IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND DISTRICT

Case No.: 2D18-4729

L.T. Case No.: 2016-CA-3186

ANDRES TORRES,

Appellant,

v.

SARASOTA EMERGENCY ASSOCIATES, NORTH PORT EMERGENCY ASSOCIATES, and AMBULATORY CARE PHYSICIANS SERVICES,

Appellees.

BRIEF *AMICI CURIAE* OF THE FIRST AMENDMENT FOUNDATION, FLORIDA PRESS ASSOCIATION, AND BRECHNER CENTER FOR FREEDOM OF INFORMATION IN SUPPORT OF APPELLANT

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IDENTITY OF *AMICI CURIAE* AND STATEMENT OF INTEREST

Amici include state non-profit groups comprising advocacy, educational, and news media trade associations dedicated to preserving and defending free press rights and robust access to government records. Specifically, *amici* include: (1) the First Amendment Foundation; (2) the Florida Press Association, and (3) the Brechner Center for Freedom of Information.[1] *Amici* have long-standing and unique expertise on, among other things, the applicability of Florida's Public Records Law, § 119.01, *et seq.*, Fla. Stat. (hereinafter, the "PRA"), to private entities performing public functions.

I. SUMMARY OF ARGUMENT

Public records are an indispensable tool for conducting effective watchdog journalism as they, among other things, document how government administers public duties, reaches decisions, and expends public funds. In this case, the trial court erred when it held that a private entity performing core functions within a public hospital (*i.e.*, the actual performance of emergency room medical services) is not subject to the PRA.

The central issue in this case is whether the longstanding and exclusive relationship between Appellees and Sarasota Memorial Hospital ("SMH") to

[1] A fuller description of all *amici* parties is set forth in *amici's* May 9, 2019, Motion for Leave to File *Amicus Curiae* Brief.

provide medical staffing and emergency room ("ER") medical services opens Appellees' operations to scrutiny under the PRA. Decades ago, SMH determined it no longer wanted the responsibility to staff ER medical doctors (and thus provide care) for its public hospital – a statutorily-required, core function that SMH would obviously need to undertake in order to fulfill its mandate. It was outsourced to Appellees, and those parties now: (1) derive all their income from services provided for SMH (their sole "client"); (2) maintain offices solely within SMH facilities; and (3) have historically (and consistently) comingled financial, management, and business operations with SMH. For these and for the additional reasons set forth in Appellant's Corrected Initial Brief, Appellees are in effect indistinguishable from the public entity they serve, and are subject to the PRA.

Without access to the records of their activities, such outsourcing arrangements pose a direct threat to citizens' ability to effectively monitor government activity which was previously under the exclusive domain of SMH, and, as discussed in greater detail below, the staffing, intake, and billing procedures of hospitals have been the subject of news stories documenting various abuses. Absent legislative and judicial safeguards broadly interpreting public records laws, state agencies like SMH "could effectively transfer their documents into the hands of private companies and avoid the reach of freedom of information" laws. *See* Craig D. Feiser, *Protecting the Public's Right to Know: The*

Debate over Privatization and Access to Government Information Under State Law, 27 Fla. St. U. L. Rev. 825, 826 (2000). Thus, the determination of what constitutes an "agency" subject to the PRA has a direct impact on what information can be obtained by the press and the public.

In recognition of this, the PRA broadly defines "agency," subjecting any "private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." § 119.011(2), Fla. Stat. As the Florida Supreme Court similarly noted in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992), it is imperative "to ensure that a public agency cannot avoid disclosure under the Act by contractually delegating to a private entity that which otherwise would be an agency responsibility." *Id.* at 1031 (internal quotations omitted).

The records at issue in this case – records in the custody of a privatized arm of a public hospital specifically delegated to staff the hospital's emergency departments – are subject to the PRA because SMH handed off its public duty to provide ER medical care services to Appellees. *See*, *e.g.*, § 395.1041, Fla. Stat. As the case law demonstrates, that handing off need not be a complete ceding of every last public hospital task; it need only be one that is central to its viability. Thus, the trial court erred by failing to take into account disputed facts establishing Appellees are subject to the PRA, construing the law too narrowly in contravention

of governing precedent. Given the co-dependency between Appellees and SMH, this Court should reverse the trial court's decision.

