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 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

- Special Note concerning Amicus. Numerous inquiries have occurred concerning this case which is obviously of great public concern. Counsel for Petitioners and Respondents have both consented to all requests for Amicus status.

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STATEMENT OF THE CASE AND FACTS

The two parties to this litigation and the other directly involved entities will be designated as:

- The News-Journal Corporation (the Publisher). A newspaper corporation and plaintiff below.
- Memorial Hospital-West Volusia, Inc. (the Hospital Corporation). Defendant below, a private not-for-profit corporation operating a hospital in DeLand, Volusia County, Florida. The operation of this hospital is pursuant to a 40 year lease with the West Volusia Hospital Authority.
- West Volusia Hospital Authority (the Authority). A special taxing district created in 1957 in Chapter 57-2085, Laws of Florida. This special district owned and previously operated the hospital.
- Memorial Health Systems, Inc. -- (Memorial) the parent company of the Hospital Corporation.
- West Volusia Memorial Hospital (the Hospital). This acute care hospital in Deland was initially built by the Authority and operated until 1994 at which time the hospital was leased by the Authority to the Hospital Corporation under a 40 year lease pursuant to Section 155.40, Florida Statutes (as it existed in 1994).

In this brief the record will be designated (R.__) along with the names of the various deponents. The five page 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) will be referred to as the opinion.

This is a Public Records and Sunshine Law controversy. The trial court ruled in favor of the Hospital Corporation holding that its records and meetings were private and not within the public records or sunshine laws. The Publisher appealed and the Fifth District Court of Appeal reversed by opinion of May 16, 1997. The Hospital Corporation sought review before this Court based upon the

District Court's express construction of the Florida Constitution and upon conflicts with decisions by other district courts. By order of October 20, 1997, this Court accepted jurisdiction, scheduled oral argument and set a briefing schedule. Numerous requests for *amicus curiae* status have been filed on both sides.

The Judgment of the Trial Court

The newspaper Publisher filed suit for declaratory decree against the Hospital Corporation asserting that all the records of this Corporation and its director's meetings were subject to Florida's Public Records Act (Chapter 119) and the Government in the Sunshine Law (Section 286.011). (R.54). The Hospital Corporation asserted that its records and meetings were not subject to public scrutiny, that it was a private business corporation and that neither Section 119.011 nor Section 286.011 applied. (R. 245-249). Depositions, documents and affidavits established the basic facts which were not contested.

The parties both moved for summary judgment based on these uncontested facts. This was not a normal or routine summary judgment proceeding where parties argued that judgment was foreclosed because of factual conflicts. The transcript and both the written and oral presentation showed no fact disputes. (R. 1-53). After thorough consideration, the trial court granted judgment in favor of the Hospital Corporation and against the newspaper Publisher holding that neither Chapter 119 nor 286 were applicable. The court thoroughly analyzed the "totality of the

factors"[1] and we beg the Court's indulgence in quoting the judgment almost in full. No better summary of the case can be found and this judgment, well supported by the evidence and the law, should have been accepted and affirmed by the Fifth District Court.

The judgment states:

> Prior to 1994, the Authority operated a public acute care general hospital in DeLand, Florida. It determined, however, that the hospital was not being properly operated, and feared for its future existence and financial viability. The Authority accordingly examined the options available to it under the law.
>
> After receiving the advice of counsel the Authority decided after receiving public input that the best option available to it was to enter into a long term lease of the hospital facility, pursuant to §155.40, *Florida Statutes*, with a private not-for-profit organization. It then published a request for proposals and reviewed the several proposals submitted to it.
>
> In 1994, in response to the request for proposals, Memorial Health Systems, Inc. ("Memorial"), a Florida not-for-profit corporation, submitted a proposal and was elected by the Authority to lease and operate the hospital. Memorial thereafter entered into negotiations with the Authority for a long term lease involving a part of the Authority's hospital facilities to allow the Authority to lease the hospital facilities to a not-for-profit corporation to be formed by Memorial in accordance with the provisions of §155,40, *Florida Statutes*. Defendant, Hospital Corporation, was formed by Memorial, as the sole member of that not-for-profit entity, as a result of the successful negotiations between the Authority and Memorial. On July 28, 1994, the Authority entered into the Lease Agreement that is attached to the Complaint as Exhibit D with the Hospital Corporation (the "Lease Agreement").
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> In its complaint Publisher postulated that the Authority delegated to the Hospital Corporation its governmental function of providing health care. It postulated further that because Hospital Corporation is an "agency" of the Authority, it is, therefore, subject

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[1]News and Sun-Sentinel Co. v. Schwab, Twitty & Hansen Architectural Group, 596 So. 2d 1029 (Fla. 1992).

to both the Public Records Law and the Government-in-the-Sunshine Law. Publisher then demanded access to the corporate records and minutes of the corporate meetings of the Hospital Corporation. Hospital Corporation has responded that it has retained its private character, and that neither the Public Records Act, nor the Sunshine Law apply to it.

Public Records Law

In determining whether a private entity under contract with a public agency falls within the purview of the Public Records Law, the courts have generally looked to a number of factors indicating the level of involvement by the public agency, rather than looking at a single factor. A determination regarding the applicability of the laws to a particular fact situation depends, therefore, on a review of the "totality of factors." *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031 (Fla. 1992); *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So.2d 730, 733 (Fla. 2d DCA 1991); *Fox v. News-Press Publishing Co., Inc.*, 545 So.2d 941, 943 (Fla. 2d DCA 1989); *Schwartzman v. Meritt Island*, 352 So.2d 1230, 1232 (Fla. 4th DCA 1977).

Among the factors considered by the Court in arriving at its conclusions, and consistent with the teachings of the Supreme Court in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031 (Fla. 1992), and the Second District Court of Appeal in *Sarasota Herald-Tribune Co. v. Community Health Corp., Inc.*, 582 So.2d 730, 733 (Fla. 2d DCA 1991), were the creation of the Hospital Corporation, its funding, the degree of regulation exercised over it by the Authority, the decision making process, whether a governmental function was involved, and the goals of the Hospital Corporation. The deposition testimony, affidavit and other discovery and documents filed with the Court reflect the following:

I. *Creation.*

A. The Hospital Corporation was not formed by or incorporated by the Authority, but instead was formed by and incorporated by Memorial.

B. The negotiations for the Lease Agreement were conducted completely at arm's length, with each side being separately represented by counsel of its choice.

C. The request for proposals by the Authority, the selection process, and the negotiation of the Lease Agreement and associated documents were conducted and completed under full public scrutiny and were lawful.

D. The Authority and Hospital Corporation specifically intentionally deleted all reference to the Public Records Law and the Sunshine Law from the Lease Agreement in order to enhance the ability of Hospital Corporation to compete in today's health care environment.

