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IN THE SUPREME COURT OF FLORIDA

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

Petitioner,

v.

NEWS-JOURNAL CORPORATION,

Respondent.

Case No. 90,835
District Court of Appeal
5th District No. 96-2608

APPEAL FROM THE DISTRICT COURT OF APPEAL FIFTH DISTRICT OF FLORIDA

RESPONDENT NEWS-JOURNAL CORPORATION'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

There is neither constitutional construction nor conflict jurisdiction. The decision tendered for review, *News-Journal Corporation v. Memorial Hospital--West Volusia, Inc.*, 22 Fla. L. Weekly D1241 (Fla. 5th DCA May 23, 1997) (the "decision"), follows settled law. It applies established constructions of open government laws elevated to the constitution by the Sunshine Amendment of 1992, and it neither announces any inconsistent doctrine nor reaches a conflicting result. Thus there is no jurisdiction for discretionary review.

ARGUMENT

I. THE DECISION APPLIED SETTLED DOCTRINE TO THE FACTS.

A. A decision applying settled statutory construction to the Sunshine Amendment should not invoke constitutional construction jurisdiction.

Petitioner argues that the Court has jurisdiction to review the decision under the constitutional construction clause.[1] To invoke this jurisdiction petitioner must show that the decision undertook "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. It is not sufficient merely that the [decision] examine[d] the facts of a particular case and then appl[ied] a recognized, clear-cut provision of the Constitution." *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958).

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[1]FLA. CONST., art. V, § 3(b)(3) (discretionary jurisdiction over case that "expressly construes a provision of the state constitution"); FLA.R.APP.PROC. 9.030(a)(2)(A)(ii).

The decision fails this test for jurisdiction because it merely applies settled legal doctrine to the undisputed facts of the case.

The decision applies the constitutional amendment ratified in 1992 to add Section 24 to Article I of the Florida Constitution (the "Sunshine Amendment of 1992"). This amendment elevated to constitutional stature the historic public right of access to records and meetings of Florida government.[2] It "does not create a new legal standard by which to judge Sunshine Law cases [but rather] has elevated Sunshine Law protection to constitutional proportions. [There is] no reason to construe the amendment differently than the Supreme Court has construed the statute." *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 868 (Fla. 3d DCA 1997); *accord Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) ("no reason to construe the constitutional provision differently from the statute"). *See also* AGO 96-32, *Op Fla. Atty Gen.* (Sunshine Amendment elevated traditional right of access to the constitution).

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[2]*See* FLA. STAT., chapter 119 ("Public Records Law"); FLA. STAT., § 286.011 ("Sunshine Law") (collectively, "open government laws"). The open government laws were passed as "companion measure[s] in the same 1967 session of the legislature." *Marston v. Gainesville Sun Publishing Co., Inc.*, 341 So. 2d 783 (Fla. 1st DCA 1976) *See* Ch. 67-356, § 1, and Ch. 67-125, § 7, LAWS OF FLORIDA (1967). Their common purpose is "to assure openness in and access to government." *Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979).

In testing for jurisdiction to review a decision applying the self-executing provisions of the Sunshine Amendment, therefore, the Court should apply the *Armstrong* distinction. If the decision does no more than apply settled principles developed under statutory open government laws, it should not be considered to have construed a provision of the constitution but rather to have "merely applied undisputed propositions of law to the facts it found to exist in the instant case." *Dykman v. State*, 294 So. 2d 633, 636 (Fla. 1973).

In both respects that petitioner argues the decision construed the constitution, it merely applied settled propositions of open government law as elevated to the constitution. Therefore, the petition for jurisdiction under the constitutional construction clause is not well-founded.

B. In holding that the public records and public meetings clauses of the Sunshine Amendment applies to the petitioner, the Court applied settled law.

1. The public records holding merely applies this Court's Schwab test.

In holding that petitioner is acting on behalf of a state agency within the meaning of the public records clause of the Sunshine Amendment,[3] the decision applied the well-settled "totality of the factors test" announced by this Court in *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural*

[3]FLA. CONST. , art. I, § 24(a) ("Every person has the right to inspect or copy any public record made or received in connection the official business of any public body . . . or persons acting on their behalf. . . .").

Group, Inc., 596 So. 2d 1029 (Fla. 1992). The decision turns entirely on the application of that test to the particular factors revealed by the record of undisputed facts before the court. It announces no new doctrine.

