IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC00-82
L.T. Case No. 5D99-1483

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.,
a Florida not-for-profit corporation,

Appellant/Petitioner,

v.

NEWS-JOURNAL CORPORATION,
a Florida corporation,

Appellee/Respondent.

INITIAL BRIEF ON THE MERITS OF MEMORIAL HOSPITAL-WEST VOLUSIA, INC.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE FIFTH DISTRICT COURT OF APPEAL

Arthur J. England, Jr., Esq.
Brenda K. Supple, Esq.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for Memorial Hospital-West Volusia, Inc.

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

TABLE OF CITATIONS
(Continued)

Page

Constitutional Provisions

TABLE OF CITATIONS
(Continued)

Page

Statutes

Other Authorities

IDENTIFICATION OF THE CITATIONS USED IN THIS BRIEF

"R. __" is used as a reference to materials found in the record on appeal.

"S.R. __" is used as a reference to the supplemental record on appeal.

"Memorial Hospital" is used as a shorthand reference to the petitioner.

"News-Journal" is used as a shorthand reference to the respondent.

INTRODUCTION

This is the second appearance of this case before the Court in connection with a 1998 statute enacted by the Florida Legislature to exempt from the state's public records and open meetings laws those private corporations which lease hospital facilities from public entities. As a question of great public importance, the Fifth District Court of Appeal has certified the question of whether the 1998 statute operates with retroactive effect.

In a prior opinion, the Court had declined to pass on the validity of the 1998 statute and indicated that the statute should not be given retroactive effect. Following remand proceedings, the Fifth District determined that the Court's reference to retroactivity was non-binding, and it made an independent determination that the 1998 statute was intended by the legislature to have retroactive effect and met all legal requirements for retroactivity. Being sensitive to the Court's mention of retroactivity in its prior opinion, and satisfied that the issue of retroactivity had not been "squarely before the Court," the Fifth District certified the question of retroactivity for full consideration by the Court.

STATEMENT OF THE CASE AND FACTS

The factual and procedural information needed for this appeal is largely set out in three prior appellate decisions in this case:

1. *News-Journal Corp. v. Memorial Hospital-West Volusia,* 695 So. 2d 418 (Fla. 5th DCA 1997), referenced in this brief as the "***News-Journal***" decision;

2. *Memorial Hospital-West Volusia v. News-Journal Corp.,* 729 So. 2d 373 (Fla. 1999), referenced as the "***Memorial Hospital***" decision; and

3. *Memorial Hospital-West Volusia v. News-Journal Corp.,* 747 So. 2d 473 (Fla. 5th DCA 1999), referenced as the **"*Memorial II*"** decision.

In 1982, the Florida Legislature enacted section 155.40, Florida Statutes (1983), to allow non-profit corporations to lease hospital facilities from independent special taxing districts. Pursuant to that statute, Memorial Hospital was formed as a private corporation to lease and operate a public hospital in Deland from the legislatively-created, independent taxing district known as the West Volusia Hospital Authority ("the Hospital Authority"). *Memorial Hospital* at 378. A lease agreement was executed by the parties in mid-1984.

Several months after the lease was executed, the News-Journal brought suit against the hospital to gain access to its meetings and records. (R. 41-228). The hospital defended the lawsuit on the basis that it was not subject to the Sunshine laws because it was not acting on behalf of a public agency. *Memorial Hospital* at 376. The trial court ruled in favor of the hospital, but that decision was reversed by the district court in the *News-Journal* decision under the common law principles flowing from this Court's decision in *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992). *News-Journal*, 695 So. 2d 418.

The hospital then sought and was granted review by this Court. Before the Court issued any decision in the case, however, and in direct response to the district court's *News-Journal* decision, the Florida Legislature enacted a statute to provide that the records of a private corporation which leases a public hospital are confidential and exempt from disclosure, and that the corporation's governing board meetings are private and exempt from public access when the corporation meets certain enumerated criteria. Chapter 98-330, Laws of Florida, now codified

as section 395.3036, Fla. Stat. (1999). For the Court's convenience, this statute will be cited in this brief without including "Laws of Florida," and will be referenced frequently simply as "the 1998 statute." The full text of the statute, and the supporting legislative findings and declarations of intent, are set out both in the *Memorial Hospital* decision and in the record of this proceeding at S.R. 349-53.

The 1998 statute, which became effective on May 30, 1998, provided that it "shall apply to existing leases and future leases" between hospital districts and private managing corporations. Ch. 98-330, § 4. The News-Journal called the 1998 statute to the Court's attention following oral argument in *Memorial Hospital* (S.R. 250), and the Court ordered supplemental briefs "as to the effect, if any, the recent enactment . . . . has on this case." (S.R. 301).

In response to the Court's request for briefs, the hospital essentially argued that the Court could not and should not consider the effect of the statute on this case due to lack of jurisdiction. (S.R. 303-18). The News-Journal answered that the Court could and should consider the new statute, and asserted that it was facially unconstitutional. (S.R. 319-426). The issue of retroactivity was mentioned by the News-Journal in a footnote of its brief, as the third of three basic issues bearing on the new law's effect on the pending case.

> Third, is the Act to be given retroactive effect? Although the Act clearly should be confined to prospective effect [citation], that alone would not negate its effect on the pending cause [since even a prospective application would interdict the News-Journal's requested relief as of its effective date].

(S.R. 329). Retroactivity was not otherwise mentioned in the News-Journal's supplemental brief.

The hospital's supplemental reply brief re-asserted that the Court should not consider the effect of the statute on the appeal at all, but stated that if it did the

statute should be found constitutional. (S.R. 427-50). Retroactivity was nowhere mentioned or discussed by the hospital.

In due course, the Court rendered a decision affirming the district court's determination that the hospital is subject to the Sunshine laws under the common law principles of *Schwab*. The opinion of the Court noted the enactment of the 1998 statute, but held that the Court was not deciding its constitutionality and that any determination of constitutional considerations should be raised through a circuit court proceeding. *Memorial Hospital* at 384. Immediately following that discussion, the Court's opinion states:

> In any event, we reject the contention that the amended statute shall apply retroactively.

