IN THE SUPREME COURT OF FLORIDA

MEMORIAL HOSPITAL-WEST VOLUSIA, INC., et al

Petitioner,

vs.

NEWS-JOURNAL CORPORATION etc.,

Respondent.

_____/

Case Number 90,835

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

BRIEF OF AMICUS CURIAE HILLSBOROUGH COUNTY HOSPITAL AUTHORITY

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STATEMENT OF INTEREST OF THE HILLSBOROUGH COUNTY HOSPITAL AUTHORITY

The Hillsborough County Hospital Authority has been granted the status of amicus curiae in support of Petitioner Memorial Hospital-West Volusia, Inc.

This year, the Hillsborough County Hospital Authority entered into a lease agreement with the Florida Health Services Center (FHSC) through which FHSC will operate Tampa General Hospital. Like Memorial hospital-West Volusia, Inc., the Hillsborough County Hospital Authority was created by a special act to own and operate Tampa General Hospital. Tampa General was operating at a financial deficit, and the Hospital Authority decided it was in the best interest of the citizens of Hillsborough County to enter into the lease. Although this lease and the lease between Memorial Hospital-West Volusia, Inc. and Memorial Health Systems, Inc. are not identical, the similarities are such that the Fifth District's incorrect ruling may have grave consequences to the successful operation of Tampa General.

STATEMENT OF THE CASE

The Hillsborough County Hospital Authority accepts and adopts the Statement of the Case of the Initial Brief of Memorial Hospital-West Volusia, Inc.

STATEMENT OF THE FACTS

The Hillsborough County Hospital Authority accepts and adopts the Statement of the Facts of the Initial Brief of Memorial Hospital-West Volusia, Inc.

SUMMARY OF THE ARGUMENT

In a well reasoned opinion, the Trial Court below found that neither Section 119.07, Fla. Stat. (the Public Records Act) nor Section 286.011, Fla. Stat. (the Sunshine Law) applied to the Hospital Corporation. The Trial Court thoroughly analyzed the undisputed facts of this case, and applied the "totality of the factors" test set out in News and Sun-Sentinel Co. V. Schwab, Twitty & Hansen Architectural Group, 596 So.2nd. 1029 (Fla. 1992). Without finding a flaw in the Trial Court's reasoning, the District Court ignored the Trial Court's factual analysis and substituted its own interpretation of the facts, and reversed the Trial Court's ruling.

In doing so, the District Court committed three obvious errors. First, the Court misapplied the Schwab "totality of the factors" test. Second, the District court violated the proper standard of review in reviewing the Trial Court's ruling. Finally, the District Court erroneously applied the "acting on behalf of a governmental agency" test found in the Public Records Law in analyzing the applicability of the Sunshine Law, in effect ignoring the "dominion and control" standard as set out in the Sunshine Law.

The District Court's flawed ruling will have a profound effect on the many public hospitals that have taken advantage of Section 155.40, Fla. Stat., and should be reversed.

ARGUMENT

I. The Trial Court correctly found, based on the Schwab Totality of the Factors Test that the Public Records Law did not apply to the Hospital Corporation.

Sunshine Law requires open meetings of any board or commission of any state agency or authority or of any agency or authority of any county, and the Public Records Law requires public disclosure of materials made or received by the government (or private entity acting on behalf of any public agency) in the conduct of its official business. Although facially applicable to governmental entities, both laws apply to private entities in certain situations.

In News and Sun-Sentinel v. Schwab, et al, 596 So.2nd. 1029 (Fla. 1992), this Court set out a "totality of factors" approach to determine whether a private entity is subject to the Public Records Act.[1] In Schwab, the Palm Beach County School Board hired an architectural firm to provide services in the construction of school building facilities. A reporter requested that he be allowed to review Schwab's files that pertained to a number of school board projects. Schwab denied the request, asserting that it was not subject to the Public Records Law.

In Schwab, this Court approved and adopted the "totality of factors" test that had been used by a majority of district courts. These factors include:

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[1] Prior to the Schwab opinion, the First District Court of Appeal ruled that Shands Teaching Hospital was not "an agency of the state" for purposes of the Sunshine and Public Records Laws. Campus communications v. Shands teaching hospital, 512 So.2d 999 (Fla. 1987). Likewise, in 1983, under similar facts, a Duval County Circuit Court found that a not-for-profit corporation that leased the University Hospital of Jacksonville from the Duval County Hospital Authority was not subject to the Sunshine and Public Records Laws. Post-Newsweek Stations v. University Medical Center, Case No. 82-8310-CA (December 1983).

1. The level of public funding.
2. Whether there is a co-mingling of funds.
3. Whether the activity was conducted on public property.
4. Whether the services contracted for are an integral part of the public agency's chosen decision-making process.
5. Whether the private entity is performing a governmental function or a function which a governmental agency would otherwise perform.
6. The extent of the public agency's involvement with, regulation of, or control over the private entity.
7. Whether the private entity was created by the public entity.
8. Whether the public entity has a substantial financial interest in the private entity.
9. For who's benefit the private entity is functioning.

