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IN THE SUPREME COURT OF FLORIDA

HALIFAX HOSPITAL MEDICAL CENTER,  
an independent taxing district  
of the State of Florida

Petitioner,

CASE NO.: 92,047

vs.

NEWS-JOURNAL CORPORATION,  
a Florida corporation,

Respondent.

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AMICUS CURIAE BRIEF OF NORTH BROWARD HOSPITAL DISTRICT

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## PREFACE

This Brief is submitted on behalf of the North Broward Hospital District ("District") as Amicus Curiae, in support of the position of Petitioner, Halifax Hospital Medical Center, pursuant to this Court's Order of January 30, 1998, granting the District leave to file a Brief in this cause. The District adopts, but does not address, the points argued by Halifax Hospital Medical Center in its Initial Brief.

The North Broward Hospital District is a special taxing district established by the Florida Legislature to provide hospital and health care services to residents of north Broward County, regardless of their ability to pay. Ch. 27438, Laws of Fla. (1951), as amended. Although the District's physical boundaries are limited to the northern area of Broward, it serves a patient population which includes residents of Palm Beach County, south Broward County, and Dade County. Certain of the District's services are sought by patients throughout the state of Florida. In addition to the District's four hospitals, its market area, defined by the Federal Trade Commission as the Dade-Broward area, is also served by hospitals owned and operated by Humana, Columbia/HCA, Tenet Health System, Cleveland Clinic, and Eastern Mercy Healthcare System, as well as by a handful of independent not-for-profit hospitals. It is in this environment that the District conducts its strategic planning.

### SUMMARY OF THE ARGUMENT

The district court erred in concluding that § 395.3035(4), providing exemptions to public hospitals from the public meeting requirements of Art. I, § 24(a) of the Florida Constitution, is broader than necessary to accomplish the stated purpose of the law and thus constitutionally infirm. Notwithstanding the district court's conclusion, the exemption created by the legislature for public hospitals' written strategic plans is sufficiently specific and capable of definition to pass constitutional muster.

Even though the term "written strategic plan," was not defined by the legislature, as used in § 395.3035(4) it has an ordinary and common meaning. That meaning should have been applied by the district court in favor of a finding of constitutionality.

Moreover, the district court erred in considering hypothetical scenarios that could **possibly** have led to an unconstitutional result. The court should properly confined itself to the facts before it, and should have deferred to the rule that courts should endeavor to preserve statutes and avoid constitutional issues if the case can be resolved on the merits. If compelled to address the constitutionality of § 395.3035(4), the district court was obliged to construe the statute in favor of constitutionality.

Finally, the district court erred in failing to effectuate the legitimate purpose of the legislature in permitting public hospitals to effectively compete in intensely competitive environments, by permitting their strategic plans to remain confidential and free from examination by competitors.

## ARGUMENT

SECTION 395.3035(4), PROVIDING EXEMPTIONS TO PUBLIC HOSPITALS FROM THE PUBLIC MEETING REQUIREMENTS OF ART. I, § 24(a) OF THE FLORIDA CONSTITUTION, IS NO BROADER THAN NECESSARY TO ACCOMPLISH THE STATED PURPOSE OF THE LAW, AND IS THUS CONSTITUTIONALLY SOUND.

A. The exemption created by the legislature for hospitals' written strategic plans is sufficiently specific and capable of definition to pass constitutional review.

In its opinion affirming the trial court's finding of unconstitutionality, the district court's attention primarily focused on the absence of a definitional section in § 395.3035, Florida Statute. Because the statute includes no definition of "strategic plan," said the court, there was no limitation on what could be included in a strategic plan. Halifax Hospital Medical Center v. News-Journal Corp., 22 Fla. L. Weekly D2587, D2588 (Fla. 5th DCA Nov. 14, 1997). According to the court, the term "strategic plan" must, at the very least, be defined. *Id.* The court specifically held that § 395.3035(4) was broader than necessary to accomplish the stated purpose of the law, and thus unconstitutional.

It is a fundamental rule of statutory interpretation that where, as here, the legislature has not defined the words used in a statute, the language should be given its plain and ordinary meaning. Florida Birth-Related Neurological Injury Compensation Association v. Div. of Administrative Hearings, 686 So. 2d 1349, 1354 (Fla. 1997). Further, it is presumed that the legislature knows the meaning of the words used in a statute and that the words

properly express legislative intent. King v. Ellison, 648 So. 2d 666, 668 (Fla. 1995); Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976) (legislature assumed to have expressed its intent through the use of words found in statute). Notwithstanding the district court's opinion, the term "strategic plan" is readily capable of definition,<sup>1</sup> and the court should have applied that definition to support a finding in favor of constitutionality. Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986) (court is obligated to adopt construction of statute that comports with dictates of Constitution).