Id.[1]

The hospital moved for rehearing, and so far as is relevant here asked the Court to remove from its opinion the one sentence concerning retroactivity, inasmuch as that issue had not been presented, argued or briefed. (S.R. 451-54). The News-Journal opposed rehearing on the primary ground that the motion was improper re-argument, and for other reasons. (S.R. 458-71). The Court denied rehearing without opinion. (S.R. 472).

In response to the Court's decision, the Florida Legislature amended section 155.40 to exempt from the Sunshine laws certain private corporations which lease hospital facilities from public entities. Ch. 99-356, § 6, Laws of Florida. That new statute is not at issue before the Court.

---

[1] Justice Overton wrote a dissent which discussed the tension between the courts and the legislature regarding the applicability of the Sunshine laws to hospitals in the position of Memorial Hospital, stating that he would address the 1998 statute and find it facially constitutional, and stating his opinion that the statute met all requirements for retroactive application. *Id.* at 384-88.

Following issuance of this Court's and the district court's mandates, the News-Journal moved in circuit court to enforce its right of access to Memorial Hospital's records and minutes for the time period prior to the enactment of the 1998 statute — that is, from the date of the filing of its lawsuit in December 1994 to May 30, 1998. (R. 302-49).[2] At a hearing on the News-Journal's motion (R. 1-40), the court recognized the difficulty of reconciling the Court's *Memorial Hospital* decision with the 1998 statute when the courts and the legislature are "diametrically opposed branches of government." (R. 32). The court then ruled in favor of the News-Journal's motion for access to records and minutes of the hospital predating the 1998 statute, in order "to go with the Supreme Court statement rejecting the contention that the statute will apply retroactively." (R. 33). A formal order was duly entered granting the News-Journal's motion (R. 354-56), with access stayed since the appeal

> might be a great opportunity for the Fifth to get a chance to do something consistent with the Supreme Court opinion. Maybe they

[2] In the meantime, the hospital had filed a declaratory action in Volusia County Circuit Court in accordance with the Court's directive that the constitutionality of the statute should be pursued in a circuit court proceeding. Seventh Judicial Circuit Court Case No. 99-30725-CICI 31. That case is still pending, with a hearing on cross-motions for summary judgment presently scheduled for April 14.

> would figure out what that means and help me out a little bit, because I'm absolutely baffled.

(R. 35).

The hospital appealed the trial court's ruling that the 1998 statute did not have retroactive effect. The parties briefed and orally argued two issues: whether the 1998 statute was retroactive; and what (if any) effect should be given to the sentence contained in the *Memorial Hospital* decision that the 1998 statute did not have retroactive application. The district court issued a decision which held that the legislature *did* intend the statute to operate retroactively, but it certified the issue of retroactivity in light of the Court's sentence to the contrary on the following rationale:

> We are aware that the supreme court said in [*Memorial Hospital*], that "we reject the contention that the amended statute shall apply retroactively." Because this was said by the court after having declined to decide the constitutionality of the statute and because the issue was not squarely before the court, it is only fair for the parties to be allowed to proceed in the supreme court to address the issue. . . . It is at least arguable that the legislature intended the legislation to be remedial and thus retroactive when the law enacting the statute specifically sought to correct a situation it deemed "to create uncertainty" and "to create a disincentive for private corporations to enter into . . . lease agreements in the future." Thus, the legislature was correcting a situation "created" by this court in *News-Journal.*

Memorial II, 747 So. 2d at 473 (citations omitted). A copy of the district court's decision is attached as Appendix 1 to this brief.

Memorial Hospital then perfected its invocation of the Court's jurisdiction to decide the certified question.

SUMMARY OF ARGUMENT

The district court has determined that the retroactivity of section 395.3036 was not determined by the Court as a matter of binding precedent in *Memorial Hospital*. On the basis of a complete analysis of the legislative history of the statute and applicable laws, the district court has properly determined that the statute was intended by the legislature to have retroactive effect and met all legal requirements for retroactivity. The court's certified question should be answered in the affirmative.

ARGUMENT

The district court has certified for the Court's plenary review whether section 395.3036 should be applied retroactively. The legislature's intent that the statute be given retroactive effect is found in the statute's text and legislative findings. A complete analysis of the common law principles governing the enactment of statutes having retroactive effect, and an awareness of the interaction between the courts and the legislature on this precise statute, establishes the validity of the legislature's action in making this statute retroactive in its application.[3] That analysis is not foreclosed by the Court's one-sentence reference to the contrary in the *Memorial Hospital* decision.

---

[3] Constitutional issues concerning the legislature's authority to enact the statute under Article I, section 24(c) of the Florida Constitution, are being decided in the circuit court proceeding noted above in footnote 2, and are not before the Court.

I. The Court's comment on the retroactivity of the 1998 statute in the *Memorial Hospital* decision is not binding precedent which prevents analytical consideration of that issue in this appeal.

The district court was persuaded that the retroactivity of the 1998 statute was not squarely before the Court in *Memorial Hospital* and that, consequently, the Court's comment on retroactivity in that opinion was not binding precedent. The evolution of the statute, and the Court's records, support the district court's judgment on that question.

The district court knew, of course, that its *News-Journal* decision had not addressed the retroactivity of the 1998 statute, inasmuch as that law was enacted after and in response to the court's decision. The merits briefs of the parties in the *News-Journal* case dealt with an application of the *Schwab* factors to the records and meeting minutes of the hospital. (S.R. 109-65, 166-224, 225-49).

When review of that decision was granted by the Court and the merits of the case were under consideration, the situation was initially the same. The Court's records establish that it was only after oral argument, and before the Court had issued any decision in the case, that supplemental briefs were requested as to the effect of the 1998 statute on the pending proceeding, if any. The Court's records further establish that the briefs which were filed by the parties contained no mention of a retroactive effect for the statute other than in one footnote in the News-Journal's supplemental answer brief, where it simply posed three possible issues implicated by the statute's enactment. No discussion or argument was presented on the issue of retroactivity by either party.

