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.

MEMORIAL HOSPITAL-WEST VOLUSIA, INC.'S REPLY BRIEF ON THE MERITS and RESPONSE TO PETITION FOR ANCILLARY WRIT OF CERTIORARI

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

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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.
- "IB __" is used as a shorthand reference to Memorial Hospital's initial brief.
- "AB __" is used as a shorthand reference to the News-Journals answer brief.
- The decision in *News-Journal Corp. v. Memorial Hospital-West Volusia,* 695 So. 2d 418 (Fla. 5th DCA 1997), is referenced in this brief as the **"*News-Journal*"** decision.
- The decision in *Memorial Hospital-West Volusia v. News-Journal Corp.,* 729 So. 2d 373 (Fla. 1999), is referenced as the "***Memorial Hospital***" decision.
- The decision in *Memorial Hospital-West Volusia v. News-Journal Corp.,* 747 So. 2d 473 (Fla. 5th DCA 1999), is referenced as the **"*Memorial II*"** decision.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is "CG Times," 14 point.

STATEMENT OF THE CASE AND FACTS

The News-Journal has provided the Court with a 12-page "Answer" to the Statement of the Case and Facts set out in Memorial Hospital's initial brief, and asserts that Memorial Hospital's Statement is "argumentative and selective." (AB 1). No relevant fact or procedure is identified in the News-Journal's Answer which was not identified and record-cited in Memorial Hospital's brief, however. The Court will find that the vast majority of the discussion in the News-Journal's Answer is background coloration never referenced or used for any purpose in the Argument section of its brief.

SUMMARY OF ARGUMENT

The Court's one sentence rejection of retroactivity was not essential to its *Memorial Hospital* decision. An evaluation of the merits of the retroactivity issue certified by the Fifth District establishes that the legislature clearly expressed an intent that the statute apply retroactively to the News-Journal's request for access to the records and meeting minutes of Memorial Hospital, and that a retroactive application does not abridge any vested constitutional right which the News-Journal possessed prior to the statute's enactment.

Memorial Hospital does not oppose the News-Journal's request for appellate attorney's fees and costs for the Fifth District appeal proceeding in the event that the Court sustains the decision of the district court.

ARGUMENT

ON

MERITS ISSUE OF RETROACTIVITY

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.

There is little value in further discussion on the issue of whether the Court's comment in the *Memorial Hospital* decision was binding precedent. Memorial Hospital provided several reasons why established precedent in Florida would treat the Court's one-sentence comment as non-binding, and why that conclusion was reached by the district court when it certified the question back to the Court for resolution.

The News-Journal presents a variety of arguments as to why the issue of retroactivity was "essential" to the Court's decision in *Memorial Hospital* and properly before the Court (AB 14-18), and why Memorial Hospital and the district court were mistaken in concluding that the comment could not have been binding precedent under established jurisprudence. (AB 18-20). In the final analysis, News-Journal recognizes that the question is entirely one of the Court's "intent" (AB 15),[1] and it "agrees" that a decision of retroactivity was *not* essential based on "a recognized exception to mootness." (AB 19).

All of the News-Journal's arguments were anticipated by Memorial Hospital and addressed in its initial brief. Repetition here is unnecessary.

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[1] The News-Journal poses the issue as: "If the Court intended" one thing or whether: "On the other hand, if the court did not intend . . . ."

Only two points merit comment. First, the News-Journal does not challenge the legal doctrines set out in Memorial Hospital's initial brief regarding the non-binding effect of matters referenced in brief footnotes and statements uttered in opinions on issues which have never been briefed or argued by any party. These legal principles apply directly to the facts of this case. Second, the News-Journal cannot legitimately claim to know the Court's "intent." The Court alone will say what it intended in *Memorial Hospital.*

The threshold issue in response to the certified question is whether the one-sentence reference to retroactivity in the *Memorial Hospital* decision was binding precedent. For all of the legal reasons set out in Memorial Hospital's initial brief, the Court is respectfully requested to hold that it was not, and to evaluate the 1998 statute's retroactive effect on the merits.

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

A. The legislative intent is clearly expressed.

Memorial Hospital demonstrated in its initial brief that the Florida Legislature thoroughly understood its responsibility in creating exemptions from the public records and the open meetings laws, and that it took affirmative action to overturn the Fifth District's decision in *News-Journal* by enacting the 1998 statute. The district court's decision had the effect of providing the News-Journal with access to records and meeting minutes dating from its pre-statute request until the effective date of the statute.