II. *Funding.*

A. Hospital Corporation caused the Authority's bonded debt of $8,181,382 to be *paid* as a component of Hospital Corporation's rent, and Hospital Corporation likewise assumed another $654,322 in debt of the Authority as a component of rent. Hospital Corporation must spend millions of dollars over the term of the Lease Agreement for capital improvements, in addition to normal maintenance and upkeep, to assure that the Authority will eventually have the return of its leased property, *plus* the capital improvements.

B. The Authority has reserved and maintained control over all tax revenues that it receives. To the extent subsidies are received by Hospital Corporation, those subsidies are within the discretion of the Authority and are limited in time and amount. To the extent public monies are received by Hospital Corporation for indigent care, those monies result from a fee for services arrangement and are governed by carefully designed accounting criteria. The Lease meets the §155.40 requirement to provide for indigent care.

C. There is no co-mingling of funds of the Hospital Corporation and the Authority, and the Authority does not have a substantial financial interest in the Hospital Corporation.

III. *Regulation and Interdependence of the Bodies.*

A. The Hospital Corporation is not a related agency to, nor a joint venturer or partner of, the Authority, and is not subject to the dominion or control of the Authority.

B. The Authority under the Lease Agreement with Hospital Corporation has no ancillary, secondary or oversight role in the operation of the leased facilities

or in the operation of the hospital itself. Operational control of the leased facility resides specifically with Hospital Corporation, and all employees of the hospital, including the administrator, are employees of Hospital Corporation.

C. The board of Hospital Corporation is elected by Memorial, and the Authority is permitted by the Lease Agreement to nominate only a single non-voting member of Hospital Corporation's board. The Authority, thus, has no direct or exercisable control or influence on or over the Hospital Corporation's board of directors, or in the operation of the facilities leased to Hospital Corporation.

D. The Authority cannot compel changes in the articles of incorporation or the by-laws of the Hospital Corporation, or the amendment of the same, but in accordance with §155.40, *Florida Statutes*, is given the right to approve changes to those documents.

IV. *Decision Making Process.*

A. Hospital Corporation cannot bind the Authority, and the Authority cannot bind Hospital Corporation, as the two are independent entities. The two bodies act apart from each other. The Authority has no direct or exercisable control or influence on or over Hospital Corporation's board of directors, or in the operation of the facilities leased to Hospital Corporation. Its representation is limited by a single non-voting, liaison member on the board of Hospital Corporation, and it cannot compel changes in the articles of incorporation or the by-laws of Hospital Corporation, or the amendment of the same.

B. So long as Hospital Corporation does not breach the Lease, the Authority has no right or power to approve or disapprove decisions made by the board of directors of Hospital Corporation concerning operations of the Hospital, including decisions setting salaries and fees to be paid to hospital staff, or expenditures for maintenance and replacement of fixed assets, or other costs or expense that comprise overhead and general administrative expenses of Hospital Corporation.

V. *Function.*

A. Hospital Corporation is not performing a public function or a function that the Authority would otherwise perform because the Authority chose to divest itself of the operation of the functions performed by its

facilities by leasing the same to the Hospital Corporation in accordance with §155.40, *Florida Statutes*.

B. Hospital Corporation is doing exactly the same thing that its "sole member," Memorial Health Systems does -- it operates a not-for-profit hospital. The Authority chose to divest itself of the operation of a public governmental hospital by leasing these assets to the Hospital Corporation in accordance with §155.40, *Florida Statutes*. The Authority is no longer in the hospital business. Its governmental function now is to see to it that certain levels of health care are delivered to residents within its jurisdiction by contracting with others to provide those services. Functionally, therefore, Hospital Corporation is not fulfilling a "governmental" role.

VI. *Goals*.

A. Hospital Corporation, as noted above, is functioning for the benefit of Memorial, and deals at arm's length with the Authority.

B. The Florida Legislature in §155.40, *Florida Statutes*, did not mandate or mention that either the Government-in-the-Sunshine Law, or the Public Records Law would apply to the Hospital Corporation, or to bodies similarly formed, even though the document has been amended on several occasions.

The Court, having considered the factors presented to it, therefore concludes that under the "totality of factors" test, Hospital Corporation is not "acting on behalf of" the Authority. Hospital Corporation is, accordingly, entitled to a judgment on Count I of the complaint dealing with the Public Records Act as a matter of law.

Sunshine Law

Despite Publisher's argument to the contrary, neither the Constitution nor the Sunshine Law contain an "acting on behalf of" provision similar to that found in the Public Records Act. If the Legislature wished to include that provision, it certainly could have done so. The Court declines to insert "acting on behalf of" where the Legislature has chosen not to do so.

The Court concludes that the proper test for applicability of the Sunshine Law in the present case is whether Hospital Corporation is subject to the dominion and control of the Authority. *City of Miami Beach v.*

> *Berns*, 245 So.2d 38 (Fla. 1971); *Times Publishing Company v. Williams*, 222 So.2d 473 (Fla. 2d DCA 1969). The Court concludes that Hospital Corporation is not subject to the dominion and control of the Authority, and that the Sunshine Law is therefore not applicable to meetings of its board. The Court notes, however, that even if the correct test were whether the Hospital Corporation was "acting on behalf of" the Authority, the Court would find that it is not for the reasons set forth in the analysis of the Public Records Act.

Final judgment was entered in favor of the defendant Hospital Corporation (T.586).

The Decision of the District Court of Appeal

The Fifth District reversed and in doing so stated that it was applying the Schwab factors test, which the trial court had applied. The District Court reached a totally different ultimate conclusion from the basic facts as found by the trial court.

The District Court concluded that "in a broad general sense" the Hospital Corporation was acting on behalf of the Authority. The language, "or persons acting on their behalf" was quoted from the Florida Constitution, Article I, Section 24, on public access. The District Court fashioned this into an "on behalf of" theory which it relied upon and applied to both of the separate and distance Public Records and Sunshine Law issues. The legal basis for the Court's reliance on the language, "in a broad general sense" is unstated.

The opinion reinterprets the facts and conclusions which the trial court had found as to each of the factors listed in News and Sun-Sentinel Co. v. Schwab, Twitty and Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992), including (1) creation (2) public funding (3) co-mingling of funds (4) use of publicly owned

property (5) part of Authority's decision-making process (6) services which would otherwise be provided by government (7) actual control (8) financial interest, and (9) receipt of benefit.

While the trial court had found in favor of the Hospital Corporation on all of these different factors, the District Court of Appeal took a different factual slant as to each factor and found in favor of the Publisher as to every factor. The Court chose not to review the record in the light most favorable to the prevailing theory below. The appellate court rejected the trial court's application of the "dominion and control" test for the Sunshine Act and concluded that the same "on behalf of" test applied to both Public Records and the Sunshine Act. The case was remanded for injunctive relief as to both.

