IN THE **SUPREME COURT OF FLORIDA**

CASE NO. SC00-82

L.T. CASE NO. 5D99-1483

MEMORIAL HOSPITAL-WEST
VOLUSIA, INC.,

Petitioner,

v.

NEWS-JOURNAL CORPORATION,

Respondent.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

FROM THE FIFTH DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE
BAYFRONT MEDICAL CENTER

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II. STATEMENT OF AMICUS CURIAE

The *Amicus Curiae*, Bayfront Medical Center, Inc. ("Bayfront"), is a Florida private, nonprofit hospital. Bayfront, like Petitioner, Memorial Hospital, leases its facilities and land from a public entity, the City of St. Petersburg. Bayfront entered into the lease in 1968 when it took over the operations of the then-failing, City-operated hospital.

Bayfront and other similarly situated private hospitals which lease public lands have a significant interest in the outcome of this appeal because they are protected by the exemptions to the public records and public meetings laws provided by section 395.3036, Florida Statutes (Supp. 1998).[1] Moreover, on February 23, 2000, Bayfront received its first-ever public records request, which request seeks records for periods both before and after the effective date of section 395.3036, May 30, 1998. Bayfront, therefore, files this *amicus curiae* brief with its interests at stake.

At issue in this appeal is whether section 395.3036 may be applied retroactively. Subsumed within this issue is the narrower question, addressed in this brief, of whether section 395.3036 precludes access to records created prior to May 30, 1998, but which were not subject to a public records request until after May

[1] Bayfront does not believe that it is subject to the Public Records Law. However, because others have asserted that it may be, it files this brief to protect its interests.

30, 1998. As discussed below, Bayfront's interests are directly impacted by the resolution of these issues.

A. Bayfront is a Safety Net Hospital

Bayfront is a safety net hospital for the citizens of Pinellas County, Florida. It provides vital medical care, without regard to the patient's ability to pay. Caring for the indigent and uninsured ("Charity Care") is a substantial part of Bayfront's services. Last year alone, Bayfront provided approximately $17,000,000.00 in Charity Care.

Bayfront's commitment to Charity Care is essential to the Pinellas County community. Florida has the fourth largest uninsured population in the nation. Almost one in four Floridians lack health care coverage and the number is growing. See Florida's Uninsured: Why are There So Many and Why is the Number Growing, Florida Hospital Assoc., March 1999. Without a safety net hospital like Bayfront, many of these individuals would not receive the medical attention they desperately need.

In addition to caring for the indigent and the uninsured, Bayfront also provides valuable services to the community, including health screenings, its Community Wellness Program, its Preventive Care Program, and its Outreach Program. Some of Bayfront's programs are offered free to the public, such as its Physician Referral Service and its Ask-A-Nurse Program. And still other programs are available only at Bayfront. For example, Bayfront is the only state designated trauma center in Pinellas County, Florida.

Bayfront also maintains the only high risk obstetrics program in the area in conjunction with All Children's Hospital. Bayfront is the only Regional Perinatal Intensive Care (RPIC) center in the area, providing services to severely ill mothers and babies.

Bayfront is also a teaching hospital, with residency programs in both family medicine and obstetrics/gynecology. Many of the physicians trained through Bayfront's teaching program choose to stay and practice in the community. Thus, teaching and training physicians is yet another way that Bayfront ensures ongoing medical care for the community.

B. The Creation of the BayCare Alliance

Bayfront has long been at a competitive disadvantage with the for-profit hospitals in the Tampa Bay area due to Bayfront's strong adherence to its mission of providing quality health care to the public regardless of the patient's ability to pay. This disadvantage became intolerable in the 1990's upon the medical care industry's shift to managed care, coupled with reductions in payments at the federal level. At the same time, the cost of medical care continued to rise, particularly as new, sophisticated medical technologies and techniques developed.