The News-Journal has mustered an array of arguments designed to suggest that the legislature failed to accomplish its intended purpose. None of its arguments have merit.

The News-Journal first argues that retroactive effect is not expressed clearly in the words of the 1998 statute, and that two possible interpretations can be given to the statute's declaration of applicability to "existing leases." (AB 21-23). As already noted by Memorial Hospital (IB 23-24), the News-Journal's hypothesized second alternative — that the statute might be interpreted to apply to existing leases but still gives the News-Journal access to those records and meeting minutes of Memorial Hospital which pre-date the statute — would be completely inconsistent with the legislature's undeniable (and admitted) intent to enact a law designed to overrule the Fifth District's grant of access to those very pre-statute materials in its *News-Journal* decision.

The News-Journal next argues that either the Court or the legislature had to be "wrong" as to the application of the public records and open meetings law prior to the 1998 statute, for if the legislature was correct the Court would have reversed the Fifth District and if the Court did not reverse then the legislature would have been wrong. The News-Journal then offers as a conclusion from its hypothesized premise — that two branches of Florida government cannot disagree and both be correct in the exercise of their respective responsibilities — that the legislative declarations are not conclusive on retroactivity. (AB 24). This, of course, is nonsensical reasoning. Legislative intent is determined by reference to the acts and words of the legislature; not by reference to judicial decision-making consistent or inconsistent with legislative action.

The News-Journal next develops a series of hypothetical questions which flow from its argument that it is impossible to give retroactive effect to exemptions from both the open records and the public meetings law, because it is "metaphysically impossible" to give retroactive closed effect to an open

meeting once held. (AB 25-26). Memorial Hospital finds it impossible to respond to this argument, since the issue of retroactivity in this lawsuit involves only *closed* meetings for which the News-Journal is seeking the minutes.

The remaining arguments made by the News-Journal on this point involve its unique interpretations of the rules of construction for retroactivity as expressed in the cases on which Memorial Hospital relied, principally *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999). Pointedly ignored is the detailed legislative history which Memorial Hospital identified, and the detailed recitations found in the 1998 statute itself. (*See* IB 16-18, 21-22, 23-24).

The legislature intended that the 1998 statute be retroactive in operation, and it said so. The first requirement for retroactive effect has been met.

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

Memorial Hospital recognized in its initial brief that a retroactive application of the 1998 statute could not run afoul of constitutional limitations, and it demonstrated that this statute does not. News-Journal disagrees, arguing that the statute abrogates a "vested substantive right of access" and, consequently, violates due process of law. (AB 30). The gravamen of the News-Journal's argument is that the right of access to public records and meetings is a vested substantive right of "constitutional proportions" which cannot be abrogated with a retroactive application. (AB 32). Here, too, the News-Journal's arguments are not on sound ground.

Memorial Hospital has never said government in the sunshine provisions do not have constitutional proportions. It *has* said, however, that the constitutional dimension of this particular provision is not identical to other provisions in the Declaration of Rights because the right created by section 24 of Article I is conditional and not absolute. That fact is undeniable, and the News-Journal itself ultimately has had to acknowledge that the constitutional provision at issue here is "unique." (AB 43).[2]

The vast majority of the News-Journal's discussion of the "vested" nature of the right of access is devoted not to that issue at all, but rather to addressing the standard for evaluating the legislature's exercise of its right to create exemptions and the alleged stringency which the courts have imposed on that legislative prerogative. (AB 36-46). This entire argument by the News-Journal is an exercise in misdirection. Argument concerning the legislature's exercise of its exemption authority bears only on the *constitutionality* of the 1998 statute, and in fact the News-Journal has made precisely those arguments in the circuit court proceeding where the statute's constitutionality is now being considered.[3] Discussion concerning a standard

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[2] The News-Journal's discussion of the constitutional dimension of its alleged right of access includes reliance on language found in *Monroe County v. Pigeon Key Historical Park, Inc.,* 647 So. 2d 857 (Fla. 3d DCA 1994). (AB 32, 41 n.9). Reliance on that language is inappropriate, however, as the quoted text comes from a dissent in that decision and represents a position, the reasoning or both, which the court's majority has rejected.

[3] A large portion of the *amicus* brief of The First Amendment Foundation is similarly misdirected to the issue of the 1998 statute's constitutionality and the issue pending in circuit court (pursuant to this Court's directive). These arguments might have been appropriate for the Court to consider if it had allowed the constitutionality of the 1998 statute to be considered along with this appeal on the statute's retroactivity, but the News-Journal opposed Memorial Hospital's motion to have those two distinctive issues heard by

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for the legislature's exercise of its exemption authority is legally irrelevant to the question of whether a retroactive application of the 1998 statute would violate any vested constitutional right.