II. ARGUMENT

A. Privatization of public records upends citizens' rights to hold government accountable.

Privatization of government agency functions, including those of hospitals, prisons, and schools, has been on the rise for decades. *See* Matthew Bunker & Charles Davis, *Privatized Government Functions and Freedom of Information: Public Accountability in an Age of Private Governance*, 75 Journalism & Mass. Comm. Q. 464, 464 (1998). *See also Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 376-77 (Fla. 1990) (discussing trend of privatization of public hospitals). The most common form of privatization happens when the government contracts with a private entity to provide a service previously performed by the government or to provide a service for or on behalf of a government entity. Shirley L. Mays, *Privatization of Municipal Services: A Contagion in the Body Politic*, 34 Duq. L. Rev. 41, 43 (1995). As Florida courts observe, this causes a "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." *Mem'l Hosp.-W. Volusia*, 729 So. 2d at 376. By creating, maintaining, and controlling previously public records, private companies are controlling access, and they are often "at odds with the very

purpose of public records laws." Bunker & Davis, *Privatized Government Functions and Freedom of Information* at 464. As other legal scholars have noted, there are many reasons privatization could be desirable, but it should nonetheless "leav[e] public accountability intact. Not only should the public be able to monitor the private company's activities, but the monitoring should be on the same terms as when the public agency was the information vendor." Feiser, *Protecting the Public's Right to Know* at 833.

The potentially detrimental effect privatizing governmental functions has on accountability is evident in the instant case. If SMH had not contracted out its emergency medical staffing and services to Appellees, it would have to perform those functions itself. It follows that any records related to the performance of those functions must be subject to the PRA. Transparency of a public hospital ER's corporate structure, personnel compensation, intake and billing practices, and medical staffing decisions, for example, is imperative for a community to fully understand a public hospital's emergency medical service operations.

Recent news stories around the country reinforce this point. For example, a recent year-long investigative series by *Vox* on the billing practices of public hospital ERs uncovered that the largest public hospital in San Francisco was out of network with all private health insurance and what it means for patients when

health insurers won't cover ER bills that they deem "non-urgent."[2] This led not only to patient ER bill reductions[3] but also to state lawmakers' introduction of a plan to end ER "surprise billing." *See* Sarah Kliff, *After Vox Story, California Lawmakers Introduce Plan to end Surprise ER Bills*, Vox (Feb. 24, 2019).[4]

The news media has also reported on similar questionable behavior by private hospitals. The *Milwaukee Journal Sentinel* recently reported on a study based on public records shedding light on patient intake policies. It disclosed how hospitals may be turning away ambulances (a practice known as "ambulance diversion") – not for the purpose of controlling overcapacity of the ER, but for a purely economic reason: they are more likely to shut their doors on ambulances if a nearby public hospital, "which treats more indigent patients, is already turning away ambulances." *See* John Diedrick, *Some Hospitals Turn Away Ambulances*

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[2] For the entire investigative series, *see* Sarah Kliff, *Hospitals Kept ER Fees Secret. We Uncovered Them.*, Vox (https://www.vox.com/2018/2/27/16936638/er-bills-emergency-room-hospital-fees-health-care-costs) (last visited May 14, 2019).

[3] Zuckerberg San Francisco General Hospital, for instance, reduced one patient's bill from over $20,000 to $200 after the story was published. *See* Sarah Kliff, *After Vox Story, Zuckerberg Hospital Rolls Back $20,243 Emergency Room Bill*, Vox (Jan. 24, 2019), https://www.vox.com/2018/2/27/16936638/er-bills-emergency-room-hospital-fees-health-care-costs.

[4] *Available at* https://www.vox.com/2019/2/24/18236482/zuckerberg-hospital-surprise-bills-california. President Trump has also very recently called on Congress to end surprise medical billing. Amy Goldstein, *Trump Pushes to End Surprise Medical Billing For Hospital Care*, Wash. Post. (May 9, 2019), https://www.washingtonpost.com/national/health-science/trump-pushes-to-end-surprise-medical-billing-from-hospital-care/2019/05/09/467f17fe-7262-11e9-9f06-5fc2ee80027a_story.html?utm_term=.82a262702131.