The trial court's judgment had noted the importance of Section 155.40 in the transfer and lease between the Authority and the Hospital Corporation. The statute's specific authorization for privatization of the hospital was found to be as important as any of the other Schwab factors. The District Court mentioned Section 155.40 only in a footnote viewing it as unimportant.

The District Court's decision discusses "privatization" of former government functions at facilities initially acquired with tax money and concludes that any such privatized "operation of a public obligation" by an entity other than government cannot ever be taken out of the Public Records and Sunshine laws. The Court recognized that the parties to this lease (the Authority and the Hospital Corporation) expressly wrote all documents so that the

Public Records/Sunshine Laws were not to be applicable. The Court held this was legally impossible because hospitals and health care was a "public obligation" similar to operating a jail or providing fire protection. The District Court has held that any function which is historically or legally "public" may not be "privatized" so as to allow records and meetings to remain private for business competitive purposes.

Hospital Care in Florida and Volusia County

The record in this case and history of health care legislation in the recent past demonstrates the marked and accelerating trend towards privatization of public hospitals.[2] Historically, hospitals were often sponsored by religious orders, churches or other charities. Other than those sponsors, hospitals were provided by the government. Florida's system of hospital special taxing districts became the vehicle by which taxes were levied to build hospitals to provide medical care for the residents and for indigents in need of hospitalization. The advent of private hospitals engaging in business for-profit for the benefit of their own shareholders is a more recent phenomenon. Likewise, community based not-for-profit corporations running publicly-owned hospitals now number at least 37 in Florida.

The creation of hospital districts has been by special legislative acts for limited areas. The very first such special act was for the Halifax Hospital District in Volusia County,

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[2]A Study of Hospital Districts, Florida House of Representatives Committee on Health Care February, 1996, HC-002.0296.

Florida. See Chapter 11272, Laws of Florida (1925). This Act created a governing body of five commissioners and granted authority to construct and operate a district hospital and to levy taxes. This special act was representative of many to follow over the next 60 years in the Florida Legislature. Many changes have now occurred. Certificates of need, the coming of competition and upward spiraling costs along with private for-profit hospitals and not-for-profit hospitals have all now dramatically changed the structure of health care in Florida. Hospital Districts are becoming a thing of the past in the actual operation of hospitals.

The West Volusia Hospital Authority (the Authority involved in the present case), was created as an independent taxing district 40 years ago by Chapter 57-2085, Laws of Florida. From 1957 to 1994 the Authority operated, among other facilities, a public acute care general hospital in DeLand, Florida. (R.54,55). Because of the dramatic changes in health care and competition among hospitals, this older hospital, run by an elected board, simply could not operate at a profit.[3] As stated by the District Court of Appeal, the Authority was simply "incapable of operating the hospital in a fiscally responsible manner". The West Volusia Hospital lost money for many years and had no choice but to spend taxpayers funds in huge amounts to cover even operational costs beyond indigent care

[3]The word "profit" is used here to mean a positive financial outcome rather than a loss. A not-for-profit corporation such as the Hospital Corporation has no shareholders and cannot return profits to its members, directors or officers in any fashion. See Section 617.01401. However, a not-for-profit corporation certainly operates to accomplish a financial profit.

costs. (Gardner dep. 6). Losses from operations alone for the five years prior to the lease to the Hospital Corporation ranged from $4.6 million in 1990 to $9.7 million in 1994. The hospital did not operate even close to a break even point. (Raines dep. 68). Including funds for capital expenditures and to cover operational losses, the tax subsidy for the hospital by the Authority for the same five year period (1990-1994) was $7.5 million, $9.2 million, $9.7 million, $10 million and $10.2 million in 1994.

Volusia County was the second highest taxed county in Florida in terms of ad valorem taxes for hospital purposes. Volusia County was charging $96 per capita while Orange County was charging $10 per person and Brevard County was charging $2 per person. (Gardner dep. 6-7).

Eventually, the Authority had to consider getting out of "the hospital business" and chose to do just that. The Authority, like many other similar public entities, resorted to Section 155.40, Florida Statutes as it existed in 1994. This statute enacted in 1982 allows any public hospital entity to remove itself partially or completely from the management and operation of a hospital. It may itself form a not-for-profit corporation for management purposes or it may enter into a lease with an independent not-for-profit corporation to take over the hospital. The statute places no limit on the lease term. Under the current 1996 version of the statute, the governmental authority may even sell or lease the hospital to a not-for-profit corporation or to a for-profit corporation. Privatization has now genuinely arrived and been

fully recognized as to hospitals under Section 155.40 as it now exists.

The Authority determined that the physicians and other providers did not wish to work with an elected board, and that neither the Authority nor the physicians trusted the existing management of the hospital. (Gardner dep. 11). In an economic environment requiring operating within a system, rather than as a single small hospital, a long term lease with a completely independent private not-for-profit corporation was chosen. Several public and private hospital organizations including Memorial Health Systems, Inc. (Memorial) submitted responses to the formal request for proposals (R.630). (Gardner dep. 62). Memorial was an existing not-for-profit corporation already active in the Florida health care business. According to one official "The [existing hospital] facility was in very, very poor condition". (Raines dep. 59).

The Lease and Transfer Agreement

The Section 155.40 lease was for a term of 40 years. It was negotiated in an "arm's length" transaction. (Hopkins dep. 11,44; Gardner dep. 75; Raines dep. 61). The lease was signed on July 28, 1994 and the Hospital Corporation took over operational control in December of 1994. The Authority conveyed a leasehold interest in the assets, including working capital. The working capital, however, had to be returned to the Authority at the conclusion of the lease. (Hopkins dep. 16). (R.914 and A.61). Covenants required the Hospital Corporation to maintain facilities to a specified level and all improvements and personal property become the

property of the Authority at the conclusion of the lease. (R.889, Hopkins dep. 17). This minimum level is $19,583,274. (Raines dep. 13). Personal property includes advanced medical equipment which is extremely expensive and must be continually replaced by the Hospital Corporation as medical research and science advances.

The first draft of the lease initially provided for open public meetings of the board of the Hospital Corporation. (See Defendant's Ex. 1 to Hopkins dep. and p. 41). This section was specifically removed from the document after reflection on the prior discussions between the parties. (Gardner dep. 72; Hopkins dep. 42). The ultimate position against the application of Chapters 119 and 286 had been taken by the Authority in the very early stages.

The Authority recognized that the Hospital Corporation needed to be able to act competitively and in private. Richard Lind, the chief executive officer of Memorial stated operation under the Sunshine Law was not required by the Authority because privacy would aid in the provision of low cost, high quality hospital and medical care to the community. (R.278, ¶6). There is no language in the lease making records or meetings public. Memorial, as a private business would not have agreed to public operations.

Under the lease, employees of the Authority who previously worked at the hospital became employees of the Hospital Corporation. (R.895; A.42; Hopkins dep. 42; R. 278, ¶9). The administrator of the hospital is an employee of the Hospital

Corporation, and the Authority has no further control over him or her. (Hopkins dep. 43).

