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IN THE SUPREME COURT OF FLORIDA

MEMORIAL HOSPITAL-WEST VOLUSIA, INC., etc.,

Petitioner,

v.

NEWS-JOURNAL CORPORATION, etc.,

Respondent.

Case No. 90,835

District Court of Appeal, Fifth District - No. 96-260

AMICUS BRIEF OF TIMES PUBLISHING COMPANY AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION 0F FLORIDA, INC.

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PRELIMINARY STATEMENT

References to the Initial Brief of Petitioner Memorial Hospital-West Volusia, Inc. are designated (Br. at __). Petitioner is referred to throughout as "the Hospital Corporation." References to the Record on Appeal are designated (R. at __). West Volusia Hospital Authority is referred to throughout as "the Authority."

STATEMENT OF INTEREST OF THE AMICI

This brief is offered in support of the News-Journal Corporation. Times Publishing Company (the "Times") publishes the *St. Petersburg Times*, a newspaper of general distribution on Florida's West Coast and *Florida Trend*, a monthly magazine concerning Florida's business matters of statewide circulation. As such, the Times relies heavily on public records in reporting newsworthy matters to its readers, including matters concerning health care delivery systems in Florida.

The American Civil Liberties Union Foundation of Florida, Inc. (the "ACLU") is a voluntary non-profit organization devoted to promoting and protecting civil rights and civil liberties. The ACLU relies extensively on access to public records in investigating potential civil rights abuses before bringing court actions. The ACLU also is a proponent generally of open government laws and opposes any effort to reduce the scope of application of those laws.

Both the Times and the ACLU are vitally interested in any action that would result in the diminution of access to public records and the resultant harm to their respective organizations.

The Amici appear by consent of the parties.

STATEMENT OF THE CASE AND THE FACTS

The amici rely upon and adopt the Statement of the Case and the Facts set forth in the Answer Brief of the News-Journal Corporation.

SUMMARY OF THE ARGUMENT

The Fifth District's opinion should be affirmed for public policy reasons, stemming from Florida's historic commitment to open government. The Hospital Corporation may be a private corporation but, in operating a public hospital facility, it stands in the place of the Authority and is discharging a public mandate of the Authority that cannot be contracted away or otherwise extinguished.

In the absence of a specific exemption duly enacted by the Legislature, the operation of public hospitals -- regardless of who is doing the operating -- must be subject to public scrutiny. The Legislature's decision to permit the Authority to contract with the Hospital Corporation does not, by implication or otherwise, exempt the Hospital Corporation from public oversight, especially where the Legislature has not chosen to abolish the Authority or its public health mandates.

The Hospital Corporation, whose sole purpose is the operation of Memorial Hospital, stands in precisely the same position as the Authority, when the Authority was operating the hospital, insofar as the Public Records Act and the Sunshine Law are concerned. Allowing the Hospital Corporation to evade public scrutiny of its discharge of the public purpose which it contracted to fulfill would violate the public policy of Florida.

ARGUMENT

PUBLIC POLICY REQUIRES A PUBLIC HOSPITAL TO BE SUBJECT TO THE PUBLIC RECORDS ACT AND THE SUNSHINE LAW

Despite the continued existence of Florida's various hospital districts, the Hospital Corporation asserts that government may choose to get out of the business of running hospitals and that the Authority here chose to do just that, with the full blessing of the Legislature, as evidenced by Section 155.40, *Florida Statutes.* Perhaps, the Hospital Corporation ventures, the government never really should have been involved in running hospitals in the first place. The Authority having made the choice to turn over this particular hospital facility to a created-for-the-occasion private corporation, that new entity is just like the Hospital Corporation of America, for example, and completely exempt from this state's Open Government Laws, the Hospital Corporation asserts to this Court.

These, and other self-proving statements like them, are at the heart of the arguments advanced by the Hospital Corporation and its amici, and provide an astonishingly crabbed view of government's role in protecting and promoting public health. This view might have a certain seductive logic. . . right up until the moment of the next malaria epidemic or marked increase of tuberculosis or outbreak of

encephalitis in Florida. Threats to public health require a systemic public response. For this reason, hospital authorities were created and were given taxing powers, and for this reason the various authorities continue to exist.

