IN THE SUPREME COURT
STATE OF FLORIDA

MEMORIAL HOSPITAL-WEST VOLUSIA, INC., a Florida corporation, not-for-profit

Petitioner,

vs.

NEWS-JOURNAL CORPORATION, a Florida corporation,

Respondent.
_____/

CASE NO. 90,835

PETITIONER MEMORIAL HOSPITAL-WEST VOLUSIA, INC.'S SUPPLEMENTAL BRIEF ON THE MERITS

On Review of a Decision of the
Fifth District Court of Appeal

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Case No. 90,835
Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.

CERTIFICATE OF INTERESTED PERSONS

Counsel for Petitioner, Memorial Hospital-West Volusia, Inc., certifies that the following persons and entities have or may have an interest in the outcome of this case.

1. Emeline C. Acton - counsel for Hillsborough County Hospital Authority
2. John Beranek - appellate counsel for Petitioner
3. Neil H. Butler - counsel for amicus curiae Association of Community Hospitals and Health Care Systems of Florida, Inc.
4. Richard A. Harrison - counsel for amicus curiae, Florida Health Sciences Center, Inc.
5. Jonathan D. Kaney, Jr. - counsel for Respondent
6. Jonathan D. Kaney, III - counsel for Respondent
7. Frederick B. Karl - counsel for amicus curiae Florida Health Sciences Center, Inc.
8. Memorial Hospital-West Volusia, Inc. - Petitioner
9. David A. Monaco - former counsel for Petitioner
10. News-Journal Corporation - Respondent
11. Teresa Clemmons Nugent - counsel for amicus curiae Association of Community Hospitals and Health Care Systems of Florida, Inc.
12. Larry R. Stout - counsel for Petitioner
13. Honorable Patrick G. Kennedy - Trial Court Judge

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STATEMENT OF THE CASE AND FACTS

This is Petitioner's Supplemental Brief under this Court's order of July 15, 1998. Pursuant to that order, Petitioner, Memorial Hospital-West Volusia, Inc. (the "Hospital Corporation") will address "the effect, if any" of newly enacted Section 395.3036, Florida Statutes (Supp. 1998). As the Court's order directed, the question is whether the statute has any effect "on this case, which is presently under review."

The Hospital Corporation incorporates herein the background and factual statement from its two previous briefs. Oral argument occurred on February 3, 1998 and the new statute did not come into effect until May 30, 1998. The primary issue in the briefs by the parties and the various amicus briefs was the validity of the decision by the Fifth District Court of Appeal in News-Journal Corporation v. Memorial Hospital-West Volusia, Inc., 695 So. 2d 418 (Fla. 5th DCA 1997). The Florida Legislature specifically disapproved of this decision of the Fifth District in its intervening statutory enactment in 1998, Section 395.3036.

The Hospital Corporation is a private not-for-profit corporation operating a formerly public hospital under a 40 year lease pursuant to Section 155.40, Florida Statutes, as it existed in 1994. The News-Journal Corporation, a newspaper, filed suit against the Hospital Corporation asserting the Hospital's records and meetings were subject to Florida's public records and sunshine laws. The trial court relied on News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029

(Fla. 1992) and the other cases following it and ruled in favor of the Hospital Corporation holding that the records and meetings were not within the scope of the public records or sunshine laws. The Fifth District Court of Appeal reversed by opinion of May 16, 1997. The Fifth District reinterpreted each factor listed in the "totality of the factors" test under the Schwab case. The District Court basically retried the case, reaching opposite factual conclusions from the trial court, on each factor. The effect was to broaden and expand public records and sunshine laws access concerning private lessees of formerly public hospitals and to extend this new approach to other areas of the law.

