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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 24 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.,

Petitioner,

vs.

APPEAL NO.: 90,835

NEWS-JOURNAL CORPORATION,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER, MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

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STATEMENT OF THE CASE AND OF THE FACTS

Defendant/Petitioner, **MEMORIAL HOSPITAL-WEST VOLUSIA, INC.** ("Hospital Corporation"), seeks to have reviewed a decision of the District Court of Appeal, Fifth District of Florida, dated and filed on May 16, 1997. A motion for rehearing was denied by that court on June 11, 1997.

Hospital Corporation was the original defendant below, and the appellee before the District Court of Appeal. Respondent, **NEWS-JOURNAL CORPORATION** ("News-Journal"), was the plaintiff and appellant below. This was an appeal by News-Journal of a final declaratory judgment in favor of Hospital Corporation determining that the Public Records Law did not apply to the records of the Hospital Corporation, and that the Sunshine Law did not apply to meetings of its board of directors. The District Court of Appeal reversed the final judgment, and remanded the case for further action consistent with its opinion. Hospital Corporation now seeks discretionary review of this decision by the Supreme Court.

In order to enable public hospitals to compete better with private hospitals the Florida legislature enacted §155.40, *Florida Statutes*.. That statute authorizes the governing body of a district hospital to enter into a lease with (and, if desired, a sale to), a not-for-profit Florida corporation for the operation of its hospital facilities, provided that certain specified conditions and covenants are contained in the lease or sale agreement.

For many years the West Volusia Hospital Authority (the "Authority"), operated its hospital facility in DeLand, Florida. The Authority, which struggled for years with its financially troubled facility, finally determined in 1994, after public study and debate, and after considering the huge annual losses incurred by the hospital, that a lease of its hospital to a private not-for-profit corporation under §155.40 for operation as a private facility was

its best alternative. The Authority selected Memorial Health Systems, Inc., an existing Florida not-for-profit corporation, and the soon-to-be-formed Hospital Corporation, to lease its hospital for a period of 40 years. The selection was made after the Authority completed an extensive public bidding and hearing process. Upon its selection and after a short transition period Hospital Corporation began operating the hospital under the lease.

The News-Journal contended that the transaction, while lawful and in accordance with §155.40, did not exempt the records and documents of the leased hospital from the Florida Public Records Law (Chapter 119, *Florida Statutes*), and did not exempt meetings of the board of directors of Hospital Corporation from the Florida Sunshine Law (§286.011, *Florida Statutes*). The News-Journal then brought suit against Hospital Corporation in the Circuit Court of Volusia County, Florida, seeking two declaratory judgments. Count I sought a declaration that the Public Records Law applies to activities of Hospital Corporation as the lessee of the Authority because, according to the News-Journal, it was "acting on behalf of" the Authority; while Count II sought a declaration that the Florida Sunshine Law also applies to Hospital Corporation. Hospital Corporation responded that as it is a private corporation, and not an agency of the Authority or of any other governmental body, the Public Records Law does not apply to it. Hospital Corporation also urged that because it is not subject to the "dominion and control" of the Authority, the Sunshine Law is not applicable to it. The matter was brought before the trial court on cross-motions for summary judgment.

The trial court concluded first that the correct test for determining the applicability of the Public Records Law where the accusation is that the subject is "acting on behalf of" a public agency is the "totality of factors" test delineated by the Supreme Court in *News and Sun-Sentinel Co. v. Schwab,*

Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992). It then analyzed each of the factors identified by the Supreme Court and other appellate courts to determine whether Hospital Corporation was in fact "acting on behalf of" the Authority as its agent. After a thorough consideration of those factors, the trial court concluded that the Public Records Law did not apply to Hospital Corporation. (A-9, 15)

The trial court then turned its attention to the Sunshine Law. It determined initially that the proper test for applicability of the Sunshine Law is whether Hospital Corporation is "subject to the dominion and control" of the Authority. The court concluded that Hospital Corporation is not subject to the dominion and control of the Authority, and that the Sunshine Law was, therefore, not applicable to meetings of its board. (A-9, 16). An appeal by the News-Journal to the District Court of Appeal followed.