When the Patients are More Likely to be Poor, Study Finds, Milwaukee J. Sentinel (May 13, 2019).[5] "In other words, researchers found private hospitals acted differently . . . depending on whether the nearby hospital turning away ambulances was public or private." *Id.*

In another recent story, a Texas journalist reported that customers insured by Blue Cross Blue Shield of Texas "could face skyrocketing bills" if they use certain ER doctors. *See* Jake Harris, *Blue Cross Blue Shield of Texas: ER Docs at 14 DFW Hospitals Now Out of Network*, WFAA (Dallas) (Apr. 25, 2019).[6] The import of that article was to warn patients, who "might assume the ER is run by the hospital it's attached to," that this is "not always the case" as "many ER doctors are actually employed by outside contractors that pair with hospitals." *Id.*

SMH, itself, along with its ER, have formerly been caught in the crosshairs of intense public scrutiny. Following allegations of patient neglect,[7] inspectors for the state Agency for Health Care Administration concluded that SMH was at fault

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[5] *Available at*: https://www.jsonline.com/story/news/investigations/2019/05/13/hospitals-divert-ambulances-when-incoming-patients-more-likely-poor/1133582001/.

[6] *Available at*: https://www.wfaa.com/article/news/health/blue-cross-blue-shield-of-texas-er-docs-at-14-dfw-hospitals-now-out-of-network/287-2ca09d24-98a6-451b-97e4-226d8adf1d0b.

[7] The various news articles describe the July 2011 incident as involving a patient who went to SMH's ER in response to the miscarriage of 13-week in utero twins. The patient was left alone (with her mother) for so long that she had to deliver the second fetus without any medical assistance.

for the deficient care administered by ER doctor (and employee of Appellees), Nicholas J. Angelastro. Barbara Peters Smith, *Neglect compounded anguish of miscarriage at Sarasota Memorial*, Herald-Tribune (Aug. 26, 2011).[8] Inspectors found hospital staff made mistakes in at least eight ER cases, which led to further federal review by the Center for Medicare and Medicaid Services, ultimately establishing SMH was not in compliance with standards for participating in its program. David Gulliver, *Sarasota Memorial facing federal review following ER mishap*, Bradenton Herald (Aug. 25, 2011).[9] This criticism of SMH's ER practices led to new protocols intended to bridge the gap in the quality of care between the ER and the rest of the hospital. During these changes, SMH's CEO Gwen MackKenzie explained, "it would break my heart if the community thought the ER were detached from our organization." Barbara Peters Smith, *Chastened by neglect case, hospital takes new approach to its ER*, Herald-Tribune (Sept. 6, 2011).[10]

Such news stories highlight why robust public oversight into ER operations are a matter of utmost public concern. When public hospitals privatize, finances, patient billing, management, and operations can become inextricably intertwined, at times to the detriment of the very citizens that public hospitals exist to serve. It

[8] *Available at*: https://www.heraldtribune.com/article/LK/20110828/News/605211536/SH/.
[9] *Available at*: https://www.bradenton.com/latest-news/article34520493.html.
[10] *Available at*: https://www.heraldtribune.com/article/LK/20110906/News/605212999/SH/.

is against this backdrop, that *amici* discuss below the contours of applicable Florida law and relevant facts necessitating reversal of the trial court's ruling.

B. Florida's Public Records Law is interpreted broadly and applies to any private entity acting on behalf of a public entity.

In addition to the rights found in the PRA, the citizens of Florida enjoy a state constitutional right of access to government records. *See* Art. I, 24, Fla. Const. Hence, any measure that obstructs citizens from exercising that right must be considered with exacting scrutiny. Consistent with these bedrock principles, Florida courts have long recognized that government records are presumptively open and the PRA is to be construed liberally in favor of access. *See*, *e.g.*, *Dade Aviation Consultants v. Knight Ridder*, 800 So. 2d 302, 304 (Fla. 3d DCA 2001) ("The Act is to be construed liberally in favor of openness. When there is any doubt, the court should find in favor of disclosure"); *Tribune Co. v. Public Records, P.C.S.O. No. 79-35504 Miller/Jent*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986) (same).

