IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-82

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.,

Petitioner,

vs.

NEWS-JOURNAL CORPORATION,

Respondent.

AMENDED AMICUS CURIAE BRIEF OF MEDIA GENERAL OPERATIONS, INC., d/b/a *The Tampa Tribune.*

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Section 395.3036, Florida Statutes (1999) . . . . *passim*

STATEMENT OF INTEREST OF AMICUS

Media General Operations, Inc., d/b/a The Tampa Tribune (the "Tribune"), publishes a daily newspaper of general circulation in west-central Florida. The Tribune regularly reports news concerning the health care needs of Tampa's residents and the medical institutions that serve them. Among the most significant of those institutions is Tampa General Hospital, a 70-year-old facility near downtown Tampa. In 1997, Tampa General's owner, the Hillsborough County Hospital Authority (the "Authority"), arranged for the creation of a not-for-profit corporation known as Florida Health Sciences Center, Inc. ("FHSC") to operate Tampa General pursuant to a lease agreement with the Authority. The Circuit Court of the Thirteenth Judicial Circuit recently found that, by operating Tampa General, FHSC is performing a public purpose of, and acting on behalf of, the Authority. See Florida Health Sciences Center, Inc. v. Tribune Co., Case No. 99-580 (Fla. 13th Cir. Ct. Oct. 22, 1999). FHSC has appealed that ruling and has attempted to invoke Section 395.3036, Florida Statutes (1999) as a basis for denying public access to its meetings and records. This case concerns the applicability of that statute to a hospital lease agreement that – like the Tampa General lease – predates the creation of Section 395.3036. The Tribune, therefore, has an interest in the outcome of this

litigation.

STATEMENT OF THE CASE AND OF THE FACTS

The Tribune adopts the statement of the case and of the facts appearing in the Answer Brief of Respondent (the "News Journal").

CERTIFICATE OF TYPE, SIZE, AND STYLE

The Tribune's counsel certifies that, in accordance with Florida Rule of Appellate Procedure 9.210(a)(2), text and footnotes in this brief appear in 14 point (proportionately spaced) Times New Roman type.

SUMMARY OF ARGUMENT

[W]e reject the contention that [Section 395.3036] shall apply retroactively.

Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 384 (Fla. 1999).

Petitioner ("West Volusia, Inc.") refuses to believe that this clear holding means what it says. Fifteen months ago, this Court correctly refused to construe Section 395.3036 in a manner that would retroactively abridge the public's fundamental, substantive, self-executing rights of access to the meetings and records of West Volusia, Inc. The legal principles requiring this result are as clear and certain now as they were then. Accordingly, this Court should summarily reaffirm its 1999 opinion and should answer the certified question in the negative.

ARGUMENT

I. Florida law precludes the retroactive abridgment of constitutional rights, including access rights under Article I, Section 24.

Basic principles of Florida law preclude the retroactive application of a statute abridging a fundamental right. Indeed, as this Court explained only last year, "retroactive abolition of substantive vested rights is prohibited by due process considerations." Metropolitan Dade County v.Chase Federal Housing Corp., 737 So. 2d 494, 503 (Fla. 1999). Non-retroactivity gives constitutional rights the protection they deserve and comports with fundamental notions of fairness. Id. at 500 n.8. Accordingly, as this Court explained in Gupton v. Village Key & Saw Shop, Inc., 656 So. 2d 475 (Fla. 1995), a substantive law that interferes with vested rights will not be applied retrospectively. Id. at 477 (citing Young v. Altenhaus, 472 So. 2d 1152, 1154 (Fla. 1985)). "Substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested." Bitterman v. Bitterman, 714 So. 2d 356, 363 (Fla. 1998).

This rule applies to Article I rights generally, and to Section 24 access rights in particular. Article I, Section 24 "has elevated Sunshine Law [and Public Records Act] protection to constitutional proportions." Monroe County v. Pigeon Key

Historical Park, Inc., 647 So. 2d 857, 868 (Fla. 3d DCA 1997). In other words, Article I, Section 24 confers upon the people of Florida a fundamental right to attend public meetings and to review public records.

Amicus Bayfront Medical Center contends that the public's access rights to West Volusia, Inc.'s meetings and records do not vest until an access request is made. See Brief of Amicus Curiae Bayfront Medical Center at 8. West Volusia, Inc. goes even farther, contending that no one had any right to attend any meeting or to see any piece of paper at West Volusia, Inc. until 1997, when the Fifth District recognized the public's constitutional access rights. See Petitioner's Initial Brief at 27. The text of Article I, Section 24 and this Court's jurisprudence are to the contrary. The right to attend public meetings and records, according to the Constitution, is "self-executing." See Art. I, § 24(c). A self-executing right, according to this Court, "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment." Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960); see also State ex rel. Citizens Proposition for Tax Relief v. Firestone, 386 So. 2d 561, 566 (Fla. 1980). This description applies precisely to rights under Article I, Section 24: The public is entitled to review records and

attend meetings whether or not the Legislature (or anyone else) takes action. Accordingly, the public's rights of access to West Volusia, Inc.'s meetings and records existed whether or not anyone attempted to enforce them.

