

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO. 2010-20801-CINS

THE BERT FISH FOUNDATION,
INC., a Florida corporation not for profit,

Plaintiff,

vs.

SOUTHEAST VOLUSIA HOSPITAL
DISTRICT, a special independent taxing
District of the State of Florida; BERT
FISH MEDICAL CENTER, INC., a not-
for-profit Florida corp.; ADVENTIST
HEALTH SYSTEM SUNBELT
HEALTHCARE CORPORATION, a not-
for-profit Florida corp.; and AHS
ACQUISITION CORP., a not-for-profit
Florida corp.,

Defendants.

AMENDED ORDER ON ISSUES RAISED IN
COUNT I OF SECOND AMENDED COMPLAINT

THIS CAUSE came before the court for trial on the issues raised in Count I of Plaintiff's Second Amended Complaint, the Court having previously severed this count from the remaining now three other counts and having conducted a five day non-jury trial on the issues raised in this count only. After having listened to

the testimony of all witnesses presented, reviewed the extensive exhibits and depositions filed in evidence and having considered the argument of attorneys for all parties to this matter, the Court does make the following findings of fact:

1. Bert Fish Hospital in New Smyrna Beach was one of the hospitals constructed with funds provided under the will of Judge Bert Fish, which will contained very specific requirements for the use of the funds and the purpose to be served by the hospitals constructed with them. Bert Fish Foundation, Inc. (hereafter BFF), was established to oversee the management of this Hospital.
2. The New Smyrna Beach Hospital was operated by the Foundation for a number of years until the mid 1960s when the Foundation Board realized it was unable to continue providing high quality care to its patients while at the same time honoring the covenants and requirements placed upon them under the will of Bert Fish. These testamentary requirements dealt with such things as the name and location of the hospital, but the primary requirement was that the hospital provide medical care to indigent persons without charge, and charges to non-indigent persons would always be just and reasonable. These requirements became more of a financial burden than the Foundation could continue to bear, so in 1966 the Foundation requested and received a consent court order in the Seventh Judicial Circuit allowing it to transfer the hospital to Southeast Volusia Hospital District, a special independent taxing district of the State of Florida (hereafter SEVHD). The deed was dated September 30, 1966 and it contained a reverter in favor of the Foundation in the event that the requirements of Judge Fish's will were abandoned. SEVHD created the Bert Fish Medical Center, Inc., a not for profit Florida corporation (hereafter BFMC), and the governing board of the new corporation consisted of the same seven individuals who served as commissioners of SEVHD, who are appointed by the governor under the enabling legislation which created SEVHD.
3. During the 1990s BFMC also came to realize that due largely to national trends in the delivery of hospital care, it could not easily survive as a free

standing hospital. After going through what proved to be an unsuccessful joint venture with Halifax Medical Center, which was terminated without notice by Halifax, BFMC entered into a sixteen month period of conducting closed meetings to discuss and approve some future affiliation with a larger and more stable organization. During this period there were 21 closed meetings which resulted in a consensus of BFMC Board to affiliate with Adventist Health systems Sunbelt Health Care Corporation (hereafter AHS). The final closed meeting and consensus occurred on May 27, 2010, and within an hour of the adjournment of that meeting the Board convened in a public meeting to ratify its previous decision, all without any public discussion or inviting any public input or questions.

4. After the BFMC May 27 vote to affiliate with AHS the Daytona Beach News Journal requested transcripts of the closed meetings, which are required to be made when a public agency closes any meeting under claim of exemption from the provisions of the Florida Sunshine Law. The News Journal wrote several articles suggesting possible violations of the Florida Sunshine Law, and BFF reviewed the matter and filed this lawsuit.
5. Faced with a legal challenge with a high likelihood of success, BFMC initiated exhaustive attempts to cure any Sunshine Law violations. BFMC board members were never advised by their attorneys or CEO that they probably should undue the reverse merger with AHS pending the outcome of the cure process. Consequently the cure process was completed before the first hearing could be conducted in the legal proceeding before this Court, and the decision was again made to affiliate with AHS. At this first hearing on November 18, 2010, this Court relied on its review of the transcripts of the closed meetings and ruled that these meetings did not fall within any exemption, and therefore violated the Sunshine Law. This ruling invalidated the May 27, 2010 public affiliation vote, but since the cure had been completed the Court did not void the reverse merger ab initio, but instead deferred its ruling until it could be determined whether the subsequent public meetings and

information exchanged did in fact cure the Sunshine Law violation. This procedure was approved in a 1981 decision of the Florida Supreme Court which has never been overturned. Tolar v. School Board of Liberty County, 398 So.2d 42 (Fla. 1981).