The Court's *Memorial Hospital* opinion, issued on May 16, 1997, affirmed the district court's determination that an application of the *Schwab* factors to the facts of this case warranted an application of the Sunshine laws to Memorial Hospital's records and meeting minutes. The Court specifically noted the enactment of the 1998 statute, but declined to consider its constitutionality. In one sentence, though, the Court did say that it rejected the contention that the statute was retroactive.

On rehearing, the hospital sought removal of that sentence from the opinion on the ground that the issue of retroactivity had neither been argued nor briefed. The News-Journal opposed rehearing on the usual grounds, asserting primarily that the hospital's motion "improperly reargues the merits of the Court's decision" and "misconstrues the Court's construction of the 1998 [statute]" (S.R. 458, 462), and arguing that the issue had been presented by its footnote. The Court issued a form order denying rehearing. (S.R. 472).

The News-Journal has acknowledged that the only mention of retroactivity to the Court by either party came in the footnote in its supplemental answer brief. (R. 25). It argued to the district court, however, that retroactivity must have been decided in *Memorial Hospital* because the question of retroactive effect was essential to the Court's decision in order to obviate "mootness" caused by the new statute.

Based on the contentions of the parties, the district court was faced with three threshold issues regarding retroactivity in light of the uncontroverted facts as to what transpired in connection with issuance of the Court's *Memorial Hospital* decision. The hospital argued binding precedent in Florida to the effect that issues raised only in a footnote of an appellate brief are not

presented for review or eligible for substantive determination. The hospital argued that statements in an appellate court opinion on an issue that is not presented, briefed or argued cannot be a "decision" in the case, but *dicta*. The News-Journal argued that, despite the legal principles identified by the hospital, the issue of retroactivity was essential to the *Memorial Hospital* decision in order to obviate mootness.

These threshold issues are addressed here.

A. **Issues raised only in a footnote of an appellate brief are not presented or eligible for substantive determination.**

> **It is elementary that arguments which are not made as a point on appeal . . . but are found only in footnote in the appellant's brief, are not properly presented to the appellate court for review.**

***E.g., R.J. Reynolds Tobacco Co. v. Engle,* 672 So. 2d 39, 41 n.1 (Fla. 3d DCA), *review denied*, 682 So. 2d 1100 (Fla. 1996).**

This principle of appellate review has long governed practice in this Court. *Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997); *Kaufman v. Bernstein*, 100 So. 2d 801, 803 (Fla. 1958) (prior to the abolition of assignments of error) ("an offhand reference [in a footnote] does not properly present for determination by this court the propriety of any ruling"). *See also Simkins Industries, Inc. v. Lexington Ins. Co.*, 714 So. 2d 1092, 1093 (Fla. 3d DCA 1998).

The News-Journals' footnote reference to retroactivity did not contain "argument" on the issue, in any event. It merely mentioned retroactivity of the 1998 statute as one of three issues the News-Journal believed was implicated by the enactment. As evidenced by the district court's determination that the 1998 statute *was* retroactive after it heard argument on

the issue in briefs and in oral presentations, full briefing by the parties can make a difference on a legal issue of this significance.

B. Statements in an appellate opinion on an issue which is not formally presented, argued or briefed do not constitute a "decision" of the Court which is binding on other tribunals.

The Court's sentence on the retroactivity of the 1998 statute appeared in the *Memorial Hospital* opinion without any pre-decision argument or discussion of the issue by the parties. In light of that situation, the district court believed that the Court's statement was *dicta*, and not binding as a holding of the Court on the merits of the question. The district court's belief is well-grounded in precedent from this Court, and from other appellate decisions which address the question.

The Court has held that points will not be considered on appeal unless they are properly raised and discussed in the parties' briefs. *E.g., City of Miami v. Steckloff,* 111 So. 2d 446, 447 (Fla. 1959); *Foley v. State ex rel. Gordon,* 50 So. 2d 179, 182 (Fla. 1951). The district courts have followed the Court's lead in this regard. *E.g., Clark v. Department of Professional Regulation, Bd. of Medical Examiners,* 463 So. 2d 328, 334 n.3 (Fla. 5th DCA), *review denied*, 475 So. 2d 693 (Fla. 1985).

The Court has also held that issues which are "neither presented, briefed nor argued" by the parties, yet are referenced in a court's decision, are non-binding *dicta*. *Spector v. Glisson,* 305 So. 2d 777, 784 (Fla. 1974). *Accord, Kent v. Burdick,* 573 So. 2d 61, 63 n.1 (Fla. 1st DCA 1990). The Court has repeatedly said that statements which are not essential to an appellate decision are simply "without force as precedent." *State ex rel. Biscayne Kennel Club v. Board of Business Regulation,* 276 So. 2d 823, 826 (Fla. 1973);

Pell v. State, **97 Fla. 650, 122 So. 110 (Fla. 1929);** ***Dade County v. Brigham,*** **47 So. 2d 602 (Fla. 1950);** ***State v. Florida State Improvement Comm'n,*** **60 So. 2d 747, 750 (Fla. 1952) (*en banc*).** ***Accord, Bunn v. Bunn,*** **311 So. 2d 387, 389 (Fla. 4th DCA 1975).**

It is noteworthy that the Court's comment on retroactivity appears after seven pages of analysis on the applicable common law principles of *Schwab,* and the Court's express decision *not* to consider the constitutionality of the statute in that decision. *Memorial Hospital*, 729 So. 2d 373-384. The Court's declination to address the issue of constitutionality adds force to the district court's belief that its one-sentence mention of retroactivity was not essential to any aspect of the Court's decision, and should be treated as *dicta*. *See e.g., Tillman v. Falconer,* 735 So. 2d 487, 489 n.1 (Fla. 4th DCA), *dismissed*, 727 So. 2d 906 (Fla. 1998), holding that a discussion about the rules of procedure was *dicta* in light of the court's holding that the rules of procedure were not applicable to the case.