At the core of any authority's decision to lease a public facility to a private corporation to operate is the assumption that a private corporation will do a better job of it. This is an untested assumption. There is no record data to support this assumption. For all this Court and the public know, the Hospital Corporation is paying its executives huge salaries, has cut staff and services, and is operating this hospital at a loss.[1]/ If the Court accepts the Hospital Corporation's arguments, that assumption of efficiency can *never* be tested, because public oversight and accountability will be a thing of the past.

Did the Legislature intend to allow the operation of Florida's public hospitals to subside into the shadows, free from public scrutiny, because of a need "to act competitively and in private"? (Br. at 14) If so, the Legislature did not say so. Because the Legislature allowed the existence of contracts such as the one at stake here does not mean, by extension, the Legislature also intended to allow a veil of

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[1]/ Tampa General Hospital, a public hospital now operated by a private corporation after a very public and heated battle on the issue of the changeover, has just reported an operating loss of $6 million for its first two months under the new management. Marty Rosen, *Tampa General expects a $6-million loss,* St. Petersburg Times, Dec. 11, 1997, at 1A. A copy of this article is attached as the Appendix.

secrecy to fall over the hospital's operations. The Hospital Corporation and its amici ask this Court to do that which this Court previously has refused to do: find an implied exemption from the disclosural requirements of Florida's Open Government Laws in a statute that has none, namely section 155.40, *Florida Statutes.*

The Hospital Corporation's reasoning is that because the Legislature allowed the state's various hospital authorities to contract with a private corporation, the Legislature must have intended that corporation to escape public scrutiny. Otherwise, so goes the argument, no private corporation would be willing to assume the operation of a hospital in the stead of the public body. (Br. at 14) In the words of this Court, "This argument should be addressed to the legislature." *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 424 (Fla. 1979)(holding only express statutory exemptions valid against disclosural demands of Public Records Act).

Aside from this issue of statutory exemption from public scrutiny, however, is a much larger issue of the Authority's discharge of its duties under the law. The Authority was created, as were other like hospital authorities, "to establish, construct, operate, and maintain such . . . hospitals as in [its] opinion shall be necessary for the use of the people of the district . . . for preservation of the public health, for the public good, and for the use of the public. [M]aintenance of such

hospital or hospitals within [the] district is . . . for a public purpose." (R. 610, West Volusia Hospital Authority Enabling Act, § 5) This public purpose is the very reason for the Authority's existence, and that purpose cannot be extinguished because the Legislature has decided to allow the Authority to engage another entity to assume some of its mandated duties. That public purpose did not evaporate when this hospital was leased and transferred to the Hospital Corporation. Public duties are not so easy to escape. If a private entity contracts with a government agency, such as the Authority, and thereafter delivers services that amount to "the complete assumption of a governmental obligation," such as monitoring misdemeanants' probation, that private entity has become, in effect, the agency, under Chapter 119. *See Stanfield v. Salvation Army*, 695 So.2d 501, 503 (Fla. 5th DCA 1997).

The very purpose of the Hospital Corporation is to discharge those parts of the Authority's legal mandate included in the parties' agreement. In a very real sense, the Hospital Corporation is the Authority's delegatee in performance of those duties and stands in the place of the Authority insofar as the Open Government Laws are concerned.

To the extent the Hospital Corporation generates or receives records that would be public records in the hands of the Authority, its position is identical to that of the Chicago White Sox organization in *Times Publishing Co. v. City of St.*

Petersburg, et al., 558 So.2d 487 (Fla. 2d DCA 1990). There, the City and the White Sox devised a scheme whereby the City would refuse to take possession of certain lease agreements, relying instead on inspection of the documents at the offices of the White Sox or their counsel, *all for the express purpose of the City's avoiding disclosure under the Public Records Act.* "By these actions," the Second District concluded, "the City improperly delegated its record keeping functions to the White Sox." *Id.* at 492. The strong public policy inherent in Chapter 119, *Florida Statutes*, required disclosure of the documents. *See also Tober v. Sanchez*, 417 So.2d 1053 (Fla. 3d DCA 1982), *rev. den.* 426 So.2d 17 (Fla. 1983).