6. The sole issue for determination at the recent trial was whether the attempted cure was a meaningful and independent action by BFMC Board, or whether it was a ceremonial acceptance or perfunctory ratification of the Board's previous action. Had the Board not completed the attempted cure prior to the first hearing in this case on November 18, 2010, the Court would have been compelled at that time to void the May 27, 2010 ratification vote and all of the agreements and documents that followed implementing the reverse merger with AHS. Defendants in this case have argued that the decisions of a public board should be afforded the presumption of correctness. While this may be generally true, this is a rebuttable presumption. BFMC lost the benefit of this presumption by flagrantly violating the Sunshine Law in arriving at the initial decision to affiliate with AHS. Consequently, the Defendants have the burden of proof in establishing that a meaningful and valid cure was accomplished.

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7. Plaintiff has argued that since the reverse merger was in place at the time of the attempted cure, the new BFMC was then private and totally controlled by the Adventists. Even though the Adventists selected members of the new BFMC Board scrupulously recused themselves from all presentation and deliberations in the public cure meetings, Plaintiff argues that a private entity cannot cure the unlawful actions of its predecessor public board. While this argument is quite compelling, the Court chooses to base its order on the validity of the efforts to cure the previous unlawful action, particularly in light of the fact that the cure meetings were joint meetings of private BFMC and SEVHD.

8. The Defendants' attempted cure was an exhaustive effort by anyone's definition. A Website was created to dispense information to the public on all aspects of the process of the cure. A document room was provided

at the Atlantic Center for the Arts Facility, where internet access and hard copies of thousands of pages of relevant documents were made available for public review. Hundreds of thousands of dollars were spent on the attempted cure. It is unclear to this Court whether it would have even been possible for this Board to cure this previous action. There was so much darkness for so long that a giant infusion of sunshine might have been too little or too late. But this attempted cure was not a fresh start. It was to a large extent managed and controlled by some of the very people who caused the problem in the first place and some who had huge personal financial stakes in the outcome. The excessive entanglement of the new BFMC Board and AHS made it virtually impossible for there to be a meaningful and independent cure. Some specific examples of actions taken in the cure process that lead this court to the inescapable conclusion that the attempted cure must fail and the resulting action vacated are:

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- a. After The News Journal secured the transcripts from the closed meetings and began writing stories about possible Sunshine Law violations, Plaintiff looked into the matter and decided to file this lawsuit challenging the reverse merger of BFMC which was approved on May 27, 2010, to become effective July 1, 2010. This case was filed on August 11, 2010, and the first public meeting of the SEVHD Board and the private BFMC Board was scheduled for September 9, 2010. According to the members of the joint Boards, all of whom testified at the trial, they were never advised by Mr. Heekin, Mr. Williams, Mr. Bloodworth, or anyone else that they should consider undoing the new agreement with AHS until such time as the cure process had been completed. This single act could have removed one of the biggest clouds hanging over the cure process, that being AHS had control of the Bert Fish Medical Center and that BFMC CEO and other critical administrators reported to the Adventists in the performance of their duties. This also presented the appearance that the RFP sent out during the cure process invited proposals to compete with the deal already in

place. This may explain why some former applicants chose not to reapply during the cure.