The District Court of Appeal in its Per Curiam opinion reversed the judgment of the trial court, holding first that Hospital Corporation was acting on behalf of the Authority within the meaning of Article I, §24 of the *Florida Constitution*, and that it was, therefore, subject to public records disclosure. Next, the appellate court determined that Hospital Corporation was subject to the requirements of the Sunshine Law using the same analysis that it used for the Public Records Law, "[E]ven though the constitutional provision referred to above in our discussion of the open meeting requirement does not use the 'acting on behalf of' terminology." (A-8). Hospital Corporation's petition for rehearing was denied, and this petition for review was timely filed.

SUMMARY OF ARGUMENT

The Supreme Court should exercise its discretionary jurisdiction over this case for a number of reasons. Initially, it is clear from the text of the

opinion that the District Court of Appeal expressly construed Article 1, §24(a) and §24(b) of the *Florida Constitution*, in arriving at its decision compelling the application of the constitutional public records and open meeting requirements to a private not-for-profit corporation which leased a hospital facility from a public authority under §155.40, *Florida Statutes*.

In addition, the decision conflicts with other decisions of the Supreme Court and of other district courts of appeal in three respects. First, it conflicts with *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971), and *Times Publishing Company v. Williams*, 222 So.2d 473 (Fla. 2d DCA 1969), with regard to the test to be used in determining whether the Sunshine Law applies to a private entity. Second, it conflicts with *Campus Communications, Inc. v. Shands Teaching Hospital*, 512 So.2d 999 (Fla. 1st DCA 1987), in connection with its holding on the issue of whether a private not-for-profit hospital leasing from a governmental agency is subject to the Sunshine Law and Public Records Act. Finally, it conflicts with the decision in *Trepal v. State of Florida*, 22 *Fla. L.Weekly* S170 (Fla March 27, 1997), concerning the propriety of an appeals court substituting its judgment for that of the trial court in public records and open meeting cases. Accordingly, jurisdiction over this controversy should be exercised.

ARGUMENT

I. AS THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY CONSTRUES ARTICLE I, §24 OF THE FLORIDA CONSTITUTION, THE SUPREME COURT HAS JURISDICTION OVER THE ISSUES RAISED BY THE DECISION BELOW.

Article V, §3(b)(3), of the *Florida Constitution*, as implemented by Rule 9.030(a)(2)(A)(ii), *Fla.R.App.P.*, grants discretionary jurisdiction to the Supreme Court to review decisions of district courts of appeal that expressly

construe a provision of the state or federal constitution. The decision in the present case falls directly within that zone of jurisdiction, and because of its widespread implications for the health care community and beyond, should be reviewed by the Supreme Court.

The District Court of Appeal specifically noted in its opinion that it intended to interpret Article 1, §24 of the *Florida Constitution*, by stating that, "In deciding issues relating to constitutional obligations, we should first, of course, refer to the applicable constitutional provision." (A-3). The Court then proceeded to review the "acting on behalf of" clause contained in the constitutional provision related to public records.[1] Indeed, at no place within the opinion is the public records statute ever referred to by citation. Clearly what the Court intended to do, and what the Court in fact did, was to construe the "acting on behalf of" language contained in Article I, §24(a) of the constitution to apply to private, not-for-profit corporations that lease hospitals from public authorities pursuant to §155.40, *Florida Statutes*.

Thereafter, the lower tribunal expressly construed the public meetings aspects of Article I, §24(b) of the Constitution, as it relates to private not-for-profit corporations involved in transactions under §155.40.[2] On page 8 of its opinion, the Court concluded that even though the public meetings language of Article I, §24(b) does not contain the "acting on their behalf" terminology of Article I, §24(a), one must use the same factor

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[1] Article I, §24(a), dealing with public records requirements, states that "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. . . ."

[2] Article I, §24(b) provides that all meetings of "any collegial public body of the executive branch of state government or of any collegial body of a county, municipality, school district, or special district at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public, . . ."

analysis in determining whether meetings must be public, as one does in determining whether records are public because, according to the District Court of Appeal, the "acting on behalf of language" is "implicit" in Article 1, §24(b). The court then held that "meetings of such surrogate public bodies come under the *constitutional open meetings requirement.*" (A-8, emphasis supplied). Neither the Supreme Court, nor any other court has ever previously come to this conclusion in considering the application of Article I, §24(b), or in the application of the statutory Sunshine Law. Once again, as if to underscore the fact that it was expressly construing the Constitution, the court never mentions the Sunshine Law itself, §286.011, *Fla. Stat.*, by citation in the opinion.