The Fifth District, in its opinion in this case, said it best:

> On the other hand, if one contracts to relieve a public body from the operation of a public obligation -- such as operating a jail or providing fire protection -- and uses the same facilities or equipment acquired by public funds previously used by the public body then the privatization of such venture to the extent that it can avoid public scrutiny would appear to be extremely difficult, regardless of the legal skills lawyers applied to the task.

News-Journal Corp. v. Memorial Hospital-West Volusia, Inc., 695 So.2d 418, 420 (Fla. 5th DCA 1997)*(per cur.)*

This hospital is not the only public facility in Florida to convert to "privatization," as detailed in the amici briefs in support of the Hospital Corporation. Interestingly, the CEO of Tampa General Hospital recently posted a lengthy article

on the Internet on strategic considerations for the operation and maintenance of public hospitals in the future.[2]/ Siegel, B., *Public Hospitals -- A Prescription for Survival* (posted October 1996)<http://www.cmwf.org/siegel.html>. Mr. Siegel observes:

> Informed, sensitive deliberations are made more difficult where state or local "sunshine" laws apply to meetings and documents. In Florida, where public hospital districts are governed by politically appointed authorities, essentially all discussions between two or more board members and internal staff memoranda are open to media scrutiny.

Id. at 10.

Mr. Siegel apparently views public scrutiny as a bad thing for hospitals.[3]/

Public scrutiny of public business, however, has long been the norm in Florida, even for "sensitive" deliberations and information. *See, e.g., City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla.1986)(city's litigation file); *Tribune*

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[2]/ The Hillsborough County Hospital Authority earlier this year leased Tampa General Hospital to a not-for-profit corporation, Florida Health Sciences Center, Inc., in a deal similar to the arrangement at issue in this case. Like the Hospital Corporation here, the new management at Tampa General takes the position it is not subject to either the Public Records Act or the Sunshine Law.

[3]/ Mr. Siegel, himself a hospital CEO, goes on to decry the "gross inequity between public- and private-sector pay," comparing, as an example, the $99,618 annual salary for the CEO of the nation's largest public hospital in Los Angeles to private sector salaries of $400,000 to $800,000 in the same area. This rather candid discussion certainly makes a strong argument for public oversight of Hospital Corporation's operations.

Co. v. Cannella, 458 So.2d 1075 (Fla.1984)(government employee personnel files); *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373 (Fla. 1984)(public housing applications); *Wood v. Marston*, 442 So.2d 934 (Fla.1983)(meetings of university's law school dean search committee); *Shevin v. Byron Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980)(materials related to screening of job applicants); *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla. 1979)(attorney-generated information); *State ex rel. Veale v. City of Boca Raton*, 353 So.2d 1194 (Fla. 4th DCA 1977)(city's internal investigation of building department).

The foundation of the Hospital Corporation's arguments is the assumption that the public has no right to know how its hospital is operated or how health care is delivered in the Authority's geographical district, under the present arrangement. This elitist assumption is repugnant to Florida's long commitment to open government. The rationale for Florida's strong Open Government Laws lies at the heart of notions of self-governance. The people are presumed capable of governing their own public affairs and, to that end, are entitled to know what their government is doing. By contrast, the Hospital Corporation here asserts it should not be expected to operate in the public eye, even though it is operating a publicly-owned facility built and maintained for years with public money and is required to provide

health care to indigent citizens, free of competition from the Authority, and, in fact, will receive public monies in the operation of that facility.

The fact that more than thirty public hospitals in Florida have now converted to operation by private corporations should give this Court pause, but not for the reasons suggested by the Hospital Corporation and its amici. Just as a private company's operation of a Florida jail is subject to the Public Records Act, so should a private company's operation of a public hospital be subject to the same public oversight. There is no rational way to distinguish the two exercises of government's important police powers -- public safety and public health. *See Hartnett v. Austin*, 93 So.2d 86, 89 (Fla. 1956)(*en banc*)("a municipality cannot contract away the exercise of its police powers"); *City of Belleview v. Belleview Fire Fighters, Inc.*, 367 So.2d 1086, 1088 (Fla. 1st DCA 1979)("as a matter of law and public policy, the City should be permitted to reclaim the discretions and authorities inherent in the police power of government...")