C. The Court's denial of rehearing did not cure the absence of argument and briefing by the parties.

The News-Journal argued below that a different result is required in this case because the hospital called to the Court's attention the absence of briefing and argument on this issue in its motion for rehearing. The district court was right in rejecting any such contention, however. The hospital's rehearing motion was not an argument on the merits of the issue which would cure the absence of full-blown briefing and argument by the parties, and the Court's denial of rehearing was not a decision on the merits as to matters argued on rehearing.

As regards "argument" in the motion for rehearing, the records of the Court establish an affirmative absence of the requisite briefing. The hospital's motion for rehearing itself declares that the hospital was not providing the Court with substantive argument on the retroactivity of the 1998 statute in its rehearing motion. That motion states, after identifying the generic constitutional principles governing retroactivity which the parties had not briefed or argued for the Court, that the hospital's rehearing motion was *not* intended as a full argument on retroactivity, and that the "sole purpose for this discussion is to point out the conflicting declarations in the Court's opinion regarding section 395.3065." (S.R. 452-53).

The News-Journal's foremost argument in its response to the hospital's rehearing motion was captioned: "THE MOTION FOR REHEARING IMPROPERLY REARGUES THE MERITS OF THE COURT'S DECISION ON THE ACT." (S.R. 458). This ground, of course, would constitute a reason for denying rehearing in and of itself. *Departmentt of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7, 9 (Fla. 1975) (citation omitted); *Suwannee & S.P.R. Co. v. West Coast Ry. Co.*, 50 Fla. 612, 613, 39 So. 538, 539 (Fla. 1905).

The district court knew full well that the Court's summary denial of rehearing did not signal a merits determination of any issue which might have been presented by the rehearing motion. A denial of rehearing is a wholly discretionary act which can be taken for any or no reason. *Casey-Goldsmith v. Goldsmith,* 735 So. 2d 610 (Fla. 5th DCA 1999). Discretionary actions of that nature by an appellate court have no precedential effect, and do not establish law of the case. *Id.*; *Degrasse v. Wertheim,* 566 So. 2d 515 (Fla. 3d DCA 1990); *Johnson v. Florida Farm Bureau Cas. Ins. Co.,* 542 So. 2d 367 (Fla. 4th DCA), *dismissed*, 549 So. 2d 1013 (Fla. 1989); *Bevan v. Wanicka,* 505 So. 2d 1116 (Fla.

2d DCA 1987). The records of the Court fully justify the district court's determination that the denial of rehearing in *Memorial Hospital* was non-precedential.

Thus, the district court quite properly determined that the Court's sentence on retroactivity in *Memorial Hospital* was not a determination on the merits or binding precedent. As it was obligated to do, however,[4] the court certified the question to the Court in light of this Court's mention of the question. It is not unusual for the district courts to ask the Court through certification to elaborate on what it meant in one of its opinions. *E.g., Bowick v. State,* 684 So. 2d 195 (Fla. 1996); *Clausell v. Hobart Corp.,* 515 So. 2d 1275 (Fla. 1987), *dismissed and cert. denied*, 485 U.S. 1000 (1988).

[4] *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973).

D. The Court's mention of retroactivity was not essential to the *Memorial Hospital* decision in order to avoid mootness.

The News-Journal has argued that the Court's decision in *Memorial Hospital* would be merely advisory if the 1998 statute was deemed to be constitutional and applicable to Memorial Hospital, because the News-Journal would get no relief from its lawsuit. (S.R. 280, 329). The Court rejected that contention in *Memorial Hospital* when it held that the 1998 statute *did* apply to Memorial Hospital,[5] declined to pass on the constitutionality of the statute, wrote an extensive analysis of the substantive, common law issues which it had agreed to review, and directed any pursuit of the constitutionality of the statute in circuit court. That action was one of the three valid and recognized courses of action available to the Court in situations such as this, and the Court's action was not prompted by "mootness" concerns.

When faced with legislation enacted in the midst of a pending lawsuit, the Court has in some cases returned the case to the lower tribunal for consideration of the effect of the new legislation on the lawsuit,[6] in some cases addressed the effect of the new enactment,[7] and in some cases declined to address the enactment other than in passing and rendered a decision on the other issues presented by the case despite the possibility that its decision may

---

5 The News-Journal has also acknowledged the application of the 1998 statute to Memorial Hospital. (R. 13-14, 26).

6 *E.g., Board of Public Instruction of Orange County v. Budget Comm'n of Orange County*, 167 So. 2d 305 (Fla. 1964); *Myers v. Board of Public Assistance of Hillsborough County*, 163 So. 2d 289 (Fla. 1964).

7 *E.g., Florida's Patient's Compensation Fund v. Von Stetina*, 474 So. 2d 783, 788 (Fla. 1985).

subsequently be rendered moot or invalid.[8] That third alternative was selected by the Court in *Memorial Hospital*, and for good reason.

The Court's decision in *Memorial Hospital* addressed the application of *Schwab* factors to privately-owned corporations which lease and operate public hospitals (other than Shands Hospital[9]). The Court's extensive *Schwab* analysis reflects a desire to address them definitively, in light of the disparate judgments on their applicability in the district court and the circuit court. The gloss which the Court put on the *Schwab* factors stands as precedent irrespective of whether the News-Journal ever gains access to the records and meeting minutes of Memorial Hospital.[10]

Indeed, the Court necessarily understood that its decision in *Memorial Hospital* could well result in a denial of relief for the News-Journal. By leaving the statute's constitutionality of 1998 statute for another day, the Court left open the possibility that the statute might be declared constitutional at least prospectively, with a consequential displacement of the *Schwab* factor analysis in future cases. Obviously, that possibility did not trouble the Court.

---

8 *Martinez v. Scanlan*, 582 So. 2d 1167, 1173 (Fla. 1991); *Godwin v. State*, 593 So. 2d 211 (Fla. 1992).

9 *Memorial Hospital*, 729 So. 2d at 382.

10 That gloss has already been recognized and applied. *See, Putnam County Humane Society, Inc. v. Woodward,* 740 So. 2d 1238 (Fla. 5th DCA 1999).

II. Section 395.3036 was designed by the Florida Legislature to operate with retroactive effect, and to bar access by the News-Journal to the records and meeting minutes of Memorial Hospital.