Id. at 1031. The Court noted that since the circumstances and relevant factors will vary from case to case, these factors are not intended to be all inclusive. Id. at 1032. Petitioner Memorial provided a very eloquent and accurate analysis of the Schwab factors in its initial brief, which will not be repeated here. However, this brief will point out where the District Court deviated from this Court's application of the Schwab factors by severely broadening those factors.

The District Court found that the "Authority played a role in Lessee's formation because it *required* its formation in order to transact this venture." (emphasis in original). However, this finding is not supported by the facts, which clearly show that Memorial was an existing non-profit corporation, and did not have to incorporate the Hospital Corporation to enter into the lease with the Authority. The District Court also found that there as a "high level of public funding",

in spite of the fact that the Authority had the *option* to obligate public funds to the hospital. Thus District Court found that the discretionary, optional funding provision in the lease amounted to a "high level" of public funding. The District Court then found, based on its ruling that the Authority commits a high level of public funding, that the Authority also had a "substantial financial interest" in the Hospital Corporation.

The District Court found that the Hospital Corporation and Authority's funds were "commingled", simply because both entities had the ability to contribute to the operation of the hospital. The Schwab Court did not address the "commingling of funds" factor. However, because that opinion adopted several previous district court opinions in formulating the "totality of the factors" test, it is instructive to look to the earlier decisions. In Schwartzman v. Merritt Island Volunteer Fire Department, 352 So.2nd. 1230, 1232, the Fourth District found a commingling of funds because of "the placing of the county funds in a common bank account .." Also, *Black's Law Dictionary* defines the term "commingle" as "to put together in one mass; *e.g.* to combine funds or properties into common fund or stock". Certainly, the District Court's interpretation of "commingle" in the instant case is a far stretch from its application in previous cases.

Finally, the District Court found that the Authority had "*real* control" over the Hospital Corporation (emphasis in original). The District Court found that, although the Authority has no voting member on the Hospital Corporation's Board of Directors, the Authority had real control over the Hospital Corporation. This "real control" stems from the mere fact that the Authority could terminate the lease if the Hospital Corporation defaulted in the lease. Such termination clauses are standard provisions in leases, and therefore under the District Court's interpretation, the "control" factor would always be present.

II. The District Court incorrectly reviewed the Trial Court's ruling.

The District Court took the factors set out in Schwab and expanded them to the degree necessary to support its far reaching decision. In doing so, the District Court ignored the detailed findings of facts and analysis of the Trial Court, without mentioning the Trial Court's decision. In Trepal v. State of Florida, 692 So.2nd. 186 (Fla. 1997) this Court noted that the trial court's application of the Schwab test turned on a series of factual determinations. The Court further stated "Our review of the record shows that competent substantial evidence supports those findings. Accordingly, we are *precluded* from substituting our judgement for that of the trial court on this matter." (Emphasis supplied). The District Court failed to follow this Court's direction regarding the review of a trial court's application of the Schwab test, and its decision should be reversed.

III. The District Court misapplied the standard of review in holding that the Sunshine law applied to the Hospital Corporation.

The Sunshine Law has consistently been judicially construed to apply to every board or commission of the state, or to any county or any political subdivision over which it has "dominion and control". City of Miami Beach v. Berns, 245 So.2nd. 38 (Fla. 1971); Times Publishing Company v. Williams, 222 So. d.. 470 (2nd DCA 1969); Krause v. Reno, 366 So.2nd. 1244 (3d DCA 1979). In the instant case, the District Court does not address this long standing "dominion and control" test. The District Court instead focuses on the "discussion of public business" language of the Sunshine Law, and concludes that someone "acting on behalf of a public body" is authorized to transact public business. Again, the District Court failed to show

any error in the trial court's following of solid judicial precedent in analyzing the Sunshine Law, and its opinion should be reversed.

CONCLUSION

In its opinion, the Fifth District ignored the well reasoned opinion of the Trial Court, and misapplied the Schwab test to find that Memorial Hospital-West Volusia, Inc. was subject to the Public Records Act and the Sunshine Law. In contrast to the argument asserted by Respondent and amici for Respondent, Petitioner is not contending that Section 155.40 creates a blanket exemption from the Public Records Act and the Sunshine Law. If that were the case, there would be no reason to analyze the Schwab factors. Instead, Petitioner correctly shows that under the Schwab test the Public Records Act does not apply to them, and because the Hospital Authority does not have "dominion and control" over the Corporation, the Sunshine law is likewise inapplicable.

The erroneous decision of the Fifth district will have far-reaching adverse effects on the numerous Hospitals that are now run by non-profit corporation pursuant to long term leases, and should be reversed..

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. mail to the attached service list this 30th day of December, 1997.

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