The Hospital Corporation has no authority over the taxing powers of the Authority and the Authority may choose not to use tax funds with respect to this hospital. (Hopkins dep. 43; Gardner dep. 75; see also, Raines dep. 61-62). The Authority has no power to direct the Hospital Corporation how to run the hospital, and under Article VI of the lease, the Hospital Corporation is expressly not an agency of the Authority. The two entities are associated solely as lessor and lessee, and are not in a partnership, joint venture or agency relationship. (R.918 and A.65, ¶12.17; Hopkins dep. 44-45; R.278, ¶10). Moreover, the Authority cannot compel changes in the Articles of Incorporation or bylaws of the Hospital Corporation, although any changes to the Articles are subject to its approval. (Hopkins dep. 46; Raines dep. 62).

As a result of the assumption of the Authority's debt by the Hospital Corporation, the net worth of the Authority was effectively increased by $8,181,382. (Raines dep. 10-11). Because of the strictures of federal law, this debt was paid off by the lessee, and a new debt in the same amount was incurred by the Hospital Corporation. (Raines dep. 24). This new debt was then unconditionally guaranteed by Memorial. (Raines dep. 25). Thus, the Authority was completely relieved of its $8,181,382 bond obligation.

The Hospital Corporation assumed outright the obligation to pay the debt due on certain capital leases of $654,322 on which the

Authority had obligated itself. (Raines dep. 25; see also R.879, ¶2.04). Therefore, as soon as the lease became effective, the Authority and its taxpayers were relieved of more than $8,750,000 in debt -- a significant "rent".

Under the lease, the Hospital Corporation is also required to maintain, at a minimum, property assets at the level equal to those transferred to it by the Authority.

Under Section 6.23 of the lease (R.901 and A.48), Memorial and Hospital Corporation agreed to commit a minimum of $26.4 million to fund capital expenditures during the first ten operating years of the lease. In point of fact, Hospital Corporation is spending $30,000,000 for capital improvements for the facility during the first five years of the lease. (Raines dep. 28).

When the Hospital Corporation assumed operational control vendors had not been paid by the Authority for months, and Memorial almost immediately had to contribute $500,000 just to make the payroll. (Raines dep. 44).

During the first four years of the lease the Authority agreed to consider providing a combined total of up to $10,000,000 in funding to the extent permitted by law. The facility has been losing money operationally (in 1994 alone about $10,000,000), and obviously needed cash. Hospital Corporation was required to supply much of the cash while operations were being turned around from a negative to a positive position. The Authority reviews the financial records of the hospital (which then become public), and

determines whether it will or will not provide the discretionary funding and in what amount.

Indigent Care

As required by Section 155.40(e), Hospital Corporation agreed to provide services for indigents. The Authority agreed to reimburse Hospital Corporation for those services, although this agreement is not guaranteed beyond the initial fiscal year due to public entity funding limitations. During the first two years, the reimbursement rate was 80% of Hospital Corporation's charges for those services. See Section 6.18(d)(i) and (ii) of the lease. Thereafter, the rate is simply 105% of the costs of those services, as determined by generally accepted accounting principles. (Hopkins dep. 19-20). It is simply a fee for services arrangement. (Raines dep. 63).

Termination

The lease may be terminated in the event of a breach by either party. (R. 911, A.58). (Hopkins dep. 37). The District Court of Appeal characterized this termination provision as "real control" solely in the hands of the Authority. Somehow, if the Hospital Corporation engages in conduct amounting to a breach and the Authority chooses to terminate, this is stated to be control over the operations of the Hospital Corporation. This will be commented on further in the argument section hereafter.

The Authority has no **voting** representative on the Board of the Hospital Corporation. (Hopkins dep. 40). The Authority may appoint one non-voting member who functions as a communications link.

(Hopkins dep. 43). The Authority does not control or direct the appointment of any other members of the Board (R.278, ¶7). The Authority likewise has no direct or exercisable control of the operation of the facilities leased to Hospital Corporation.

Many records of the Hospital Corporation are not private. Detailed records and reports must be generated by Hospital Corporation and are required to be supplied to the Authority under 6.19 of the lease including monthly, quarterly and annual financial reports. As soon as these reports reach the hands of the Authority, they become public records.

The transfer of the Hospital to the competitive private sector under Section 155.40 has been a tremendous progressive step in providing access to care and new programs without private gain. This progress may be halted by the current ruling of the District Court. The Hospital Corporation is committed to the betterment of health care in the DeLand area, but the Corporation, like any other business, cannot fully and successfully compete in the modern medical marketplace under the public records/sunshine requirements.

SUMMARY OF ARGUMENT

The West-Volusia Hospital Authority privatized a previously public hospital under Section 155.40, Florida Statutes. The parties (public and private) to the resulting 40-year lease intended and stated that neither the Public Records law nor the Sunshine Act would apply to the new hospital management entity. The lessee Hospital Corporation totally took over operation and management of the hospital in a complex transaction in meticulous

compliance with Section 155.40 and the factors test based upon the Schwab case and other case law.

The newspaper Publisher sued for access to all records and meetings and the trial court entered an extensive final judgment based on motions for summary judgment in which both parties agreed that there were no factual issues. The trial court concluded that the Hospital Corporation was not within the Public Records or Sunshine Law and the publisher appealed to the Fifth District which reversed by basically retrying the facts and reaching different conclusions.

The District Court violated the proper standard of review in retrying the case. The trial court's judgment was completely proper and should have been accepted and affirmed.

Great changes have occurred in the health care delivery systems in Florida and across the country. Intense competition now exists and generally publicly owned and operated hospitals cannot compete. For this and many other reasons, the Legislature enacted Section 155.40 which allows for privatization of formerly public hospitals. Although this statute does not mention Public Records or the Sunshine Laws, it is clear that these statutes do not apply to the present Hospital Corporation because it is purely a private business providing health care services. The District Court wrongly concluded that hospital care is solely a governmental function. Section 155.40 allows for the total privatization of a hospital and that is precisely what occurred here. That hospital

is thus not subject to public scrutiny in its competitive business practices.

The Schwab multiple factor analysis is the applicable law. The Hospital Corporation and the Authority in this case fully complied with the multiple factor analysis and fully intended to do so from the beginning. The trial court correctly applied Schwab and the District Court committed substantial error in misapplying the case.

The Schwab factors were all found to favor the Hospital Corporation by the trial court, but the District Court of Appeal simply took a different factual slant as to each factor. Other hospitals in the state of Florida such as the Shands Teaching Hospital, have been held not subject to the Public Records Law and the District Court erred in its contrary conclusion.

In addition, the test for the application of the Sunshine Law is different than the test for the application of Public Records Law. The trial court used the dominion and control test as established by case law and the District Court of Appeal wrongly rejected this test.