A strategic plan is commonly understood to be a statement of where an organization is headed, its short-range and long-range performance targets, and the competitive moves and internal action approaches to be used in achieving the target results. *ARTHUR A. ANDERSON, JR. & A.J. STRICKLAND, STRATEGIC MANAGEMENT* 11 (8th ed. 1995). The process of strategic planning, which entails a systematic evaluation of the hospital's internal and external environment and the development of its future strategies, is necessary to enable the hospital to thrive in the face of competition and limited resources. *Gerald Katz, Leslie Zavodnick & Elaine Markezin, STRATEGIC PLANNING IN A RESTRICTIVE AND COMPETITIVE ENVIRONMENT*, 8 *HEALTHCARE MANAGEMENT REVIEW* 7, 8 (Fall 1983). Strategic planning focuses not

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<sup>1</sup>As noted by Halifax Hospital Medical Center in its Initial Brief, the parties to the underlying litigation recognized that strategic planning is a process whereby a hospital "looks at the healthcare industry, looks at its local market, determines where it wants to be in that market, identifies the major changes needed to achieve that position and establishes a plan to accomplish those changes."



only on internal, but also on external market needs, and how best to meet those needs with the resources of the organization. Garry D. Bruton, Benjamin M. Oriatt & Luanne Kallas-Bruton, *Strategic Planning in Hospitals: A Review and Proposal*, 20 HEALTH CARE MANAGEMENT REVIEW 16, 17 (1995). Thus, it is a proactive attempt to understand the future environment and to mold the hospital to succeed in that environment. *Id.* In short, it enables the hospital to identify where it is and where it aspires to be, and to select from among a variety of potential options those actions that will enable it to bridge that gap. JOSEPH P. PETERS, A GUIDE TO STRATEGIC PLANNING FOR HOSPITALS 83 (1979). The culmination of the process is a written strategic plan; that is, the explicit formal strategy of the organization, derived from a careful analysis of the organization's external and internal environments. Jean-Louis Denis, Ann Lagley and Daniel Lozeau, *Formal Strategy in Public Hospitals*, 24 LONG RANGE PLANNING 71, 72 (1991).

The concept of strategic planning has also been addressed and the term defined by the Florida legislature in other contexts. Those legislative definitions are not only consistent among themselves, but are also applicable to the term "strategic plan" as used in § 395.3035. For example, in § 411.202(12), Fla. Stat. (1995), a strategic plan is defined as "a report that analyzes existing programs, services, resources, policy and need and such clear and consistent direction for program and services . . . by establishing goals . . . and strategies to meet them." Similarly, in § 186.503(10), Fla. Stat. (1995), the legislature defined a

strategic regional policy plan as "a long range guide for physical, economic and social development which identifies regional goals and policies." Where, as here, there is no accumulation of jurisprudence on the actual meaning of words used in a statute, and the statute does not define the terms, the Court may look to similar statutes, the common law, and common sense to aid in the interpretation of the words. United States v. Porter, 591 F. 2d 1048, 1053 (5th Cir. 1979). As stated by the supreme court in Morrisette v. United States:

Where congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

342 U.S. 246, 263 (1952), *quoted in* United States v. Porter, 591 F.2d at 1053. While, concededly, the term "written strategic plan" is not imbued with centuries of practice, it should nonetheless be presumed that the legislature, in adopting the term, was satisfied with the widely accepted definition.

**B. The District Court was obligated to give effect to the legitimate legislative purpose set forth in § 395.3035(4).**

In support of its conclusion that § 395.3035(4) is overbroad, the district court voiced concerns about activities which could

arguably be included within the ambit of strategic planning. The Court's concerns, however, are unfounded. Written plans regarding holidays and employee work schedules, or discussions about director and officer benefits or salaries or severance plans, activities contemplated by the district court, are clearly outside the scope of strategic planning as that term is commonly understood. None of those activities bear any meaningful relationship to the process of formulating strategies to meet a public hospital's mission and future direction. See ARTHUR A. ANDERSON & A.J. STRICKLAND, *supra* at 20. Indeed, when called upon to do so, a court can and should find that these activities are not components of a written strategic plan, and that discussions regarding them fall outside the exemptions provided by § 395.303(4). Such a finding, rather than a finding of unconstitutionality, would better comport with the court's obligation to honor the obvious legislative intent and policy behind § 395.3035(4), even if that intent requires an interpretation that may exceed the literal language of the statute. See, generally, Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1102 (Fla. 1989).

Equally importantly, the district court should have refrained from injecting hypothetical scenarios into its analysis of the statute. Courts should not consider factual questions beyond the scope of the case at hand, or envision theoretical combinations of factors which, if present, may render a statute unconstitutional. Fieldhouse v. Public Heath Trust of Dade County, 374 So. 2d 476, 478 (Fla. 1979). Rather, it is the court's responsibility to

examine the facts as they exist and resolve all doubts as to the validity of a statute in favor of constitutionality. *Id.* Although courts may, in some cases, consider hypothetical consequences when considering allegedly overbroad statutes, the rationale for hypothetical considerations -- the protection of free speech -- were not present in this case. See Schmitt v. State, 590 So. 2d 404, 411 (Fla. 1991) (hypothetical consequences considered because it is only way to give effect to constitutional right of free speech; intended to eliminate chilling effect of free, unhindered exercise of constitutional rights). Thus, the courts below could not properly have found § 395.3035(4) unconstitutional based on some future event that "might" occur.