No jurisdictional significance attaches to the fact that this appears to be the first case to apply *Schwab* to a lease authorized by Section 155.40, FLORIDA STATUTES. The enduring principle of law is that "[a] public agency cannot avoid disclosure under the [Public Records Law] by contractually delegating to a private entity that which otherwise would be an agency responsibility." *Schwab*, 596 So. 2d, at 1031. *Schwab* establishes guidelines for applying this principle to infinite factual contexts, and each new application does not give rise to a new constitutional doctrine.

2. The public meetings holding applies the landmark rule of Gradison and Wood.

The decision holds that the public meetings clause of the Sunshine Amendment[4] applies to meetings of petitioner's board because it transacts and discusses public business when it acts on behalf of the delegating agency. This applies the settled rule first announced in *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974) and reaffirmed in *Wood v. Marston*, 442 So. 2d 934, 939 (Fla. 1983).

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[4]FLA. CONST., art. I, § 24(b) ("All meetings of any collegial public body . . . 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 . . . .").

From the earliest moments in the history of the Sunshine Law, it has been clearly understood that the law may not be avoided by delegating powers to ostensibly private surrogates. *Gradison* affirmed that "the Sunshine Law does not provide for any 'government by delegation' exception" and applied the law to a "committee . . . established by the town council and *acting on behalf of* the council in an advisory capacity." *IDS Properties, Inc. v. Town of Palm Beach*, 279 So. 2d 353, 356 & 360 (Fla. 4th DCA 1973), *aff'd sub nom. Town of Palm Beach v. Gradison,* 296 So. 2d 473 (Fla. 1974) (e.s.). In affirming this holding, the Court expressly rejected Justice Dekle's dissenting view that the Sunshine Law should apply only to "elected or officially appointed boards," *Id.*, 296 So. 2d, at 481 (Dekle, J., dissenting). Thus it is settled that the Sunshine Law is not limited to official entities and the test for application of the law to an ostensible surrogate "correctly [must be] focused on the *nature* of the act performed, not on the make-up of the committee or the proximity of the act to the final decision." *Wood*, 442 So. 2d, at 939 (e.s).

In applying the public meeting clause to the surrogate board meetings, the decision focused on the fact that the nature of the act performed by the surrogate is the transaction and discussion of public business of the delegating agency. Therefore, the decision merely follows and applies the settled doctrine of *Wood*

and *Gradison* to the facts of this case. Thus it is not a jurisdictional construction of the constitution.

II. THE DECISION DOES NOT CONFLICT WITH DECISIONS CITED BY PETITIONER.

A. To conflict, decisions must announce a conflicting rule of law or reach conflicting results on indistinguishable facts.

Petitioner seeks to invoke this Court's conflict jurisdiction.[5] To establish jurisdiction for this purpose, petitioner must show that the decision "establishes a point of law contrary to a decision of this Court or another district court." *The Florida Star v. B.J.F.*, 530 So. 2d 286, 289 (Fla. 1988). Although the announcement of a conflicting rule of law will create jurisdiction, *Neilson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960), the application of the same principle of law to reach different results on different facts does not raise conflict. *Wilson v. Southern Bell Telephone and Telegraph Co.*, 327 So. 2d 220, 221 (Fla. 1976).

B. There is no conflict with *Berns* and *Williams*.

Petitioner argues that the decision conflicts with *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971) and with *Times Pub. Co. v. Williams*, 222 So. 2d 473 (Fla. 2d DCA 1969). This argument hinges on the erroneous contention

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[5]FLA. CONST., art. V, § 3(b)(3) (discretionary jurisdiction to review a decision that "expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law"); FLA.R.APP.PROC. 9.030(a)(2)(A)(iv).

that these decisions establish a point of law confining the Sunshine Law to "those bodies under the 'dominion and control' of a *public body*." Pet. Br., at 9 (e.s.).

The cases establish no such rule. Each states that "the legislature intended to extend application of the 'open meeting' concept so as to bind every 'board or commission' of the state, or of any county or political subdivision over which it has dominion and control." *Berns*, 245 So. 2d, at 40; *Williams*, 222 So. 2d, at 473. These cases held the new Sunshine Law overrode an earlier open meetings act which had been limited solely to formal meetings and thus applied the new law to informal meetings. This does not establish a point of law that limits the Sunshine Law, as petitioner contends, "to those bodies under the 'dominion and control' of a *public body*." Pet. Br., at 9 (e.s.). *Berns* and *Williams* say the law was intended to reach all bodies under the dominion and control of the *legislature*.