In 1997, Bayfront, at a financial crossroads, made a decision to ensure its survival. Determined to continue its mission of providing medical care for the community as a whole, including Charity Care, Bayfront rejected the notion of joining the ranks of for-profit hospitals. Instead, to level the competitive playing field without abandoning its mission, Bayfront entered into the BayCare Alliance ("the Alliance") in May 1997 with several other regional nonprofit hospitals in the Tampa Bay area. Recognizing their common goals, these hospitals determined that, by working together, they could compete with for-profit hospitals. Such alliances are becoming exceedingly common in Florida as nonprofit hospitals struggle to survive in a managed care environment.

The Alliance allows Bayfront to share in substantial cost savings through collective purchasing efforts, achieving economies of scale and by eliminating of duplication of certain costs and services.

Over the last two years, Bayfront has saved approximately $12 million through its participation in the Alliance -- a substantial offset of the $17 million in Charity Care it provided last year. Without this offset, Bayfront could not have maintained its past level of Charity Care and thus enhance the public health of the community.

C. The Impact of Holding That Section 395.3036 Applies Only To Records Created After May 30, 1998

If this Court were to broadly hold that section 395.3036 does not apply retroactively without distinguishing between those records requests made before May 30, 1998 and those made after that date, it would adversely impact many of the private nonprofit corporations leasing public hospital facilities in the State of Florida.

The BayCare Alliance's ability to survive in competition with the region's for-profit hospitals has come in large part from its ability to use the Alliance as a basis for negotiating preferential agreements with vendors, managed care organizations and insurance companies. Opening Bayfront's pre-effective date records to the public would make these agreements, as well as Bayfront's other proprietary records, available to the Alliance's competitors. These competitors, the majority of whom are private for-profit entities whose records are not subject to the Public Records Law, could then use these records to gain a competitive advantage over the Alliance with a resulting reduction of available funds for

Charity Care and a destabilization the Alliance's present financial position. This result would ill serve the Pinellas County community.

III. STATEMENT OF THE CASE AND FACTS

Bayfront adopts the Statement of the Case and Facts set forth in the Petitioner's brief.

IV. SUMMARY OF THE ARGUMENT

The broad question certified to this Court by the Fifth District addresses whether section 395.3036 should be applied retroactively. In answering this question, a second narrower question, subsumed within the certified question but of equal significance and impact, may go unanswered:

> Whether a retroactive application of section 395.3036 is necessary to exempt from disclosure records created before the effective date of the statute in instances

where a public records request was not made until after the statute's effective date?

This second question is of great importance to Bayfront, and the many other private entities whose records are protected by section 395.3036, who either received public records requests after the statute's effective date or who have yet to receive such requests but may receive such requests in the future.

Without distinguishing between when or whether a request had been made, the trial court ruled that section 395.3036 was not retroactive and, therefore, records created before the effective date of section 395.3036 were subject to disclosure. This ruling erroneously presumed that a retroactive application was necessary to protect from disclosure records created prior to section 395.3036's effective date. As both the Second and Fourth District have held, a retroactive application of a statutory privilege is unnecessary where demand for access is not made

until after the statutory privilege became effective. The decisions of these courts are sound and should be adopted by this Court.

Moreover, as discussed herein, public policy dictates that this Court hold that section 395.3036 exempts from disclosure those records which were created before its effective date but which were not subject to a public records request until after its effective date. To hold to the contrary would place an impossible burden on all public and private entities whose records are protected from disclosure by legislatively created privileges.

V. ARGUMENT

THE EXEMPTION CONTAINED IN SECTION 395.3036 SHOULD APPLY IN ALL EVENTS TO RECORDS CREATED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE IN INSTANCES WHERE NO RECORDS REQUEST WAS MADE UNTIL AFTER ITS EFFECTIVE DATE

The exemption contained in section 395.3036, Florida Statutes (Supp. 1998) should apply in all events to records created prior to the statute's effective date where no records request was made until after its effective date. The lower court in this matter held to the contrary, ruling that "[t]he exemption provided by Chapter 98-330, LAWS OF FLORIDA (1998) (the "1998 Exemption") is not retroactive and does not apply to records made or received, or to meetings conducted before March 30, 1998 [sic]." (R. 354-56). However, on appeal, the Fifth District disagreed, stating its belief that section 395.3036 was intended to apply retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 747 So. 2d 473 (Fla. 5th DCA 1999).