The affect of this very expansive decision governing the applicability of the public records and open meetings requirements of the *Florida Constitution* is widespread, and goes well beyond the facts or parties of the present case. At its most fundamental level the broadside directed by this opinion at hospitals leased (and perhaps even those purchased in accordance with the current version of the statute), under the authority of §155.40 is very significant. An amicus brief of the Association of Voluntary Hospitals of Florida, Inc., filed below, for example, relates that there are 37 other hospitals in the state which are publicly owned, but which are operated by private companies, primarily pursuant to §155.40, and which accordingly will be affected by this decision. (A-19, 20).

Moreover, a determination of the applicability of both the open meetings and public records requirements of Article I, §24, in light of the decision of the District Court of Appeal in the present case to other private corporations who are asserted to be "acting on behalf of" a governmental agency - whether providing health care or otherwise - is undoubtedly an

issue in need of immediate resolution by the Supreme Court. Private corporations not under the direct dominion and control of a governmental agency, but which by contract provide services to a governmental agency will unquestionably be bathed in uncertainty regarding the applicability of the public records and open meetings provisions of the Constitution as a result of this opinion. Because compliance or non-compliance with these requirements may have profound impacts on the operation of all such bodies, a resolution of these issues is of great importance.

Finally, because the District Court of Appeal considered the effects of the Constitution on §155.40, rather than the effects of the the statutory Sunshine Law and the Public Records Act on §155.40, the potential for legislative relief from the wide spread effects of the opinion are sharply reduced. Thus, relief, if it is to be had, must come from the Supreme Court.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL AS IT CONCERNS THE APPLICABILITY OF THE SUNSHINE LAW CONFLICTS WITH *CITY OF MIAMI BEACH V. BERNS*, 245 SO.2D 38 (FLA. 1971); AND *TIMES PUBLISHING CO. V. WILLIAMS*, 222 SO.2D 473 (FLA. 2D DCA 1969), IN HOLDING THAT THE SAME TEST APPLIES TO THE SUNSHINE LAW AS APPLIES TO THE PUBLIC RECORDS ACT; AND WITH *CAMPUS COMMUNICATIONS, INC. v. SHANDS TEACHING HOSPITAL, 512 SO.2D 999 (FLA. 1ST DCA 1987)*, REGARDING WHETHER SUNSHINE AND PUBLIC RECORDS APPLIES; AND WITH, *TREPAL V. STATE OF FLORIDA*, 22 *FLA. L.WEEKLY* S170 (FLA MARCH 27, 1997), CONCERNING THE APPLICATION OF THE "TOTALITY OF FACTORS TEST."

Article V, §3(b)(3), of the *Florida Constitution*, as implemented by Rule 9.030(a)(2)(A)(iv), *Florida Rules of Appellate Procedure*, grants discretionary jurisdiction to the Supreme Court to review decisions of district courts of appeal that expressly and directly conflict with a decision

of the Supreme Court or another district court of appeal on the same question of law. The present case conflicts on three different questions.

A. Conflict with *City of Miami Beach v. Berns*, 245 So.2d 38 (Fla. 1971, and *Times Publishing Company v. Williams*, 222 So.2d 473 (Fla. 2d DCA 1969).

In concluding that the Sunshine Law applies to Hospital Corporation by virtue of its Lease with the Authority, the District Court of Appeal held that the same analysis that applies to a determination of the applicability of the Public Records Act also applies to an analysis of the Sunshine Law, even though the basis for that analysis - the "acting on behalf of" language found in Article I, §24(a) of the *Florida Constitution*, and §119.01(2), *Fla. Stat.*, which concern public records - is not found in Article I, §24(b), *Florida Constitution*, or §286.011, *Fla. Stat.*, which deal with open meetings.

The Supreme Court and the Second District Court of Appeal have both stated, however, that the legislature intended the Sunshine Law to bind "every board or commission of the state, or of any county or political subdivision *over which it has dominion and control.*" *City of Miami Beach v. Berns*, 245 So.2d 38, 40 (Fla. 1971); *Times Publishing Company v. Williams*, 222 So.2d 470, 473 (Fla. 2d DCA 1969). At no time since this ruling was first announced in 1969, has the legislature amended the statute to modify the standard established by these cases, and at no time has any other court varied from it. That is to say, the District Court of Appeal in the present case has unilaterally implied a new standard different from that which was first identified 28 years ago, and which was approved by the Supreme Court.