ARGUMENT

I. AS THE TRIAL COURT CORRECTLY FOUND, THE HOSPITAL CORPORATION IS NOT SUBJECT TO FLORIDA'S PUBLIC RECORDS OR SUNSHINE LAWS BECAUSE IT IS SIMPLY A PRIVATE CORPORATION IN THE BUSINESS OF PROVIDING HEALTH CARE SERVICES.

Hospitals are currently being compelled by pressures from various market forces to compete for patients in ways that were never contemplated in the history of hospitals in this state. See generally, Noether, Competition Among Hospitals 74 (1987) (presenting the results of a study on the extent, form, and effect of competition among hospitals); Baker, The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry, 51 Law and Contemporary Problems 93, 97-99 (1988); Bryant, Should Not-for-Profit organizations be exempt from anti-trust laws?, Health Care Fin. Mgmt., (June 1988, at 70,71). The pre-1994 hospital, under the management of the elected Board of the Authority, was close to a financial disaster. Privatization under Section 155.40 became absolutely necessary and there is no doubt that the public will benefit from this change from public to private.

The District Court Violated The Proper Standard of Review

The trial court's judgment should have been affirmed. The Fifth District's function was to review that judgment for error. Neither side suggested to the trial court that there were issues of fact and the District Court should have accepted the trial court's factual findings and simply affirmed the trial court's legally well-supported final judgment. In Trepal v. State of Florida, 692

So. 2d 186 (Fla. 1997), this Court dealt with a public records issue growing out of a criminal defendant's contention that the Coca-Cola Company had engaged in a governmental function under state agency authorization by conducting laboratory tests on poisoned soft drinks. The trial court denied the motion to compel disclosure of documents against Coca-Cola and this Court directly reviewed the circuit court's order. Affirming the trial court, this Court enunciated the appropriate function of an appellate court under such circumstances and stated:

> Our review of the record shows that competent substantial evidence supports those findings. Accordingly, we are precluded from substituting our judgment for that of the trial court on this matter. (emphasis in original)

The opinion further states that it was the duty of the Court on appeal:

> "to review the record in the light most favorable to the prevailing theory and to sustain that theory if it is supported by competent and substantial evidence". (Trepal at 187).

Thus, in a public records context, this Court has very recently stated the proper review standard.

This standard is precisely what the Fifth District Court of Appeal failed to follow in the present case. The District Court was precluded from substituting its judgment for that of the trial court and the District Court certainly did not review the record in the light most favorable to the Hospital Corporation, the prevailing party below. Although the normal strong presumption of correctness is lessened in a summary judgment situation, a presumption still remains and as previously noted; in this case

there simply were no conflicts in the facts even argued to the trial judge (R. 1-53). Thus, the trial court's factual conclusions, unless unsupported by the evidence, were to be accepted on the appeal.

What is or is not a public record in Florida is to be decided on a case-by-case basis. Chevin v. Byron Harless, 397 So. 2d 633 (Fla. 1980) and Michael v. Douglass, 464 So. 2d 545 (Fla. 1985). Here, the trial court thoroughly analyzed all of the factors which this Court has established in Schwab and further analyzed the direct application of the statutory basis (§ 155.40) for the 40-year lease. Section 155.40, was an additional very important statutory factor and it was considered and dealt with in detail by the trial court alone. The trial court should have been affirmed because the very thoughtful and thorough judgment quoted in detail at p. 3-7 herein was a matter within the trial court's proper judgment based on competent and substantial evidence. The District Court did not even suggest that the trial court made the first factual error. Indeed, the District Court itself made factual errors, such as the 1% rent figure, which will be dealt with in detail hereafter.

The circuit court's judgment and the District Court's opinion can be placed side-by-side and compared. The District Court simply disagreed and attempted to explain away the trial court analysis of the Schwab factors without even finding factual or legal error in any of those trial court findings. This was plain error and the lower court judgment should be reinstated under Trepal.

Public Policy and Privatization Under Section 155.40

Health, safety and welfare are the traditional terms historically applied to the functions of government. However, radical changes have taken place in the health care delivery system in Florida and medical care in a hospital is no longer purely a governmental function. It is doubtful that it ever was.

With certain limited exceptions (§ 395.3035), the records and meetings of a purely public hospital are open and competitive hospitals and increasing numbers of non-hospital health care competitors have free access to this proprietary material. Public hospitals now often wake up and find that their own planned ambulatory surgical center has just opened down the street. Competition between private providers is extreme and ever increasing. Health care service is also one of the few industries where government directly competes with private entities. Of course, private provider competition is the most pervasive and important single factor. Health care decisions should also remain locally based and quality medical care is an absolute necessity in the modern world.

The Legislature enacted Section 155.40, Florida Statutes in 1982 allowing for privatization of public hospitals. Radical changes in medical delivery systems continued to accelerate and the statute was further amended in 1996 to allow for total and complete privatization of public hospitals by both private for-profit and private not-for-profit corporations.

As it existed in 1994, Section 155.40 provided in relevant part:

> 155.40 Reorganization of county, district or municipal hospital as a not-for-profit corporation.
>
> (1) In order that citizens and residents of the state may receive quality health care, any county, district, or municipal hospital organized and existing under the laws of this state, acting by and through its governing board, shall have the authority to reorganize such hospital as a not-for-profit Florida corporation, and enter into contracts with not-for-profit Florida corporations for the purpose of operating and managing such hospital and any or all of its facilities of whatsoever kind and nature; to enter into leases with a not-for-profit Florida corporation for the operating of such facilities so existing.
>
> * * *
>
> (2) Any such lease, contract, or agreement made pursuant hereto shall:
>
> * * *
>
> (b) Require that the not-for-profit corporation become qualified under Sec. 501(c)(3) of the United States Internal Revenue Code;
>
> (c) Provide for the orderly transition . . .
>
> (d) Provide for the return of such facility to the ... district upon the termination of such agreement ...
>
> (e) Provide for the continued treatment of indigent patients ....

As amended in 1996, Section 155.40 provided in relevant part:

> 155.40 Sale or lease of county, district, or municipal hospital.
>
> (1) In order that citizens and residents of the state may receive quality health care, any county, district, or municipal hospital organized and existing under the laws of this state, acting by and through its governing board, shall have the authority to sell or lease such hospital to a for-profit or not-for-profit Florida corporation, and enter into leases or other contracts with a for-profit or not-for-profit Florida corporation for the purpose of operating and managing such hospital and any or all of its facilities of whatsoever kind and nature.

The statute (§ 155.40) establishes a continuum running all the way from total government ownership and management to the other extreme of total divestiture.