Newly Enacted Section 395.3036

On May 30, 1998, newly enacted Section 395.3036 became effective. The Hospital Corporation contends that under the previously existing Schwab standard, known as the "totality of the factors" test, the public records and sunshine laws of this state simply do not apply. The Hospital Corporation never sought an exemption from these laws before the trial court nor the District Court of Appeal. The Hospital Corporation has always contended that it is simply not within those laws based on the Schwab multiple factors test and that no exemption was necessary. This was the trial court's ruling below and remains the position of the Hospital Corporation herein. While the policy and reasons behind the new statute are obviously relevant, Section 395.3036 is not before the Court and should not have any actual effect on this case

which should be decided under the Schwab factors test and Section 155.40, Florida Statutes, as it existed in 1994.

The Court's July 15, 1998 order required the first supplemental brief to be filed by the Hospital Corporation. This places the Hospital Corporation in the position of anticipating the unknown arguments of the News-Journal Corporation. This newspaper has generally advised that it intends to argue that the newly enacted statute is unconstitutional and that the Hospital Corporation does not fall within the statutory "exemption" created by the new Section 395.3036.

Since neither the constitutionality nor the application (or even the existence) of Section 395.3036 has been argued before a trial court or a District Court of Appeal, the Hospital Corporation finds it impossible to anticipate the content of the arguments which will apparently now be made for the first time by the newspaper. Thus this brief will address the Court's limited jurisdiction to consider the new statute along with the general policy implications of the new statute plus the real need to reaffirm the continued existence of the Schwab test. The statute clearly indicates the Legislature's view that the Fifth District's News-Journal opinion was wrongly decided under the existing case law which the parties had appropriately relied upon in entering into their 40 year lease and privatizing the hospital. This Court should follow the legislative lead, reverse the Fifth District's opinion and reaffirm Schwab.

SUMMARY OF THE ARGUMENT

Although newly enacted Section 395.3036, Florida Statutes (Supp. 1998) is not before the Court for direct application or review, it clearly shows the Legislature's strong disagreement with the Fifth District's News-Journal Corporation opinion. The Legislature has stated that the existing (Schwab) case law standard based on the "totality of factors" is the appropriate law and should remain in effect. The Legislature obviously takes issue with the Fifth District's News-Journal opinion and this Court should follow the legislative lead. Based on all of the legal arguments previously voiced herein, the Fifth District's News-Journal opinion should be reversed.

There can be no consideration as to whether the statutory exemption created in the new statute is applicable or not applicable to the facts of this case. Obviously, the record contains nothing concerning the application of the newly enacted statute. A controversy before a trial court has yet to occur.

It would be short-sighted for this Court to merely remand and conclude that the Legislature has now solved the problem and that the present case need not be decided. The Fifth District Court of Appeal, in subsequent cases, has now used its own News-Journal Corporation opinion as a basis for abandoning the totality of factors test as established by this Court and numerous other courts. This Court should reverse the Fifth District, reaffirm the Schwab test and reinstate the trial court's ruling herein.

ARGUMENT

I. NEWLY ENACTED SECTION 395.3036 DOES NOT APPLY TO THIS CASE WHICH SHOULD BE DECIDED UNDER EXISTING LAW REQUIRING REVERSAL OF THE FIFTH DISTRICT'S DECISION--JURISDICTION TO CONSIDER THE CONSTITUTIONALITY OF THE NEW STATUTE DOES NOT NOW EXIST.

Petitioner respectfully suggests that this Court does not have jurisdiction to review the constitutionality of this or any other new statute which has never been before a trial court or a District Court of Appeal. Article V, § 3(b) of the Florida Constitution limits this Court's review power to "any decision of a District Court of Appeal". This Court does not have original jurisdiction over the constitutionality of newly enacted statutes.