This Court's decision in Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982), like Section 24(c), confirms that rights do not depend upon judicial recognition for their existence. In Rupp, this Court held that the legislature could not retroactively confer immunity upon certain public officials and thereby take away existing causes of action against them. Id. at 665-66. This rule applied, this Court added, even though no jury award had been returned in the particular case before the Court. Id. at 666. In other words, this Court in Rupp recognized that rights had vested even before they had been recognized. Similarly, the public's right to attend West Volusia, Inc.'s meetings and records was inherent in the relationship between the corporation and the West Volusia Hospital Authority – regardless of the passage of time prior to recognition of those rights.

II. This Court correctly refused to construe Section 395.3036 in a manner that would retroactively abridge constitutional rights.

Because access rights are fundamental, this Court in 1999 appropriately declined to allow Section 395.3036 to thwart the News-Journal's pre-existing access rights to meetings and records of West Volusia, Inc. As this Court

explained, the fundamental public policy of this state compels public access to the meetings and records of institutions that use government funds to carry out public purposes. 729 So. 2d at 380. That is why this Court correctly refused to construe Section 395.3036 in an unconstitutional manner. Accordingly, to preserve that statute's validity, it must be read as applying only to future lease transactions.

To avoid this result, West Volusia, Inc. relies upon an overly broad reading of City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986), in which this Court found that the Public Records Act's statutory work product privilege was retroactive. See Initial Brief at 30. The Desjardins decision is inapplicable in this case, because Desjardins approved abridgment only of the statutory right of access found in Section 119.07, Florida Statutes (1983), to a certain, narrow category of records (i.e., attorney work product while litigation is pending). Article I, Section 24, which did not exist at the time of the Desjardins decision, "has elevated Sunshine Law [and Public Records Act] protection to constitutional proportions." Monroe County, 647 So. 2d at 868. Consequently, the Desjardins court did not face the question before this Court: whether a statute may retroactively revoke a constitutional right and close forever every meeting and every record of a public hospital. As Metropolitan Dade County and its predecessors illustrate, statues

cannot have such veto power over constitutional rights. This Court, therefore, should re-affirm its 1999 decision in this case and reject retroactive application of Section 395.3036.

Petitioner's call for retroactive application of the new statute also conflicts with basic canons of public records law. Florida courts consistently (1) construe exemptions narrowly;[1] (2) provide for access in close cases;[2] and (3) reject evasive devices.[3] Petitioner's argument is tantamount to reversing these rules of statutory construction. In fact, by seeking a retroactive construction of Section 395.3036, West Volusia, Inc. would have this Court construe that statute broadly, reject access in a case where the facts clearly favor public scrutiny, and endorse an evasive device. This can never be.

Finally, this Court's previous decision was correct because non-retroactivity

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[1] Downs v. Austin, 522 So. 2d 931, 933-34 (Fla. 1st DCA 1988).

[2] See Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775, 780 n.1 (Fla. 4th DCA 1985) (when in doubt, courts must prefer disclosure over secrecy), review denied, 488 So. 2d 67 (Fla. 1986).

[3] Town of Palm Beach v. Gradison, 296 So. 2d 473, 477 (Fla. 1974).

is consistent with the well-established rule that a government agency cannot by contract create an exemption to the public's access rights. See, e.g., State, Dep't of Health & Rehabilitative Servs. v. Southpointe Pharmacy, 636 So. 2d 1377, 1383 (Fla. 1st DCA 1994) ("to allow the elimination of public records from the mandate of Chapter 119 by private contract would sound the death knell of the Act") (quoting Mills v. Doyle, 407 So. 2d 348, 350 (Fla. 4th DCA 1981)); Palm Beach County Classroom Teachers Ass'n v. School Board of Palm Beach County, 411 So. 2d 1375, 1376 (Fla. 4th DCA 1982) ("provisions of a private agreement entered into by public bodies cannot be used to circumvent the requirements of public meetings"). In accordance with this case law, this Court should reject the theory that Section 395.3036 retroactively enabled West Volusia, Inc. to use a contract to convert a hospital subject to public monitoring into a private entity immune from public oversight.

CONCLUSION

For the foregoing reasons, the decision of the Fifth District Court of Appeal in this case should be affirmed, and the certified question should be answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April ____, 2000, a true and correct copy of the foregoing was furnished by United States Mail to Jonathan D. Kaney, Jr., Esq., Cobb Cole & Bell, P. O. Box 2491, Dayton Beach, Florida 32115-2491; Larry R. Stout, Esq., 444 Seabreeze Boulevard, Suite 900, P. O. Box 15200, Daytona Beach, Florida 32115, and Arthur J. England, Jr., Esq., Greenberg Traurig, P.A., 1221 Brickell Ave., Miami, Florida 33131.

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