the terms of the lease agreement.

Fla. AGO 89-52. To now hold that, despite the bargained for terms, Hospital Corporation and similarly situated hospitals, are to have their meetings and documents subjected to public scrutiny amounts to a retroactive impairment of the contract -- an impermissible and unfair changing of the rules in the middle of the game. See, e.g., Rebholz v. Metrocare, Inc., 397 So.2d 677 (Fla. 1981)(New statutory requirements for agreement concerning the operation, maintenance and management of condominiums could not be retroactively enforced against pre-existing contracts); Fleeman v. Case, 342 So.2d 815 (Fla. 1976)(same, regarding newly enacted prohibition against rental escalation clauses); Myers v. Hawkins, 362 So.2d 926, 935 (Fla. 1978)(constitutional amendment imposing an employment

restriction on legislators during their term in office could not be applied to those already in office at the time of the amendment: "To apply newly-created professional limitations on a part-time Florida legislator in the midst of his term of office obviously defeats expectations honestly arrived at when the office was initially sought.").

An affirmance of the Fifth District's opinion would also immediately call into question the rights and obligations of similarly situated lessee hospitals. The resulting confusion and possible abrogation of existing leases would certainly disrupt, and quite possibly significantly diminish, the orderly provision of health care services by the hospitals.

Additionally, it is readily foreseeable that such a ruling would have a chilling effect on future negotiations under §155.40. MHS is surely not atypical in its position that it never would have pursued the lease had public scrutiny of its private business strategies been part of the bargain.

And what of those public hospitals which may desire to sell their facilities under the newly amended §155.40 (1996)? Under the Fifth District's simplistic rationale, because the Authority was in the business of health care one day and relinquished it to a private corporation the next, the Hospital Corporation was, ipso facto, acting in place of the Authority and therefore required to operate in the sunshine. Would this rationale extend to the purchasers of public hospitals? Both common sense and sound legal principles recognize the absurdity of this result, but this

"shifting of the responsibilities" factor was the linchpin of the district court's opinion. If public scrutiny similar to that imposed against Hospital Corporation is to be the result of embracing $155.40, the prospective buyers and lessees will be few and far between. This would obviously defeat the clear purpose of the statute which was, ironically, so readily recognized by the Fifth District in Jess Parrish Memorial Hospital, supra.

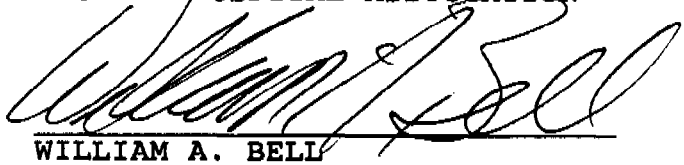
Again, both the State's and FHA's primary goals of providing quality health care services to the public will surely be thwarted by the substantive and transactional dilemmas inherently flowing from the appellate court's decision. A reversal is in the best interest of not only the hospitals of this State, but of its citizens as well.

CONCLUSION

For the foregoing reasons, as well as for those reasons articulated in Petitioner's briefs, the amicus curiae, Florida Hospital Association, urges the Court to reverse the opinion of the Fifth District Court of Appeals and to reinstate the order of the trial court.

Respectfully submitted,

FLORIDA HOSPITAL ASSOCIATION



WILLIAM A. BELL
Florida Bar No. 0197653
Post Office Box 469
Tallahassee, Florida 32302-0469
(850) 224-8127

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following:

Jonathan D. Kaney, Jr., Esquire
Jonathan D. Kaney, III, Esquire
Cobb, Cole & Bell
Post Office Box 2491
Daytona Beach, Florida 32115-2491
Attorneys for Respondent

David A. Monaco, Esquire
Larry R. Stout, Esquire
Post Office Box 15200
Daytona Beach, Florida 32115
Attorneys for Petitioner

John Beranek, Esquire
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
Attorneys for Petitioner

Neil H. Butler, Esquire
Butler & Long
Post Office Box 839
Tallahassee, Florida 32302
Attorneys for amicus curiae,
Association of Community
Hospitals and Health Care
Systems of Florida, Inc.

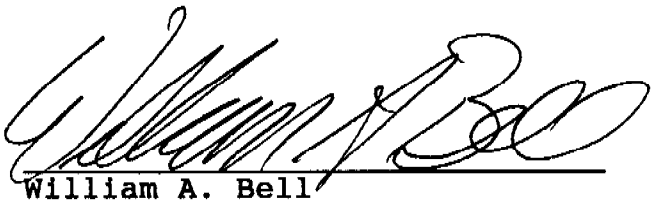
Richard A. Harrison, Esquire
Allen, Dell, Frank & Trinkle
Post Office Box 2111
Tampa, Florida 33601
Attorneys for amicus curiae,
Florida Health Sciences
Center, Inc.

Frederick B. Karl, Esquire
Annis, Mitchell, Cockey, et al.
Post Office Box 3433
Tampa, Florida 33601
Attorneys for amicus curiae,
Florida Health Sciences
Center, Inc.

Emeline C. Acton, Esquire
Post Office Box 1110
Tampa, Florida 33601-1110
Attorney for Hillsborough
County Hospital Authority

Teresa Clemmons Nugent, Esquire
315 South Calhoun St., Suite 808
Tallahassee, Florida 32301

this 21 day of November, 1997.



William A. Bell