The statute as originally enacted gave the governing board of a public hospital essentially two options: (i) it could reorganize the hospital and form or contract with one or more not-for-profit corporations to operate and manage the hospital facilities, or (ii) it could lease the hospital to a not-for-profit corporation for the operation of the facilities during the period of the lease. The latter choice was made by the Authority in this case, and the statute granted wide discretion on the degree of involvement, if any, of the public body with respect to the operation of the facilities during the term of any lease. With the recent amendment to the statute which now allows for the sale of public hospital facilities to a private for-profit corporation, it is clear that the Legislature intended to give the governing boards of public hospitals the ultimate ability to totally remove government from the rendition of hospital services and shift that activity exclusively to the private sector. From total governmental involvement to no involvement is only a matter of degree; the application of the "totality of factors" and "dominion and control" tests when applied to the facts of this case justify the trial court's decision in this case.

Purely public functions, e.g. jails, probation, etc. that can only be lawfully performed by an element of the government will invariably result in the application of the Sunshine Laws to the

entity the government contracts with to perform those purely governmental functions. The District Court's "once public always public" approach works well when these purely governmental functions are considered, but hospital services are not the same and therefore a different test (Schwab) must be used.

Obviously, the 1996 statute allows for the sale of the hospital to a for-profit corporation and without question such a sale would dramatically end any public or government involvement. We do not believe that even the average newspaper would suggest that a hospital bought by a private profit making corporation could still be subject to public records and open meeting laws. However, the 40-year lease in the present situation is tantamount to a sale and the very careful structure of this lease is tantamount to a total divestiture of authority and control by the Authority during the term of the lease.

As previously held by the Fifth District Court, the "statute [§ 155.40] was passed to help the [public] hospitals better compete with the private hospitals" and to "have 'outside', presumably more efficient, assistance in the running of the business of a hospital". Jess Parish Memorial Hospital, Inc. v. City of Titusville, 506 So. 2d 22, 23 (Fla. 5th DCA 1987).

Section 155.40 had many reasons behind its passage. As the delivery of quality health care became more competitive and the pressures to contain rising health care costs increased, the Legislature understood the unique difficulties that public

hospitals faced. Those unique circumstances, limited to government, included:

(1) Mandatory participation in the Florida Retirement System under Chapter 121, Florida Statutes.

2) The Florida Constitutional restrictions on governmental units such as the prohibitions against public hospitals participating in partnerships with privately owned entities under Article VII, Section 10, Florida Constitution.

3) The public records and public meeting requirements which purely public hospitals must comply with; Chapter 119 and Chapter 286, Florida Statutes.

Public hospitals must compete with private profit-oriented hospitals and with non-hospital medical providers such as free-standing specialized surgical centers operated by major hospital chains along with an ever increasing array of smaller hospital-like providers. For-profit hospitals and huge private hospital systems have proliferated in Florida. To suggest that hospitals are purely a governmental function is totally unrealistic and an inaccurate mind-set.

Section 155.40 was intended to allow public hospitals to restructure themselves completely and become competitive so that the patients could receive the care they needed. It simply makes no sense to lease a hospital for 40 years to make it more competitive and more efficient and to still require the new hospital management entity to compete in the marketplace in the Sunshine inviting its competitors to attend its meetings.

This simply was not the intent of Legislature in enacting Section 155.40 nor in amending it in 1996 in 96-304. Indeed, the initial statute made no mention of the sunshine or public records

law at all and the trial court noted this absence. However, the 1996 amendment to Section 155.40 did make a reference to the sunshine law in subsection (3)(a) where Section 286.0105 was mentioned as applicable. Clearly the Legislature would not have troubled to insert a reference specifically requiring compliance with one specific aspect of Chapter 286 if Chapters 286 and 119 were already fully applicable in any event. The Legislature is aware of the state of the law and it could not have been their intent to have a specific part of the law apply unless the entire law was simply inapplicable as the Hospital Corporation has always contended.

The Legislature enacted Section 395.3035, as an exemption to Public Records and Sunshine Law requirements, to protect purely public hospitals from disclosing competitive strategic plans in limited circumstances. Section 395.3035 was held to be unconstitutional in part by the Fifth District Court of Appeal while this brief was in the last days of preparation. *See* Halifax Hospital Medical Center v. News-Journal Corporation, Case No. 96-3115, Opinion filed November 14, 1997. The District Court ruled the exemption unconstitutional and held that the constitutionality of the statute for public hospitals was an issue of statewide concern and certified it to this Court. We presume review will be sought.

Indeed, in many cases where the Legislature has created private corporations to assume a role previously performed by government, the Legislature has specified whether the public

records and open government laws apply to that private corporation. See, Section 624.91, Florida Statutes (Florida Healthy Kids Corporation); Section 627.351(6), Florida Statutes, (Residential Property and Casualty Joint Underwriting Association); Section 55.103, and Section 288.901, Florida Statutes, (Enterprise Florida, Inc.). Accordingly, had the Legislature intended the same result for corporations under Section 155.40, it could and would have expressed that intent in the law.

The Fifth District's Misapplication of Schwab and the Schwab Factors

This Court's Schwab decision has become the bible for Public Record/Sunshine Law applications to situations where a private entity contracts with a governmental agency. Section 155.40 creates the public to private continuum and the Schwab case establishes when that balance tilts to the private sector. Under Schwab, an analysis of the listed factors is necessary to determine the application of the public records requirements but the Fifth District misapplied the Schwab case and further misapplied several of the individual factors from that case.

In short, the opinion pays lip service to Schwab but does not follow it. In New York Times Company v. PHH Mental Health Services, Inc., 616 So. 2d 27 (Fla. 1993), this Court had the opportunity to hold that all private not-for-profit medical providers in lease agreements with public agencies were "acting on behalf of" those agencies and were therefore subject to the public records laws. However, this Court chose not to so rule and instead issued a directive for private entities entering into such

agreements. This Court stated, "Private entities should look to the factors announced in Schwab to determine their possible agency status under Chapter 119." Thus, parties facing such circumstances were advised to look to the Schwab "totality of the factors" evaluation and were advised that not every such lease arrangement with a public entity would remain under the public records act.

Most public hospital reorganizations under Section 155.40 occurred before the enactment of the state constitutional provisions relating to public records and public meetings in Article I, Section 24 of the Constitution. Preexisting contract rights should thus not be impaired. It was incumbent on both the trial court and the District Court of Appeal herein to correctly interpret and apply the Schwab factors and the Fifth District committed significant error in this regard.

Initially, the Fifth District seems to have ruled at p. 420 just before its discussion of Schwab that any "public obligation" performed by a private entity using facilities or equipment initially acquired with public funds will, as a matter of law, always be within Chapters 119 and 286. The Fifth District's use of the words "public obligation" must be considered the same as the "governmental function" factor, which was factor number 5 in Schwab. There is simply no rule of law in Florida that performing a governmental function in and of itself requires application of the public records and sunshine law. This has been made absolutely clear in this Court's very recent Trepal decision where the Coca-Cola Company was held to have been performing a "governmental

function", but this factor was found not sufficient, in and of itself, to negate the other private aspects of that Company's activities. Certainly, there are governmental functions which will always remain governmental and may not be privatized. Private prison buildings may occur but the authority to incarcerate must remain governmental. Private mediators may provide mediation service but the judiciary will remain governmental. As previously indicated, medical service is something which has never been purely public or private in American society.