In *Palm Beach County Health Care District v. Everglades Memorial Hospital, Inc.*, 658 So.2d 577 (Fla. 4th DCA 1995), the Fourth District clearly was troubled by the policy implications of a public body "giving away" a public hospital facility pursuant to a forty-year lease with and eventual sale (for $100) to a private corporation, formed for the purpose.

> Although section 155.40 provides that a district may reorganize a hospital entity for the purpose of operating and managing the hospital, it does not authorize relinquishing to an independent private board effective unfettered control over public property, powers, taxing authority, and money, including expenditure of ad valorem taxes without public oversight or accountability.. . .Certainly if the legislature intended to authorize such a radical and complete divesture of public assets, control oversight, and authority, it would be clearly stated.

Id. at 580.

These words could have been written about the Hospital Corporation's arrangement with the Authority. In its brief, the Hospital Corporation goes to great lengths to demonstrate to the Court just how "unfettered" it is from the Authority's control, arguing the lease itself provides that the Hospital Corporation "is expressly not an agency of the Authority, that "the two entities are associated solely as lessor and lessee," and that the Authority "has no power to direct the Hospital Corporation how to run the hospital." (Br. at 15) Under *Everglades Memorial Hospital*, however, this argument goes too far. In effect, the Authority has "given away" the public's store,[4]/ and now the recipient of its beneficence, the Hospital Corporation,

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[4]/ The Fifth District analogized the least payments from the Hospital Corporation to the Authority as rent of $1,000 per year on a $100,000 house. *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So.2d 418, 421 (Fla. 5th DCA 1997)(*per cur.*). The Hospital Corporation terms this analogy "homespun," but it certainly and vividly makes the point about public funding of this enterprise.

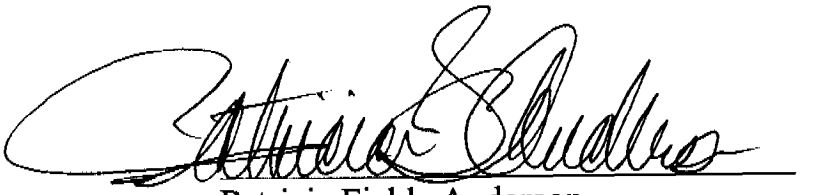
argues the public has no right to watch how it runs the store.

One of two things, now absent in the law, must be present for the Hospital Corporation's position to be valid: either the Legislature must amend section 155.40 to exempt the Hospital Corporation and others similarly situated from the Public Records Act and the Sunshine Law, or the Legislature must abolish the state's various public hospital authorities and their concomitant public health mandates, in order to allow these public hospitals to become truly private. Unless and until the Legislature acts, private corporations running public hospitals in Florida should expect to be accountable to the public.

As long as there is one person in Florida who cannot afford health care and who is suffering from a serious, life-threatening communicable disease, there is a place for public hospitals. As long as public hospitals exist, there is a public interest in ensuring public scrutiny of their operation. Public policy demands no less.

CONCLUSION

For the foregoing policy reasons, the Fifth District's opinion in this case should be affirmed.



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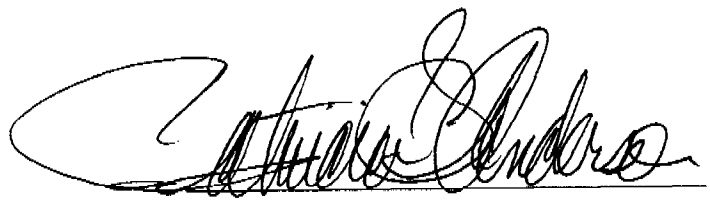

Attorney

APPENDIX

Marty Rosen, *Tampa General expects a $6-million loss*,
St. Petersburg Times, Dec. 11, 1997, at 1A — Attached