There is no doubt from the declarations of legislative intent for the 1998 statute, and from the inter-governmental tug-of-war which led to its enactment, that the statute was intended have a retroactive application effect for Memorial Hospital.

A. Analysis of the 1998 statute and its legislative declarations of intent.

The 1998 statute exempts from the Sunshine laws both the records and meeting minutes of a private corporation which leases a public hospital. Section 4 of the enacting legislation states that its application extends to the "existing leases" of public hospitals and other health care facilities. Ch. 98-330, § 4. Amplification of this directive is found in the legislative findings which accompanied its enactment.

In section 2 of the enacting law, the legislature set forth its finding of a "public necessity" for the confidentiality of all records and meetings of private corporations leasing public hospitals, and for exempting those records and meetings from the Sunshine laws. Ch. 98-330, § 2(1). The legislature further found in that section that private corporations had in the past entered into such leases in reliance on the common law governing Sunshine law exemptions, which *at the time* provided that such private lessees were not subject to the Sunshine

laws because they were not acting on behalf of the public entity.[11]

This latter legislative finding identified a "totality of factors" test as the governing common law standard for determining an exemption — an unmistakable reference by the legislature to the *Schwab* decision. It went on to note that the effect of the district court's *News-Journal* decision was to "create uncertainty with respect to the status of records and meetings under *existing* lease arrangements." Ch. 98-330, § 2(1)(a) (emphasis added).

These declarations of the policy reasons for giving the 1998 statute retroactive effect were supplemented by further findings in subsection 2(2) of the enactment. There the legislature noted that public entities had chosen, in the past, to privatize the operations of their public hospitals in order to alleviate three problems that posed "a significant threat to the continued viability of Florida's public hospitals": the financial drain caused by their forced participation in the state's retirement system; the competitive disadvantage they suffered *by reason of having to comply with the state's Sunshine laws*; and the state constitutional restrictions on public facility partnerships with private corporations. Ch. 98-330, § 2(2)(a)-(c) (emphasis added). The legislature then noted that it had encouraged the leasing of public facilities to private corporations, first through special acts and then through the adoption of section 155.40, and that lease arrangements under that statute had enabled public entities to obtain private capital and relieve public tax revenues. Ch. 98-330, § 2(2)(c).

---

[11] The law requires that lessees not be controlled by the public entity, and an exemption continues only so long as the public entity does not retain control over the private entity. Control is not an issue in this case. The News-Journal has previously acknowledged that Memorial Hospital meets this criterion for exemption. (S.R. 329).

Based on these predicate findings, the legislature specifically declared the "public necessity" for clarification "through this act" of its intent that the Sunshine laws not be applied to the private lessees of public hospitals. Ch. 98-330, § 2(3). It then made a specific finding that there existed a "public necessity" for private lessees to be exempt from the Sunshine laws.[12] Expressions of legislative intent similar to those attending the 1998 statute have been held to express a "retroactivity" intent in *Village of El Portal v. City of Miami Shores,* 362 So. 2d 275 (Fla. 1978), and in *Metropolitan Dade County v. Chase Federal Housing Corp.*, 705 So. 2d 674 (Fla. 3d DCA 1998), *affirmed*, 737 So. 2d 494 (Fla. 1999).

The Court readily recognized in *Memorial Hospital* that the 1998 statute put the legislature and the courts at odds with respect to the applicability of the Sunshine laws to entities such as Memorial Hospital.

> **This case results from the natural tension between the privatization of traditionally public services and this State's constitutional commitment to public access to records and meetings concerning public business.**

***Memorial Hospital,* 729 So. 2d at 376. The Fourth District has also noted the high level of interaction on this issue between those two branches of the government. *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.,* 25 Fla. L. Weekly D320, 322 (Fla. 4th DCA Feb. 2, 2000). The story of Memorial Hospital is a tale of that tension.**

The legislature authorized the privatization of public hospitals in early 1982 through the enactment of section 155.40, and the Hospital Authority

---

[12] The 1998 statute also specifically states the benefits of and expresses the necessity for an exemption of *future* lease arrangements, but those leases are not of concern in this appeal and consequently not discussed in this brief.

took advantage of that statute by leasing its facilities and operations to Memorial Hospital in July of 1994. 729 So. 2d at 377-78. Both the Hospital Authority and Memorial Hospital held that same expectation for the effect of their lease agreement, namely:

> **that Lessee not face the glare of the Sunshine Law or be saddled by the requirements of the Public Records Law. The agreement was carefully drafted in order to accomplish this end.**

***News-Journal*, 695 So. 2d at 420.**

Later in 1994, the News-Journal brought suit to gain access to Memorial Hospital's records and meeting minutes, and in August of 1996 a Summary Final Judgment was entered for the hospital which applied the principles of *Schwab* to hold that the hospital was exempt from the Sunshine laws. (S.R. 100-08). That decision was reversed by the Fifth District in May of 1997, again under a *Schwab* factor analysis.

The district court's *News-Journal* decision prompted the legislature's first inter-governmental intervention: the enactment of the 1998 exemption statute.[13] After this Court affirmed the district court and its application of the *Schwab* factors in *Memorial Hospital*, the legislature again reacted with a second, inter-governmental intervention designed specifically to counter the application of the Sunshine laws to hospitals such as Memorial Hospital: the enactment of Chapter 99-356, section 6, Laws of Florida.

---

[13] In *Memorial II,* the district court observed that, through the 1998 statute, "the legislature was correcting a situation 'created' by this court in [the *News-Journal* decision]." 747 So. 2d 473.

B. The 1998 statute meets the requirements for retroactive operation.

There is extensive case law in Florida regarding the retroactivity of legislative enactments. The rules of statutory construction can be stated rather simply, but as is usually the case with the statutory construction of a statute the application of those rules can present difficulties. Here, an application of the applicable rules is facilitated by the text of the 1998 statute and the legislature's declarations of intent and purpose, and by an appellate analysis of retroactive applicability of this statute by one of the Justices of the Court in the *Memorial Hospital* decision — the only such analysis in that decision.