The district court's holding also ignored its obligation to construe statutes to avoid constitutional infirmities. Firestone v. News-Press Publishing Co. v. Earle, 538 So. 2d 457, 459 (Fla. 1989) (statute should be construed so as not to conflict with Constitution). Courts have a duty not to pass on the constitutionality of the statute if the case can be decided on other grounds. State v. Tsavaris, 394 So. 2d 418, 421 (Fla. 1981); State ex rel. City of Casselberry v. Mager, 356 So. 2d 267, 269 n. 6 (Fla. 1978); McKibben v. Mallory, 293 So. 2d 48, 51 (Fla. 1974); Victor v. State, 174 So. 2d 544 (Fla. 1965). Further, the fact that a statute may be unconstitutional in some circumstances is not a ground for finding the statute itself unconstitutional. See, State v. Ecker, 331 So. 2d 104, 110 (Fla.), cert. denied, Bell v. Florida, 423 U.S. 1019 (1975). The test to be applied by courts is

whether the legislature had a reasonable basis to believe that the statute would achieve a legitimate legislative purpose. United States Fidelity & Guaranty v. Department of Insurance, 453 So. 2d 1355, 1362 (Fla. 1984).

In enacting § 395.3035, the legislature clearly had a reasonable basis to believe that the exemptions provided therein would achieve a legitimate legislative purpose. See, Ch. 95-199, Laws of Florida (setting forth legislative justification for exemption). See also, Legislative history and analysis of § 395.3035(4), set forth in Halifax Hospital Medical Center's Initial Brief.

Competition in health care has long been advanced as a means of reducing health care costs. As health maintenance organizations, self-insuring employee benefit plans and public reimbursers search for the best price for hospital services, hospitals must compete with other to provide services at lower prices. *Gerald Katz, Leslie Zavodnick & Elaine Markezin, supra*, at 8. Hospitals also compete for patients, physicians, and with a variety of alternative systems for delivery and care. *Id.* at 9. It is through the process of strategic planning that hospitals explore and implement the strategies that enable them to survive in increasingly competitive environments.

Strategic planning by hospitals is also mandated by the Joint Commission for Accreditation of Healthcare Organizations (JCAHO), the accrediting agency for hospitals. Standard LD.1.1 of the JCAHO'S COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS requires that

hospitals provide for planning that "includes defining a mission, a vision, and values for the hospital and creating the strategic, operational, programmatic, and other plans and policies to achieve the mission and vision." *Id.* at LD-4. Hospitals that fail to acquire JCAHO accreditation risk losing their eligibility for reimbursement from Medicare, Medicaid and other third-party payors.

To permit the hospital to effectively compete in an intensely competitive environment, its strategic plan must remain confidential and free from examination by competitors. Even a strategic plan written for distribution to managers and employees within the organization may omit elements of the plan or express in general terms those areas deemed to be too sensitive to reveal before they are actually implemented. ARTHUR A. ANDERSON & A.J. STRICKLAND, *supra* at 11.

The necessity for confidentiality in the public sector is underscored by the persistent requests by for-profit hospital chains for documents related to public hospitals' business and strategic plans. See, e.g., Terese Hudson, *Faster, Stronger, Private: Converting Hospitals from Public to Private Status to Improve Competitiveness*, 13 ASAP 22 (July 5, 1997); J. Duncan Moore, Jr., *Hospitals Fear Effects of Disclosure Laws*, MODERN HEALTHCARE (Apr. 29, 1996). It has also been widely reported that public hospitals are converting to private not-for-profit systems, in large part to avoid having to disclose sensitive competitive information. According to Charlotte Collins, an attorney who represents the National Association of Public Hospitals and Health

Systems in Washington, "a public hospital's ability to strategize is uniquely impaired by the sunshine laws." Terese Hudson, *supra*. See also Mary Jane Foster, *Bay Area Hospital Seeks New Birth*, MEDICAL INDUSTRY TODAY (Oct. 28, 1996) (important benefit in transferring to private ownership is ability to hold meetings and make strategic plans in private).

It was in response to public hospitals' need for effective strategic planning, and the manipulation of the sunshine laws by for-profit hospitals as a way of enhancing their position in a competitive environment, that the legislature enacted the exemptions found in § 395.3035(4). Because the legislature clearly had a reasonable basis to believe that the exemptions provided therein would achieve a legitimate legislative purpose, the district court should have affirmed the constitutionality of § 395.3035(4), Florida Statutes.

#### CONCLUSION

For the foregoing reason, the North Broward Hospital District respectfully requests that this court reverse the decision of the Court of Appeal, Fifth District, of November 14, 1997, and recognize the constitutionality of § 395.3035(4), Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U. S. Mail upon all persons listed on the attached Service List this 5th day of February, 1998.

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