St. Petersburg Times
Florida's Best Newspaper

WEATHER: High 75, low 55; 50% chance of rain. More, 12B

THURSDAY, DECEMBER 11, 1997

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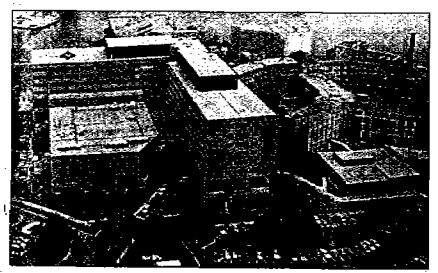
Tampa General expects a $6-million loss



Times files — MIKE PEASE (1997)

Tampa General's public board voted in June to turn the hospital over to a private board.

■ The hospital was supposed to improve its fiscal health by going private, but board members were told: Expect losses in first two months.

By MARTY ROSEN
Times Staff Writer

TAMPA — Tampa General Hospital anticipates losses of nearly $6-million in its first two months as a private hospital, but senior executives were unable to tell board members this week what caused the unexpected financial problems.

The losses were confirmed by senior hospital managers and members of the private Florida Health Sciences Center board, which now runs Tampa General.

"The president's address to us was basically, 'We don't have final results but it does look like it will be a substantial loss,' " said board member Elizabeth Moody, dean of the Stetson College of Law.

"The hospital is going through a difficult time," said Dr. Alden Cockburn, a board member who did not attend Tuesday's meeting. "Just because they changed boards and went private doesn't mean the downward spiral they had been in has been arrested. They will continue to lose money until things change."

At a management forum Tuesday afternoon, Tampa General president Bruce Siegel announced losses of almost $3-million for October and again in November, then asked employees to join him in a chant of "We're going to win," two employees told the *Times*.

Board chairman H.L. Culbreath, who told board members at the start of their meeting Tuesday morning that Siegel had "some disturbing news" to tell them, refused to comment. He referred all questions to Siegel, who also referred

Please see HOSPITAL 6A

Hospital

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questions to a spokeswoman.

"It's not true, it's not true," said spokeswoman Stacey Packer, referring to the reported $6-million loss. "That's all I'm going to say about it."

Packer would not comment on other reports that the board canceled plans to build a $1.4-million executive suite for Siegel and second-in-command Shirley Gamble, a former consultant who helped Siegel shape his privatization plan.

The hospital's spokeswoman also would not comment on reports that the law firm of Allen, Dell, Frank & Trinkle, the long-time general counsel for the public hospital, no longer represents the private board. A lawyer with the firm, however, confirmed the change.

"I can tell you we continue to do work for the health sciences center in specific areas in litigation, but we are not serving as general counsel to that entity," said Richard Harrison, the lawyer who worked with Siegel this year to convert the public hospital to its non-profit status.

Harrison abruptly resigned in September as general counsel for the public hospital authority as Siegel announced he would work for the private board. Tampa lawyer Jim Kennedy is now the private board's general counsel.

Tampa General's public board voted in June to turn the hospital over to a private, non-profit board. The public board then approved a lease agreement setting the groundwork for a proposed move from Davis Islands to a site near the University of South Florida.

Initially, Siegel estimated the hospital would save $58-million as a private hospital and could apply those savings toward the cost of building a new hospital complex near USF. Board members said they did not receive any documents at Tuesday's private meeting, during which they also approved the budget for the 1997-98 fiscal year that began Oct. 1.

Siegel told the public board in May, during his campaign to privatize the hospital, that remaining public would result in a loss of $31-million over four years. Ernst & Young auditors put the number closer to $44-million.

The latest development follows a series of management shake-ups at the hospital. Vice president Mary Ann Knight's resignation was announced in October, and chief financial officer Kathy Gillette's resignation was announced suddenly last week. Board members confirmed that Siegel announced her departure, telling them it was difficult. They said she was given a one-year severance package of full pay and benefits, with the stipulation she does not publicly discuss Tampa General. Also leaving the staff was Barbara Hubbard, interim director of marketing, media and strategic services.