The authority of the Florida Legislature to retroactively exempt Memorial Hospital from the public records and open meetings laws is ascertained in the first instance by determining what legal right the News-Journal had prior to the 1998 statute. *Rupp v. Bryant*, 417 So. 2d 658, 661 (Fla. 1982) ("Our first step, and the heart of this issue, is to determine what legal rights the [plaintiffs] had prior to the [applicable statutory] amendments."). The News-Journal had only the right of access accorded by Article I, section 24(a) of the Constitution — that is, the right of access to records of public bodies and "persons acting on their behalf."[4]

Memorial Hospital was not a public body, though, and there had been no final judicial determination that it was acting on behalf of a governmental body. In fact, through an analysis of the *Schwab*[5] factors for determining whether it was acting "on behalf of" the Volusia County Hospital Authority, the trial court had concluded that it was *not* acting on behalf of the Authority and was not subject to the public records laws. 729 So. 2d at 376. The 1998 statute was passed in the midst of the appellate review of that determination, after the Fifth District had reversed the trial court through a different

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the Court together and the Court chose to deny Memorial Hospital's motion.

[4] There is no comparable "acting on behalf of" provision that governs open meetings under section 24(b) of Article I, as the Court acknowledged in the *Memorial Hospital* decision. 729 So. 2d at 382. The applicability of section 24(b) had to be implied by the Fifth District. *See News-Journal*, 695 So. 2d at 422.

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

application of the *Schwab* factors but while the case was pending in this Court on review of the district court's decision.[6]

Inasmuch as the status of Memorial Hospital vis-à-vis the constitutional provisions on access had not been finally resolved by the judiciary, the News-Journal had no more "vested" right to access under the district court's decision than Memorial Hospital had to exemption under the trial court's decree. *Florida East Coast Ry. v. Rouse,* 194 So. 2d 260 (Fla. 1966); *Morgan v. State*, 392 So. 2d 1315 (Fla. 1981); *Wheeler v. State,* 344 So. 2d 244 (Fla. 1977); *Hendeles v. Sanford Auto Auction, Inc*., 364 So. 2d 467 (Fla. 1978). Put another way, unlike the plaintiffs in *Rupp* who "had the right to seek recovery" from the defendants "prior to the [statutory] amendment" at issue in that case (417 So. 2d 665), the News-Journal did *not* have a right of access to records and meeting minutes of Memorial Hospital until this Court so held under a *Schwab* analysis nine months after the 1998 statute became effective.

The lack of any vested right in the News-Journal is confirmed by another of the decisions on which it has mistakenly relied: *State, Dep't of Transportation v. Knowles,* 402 So. 2d 1155 (Fla. 1981). In that decision, just as in *Rupp,* the Court approached the issue of vested rights in relation to retroactivity by first seeking to ascertain if the plaintiff had some sort of vested right. 402 So. 2d at 1157. The Court did so in *Knowles* by "considering the change in [the plaintiff's] position which a retroactive application of the 1980 statute would engender." *Id*. In undertaking that analysis, the Court

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[6] The News-Journal's access to the meeting minutes of Memorial Hospital was also indeterminate, and similarly hinged on the Court's willingness to import into section 24(b) the same type of "acting on behalf of" analysis that the district court had advanced. The fact that the Court later did so (729 So. 2d at 382-83), is not determinative of Memorial Hospital's subjugation to section 24(b) before that position was finally determined by the Court.

distinguished between a cause of action and a mere expectation which every citizen would have (402 So. 2d at 1158 n.7), and then found it "indisputable that a retroactive application of the 1980 law has taken from [the plaintiff] something of value" — a *judgment* for $20,000 more than a retroactive application of the statute would have allowed the plaintiff to recover. 402 So. 2d at 1158.