For a number of policy reasons, statutes are presumed as a general matter to apply prospectively. *E.g., Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 424 (Fla. 1994).

> **Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear legislative intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined it an acceptable price to pay for the countervailing benefits. Such a requirement allocates to [the legislature] responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.**

Landgraf v. USI Film Products, **511 U.S. 244, 272-73 (1994), cited with approval in *Arrow Air, Inc.*, 645 So. 2d at 425.**

The legislature will on occasion make the temporal judgment that a particular statute should give "pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."[14] When it does, the courts are called upon to determine if the legislature had knowingly intended retroactive effect, and if it did whether it has done so without violating constitutional principles. *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). These are the inquiries to be made in this appeal. In this case, the legislature knowingly made the temporal judgment that the problems which led to enactment of the 1998 statute required an application of the statute retroactively to the commencement of lease arrangements between public entities and private hospitals.

---

[14] Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692 (1960). This article was cited with approval in *Chase Federal,* 737 So. 2d at 499.

1. **The legislative intent is clearly expressed.**

It is hardly necessary to repeat here the multiple manifestations of the legislative intent that leasing hospitals should be exempt from the Sunshine laws dating from the entry of their lease arrangements with the public entity. Those manifestations jump out from the mere restatement of the statute's provisions, as recited above. The legislative findings for Chapter 98-330, and the language in its text, articulate with clarity that intent. In *Chase Federal*, the Court used comparable findings and text from the statute there at issue to demonstrate that the legislature had intended a retroactive effect for the statute. *Chase Federal,* 737 So. 2d at 500-02.

The retrospective effect of the 1998 statute is manifest not just from the words of the statute, however, but also from its purpose. Words and purpose are the principle guideposts for determining legislative intent for retroactivity.

> **In order to determine legislative intent as to retroactivity, both the terms of the statute and the purpose of the enactment must be considered.**

Chase Federal, **737 So. 2d at 500. More than in most cases, the words used and the purposes expressed by the legislature were the product of extensive and focused legislative consideration.**

Even before the 1998 legislative session convened, the legislature had become fully familiar with the requirements imposed by the Constitution on any attempt to create an exemption to the Sunshine laws. A Senate project had been undertaken for the express purpose of identifying those requirements, "to better familiarize Senators and staff with the constitutional and statutory requirements for adopting exemptions to the public records law and the public meetings law," and a review of those requirements was published for the Senate in September of 1997. (S.R. 375).

During the legislative session, both the Senate and House committees responsible for exemption legislation had written reports on the bills they had respectively drafted to create the exemption at issue here. All of those reports commented on the district court's *News-Journal* decision, discussed the constitutional requirements for enacting a Sunshine law exemption, aired policy considerations favoring and opposing the proposed legislation, and

addressed the legal implication of making the legislation retroactive. (S.R. 388, 390-97, 399-400, 405-07, 412, 415-18).

The legislators' explication of their intent reflected a collective awareness of the *News-Journal* decision, and an unmistakable intention to change its outcome.

> **CS/CS/HB 3585 [the bill which became section 395.3036] is *in response* to the Fifth District's opinion in *Memorial Hospital*.**

(S.R. 406) (emphasis added). *And see* Ch. 98-330, § 2(1).

The district court's decision, of course, was an adjudication of the News-Journal's right of access to Memorial Hospital's records and minutes *dating from the filing of its lawsuit in December of 1994*, for that was the time period covered by the *News-Journal* decision. In disagreeing with the decision, the legislature was saying in unambiguous terms that the News-Journal should not have been given the access rights it sought — namely, the records and minutes generated *before* the consideration of the bills which were being considered for enactment. If the legislature had the powers of a higher judicial tribunal, its act of disagreement with the *News-Journal* decision would have taken the form of a decision reversing and vacating the decision, and

reinstating the trial court's access-denying summary judgment, with the consequence that the News-Journal would have been denied access to *any* of Memorial Hospital's records and minutes dating from the filing of its lawsuit.

The legislature is not a higher tribunal, however, and it lacked the constitutional authority to set aside the *News-Journal* decision. Its passage of the 1998 statute, however, was a clear indication of disagreement with the *effect* of the *News-Journal* decision, which was to give the News-Journal access to Memorial Hospital's records and minutes *dating from the filing of this lawsuit in 1994.*

There is absolutely nothing in the law, or in its legislative history, which suggests that the legislature contemplated that the *News-Journal* decision was an accurate application of the *Schwab* factors which ought to be changed only *prospectively*. In fact, the legislative findings distinguish explicit concerns and necessities which affect both *existing* leases and leases to be adopted in the future. *Compare* Ch. 98-330, § 2(1)(a), referencing "existing lease arrangements," *with* § 2(1)(b), referencing "lease agreements in the future"; and *compare* § 2(2), referencing public entities which "have chosen to privatize" and "have been able to obtain" benefits from privatization, *with*

§ 2(3), referencing "future lease agreements." The declaration of public necessity in § 2(4), which follows these recitations, makes *no* distinction between past and prospective lease arrangements, and section 4 of the statute directly embraces applicability to both — that is, to "*existing leases*" as well as future leases.

Unable to parse the statute in terms which the legislative history or the language of law supports, the News-Journal suggested in the court below that even if the legislature intended retroactive effect for entities with pre-existing leases such as Memorial Hospital, the law should not be applied to pre-enactment *events* such as records developed and the meetings held prior to the statute's enactment. This suggestion was manufactured out of whole cloth for a result the legislation did not afford, and is totally untenable. Here again, guidance is found in this Court's *Chase Federal* decision.

In *Chase Federal*, the Court was considering the effect of a 1994 statute on the ability of Dade County to recover cleanup costs for contamination which had occurred prior to the date of its enactment. In the district court, and before the case had reached the Supreme Court, Dade County had lost its claim that the statute was not intended to be retroactive as to contamination

events which occurred before the legislature enacted the statute.[15] Consequently, the County refined its argument in the Court to suggest that retroactivity should extend only to pre-enactment contamination events for which no cleanup costs had been expended at the time of enactment, but *not* to cases where cleanup costs had in fact been expended prior to enactment. The Court soundly rejected the County's suggestion that it could parse the legislation by judicial decree, on the ground that any such refinement would require the Court to rewrite the law and add phrases that do not appear in its text. *Chase Federal*, 737 So. 2d at 501. That is precisely the situation here.