To this end, the legislature broadly defines "agency," subjecting any "private agency, person, partnership, corporation, or business entity acting on behalf of any public agency" to the PRA. 119.011(2), Fla. Stat. There are two ways in which a private entity can be branded an agency under the PRA: when it is delegated a

public function or, in the absence of such delegation, when the relationship meets the "totality of factors test" announced in *Schwab*.[11]

But the *Schwab* factors need not be even be considered where a delegation of government function has occurred. *See Putnam Cty. Humane Soc'y, Inc. v. Woodward*, 740 So.2d 1238, 1239 (Fla. 5th DCA 1999). For example, the court in *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997), noted that there had been "a complete assumption of a governmental obligation" when the private entity took over the county's role as the provider of probation services. "Rather than providing services *to* the county, the Salvation Army provided services *in place of* the county." *Id.* at 503 (emphasis in original).

The court in *News-Journal Corporation v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d. 418 (Fla. 5th DCA 1997), similarly analyzed the relationship between a hospital authority and the not-for-profit company leasing the public

[11] The factors considered include, but are not limited to: 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency's chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency's involvement with, regulation of, or control over the private entity; 7) whether the private entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning. *See Schwab*, 596 So. 2d at 1031.

hospital's facilities. The court recognized a distinction between a mere contract in which the private entity provides services to a public body and a contract in which the private entity provides services in place of the public entity.

> If one merely undertakes to provide material – such as police cars, fire trucks, or computers – or agrees to provide services – such as legal services, accounting services, or other professional services – for the public body to use in performing its obligations, then there is little likelihood that such contractor's business operation or business records will come under the open meetings or public records requirements. On the other hand, if one contracts to relieve a public body from the operation of a public obligation . . . and uses the same facilities or equipment acquired by public funds previously used by the public body then the privatization of such venture to the extent that it can avoid public scrutiny would appear to be extremely difficult, regardless of the legal skills lawyers applied to the task.

Id. at 420.

Moreover, courts have held private entities subject to the PRA when the delegation amounts to something less than the agency's *entire* obligations. In *B&S Utilities., Inc. v. Baskerville-Donovan, Inc.*, 988 So. 2d 17 (Fla. 1st DCA 2008), for instance, the court held that a private engineering firm's records regarding projects on which it worked as the city's engineer were public records. The court reasoned that the private company's documents were created in the course of fulfilling a municipal function – namely, providing ongoing engineering services, and specifically designing and implementing water and wastewater system improvements. The court did not find that delegation existed due to a *complete* assumption of the city's duties. Rather, it found that, "[i]n evaluating the need for

system improvements, in developing funding priorities that could shape the City's budget, as well as in acting as the City's representative in the improvement project, [the engineering firm] was 'acting on behalf of a public agency.'" *Id.* at 22.

Similarly, in *Putnam County Humane Society*, the court found that the County's Humane Society – a private organization – was subject to the PRA because it performed a governmental function in "exercise[ing] its investigative power, and the right to remove animals." 740 So. 2d at 1240.[12] The court opined that the investigation of a criminal act pursuant to authority granted by statute "is the performance of a public function. To hold that the Public Records Act is not applicable to this type of investigation would improperly result in the avoidance of disclosure through a delegation 'to a private entity that which otherwise would be an agency responsibility.'" *Id.* Far from taking on the *entire* governmental function of "protecting children and animals or preventing any act of cruelty thereto," the Humane Society performed a small but essential portion of the government's total

[12] This power was exercised under Fla. Stat. § 828.03, which provides, in pertinent part:

> Any county or any society or any association for the prevention of cruelty to children or animals . . . may appoint agents for the purpose of investigating violations of the provision of this chapter or any other law of the state for the purpose of protecting children and animals or preventing any act of cruelty thereto.

Even though the statute authorizes, but does not compel, the Humane Society to perform the governmental function, the Court found this was immaterial to holding it subject to the PRA. *Id.* at 1239-40.

obligation. This was enough of a governmental delegation to hold the Society subject to the PRA.