The District Courts of Appeal are the final courts of appeal in most cases in this state and they are the initial courts for dealing with constitutional issues. A finding by a district court that a statute is unconstitutional is subject to this Court's mandatory appellate jurisdiction under Article V, § 3(b)(1), Florida Constitution (1980). A district court's express determination that a statute is constitutional is subject to this Court's discretionary review. Article V § 3(b)(3), Florida Constitution (1980) and Libertarian Party of Florida v. Smith, 687 So. 2d 1292 (Fla. 1996). The "inherency doctrine" under Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959) and the prior Constitution no longer exists. Thus, this Court does not even review district court decisions which merely have the effect of upholding the validity of a statute. There must be a written statement in an opinion

"expressly" finding a statute valid before jurisdiction arises. Philip J. Padovano, Florida Appellate Practice, § 3.7 at 54, 55 (2d ed. 1997). If the Court has no jurisdiction to review an implicit finding of constitutionality, it certainly has no jurisdiction to review when there is no district court decision whatsoever.

A case in point is Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991). This case involved major amendments to the Florida Workers Compensation Law. As soon as the new statutes were enacted a broad declaratory decree action by multiple parties sought complete review of many aspects of the new statutes in the circuit court in Tallahassee. The trial court rendered a declaratory judgment of partial unconstitutionality in December of 1990 which was then appealed to the First District Court of Appeal which certified the case on to this Court. The Legislature convened a special session in January of 1991 to specifically address various statutory problems in the new workers compensation amendments as enacted in Chapter 90-201. This Court reviewed the declaratory decree based on the 1990 statutes, but did not review the 1991 amendments. The opinion specifically held that:

> The 1991 act is not properly before this Court, and we are unable to make a binding ruling on its effect.

Justice Kogan, specially concurring, stated:

> If a new challenge is raised as to the constitutionality of the statute as enacted in 1991, then it would be proper for the Court to rule on it at that time.

Martinez at p. 1176. The opinion even expressed reluctance at reviewing any of the constitutional issues concerning the statutes which had been ruled on by the trial court because they were raised

in a somewhat hypothetical declaratory decree setting. The Court only "hesitantly decline[d] to dismiss . . . sua sponte", at p. 1171.

Florida statutes as enacted by the legislative branch are presumed to be constitutional and courts are to resolve all doubts in favor of constitutionality. Schultz v. State, 361 So. 2d 416 (Fla. 1978); Department of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1957) and Martinez v. Scanlan at p. 1172. The Petitioner/Hospital Corporation will not take it upon itself to manufacture arguments against the constitutionality of this totally untested and valid statute.[1]

The case also presents a further procedural oddity because the Florida Attorney General has already appeared as amicus in favor of the News-Journal. Now, the Attorney General should be given notice that the News-Journal makes a constitutional attack on the statute. The Attorney General has the right to be heard and to defend the constitutionality of this statute. See Section 86.091, Florida Statutes (1995).

Although we will not anticipate what arguments will actually be made by the News-Journal, we do suggest that this Court's jurisdiction to consider such arguments should be initially addressed in any brief filed by the News-Journal.

Although the new statute is not directly before the Court, its policy implications strongly favor a reversal herein. The Florida

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[1]We, of course, retain the right to respond to any and all constitutional arguments in the reply brief.

Legislature has expressly disagreed with the Fifth District's News-Journal opinion in the new Section 395.3036. The statute specifically recognizes the existence of and prior reliance on the "case law" test of the "totality of factors". The new statute states that, "In a recent decision however, the Fifth District Court of Appeal has now applied the standard in a [more expansive] manner" and that this will result in harm to the "best interest of the public". Rarely, does the Legislature specifically refer to a particular district court opinion in passing new legislation to remedy the effects of that new court decision. The new legislation makes clear the legislative view that the case law (Schwab) standard of the "totality of factors" should continue to apply and that the Fifth District has wrongly deviated from that standard.

If the News-Journal opinion is vacated and the trial court judgment reinstated, then the Schwab factors test for the application of public records and sunshine laws will remain in place. That case law standard and the new statute are completely consistent and will exist side by side as the governing law on all aspects of these issues. As pointed out in the briefs, health care is by no means exclusively a governmental obligation.