In order to hold that the 1998 statute was retroactive to lessees such as Memorial Hospital dating back to their acquisition of the leased facilities, but only for the purpose of exempting from public disclosure those records and minutes developed *after* the statute was passed, the Court would have to rewrite the 1998 statute to insert words conveying that effect. That is, section 2(1)(a) of the legislation would have to be altered to say that the legislature finds that the effect of the *News-Journal* decision had been to "create uncertainty with respect to the status of records and minutes *developed in the*

---

[15] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 705 So. 2d 674 (Fla. 3d DCA 1998), *affirmed*, 737 So. 2d 494 (Fla. 1999).

future **under existing lease arrangements," and section 4 of the enactment would have to be altered to say that it "shall apply *only* to *post-enactment records and minutes under* existing leases . . . ." Without a judicial rewrite of the statutes, there is no basis in the law or its history to suggest that a retroactive effect on "leases" was intended to be coupled with a prospective effect on records and minutes.**

In sum, the Florida Legislature has overtly manifested its intention that the Sunshine law exemptions provided in section 395.3036 are to be applied to *all* prior records and meeting minutes of private corporations which have been operating public hospitals under lease arrangements made possible through section 155.40. In light of the manifestation of that intent, inquiry as to "intent" ends. There is no occasion to invoke the so-called "default rule of statutory construction" which creates a presumption of prospectivity. *Chase Federal,* 737 So. 2d at 500.

2. A retroactive application of the 1998 statute does not violate any constitutional limitation.

Memorial Hospital recognizes that the legislature's declaration that a particular statute is to be given retroactive application does not guarantee that its declared intent will be honored. *State Farm Mutual Automobile Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995); *State v. Lavazzoli,* 434 So. 2d 321 (Fla. 1983). Further inquiry is required to determine if the statute is impermissibly retroactive because it impairs vested rights, creates new obligations, or imposes new penalties. *Laforet*, 658 So. 2d at 61; *Chase Federal*, 737 So. 2d at 503-04; *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949). This statute has no such impermissible adverse effect.

Section 395.3036 is a substantive statute which grants an affirmative right to Memorial Hospital and others similarly situated — the right to maintain the confidentiality of its records and meetings and to avoid the public scrutiny imposed on governmental entities. The News-Journal had contended below that the law has denied it a vested right of access (S.R. 465),[16] which of course would be prohibited by constitutional due process

---

[16] There was no contention that new obligations were created, or that new penalties were imposed.

considerations. *Rupp v. Bryant*, 417 So. 2d 658, 665-66 (Fla. 1982); *Village of El Portal v. City of Miami Shores,* 362 So. 2d 275 (Fla. 1978). The News-Journal had no vested right of Sunshine law access, however.

Memorial Hospital and the Hospital Authority understood and agreed that the records and minutes of the lessee were not subject to the Sunshine laws. The initial judicial adjudication on the News-Journal's claim of access was that it did *not* have access. It is arguable that, at that juncture, *the hospital* had a vested right to privacy.

The News-Journal first acquired a common law right of access when the trial court's denial was overturned on appeal, using in the appeal the same factors from the *Schwab* decision which were used by the trial court. That appellate determination generated prompt disagreement from the legislature, in the form of the enactment of section 395.3036, at a time when the district court's *News-Journal* decision was not a final judicial determination and the issue was subject to further judicial review. At the time of enactment, the News-Journal had no "vested right" which enactment of the 1998 statute might have impaired.

A common law claim which is under review by a higher court does not constitute a "vested right" within the meaning of the due process clause of the Constitution. The reason is obvious, of course. An adjudication of common law rights does not *create* a vested right; it can only recognize pre-existing rights which have that character. Only the higher court's decision creates a final determination of a right, and then only effective upon issuance of the mandate and entry of a corresponding final judgment. *See, Division of Workers Comp., Bureau of Crimes Comp. v. Brevda,* 420 So. 2d 887 (Fla. 1st DCA 1982).

The News-Journal argued below, however, that its claim involves a constitutional right rather than a common law right, and that it found "instructive" the decision in *State Farm Mutual Auto Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). Its discussion of the inapplicability of a common law right, as distinguished from a right deriving from the Constitution, was undercut by its very reliance on *Laforet*, however, which involved only a *common law right*. That case, in any event, is instructive on nothing beyond the notion that a declaration of retroactivity is not conclusive — an issue not in dispute here.

The News-Journal's attempt in the lower court to cloak access to records and meetings with constitutional garb is unpersuasive in light of the structure of the applicable constitutional provisions, in any event. The Florida Constitution does not confer a "vested" right of access to any records or meetings if the legislature says that access does not exist. Whether and to what extent a right exists at all is a choice that is entirely in legislative hands. The existence of a constitutionally-prescribed path for an *exercise* of the legislative prerogative to exempt public access to particular entities or subjects may provide a basis for scrutinizing its exercise of that policy-making, but it does not lessen its prerogative.[17]

Despite all instincts to accord the news media access to the benefit of Florida's "sunshine" ethos,[18] a "constitutional" or a "vested right" analysis is

---

[17] The News-Journal also argued in the district court that its claim was akin to the prohibition against laws impairing the obligation of contracts, to the prohibition against a denial of access to courts, and to the doctrine of due process of law. Contrary to those arguments, there is no similarity between those ***unconditional*** rights which are conferred in the Constitution, on the one hand, and the ***conditional*** right of access to records and meetings which *may* exist, on the other. The media invariably claims that its pursuits are in vindication of constitutional rights, but that is not necessarily the case. *E.g., In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 774 (Fla. 1979).