In addition to the grounds stated by the Fifth District, Bayfront submits that the trial court's ruling was also erroneous because a retroactive application of section 395.3036 is not required to exempt from disclosure records created prior to the effective date of the statute. The question whether a

substantive statutory provision will be applied retroactively comes into play where the provision has the effect of impairing vested rights, creating new obligations or imposing new penalties. *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). As discussed below, because a party does not have a vested right of access to public records prior to the time an actual public records request is made, retroactive application of section 395.3036 is unnecessary in instances where the records request was not made until after the records became protected from disclosure.[2]

[2] Petitioner maintains that the earliest time a common law right to review public records can vest is upon the issuance of a mandate by a reviewing court and the entry of a corresponding final judgment. If this position is accepted by this Court, the argument presented herein will be rendered moot.

Section 395.3036 states that "[t]he records of a private corporation that leases a public hospital . . . are confidential and exempt from the provisions of s.119.07(1) and s. 24(a), Art. I of the State Constitution . . . ." Section 4 of the enacting legislation applies this exemption to leases, such as Bayfront's, which existed at the time section 395.3036 became effective, as well as to leases entered into after the statute's effective date. Florida Session Laws 98-330, §4.

The trial court, concluding that section 395.3036 was not intended to apply retroactively, interpreted this statutory language as allowing access to records existing at the time of the statute's effective date, while precluding access to records created after that date. That ruling constitutes a fundamental

misunderstanding of when a party's right to access documents under the Public Records Law vests. A party's right to access documents under the Public Records Law vests, at the earliest, at the time the request is made, not, as Respondent contends, at the time of a requested document's creation.

As early as 1935, this Court stated that "[a] vested right has been defined as 'an immediate fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment or a present, fixed right of future enjoyment." *City of Sanford v. McClelland*, 163 So. 2d 513 (Fla. 1935). Consistent with that initial pronouncement, courts in this state have explained that:

> [T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present future enforcement of a demand, . . .

Division of Workers' Compensation v. Brevda, 420 So. 2d 887, 891 (Fla. 1982); *In re: Will of Martell*, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1984). *See also McCain v. Yost*, 284 S.W. 2d 898, 900 (Tex. 1955)(holding that when a lawmaking power can declare that a right does not exist, the right is not 'fixed or vested.').

Application of this settled standard to the Public Records Law makes clear that a party's right to view public records does not become vested until, at the earliest, the date a valid public records request is served on the appropriate agency or party. Prior to the service of a demand to view the sought-after records, a party's "right" to view public records is no more than an <u>expectation</u> that the Public Records Law will continue in its current form and scope.

This Court has not directly addressed the issue whether a party has a vested right of access to public records created prior to the enactment of a statutory privilege. However, the Second and Fourth District Courts of Appeal have held that such records are protected from disclosure. Their reasoning is sound and should be adopted by this Court.

The earlier of these decisions is *News-Press Publishing Company, Inc. v. Kaune*, 511 So. 2d 1023 (Fla. 2d DCA 1987). In *Kuane*, Appellant News-Press sought access to medical records of firefighters employed by the City of Ft. Meyers which had been prepared in June 1986. *Id.* at 1024. The News-Press' request to review these records was made on July 2, 1986. One day prior to this request, subsection (7) to section 112.08, Florida Statutes,

had become effective, making the sought after records exempt from the Public Records Law. *Id.* at 1026.

Appellant News-Press argued that its request was not subject to subsection (7) because such an application would require an impermissible retroactive use of the new exemption. *Id.* The Second District disagreed, holding that subsection (7) did not have to be applied retroactively to apply to the News-Press request.

As grounds for this conclusion, the Court noted that "[n]ormally the critical date in determining whether a document is subject to examination is the date the request for examination is made . . . ." *Id.* Following this rule, the Second District declared it would be "illogical to base a chapter 119 exemption

of a class of public documents on the question of whether the document came into existence prior to or subsequent to the date of exemption for those requests for disclosure made thereafter."