There simply is no rule that performance of what may be viewed as a traditional "governmental function" means that the Sunshine Act applies as a matter of law. If this was the law, then there would be no necessity to even consider the Schwab factors. Here, the Authority and the Hospital Corporation wrote and structured the entire transaction intending to comply with the Schwab factors test. Now, the District Court has conflicted with, rather than followed that case law.

Individual Schwab Factors

The list of factors enunciated in Schwab is a non-exclusive list and it must be expanded when there are other relevant factors. Section 155.40 is obviously such a necessary and relevant factor. No reported Florida public records/sunshine case has ever mentioned Section 155.40. This is because the statute and a corporation acting under it has never been involved in a public records case. Here, the trial court specifically analyzed the application of Section 155.40 and found it allowed for private records of the

management of the Hospital under the lease. But, the Fifth District Court of Appeal found the statute to be totally unimportant. It was mentioned only in a footnote and absolutely no recognition was given to the trial court's application and reliance on the statute.

The District Court could not properly review the judgment without analyzing the statute as a factor which should have been viewed as equal or more important than any of the other listed Schwab factors. The Court's footnote 2 states that Section 155.40 does not waive public record requirements "for agreements entered into pursuant to its authorization". This footnote is inaccurate; no contention was in issue as to whether the lease agreement made pursuant to the statute was confidential. That agreement in the form of the lease had always been public. Section 155.40 specifically authorized this lease and the Court failed to properly apply the statute. The issue was not whether the lease agreement was a public record, but instead whether the records and meetings of the lessee were public.

Further errors of a serious nature relate to the actual Schwab multiple factor test. The Authority and the Hospital Corporation here relied on this Schwab test as have so many other formerly public hospitals in the last 10-15 years.

Creation

The trial court held, the Hospital Corporation was not formed by or incorporated by the Authority. (R.486,489). The evidence was uncontradicted that the Corporation was formed by the Memorial

parent corporation to operate the facility for which it was awarded a lease. Memorial was the sole member and incorporator of Hospital Corporation. (R.1106). Memorial incorporated Hospital Corporation and applied for and acquired 501(c)(3) status under the federal tax code, appointed its board, and founded it. The Authority did nothing other than to appoint its one liaison member to the board.

The District Court came to the opposite conclusion. It held, "While it is true that the Authority had nothing to do with the physical acts involved in incorporating Lessee, we do not believe that such acts are what the supreme court had in mind in listing this factor." (Opinion at 421). It then concluded that the Authority "played a role" because a not-for-profit corporation was required under Section 155.40. This, of course, ignored the fact that Memorial was already an existing not-for-profit corporation and could have entered into the lease itself if it chose to do so. It chose, however, to form a "subsidiary" for its own purposes.

In addition, the uncontested testimony is that Hospital Corporation is not a board, commission, related agency or partner of the Authority. (Hopkins dep. 44,46), (R.278, ¶10). It is also not subject to the dominion or control of the Authority. (Hopkins dep. 45), (R.278, ¶11). There is no contradictory affidavit, deposition or other paper in the court file. The Authority simply does not have direct or indirect control of the hospital operations.

Public Funding

Funding is one of the clearest factors showing that Hospital Corporation is not within the reach of the Public Records Law. Yet, the District Court held there was a "high level of public funding indeed." (Opinion p. 421). This conclusion disregarded all of the specific financial evidence and findings and instead relied upon an analysis of the District Court's own making which even the newspaper Publisher did not suggest in its two briefs before that Court. The opinion states the hospital was valued at $20 million and the rent was 1% of that value or $200,000 per year. The opinion then provides a homespun example of a father leasing a home to his son. None of this has any basis in the evidence and the newspaper Publisher made no such suggestion in its briefs which consistently placed the value at $18.6 million. We simply do not know where the Court got the 1% rent figure and certainly here the District Court erred in not accepting the "Funding" factual findings from paragraphs II A, B and C in the trial court judgment. (See p. 5 herein).

When Hospital Corporation assumed full operational control in December 1994, it found that vendors had not been paid for 60 to 90 days, all of whom had to be paid by Hospital Corporation. Moreover, Memorial almost immediately had to contribute $500,000 just to make the payroll. (Raines dep. 44). There is no doubt that the hospital was in very poor financial condition when Hospital Corporation took over. It clearly did not receive any gift from the Authority and it certainly did not merely pay

$200,000 in rent as erroneously suggested as fact by the District Court opinion.

Public funds are certainly received by Hospital Corporation, but they are received on the basis of fees for services, similar to the architectural firm in Schwab. The Authority has total control over all tax revenues and Hospital Corporation must justify its requests for payment from the Authority based on objective criteria set forth in the lease. For example, in Section 6.18 of the lease, Hospital Corporation agrees to provide services to indigents, and the Authority agrees to reimburse Hospital Corporation for those services. (R.897).

Commingling of Funds; Substantial Interest in Lessee

Contrary to the trial court, the District Court held that while there was "no evidence of a single bank account", in which funds were commingled, there was commingling because funds of the Authority and funds of the Lessee were both used to pay hospital expenses. (Opinion at 421). With due respect, there is no evidence in this record substantiating this assertion.

Hospital Corporation has its own checking accounts, banking arrangements and funds, none of which are in any way associated with the Authority. (R.278, ¶8). Every possible effort was made to keep the funds separate in full compliance with the Schwab test.

All activities of the Hospital Corporation, moreover, are conducted on property that has been leased after arm's length negotiations for an extended term by Hospital Corporation from the Authority in response to a request for proposals. (R.278, ¶4).

Control of the Lessee

The trial court concluded there was none, and so stated in detail. Hospital Corporation and the Authority act completely apart from each other. The Authority, as the trial court noted, has no direct or exercisable control or influence on or over the Hospital Corporation's board of directors, or in the operation of the leased facilities. It has a single non-voting, liaison member on the Board. (R.1106,1109-1110). In addition, the Authority cannot compel changes in the articles of incorporation of the Hospital Corporation. According to the trial court, the Hospital Corporation cannot bind the Authority, and the Authority cannot bind the Hospital Corporation, as the two are independent entities.

The District Court held, however, that the Authority did exercise control over the Hospital Corporation because it could terminate the lease if there was a default by the Hospital Corporation. Surely that was not what was intended by this factor. The control described by courts in Schwab and other cases certainly meant control over day to day operations.

Even the Publisher admitted in its brief before the District Court that:

> There are only two factors which arguably suggest the public records law is not applicable. First, the Authority will not control the day-to-day activities of the corporation. . . . Second, the Authority lacks the ability to exercise voting control over the corporation.