The Hospital Corporation has already thoroughly argued, both in its briefs and orally before this Court, that it is simply not within the scope of Florida's public records and sunshine laws. We will not repeat all of those arguments. The existing law of this state is as enunciated in the Schwab test and the cases following it. The Legislature even noted that leases under Section 155.40,

as entered into by the Hospital Corporation, have been fashioned by the parties in reliance upon that existing case law standard.

This Court should apply that existing law and hold that the trial court correctly analyzed the totality of all the factors and reached a correct decision.

II. ANY FUTURE APPLICATION OF THE NEW STATUTE WILL REQUIRE FACTUAL AND LEGAL DETERMINATIONS.

We have no idea what arguments News-Journal may make to support its suggested position that the new statute will have no application to the Hospital Corporation. If this Court were to affirm the Fifth District's opinion, contrary to the trial court's decision and the now obvious will of the Florida Legislature, then the Hospital Corporation may well seek the benefits of the new statute at some point in the future. Application of that new statute will require factual and legal determinations before a circuit court. That prerequisite consideration and application of the new statute has not yet occurred.

III. THIS COURT SHOULD UPHOLD THE CONTINUED VALIDITY OF THE SCHWAB FACTORS TEST BECAUSE THE FIFTH DISTRICT HAS NOW ABANDONED THAT TEST BASED ON ITS OWN NEWS-JOURNAL OPINION IN OTHER AREAS OF THE LAW.

It may be suggested that the Florida Legislature has thoroughly dealt with this problem in the newly enacted statute and therefore this Court should not trouble itself with deciding this case under existing law. We respectfully suggest that any such view would be short-sighted because the Fifth District Court of Appeal has now abandoned the factors test as enunciated in Schwab and the numerous cases following it.

In the very recent Stanfield v. Salvation Army, 695 So. 2d 501 (Fla. 5th DCA 1997) opinion, the Fifth District cited its own News-Journal Corporation opinion for a new test as to the application of public records and sunshine laws to entities entering into contracts to provide professional services to a governmental agency. The Fifth District has announced that the new test is whether there has been an "assumption of a governmental obligation". Stanfield at p. 503. Because of this finding, the Fifth District has announced that:

> It is unnecessary to engage in the factor-by-factor analysis outline by Schwab.

The Stanfield decision involved an agreement by the Salvation Army to provide probation services to Marion County. The Salvation Army handled the supervision of misdemeanor offenders under a private contract. Obviously, this was not a hospital lease under Section 155.40, but the Fifth District abandoned the factor-by-factor test under Schwab and substituted a new "governmental obligation" test in its place. Hospital care is most definitely not solely a governmental function or obligation.

It is thus necessary for this Court to reaffirm the validity and existence of the Schwab factor-by-factor test and in doing so reverse the Fifth District's News-Journal opinion.

CONCLUSION

The Fifth District opinion should be reversed and the final judgment of the trial court reinstated. This result is completely proper under the existing law as applied by the trial court and without resort to the newly enacted statute. However, the 1998 statute (Section 395.3036) clearly supports reversal of the Fifth District, but need not be directly applied to reach this result.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy has been furnished by Mail to **NEIL H. BUTLER,** P.O. Box 839, Tallahassee, Florida 32302; **DAVID A. MONACO, LARRY R. STOUT**, P.O. Box 15200, Daytona Beach, Florida 32115; **JONATHAN D. KANEY, JR.**, P.O. Box 2491, Daytona Beach, Florida 32115-2491; **WILLIAM A. BELL**, P.O. Drawer 469, Tallahassee, Florida 32302; **TERESA CLEMMONS NUGENT**, 315 South Calhoun Street, Suite 808, Tallahassee, Florida 32301; **RICHARD A. HARRISON**, P.O. Box 1110, Tampa, Florida 33601; **EMELINE C. ACTON**, P.O. Box 1110, Tampa, Florida 33601-1110; **FREDERICK B. KARL**, P.O. Box 3433, Tampa, Florida 33601; this 4th day of August, 1998.

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