This Court explicitly has rejected the distinction on which petitioner relies. *Wood*, 442 So. 2d, at 939. In *Krause*, the court dismissed the distinction as one that would "submerge [the Sunshine Law] in a semantic quagmire thereby thwarting its manifest purpose." *Krause*, 366 So. 2d, at 1253 ("fact of the board, not the source of the board, taking official acts which is subject to the Legislature's 'dominion and control' . . . is determinative"). When this Court approved *Krause* as "correctly focus[ing] on the nature of the act performed,"

Wood, 442 So. 2d, at 939, it approved the reasoning which rejects precisely the argument made here by petitioner. Thus the decision conflicts with no point of law established by *Berns* and *Williams*.

C. There is no conflict with *Shands*.

Petitioner contends that the decision of the District Court conflicts with *Campus Communications, Inc. v. Shands Teaching Hospital*, 512 So. 2d 999 (Fla. 1st DCA 1987) (*Shands II*). However, *Shands II* stands alone on unique facts. In the act authorizing transfer of Shands Teaching Hospital to a private entity, the legislature found that this hospital "is unique and different from other state institutions." Chapter 79-248, LAWS OF FLORIDA (1979). In *Shands Teaching Hospital v. Lee*, 478 So. 2d 77, 79 (Fla. 1st DCA 1985) (*Shands I*), the court looked deeply into the particular legislative history of this act and found that "the intent of the legislature was to treat Shands as an autonomous and self-sufficient entity, not one primarily acting as instrumentality on behalf of the state."

In concluding that the Public Records Law did not apply, *Shands II* relied on the legislative finding that Shands Teaching Hospital is unique and different from such other state institutions as the public hospital now operated by petitioner and on the judicial finding in *Shands I* that the legislature intended Shands Teaching Hospital to be autonomous. These findings are diacritical

distinctions between the present decision and *Shands II*. Thus there is no conflict. *Wilson*, 327 So. 2d, at 221.

D. There is no conflict with *Trepal*.

The decision does not conflict with *Trepal v. State*, 22 Fla. L. Weekly S170 (Fla. March 27, 1997). In *Trepal*, the trial court received evidence concerning disputed factual issues and made specific findings of fact. This Court concluded that the trial "court's application of the *Schwab* 'totality of the factors' test . . . turned primarily on a series of factual determinations." Since the record showed substantial and competent evidence supporting these findings, the Court applied the deferential standard of review.

Unlike *Trepal,* this case was submitted on cross motions for summary judgment, and the trial judge found that "[t]here are no material facts in dispute." R. 486 (same at Appendix to Petitioner's Jurisdictional Brief, page 1). Thus the trial judge's application of *Schwab* turned exclusively on a series of conclusions of law based on a record of undisputed facts.

There can be no deferential review of a summary judgment. "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985) *citing Shaffran v. Holness*, 93 So. 2d 94 (Fla. 1957). Questions of law are

subject to plenary review. *Whigum v. Helig-Meyers Furniture, Inc.*, 682 So. 2d 643, 646 (Fla. 1st DCA 1996).

There is thus no conflict between this decision and *Trepal*. In *Trepal*, the court made findings based on disputed factual contentions and then reached its legal conclusions. In the instant case, the trial court made only legal conclusions based on undisputed facts proved by a record cooperatively developed by the parties. The cases are thus distinct because the standard of review of disputed factual issues appropriately differs from the standard for review of legal issues. *State v. Setzler*, 667 So. 2d 343, 344-345 (Fla. 1st DCA 1995).

CONCLUSION

Therefore, respondent requests the Court to deny review.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a photocopy of the foregoing has been delivered by U.S. Mail to David A. Monaco, Esq., Larry R. Stout, Esq., 444 Seabreeze Boulevard, Suite 900, P. O. Box 15200, Daytona Beach, FL 32115; William A. Bell, Esq., Post Office Box 469, Tallahassee, FL 32302; Neil H. Butler, Esq, 322 Beard Street, Tallahassee, FL 32303; and Teresa Clemmons Nugent, Esq., 315 South Calhoun Street, Suite 808, Tallahassee, FL 32301 this 17th day of July, 1997.

Jonathan D. Kaney Jr.

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