- b. Mr. Heekin and Mr. Williams were very instrumental in setting up the cure process, including the selection of the attorneys to be hired and Mr. Curran as the consultant. Mr. Heekin's firm was paid over \$300,000 for its work in setting up the document production room and website for the cure, and he continued to be consulted and copied with multiple strategy e-mails during this entire period. Mr. Heekin's testimony at trial was that he gave the Board faulty advice in allowing them to close the meetings to the public which led to the initial affiliation with AHS. He also testified that he had notified the Board that they had a potential legal malpractice case against him and his firm. This presented a huge financial interest to Mr. Heekin and his firm in the outcome of the cure process. If AHS prevails again, the damages flowing from this faulty advice would be far less than what could be potentially claimed if a different partner were chosen and a very expensive unwinding of the AHS affiliation is to be required. Mr. Williams had a guaranteed three year payout if terminated due to change of ownership of the hospital, which he knew he would collect because he was ineligible to serve as CEO of an Adventist hospital due to his not being affiliated with the Adventist religious order.
- c. The joint Boards conducting the cure meetings and approving the renewed affiliation with AHS were never told of a very significant theoretical difference of opinion between their CFO, Mr. Allred, and their outside consultant, Mr. Curran, on the formula used in calculating uncompensated care. This fundamental difference was clearly outlined in an exchange of e-mails between Mr. Curran and Mr. Allred on November 3, 2010. Mr. Curran pointed out to Mr. Allred that he should not include bad debt expense in the calculation because that results in double reimbursement to the hospital. Mr. Allred responded that he did not agree with these comments. Plaintiff argues that the use of the Allred approved

formula over the course of a thirty-five year lease could result in over payment to AHS for uncompensated care in the hundreds of millions of dollars. But the Boards deliberated and voted without knowing of this huge potential liability.

- d. Dozens of e-mails were introduced into evidence by Plaintiff demonstrating the continuous efforts by Mr. Williams and others on his staff to influence the result of the cure process. The response given by Defendants was that a public relations effort must be made so that the citizens would understand the dire straits Bert Fish Medical Center would be in if it doesn't affiliate with a strong partner. No one involved in this case disagreed with that premise, but after the September 27 public meeting on the cure, when the joint Boards unanimously voted to affiliate as opposed to remaining a stand alone hospital, the need to convince the public or the joint Boards was no longer there. Three strong candidates emerged, any one of which could have made an outstanding partner for BFMC. Notwithstanding this, Mr. Williams was e-mailing the public relations people for AHS on November 3, 2010, just prior to the AHS presentation, and comparison pieces were being circulated which painted AHS in a favorable light.

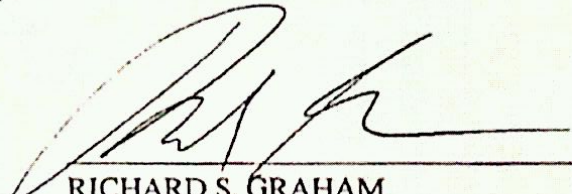
NOW, THEREFORE, it is ORDERED AND ADJUDGED as follows:

1. The initial decision of BFMC to affiliate with AHS of May 27, 2010, effective July 1, 2010, was previously determined to have been made in violation of the Florida Sunshine Law. This Court now finds that the attempts to cure this violation, resulting in a subsequent decision to affiliate with AHS under a modified proposal, were not sufficiently independent of the original unlawful decision to constitute a valid cure.
2. The parties shall submit a plan to the Court, either jointly or separately, if no agreement can be reached, within thirty (30) days of the date of this order, which plan or plans outline an orderly method of transition of this

hospital from AHS control back to public BFMC control. It is the intent of this order that this transition be accomplished with the least amount of disruption to the delivery of patient services, employee relations and existing contracts as possible.


3. It is the intent of the Court that this order be considered a final order on the Sunshine Law issue for purposes of allowing any party to seek appellate review. The Court does retain jurisdiction, however, to enforce this order and determine other issues in this case not covered herein. The Court specifically retains jurisdiction to award attorney fees and costs pursuant to Section 286.011(4), Florida Statutes.

DONE AND ORDERED in Chambers at Daytona Beach, Volusia County, Florida, this 24 day of February, 2011.



RICHARD S. GRAHAM
CIRCUIT JUDGE

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