The Court further reasoned that:

> [i]t seems to us indisputable that if the legislature determines that 'all documents pertaining to subject 'A' in personnel files shall be exempt,' it intends that on the effective date of the law creating the exemption *all* such documents are exempt from any request for disclosure made thereafter regardless of when they came into existence or first found their way into the public record.

Id. (emphasis in original).

In *Cebrian v. Klein*, 614 So. 2d 1209 (Fla. 4th DCA 1993), the Fourth District reached a similar conclusion regarding an

amendment to section 415.51(2), Florida Statutes (1989), which had the effect of precluding discovery, with limited exception, of "unfounded [child abuse] reports" prepared by the Florida Department of Health and Rehabilitative Services ("HRS").

Seeking review of an order requiring production of certain HRS investigation reports, Petitioner Cebrian asserted that records created in February 1988, prior to the effective date of the section 415.51(2), were protected from discovery by the amended section. The discovery request in *Cebrian* was made in December 1991, well after the June 11, 1990 effective date of the amendment of section 415.51(2). *Id.* at 1210.

As in *Kuane*, Respondent Klein argued that applying the new exemption to his later document request would result in a

retroactive application of the exemption, which would purportedly interfere with his substantive right to review the reports. *Id.* at 1211-12. Rejecting that argument, the Fourth District held that the event which triggered the "confidentiality statute" was not the accrual of the cause of action or the filing of a lawsuit, but rather it was the actual discovery request. *Id.* at 1212. *See also Hemmerle v. Bramlea, Inc.*, 547 So. 2d 203 (Fla. 4th DCA 1989)(holding that event triggering remedy provided by new offer of judgment statute was the making of the offer, not the accrual of the cause of action), *rev. denied*, 588 So. 2d 18 (Fla.), *cert. denied,* 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed. 2d 641 (1990).

Both *Kuane* and *Cebrian* provide sound reasoning for holding that a party's right to review public records does not vest until such time as it actually makes a demand to review records. A requesting party cannot reasonably expect that a right to review then-public records will exist in perpetuity, absent an affirmative exercise of their then-existing rights. Moreover, a responding agency or party cannot be expected to segregate their records in such a manner as to track the date each and every scrap of paper comes into existence for the purpose of ensuring that those records subject to disclosure are not commingled with records subject to statutory protection.

The absurd results which would be compelled by the application of section 395.3036 suggested by Respondent are

further highlighted when one considers the fate of records for an activity or project which commenced before the effective date of section 395.3036 and which continued until after the statute's effective date. The records for such a project would have to be segregated by date into multiple separate and independent files, each of which would be incomplete.

The records of public entities which are later privatized would also suffer an inconceivable fate should this Court apply section 395.3036 as proposed by Respondent. These records would be placed in public records purgatory wherein they would remain subject to disclosure in perpetuity under the Public Records Law despite the fact that the entity may have ceased to be "public" tens of years earlier. This would all but eviscerate any

legislatively mandated privatization scheme because no private entity would agree to such a degree of public access to its records.

Finally, the shear magnitude of the burden of housing ancient and outdated records which would be imposed on public entities under Respondent's proposed application of the statute dictates that it be rejected. Under Respondent's interpretation, a requesting party's right of access would vest at the time of a record's creation. If this Court were to adopt this position, public entities would never be able to destroy outdated records because such action would impinge on the vested rights of unknown persons who had yet to even contemplate that they might make a future public records request.

As each of these examples make clear, this Court cannot and should not hold in Respondent's favor. To do so would implicate matters far beyond the scope of this case and would, with certainty, bring about results which would be highly detrimental to the public interests of this State.

VI. CONCLUSION

For the reasons stated herein, should this Court fail to hold in Petitioner's favor, this Court should, at a minimum, make clear that section 395.3036, Florida Statutes (Supp. 1998) exempts from disclosure under the Public Records Law records for which a records request was not served until after the effective date of the statute.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U.S. Mail to **Arthur J. England, Jr., Esq.**, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, Florida 33131, **Larry R. Stout, Esq.**, Smith, Hood, Perkins, Loucks, Stout & Orfinger, P.A., 444 Seabreeze Boulevard, Suite 900, Post office Box 15200, Daytona Beach, Florida 32118,

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