Moreover, courts have held that private entities are subject to the PRA when their raison d'être is to serve a limited purpose on behalf of a public entity. The Third District Court of Appeal in *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302, for instance, found that a consulting firm retained by the county to oversee an airport expansion project was subject to the law. The court reasoned that the consulting firm received public funds, was performing services that were an integral part of the County Aviation Department's decision-making process,[13] had no independent offices and no other clients, and *was formed specifically to fill* the county-created consultant position. *Id.* at 305-06. It did not matter that the Department had not created the firm itself, but the fact that the firm

[13] Many Florida Attorney General opinions also reinforce the point that private entities are subject to the state's open government laws when they play an integral part of the public entity's decision-making process. *See*, *e.g.*, Sunshine Law, architectural review committee, Op. Att'y Gen. 99-53 (1999) (opining that an architectural review committee of a home owners' association was subject to all of Florida's open records laws because the committee, pursuant to county ordinance, was required to review and approve applications for the county building permits); Sunshine Law, Enterprise Florida, Inc., Op. Att'y Gen. 92-80 (1992) (finding that a recruitment company hired by a public entity's board of directors to conduct the search for an executive director was subject to the Sunshine Law because it was significantly participating in the board's decision-making process).

was specifically designed to fulfill the Department's duty was a significant factor in finding that the firm was performing a function on behalf of the public entity.[14]

C. The relationship between SMH and Appellees makes clear that Appellees are subject to the Public Records Law.

The instant case involves contractors providing services *on behalf of* a public entity rather than providing services *to* the public entity. To be sure, Appellees are not merely supplying SMH's surgical gloves, medications, or bedding supplies; nor are they providing attendant professional services that a hospital would ordinarily not perform on its own (e.g., accounting or legal services). Rather, Appellees are performing the core function of providing the actual emergency medical services to SMH's patients.

SMH is a public hospital, with a statutory duty to provide emergency services to the public.[15] To relieve itself of actually having to obtain the medical staff necessary to meet its mandate, the record shows SMH long ago decided to change policy and contract out its duty to hire and manage its emergency department physicians and mid-level staff exclusively to Appellees, and Appellees

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[14] *See also*, Op. Att'y Gen. 98-49 (1998) (providing that, where a county commission dissolved its Cultural Affairs Council and designated a private organization as the local arts agency, the private entity was subject to the Sunshine Law because the county played an integral part in its creation).

[15] Appellant cites several statutes in its appellate brief that require SMH to provide and manage emergency services, including § 395.1041, Fla. Admin Code R. 59A-3.255(6)(a) and (e). Appellant's Amended Brief at 30-31.

provide their services exclusively to SMH. Appellant's Amended Brief, at 2; R. at 1534. This dually-exclusive relationship has existed through various contractual agreements for almost 50 years. R. at 1537, ¶ 3. Appellees maintain offices only within SMH facilities; they do not derive any income except for services rendered at SMH facilities; and all of the facilities used by Appellees to render services are owned or operated by SMH. R. at 1534. SMH also exercises significant influence and control over Appellees' operations, including decisions regarding the firing of physicians and requiring Appellees to follow all SMH policies. R. at 1554-58, ¶ 67-79. Further, all records for services performed by Appellees contractually belong to SMH. R. at 1543, ¶ 30. In reality, Appellees have no reason to exist but for the arrangement they have with SMH. R. at 1537-38, ¶¶ 3-8.

SMH itself holds its emergency department units (staffed by physicians hired exclusively by Appellees) out to be a part of the public institution. A menu option on its website, listed as "Value of a Public Hospital," leads visitors to a webpage titled "A Public Hospital Serving Its Community," where SMH recognizes that the laws and regulations governing the hospital and elected officials include Florida's public records and open meetings laws. SMH, *A Public Hospital Serving Its Community*, https://www.smh.com/Home/About-Us/Value-of-a-Public-Hospital (last visited May 14, 2019). It lauds itself for offering the "greatest breadth and depth of inpatient, outpatient and extended care services,"

partially through its "*urgent care clinics* and physician groups." *Id.* (emphasis added). It highlights the benefits of being a public hospital, pointing out that it "continues to provide necessary services," including "the community's largest and most comprehensive spectrum of *emergency specialty care* available 24/7." *Id.* (emphasis added). It further claims that this is in stark contrast to "private hospitals [that] have eliminated services over the years or chosen not to offer essential programs." *Id.*

Taken together, these facts clearly establish that SMH has shifted its duty to perform the public function of providing emergency medical care to Appellees. And, at the risk of belaboring the point, "when a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity's performance of that duty become public records." *Weekly Planet, Inc. v. Hillsborough Cty. Aviation Auth.*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002). The trial court thus erred in its application of this standard because it presumed that there must be a "*complete assumption* of a governmental" agency's duties in order for a contracted-out private entity to be subject to the PRA. R. at 4807-08 (emphasis added). The law counsels otherwise, as the obligation to hire and manage ER doctors is indistinguishable from the general statutory duty to provide emergency care.