[18] *See Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).

not apt in this situation. Neither the News-Journal nor Memorial Hospital had a fixed right in the outcome of an application of *Schwab* factors to the facts and circumstances of the News-Journal's lawsuit. A "vested right," for the purpose of defeating a legislative declaration of statutory retroactivity, is

> **an *immediate* right of present enjoyment, or a *present* fixed right of future enjoyment . . . . [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 or future enjoyment of a demand.**

***Clausell v. Hobart Corporation,* 515 So. 2d 1275, 1276 (Fla. 1987), *dismissed and cert. denied*, 485 U.S. 1000 (1988) (citations omitted) (emphasis added); *In re Will of Martell*, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1984).**

A vested right, for purposes of what the courts have protected from an otherwise retroactive application of a statute, is a right of the nature seen in *City of Winter Haven v. Allen,* 541 So. 2d 128 (Fla. 2d DCA), *review denied*, 548 So. 2d 662 (Fla. 1989). In that case, the plaintiff filed suit against the city for an improper police shooting covered by the city's liability insurance policy. Prior to trial the legislature amended the pertinent statute which had the effect of limiting the city's liability. The trial court refused to apply the

amended statute. The plaintiff ultimately obtained a judgment in excess of the statutory limit and the city appealed. The Second District affirmed, holding that the plaintiff had an existing right to sue for a full recovery of *damages* — a right which could not be foreclosed by application of the damage-limiting statute. *Id.* at 134-35.

The fact that the legislature acted *during* the course of on-going litigation, and did so in direct response to an interim decision in that litigation, is a compelling reason to recognize that the News-Journal had no vested right which would impose a constitutional barrier to a retroactive application of the legislative response. Indeed, the News-Journal has itself recognized that there is great public importance in having *the legislature* "fashion a valid solution to the genuine problems raised by public access to records and meetings of public hospitals." (S.R. 333). Simply because the legislature fashioned a solution which is not to the liking of the News-Journal is no reason for invalidating its action.

The present case involves only the right of access to records and meeting minutes which is in a domain where the *legislature* has the final say in setting Florida's policy. This Court recently acknowledged and paid deference to the

legislature's role in creating exemptions to the Sunshine laws. *Halifax Hospital Medical Center v. News-Journal Corp.,* 724 So. 2d 567, 570 (Fla. 1999). Appropriate deference to the 1998 statute was recently accorded by the Fourth District. *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.*, 25 Fla. L. Weekly D320 (Fla. 4th DCA Feb. 2, 2000).

Access to public records through the Sunshine laws stands on no unique or higher footing than other substantive rights which may be curtailed retroactively. The Court made that clear in *City of Orlando v. Desjardins,* 493 So. 2d 1027, 1028 (Fla. 1986), where it held that a public records statute limiting access is remedial in nature and "can and should be retroactively applied in order to serve its intended purposes." It was highly relevant there, as it is here, that the legislature had enacted the exemption statute in light of and as a response to developing case law, in order to resolve competing interests between public policy values and government in the sunshine considerations as reflected in the public records act. *Id.* at 1029.

Another factor for giving effect to a knowing declaration of retroactive application is the promptitude with which the legislature acts to address an on-going controversy. An amendment to a statute which is enacted soon after

the judicial action is considered a legislative interpretation of the original law, and not as a substantive change. *Chase Federal*, 737 So. 2d at 503 (statute passed five months after a district court decision to express agreement with and call for continued construction of the statute in the same manner); *Laforet,* 658 So. 2d at 61; *Seaboard System Railroad, Inc. v. Clemente,* 467 So. 2d 348 (Fla. 3d DCA 1985) (upholding the intended retroactive effect of a county ordinance enacted during the pendency of an appeal based on pre-existing common law principles of strict liability). Here, of course, the legislative response came even *before* there was final judicial action.[19]

In order to ensure the continued availability of quality health care to the public, the legislature has in no uncertain terms announced (and struggled with the courts to preserve) the public policy of encouraging the privatization of public hospitals so they can compete with profit-making hospitals. The confidentiality of records and meetings is just one feature of that public goal, and the 1998 statute was unquestionably crafted to benefit institutions with pre-existing leases such as Memorial Hospital.

---

[19] The legislature *again* acted in response to this Court's *Memorial Hospital* decision with the newly-enacted 1999 statute, underscoring the dire situation facing non-profit hospitals.

In viewing the legislature's authority to enact retroactive legislation, it is also significant to consider that it crafted a comprehensive solution to the problem being addressed, as was the case in *Chase Federal*. The 1998 statute endeavored to resolve the survival concerns of *all* public hospitals in the state. This was a consideration noted by Justice Overton in his dissenting analysis of the problems facing private hospitals which operated public facilities. *Memorial Hospital*, 729 So. 2d at 385-88.[20] The legislature has unmistakably expressed its desire to level the playing field between private hospitals which operate public facilities and those which do not. Confidentiality of records and meetings is believed by the legislature to be critical to that objective.

[20] In responding to Memorial Hospital's motion for rehearing in *Memorial Hospital*, the News-Journal recognized the pertinence of a dissent when it argued a position derived from the dissenting opinion of Justice Wells. (S.R. 466).

CONCLUSION

The Court is respectfully requested to answer the certified question in the affirmative, holding that section 395.3036 applies to leases in effect on the date of its enactment with retroactive effect and that the News-Journal is not entitled to access to the records and meeting minutes of Memorial Hospital for the period preceding enactment of the 1998 statute.

Respectfully submitted,

Arthur J. England, Jr., Esq.
Florida Bar No. 022370
Brenda K. Supple, Esq.
Florida Bar No. 124941
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 579-0500
Facsimile: (305) 579-0723

Counsel for Memorial Hospital-West Volusia, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of this initial brief on the merits was mailed on March 31, 2000 to:

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
Co-counsel for Memorial Hospital-West Volusia, Inc.

Jonathan D. Kaney, Jr., Esq.
Jonathan D. Kaney, III, Esq.
Cobb Cole & Bell
150 Magnolia Avenue
Post Office Box 2491
Daytona Beach, Florida 32114
Counsel for News-Journal Corporation

MIAMI/ENGLANDA/1105494/np0609!.DOC/4/27/1/28265.010200

APPENDIX