The change in access to Memorial Hospital's records and meeting minutes which was wrought by the 1998 statute did not take from the News-Journal anything of value to which it otherwise had an "indisputable" right. At the time of enactment, the News-Journal had only an intermediate appellate court's decision that an application of the *Schwab* factors would provide access to Memorial Hospital's records and meeting minutes, after Memorial Hospital had obtained a judgment of *non*-access. That intermediate court decision was not final, and in fact was under review and being examined by a higher tribunal. Thus, nothing was "vested."[7]

The News-Journal had no vested right which would have been abrogated by the 1998 statute. Consequently, there is no bar to according full

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[7] The News-Journal's reliance on *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983), is similarly distinguishable on the basis of the nature of the pre-enactment right claimed to have been possessed. In that case, the Court held that a recently-adopted constitutional amendment manifested no retroactive intent, and consequently would be given prospective effect only. The Court went on to state, although it was not necessary to its decision, that retroactive effect could not be given to the amendment in any event because it "unquestionably" altered the substantive right of the courts to give Florida citizens a higher-than-federal standard of protection from unreasonable searches and seizures under the Florida Constitution. 434 So. 2d at 323. The absolute right of the courts to apply the Florida Constitution in criminal cases is quite different from the News-Journal's right to ask that the *Schwab* factors be applied to a non-governmental body in order to take away its then-extant freedom from public access.

effect to the legislature's reasoned determination that the statute should be given retroactive effect in order to overturn the Fifth District's *News-Journal* decision.

C. The issue raised in the *amicus curiae* brief of Bayfront Medical Center is not before the Court, and is not germane to the Court's decision on retroactivity.

Memorial Hospital opposed the motion of Bayfront Medical Center to appear as *amicus curiae* in this case, on the ground that it had nothing of value or relevance to offer regarding the issue of retroactivity which is before the Court on certification from the Fifth District. Bayfront's motion to appear as *amicus* did not state the party or interest on whose behalf the brief was to be filed, as required by Rule 9.370, Fla. R. App. P., and its brief sheds no light on that question.

Bayfront's motion and brief were filed within the time frame for the filing of Memorial Hospital's initial brief, however, suggesting that Bayfront thought it had aligned itself with the interests of Memorial Hospital rather than the News-Journal. To the extent the time of Bayfront's filing is intended by Bayfront to identify its interests with Memorial Hospital or its interests, Memorial Hospital respectfully declines Bayfront's identification.[8]

[8] As pointed out in Memorial Hospital's responses to the motions seeking *amicus* briefing privileges for Bayfront and for Media General Operations, Inc. d/b/a The Tampa Tribune, and as now confirmed in Media General's *amicus* brief (at p. 1), both Bayfront and Media General are asking the Court for an advisory opinion designed to influence an appeal involving Media General which is pending in the Second District Court of Appeal on issues unrelated to the narrow issue in this appeal. Memorial Hospital believes both briefs, presenting issues for a different factual situation which does not

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Memorial Hospital disavows any and all discourse and argument in Bayfront's brief. Memorial Hospital further notes that even the News-Journal did not deign Bayfront's brief to be sufficiently pertinent or germane to this appeal to warrant any mention or response.

ARGUMENT IN RESPONSE
TO
PETITION FOR ANCILLARY WRIT OF CERTIORARI

The News-Journal has petitioned the Court to exercise its all writs jurisdiction to review and vacate an order of the district court which denied its motion for attorney's fees and costs ("the Petition"). Upon receipt of the Petition, the Court entered an administrative directive placing the Petition with this retroactivity appeal. The News-Journal has now supplemented its answer brief with argument on the fee issue raised in the Petition. (AB 46-48).

The News-Journal has moved for *appellate* attorney's fees and costs in the "retroactivity" appeal which was brought in the district court. *See* Appendix 2 to the Petition. Memorial Hospital did not file a response in opposition to the News-Journal's motion. The district court denied fees and costs, nonetheless. The News-Journal has now petitioned to overturn that order, addressing its petition only to the Fifth District's denial of *appellate* attorney's fees and costs in the "retroactivity" appeal. The News-Journal correctly points out, however, that its entitlement to those fees and costs is not absolute, for if this Court rules for Memorial Hospital and determines that the 1998 statute does have retroactive application then News-Journal is *not* entitled to fees and costs for the district court proceeding. (Petition at 17).

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involve statutory retroactivity, are improper and of no value in this appeal.

Memorial Hospital does not oppose the News-Journal's Petition for the conditional and limited relief it has here requested.

CONCLUSION

The 1998 statute was intended by the Florida Legislature to operate with retroactive effect to shield the records and meeting minutes of Memorial Hospital from disclosure to the News-Journal. The legislature understood the gravity of its responsibility in creating a retroactive exemption to Article I, section 24 of the Constitution, and it violated no due process right of the News-Journal in exercising its constitutional exemption prerogative. The Court is respectfully requested not to invalidate that legislative action.

Respectfully submitted,

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I certify that a copy of this reply brief on the merits was mailed on May 16, 2000 to:

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