Frankly, the District Court was stretching too far in this opinion and did not even countenance the concessions made by the newspaper Publisher as to these two factors. We do not suggest that the

Publisher conceded error -- but only that these two factors out of the nine should have been determined in the Hospital Corporation's favor. Instead of accepting what had been found as a fact and conceded as a fact (absence of control) the District Court, without evidence, arrived at a conclusion of control of operations within the hand of the Authority. This was error as a matter of law.

Governmental Function

Again, the District Court reversed. This conclusion presumes that health care is purely the domain of government. If that were true, then Hospital Corporation would undoubtedly be performing a governmental function. Health care, however, may be provided either for profit, or not-for-profit, by public or private entities. Hospital Corporation is a private, not-for-profit provider. This Court should note that major hospital chains provide hospital and health care in every county in this state. These companies are not engaged in a governmental function. Here, the trial court found the Authority is "no longer in the hospital business".

By way of analogy, consider a circumstance that is found in virtually every hospital in the state. Hospitals routinely contract with doctors to provide certain hospital-based services, such as emergency room, pathology, anesthesiology, or radiology services. While all of those services are of benefit to the public and certainly relate to health care, we would hardly call them governmental functions, and no one has yet suggested that a medical practitioner is subject to the Public Records law simply because he

or she takes care of patients in a publicly owned facility. The situation is no different in the case of the Hospital Corporation. It is simply providing medical services to the community, and is certainly not acting as the "government." Certain of its documents become public records because under its lease it must supply them to the Authority. The remainder are not.

Finally, it is noteworthy that Section 155.40, the statutory basis for the lease, was amended in 1996, to enable county, district or municipal hospitals to sell, as well as lease hospitals to not-for-profit Florida corporations. Certainly upon a sale of such a facility to a not-for-profit corporation the buyer would not then be subject to the Sunshine or Public Records Laws. If a sale is exempt from the requirements of these statutes, then a 40-year long term lease to an independent organization is likewise exempt.

Goals

This has already been thoroughly reviewed and will not be further argued.

Other Decisions Applying The Totality of Factors Test in Hospital Circumstances

Among the courts agreeing with the totality of factors test was the Second District Court in Sarasota Herald-Tribune Co. v. Community Health Corp., Inc., 582 So. 2d 730, 733 (Fla. 2d DCA 1991) which was repeatedly relied upon by the Publisher below. Community Health predated Schwab by a year, but is instructive because it dealt with a situation somewhat similar to the present case. It is most noteworthy, however, because of its *dissimilarity* between the not-for-profit hospital there, and the one formed here.

First, Section 155.40 was not involved in Community Health. This 1997 News-Journal case is the first to occur under the statute in a public records context. In Community Health the Sarasota County Public Hospital Board decided to create a separate not-for-profit corporation to support the Board's activities and it did so pursuant to an amendment to the special legislation that had initially created the Board. The purpose of the not-for-profit corporation, according to the legislation, was "the furtherance of the hospital board's provision for the health care needs of the people of the hospital district." The articles of incorporation similarly reflected that its purpose was to further the interests of the Board "and thereby those of the residents of Sarasota County in maintaining and enhancing the financial well-being" of the Board. Moreover, the articles required that two members of the Public Hospital Board also be members of the board of the not-for-profit corporation, and that the president of the foundation that supported the Public Hospital Board be a third member. Finally, those three members of the not-for-profit's board were given the power to name the remaining two members. Thus, it was obvious to the appellate court that the "Board can substantially influence policy and financial decisions of the corporation." The Board gave the corporation a favorable lease, poured hundreds of thousands of dollars into it, and extended a $3,000,000 noncollateralized loan to open and operate a cardiac catheterization laboratory.

The Board played a major role in the creation of the corporation and it was clear that the not-for-profit corporation

was simply an agency of the Hospital board. The contrast with the present facts is obvious and Community Hospital is not applicable or controlling. However, it should be noted that even in Community Health the appellate court noted that there might well be functions carried out by the not-for-profit corporation which fell "outside the realm of public access" and that this was a factual question.

The First District's decisions in Campus Communications, Inc. v. Shands Teaching Hospital and Clinics, Inc., 512 So. 2d 999, rev. denied, 531 So. 2d 1352 (Fla. 1988) and Shands Teaching Hospital and Clinics, Inc. v. Lee, 478 So. 2d 77 (Fla. 1st DCA 1985) are also noteworthy. In the 1985 decision, it was held that the Florida Board of Regents was a state agency, but that the Shands Teaching Hospital in Gainesville, Florida, located at the University of Florida, was not a state agency or a corporation primarily acting as an instrumentality or agency of the state. The first case was an attorney's fee matter, but the second case arose in the public records context and the Court reached the same conclusion, holding that Shands Teaching Hospital and Clinics, Inc. was not bound by the Public Records or Sunshine Laws and that it was not a private entity "Acting on behalf of any public agency." This Court denied review in Shands in 1988. If the Shands Teaching Hospital and Clinics involving both health care and education is not bound by the Public Records Law, then certainly the Hospital Corporation here is similarly not bound by the Public Records Law. Any contrary ruling would directly conflict with Shands.

Any fair application of the balancing of the totality of the factors test must result in a determination that neither the Public Records Law nor the Sunshine Act apply to this case. Reversal is thus required.

II. THE SUNSHINE LAW DOES NOT APPLY TO THE HOSPITAL CORPORATION BECAUSE IT IS NOT SUBJECT TO THE DOMINION AND CONTROL OF THE AUTHORITY.

This point is last but should not be minimized or viewed as unimportant. Open meetings are of great concern to the Hospital Corporation. Reversal, even of this point alone, is definitely sought. The District Court of Appeal overruled the trial court's application of the dominion and control test for application of the Sunshine Law and instead ruled that the two statutes depended on precisely the same test. The Schwab case never mentions the Sunshine Law and cannot be said to construe it. Moreover, until the present decision of the Fifth District there was no specific direction from this Court or any other appellate court suggesting that the totality of factors analysis should also apply to the Sunshine Law. Nowhere in either the Constitution nor the Sunshine Law is there an "acting on behalf" provision similar to that found in the Public Records Law.

Both this Court and the Second District Court of Appeal have held that in determining application of the Sunshine Law, it was the intent of the Legislature to apply that law to bind "every board or commission of the state, or of any county or political subdivision over which it has dominion and control." *See* 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). Despite this clear case law supporting the trial court's dominion and control test, the Fifth District has again chosen to create conflict on the same point of law and to reject the dominion and control test in favor if an equal application of both laws. There is simply no evidence in this record that the Hospital Corporation is under dominion and control of the Authority and the Fifth District applied the wrong test in any event.

CONCLUSION

The decision of the Fifth District Court of Appeal should be reversed with instructions to reinstate the judgment of the trial court.

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 21st day of November, 1997.

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