The District Court of Appeal in the present case, however, held that:

> "Even though the constitutional provision referred to above in our discussion of the open meeting requirement does not use the 'acting on behalf of' terminology, it does require that all meetings of

> public bodies in which 'public business of such body is to be transacted or discussed' shall be open to the public. Since someone 'acting on behalf of' a public body is authorized to transact or discuss public business, *we believe that such language is implicit in this provision* and that the meetings of such surrogate public bodies come under the constitutional open meetings requirement."

As the District Court of Appeal has determined that the Sunshine Law applies to those "acting on behalf of" a public body, and as this determination is in direct and express conflict with this Court's holding and the holding of the Second District Court of Appeal that Sunshine applies to those bodies under the "dominion and control" of a public body, conflict in need of resolution exists.

B. Conflict with *Campus Communications, Inc. v. Shands Teaching Hospital*, 512 So.2d 999 (Fla. 1st DCA 1987).

The First District Court of Appeal in *Campus Communications, Inc. v. Shands Teaching Hospital*, 512 So.2d 999 (Fla. 1st DCA 1987), held specifically that "Shands is not a state agency or authority for purposes of the Sunshine Law and that Shands is not a unit of government or private entity acting on behalf of any public agency for purposes of the Public Records Law." *Id.* at 1000. This conclusion was based on a determination made by the same court in the earlier case of *Shands Teaching Hospital v. Lee*, 478 So.2d 77, 79 (Fla. 1st DCA 1985), in which it held that as the State Board of Education was authorized by special legislation "to lease Shands to a private not-for-profit corporation organized solely for the purpose of operating the hospital and ancillary health-care facilities," Shands was not a corporation primarily acting as an instrumentality of the state. The special legislation authorizing the Shands lease and §155.40 have obvious parallels.

Inasmuch as Shands is operated by a private not-for-profit corporation leasing the facility from a government agency, and Hospital Corporation is

likewise a private not-for-profit corporation leasing from a government agency, the direct and express conflict is evident.

C. Conflict with *Trepal v. State of Florida*, 22 *Fla. L.Weekly* S170 (Fla March 27, 1997).

In the case of *Trepal v. State of Florida*, 22 *Fla. L.Weekly* S170 (Fla March 27, 1997), the Supreme Court noted that when there is competent substantial evidence to support the findings of the trial court related to the application of the "totality of factors" test, an appellate court is "precluded from substituting our judgment for that of the trial court on this matter." In the present case the trial court made a complete factual determination regarding the application of the "totality of factors" test to the facts in the present case. Despite this careful analysis, the District Court of Appeal simply reanalyzed the facts and substituted its judgement for that of the trial court. In doing so, the District Court of Appeal has brought itself into direct conflict with this decision of the Supreme Court precluding the substitution of judgment by the appellate court.

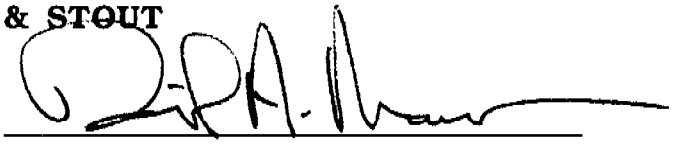
CONCLUSION

The Supreme Court has jurisdiction of this case based both on the construction by the District Court of Appeal of the Florida Constitution, and on the conflict between the present decision and the decisions of this Court and those of other district courts of appeal. Because of the critical importance of this case to the petitioner and to other private not-for-profit corporations acting under §155.40, and, indeed, to all other private enterprises which may contemplate doing business with a governmental agency, the petitioner urges the Court to accept jurisdiction of this matter.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile transmission and by U.S. Mail to **Jonathan D. Kaney Jr., Esq.**, Post Office Box 2491, Daytona Beach, Florida 32115-2491, and by U.S. Mail to **William A. Bell, Esq.**, Post Office Drawer 469, Tallahassee, Florida 32302; **Neil H. Butler, Esq.**, 322 Beard Street, Tallahassee, Florida 32303; and **Teresa Clemmons Nugent, Esq.**, 315 South Calhoun Street, Suite 808, Tallahassee, Florida 32301, this 23rd day of June, 1997.

MONACO, SMITH, HOOD, PERKINS, LOUCKS & STOUT

By: 

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