This link between medical care providers and medical care facility operators is recognized under tort agency theory. To that end, courts in Florida and nationwide have held that hospitals cannot escape liability for the tortious acts of physicians and staff by simply hiring independent contractors. These cases recognize the integral role played by physicians within the hospital's infrastructure. In the words of one court:

> The hospital itself has come to be perceived as the provider of medical services . . . [P]atients come to the hospital to be cured, and the doctors who practice there are the hospital's instrumentalities, regardless of the nature of the private arrangements between the hospital and the physician. Whether this perception is accurate seemingly matters little when weighed against the momentum of changing public perception and attendant public policy.

Bing v. Thunig, 143 N.E.2d 3, 7 (N.Y. 1957).

Florida's Second District Court of Appeal in *Roessler v. Novak*, 858 So. 2d 1158 (Fla. 2d DCA 2003), posited that SMH could be held vicariously liable for the tortious acts of one of its independently contracted radiologists if SMH had represented that the physician was its apparent agent. *Id*. at 1162. In its reasoning that certain circumstances would subject SMH to liability for the physician's acts, the court set out a familiar set of facts to be considered by a jury:

> Sarasota Memorial maintained a radiology department which was physically located within the hospital's grounds. Sarasota Memorial contracted with SMH Radiology Associates, P.A., for it to be the exclusive provider of professional radiological services at the hospital. Dr. Lichtenstein was an employee of SMH Radiology on the date he interpreted Mr. Roessler's scans. Neither Dr. Lichtenstein nor SMH

> Radiology had offices outside of Sarasota Memorial's hospital grounds. The radiologists employed by SMH Radiology, including Dr. Lichtenstein, worked at Sarasota Memorial to provide all professional radiological services twenty-four hours a day, seven days a week, to Sarasota Memorial's inpatients and outpatients.

Id.

Courts have also recognized that a major component of a modern hospital's business is its emergency department. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 793 (Ill. 1993). The ER and its physicians have been held to be an "inherent function" of the hospital, which is "a function without which the hospital could not properly achieve its purpose." *Beeck v. Tucson Gen. Hosp.*, 500 P.2d 1153, 1158 (Ariz. App. 1972). For example, in *Adamski v. Tacoma General Hospital*, 579 P.2d 970 (Wash. App. 1978), the plaintiff sued Tacoma General and one of its independent contractor emergency physicians for damages resulting from misdiagnosis and treatment of a hand injury. The court concluded that:

> [w]hen, in fact, the hospital undertakes to provide medical treatment rather than merely serving as a place for a private physician to administer to his patients, the physician employed to deliver that service for the hospital may be looked upon as an integral part of the total "hospital enterprise." In such cases, it should make no difference that the physician is compensated on some basis other than salary or that he bills his patient directly. These are artificial distinctions, the efficacy of which has long since disappeared and to the perpetuation of which [this court does] not subscribe.

Id. at 972.

In yet another case, *Jackson v. Power*, 743 P.2d 1376 (Alaska 1987), an independent contractor emergency physician allegedly committed malpractice while working at a hospital, leading to a patient's loss of both kidneys. The patient brought suit against the hospital and the doctor, arguing that the hospital should be found liable for the doctor's negligence under several theories, including that of apparent authority and nondelegable duty.[16] In deciding whether the hospital had a nondelegable duty, the *Jackson* court first evaluated whether the hospital had a duty to provide emergency services in the first place. The court considered that state regulations required the hospital to maintain a physician at all times available to respond to emergencies; accreditation standards required the hospital to have certain policies, procedures, and quality control mechanisms in place for its emergency department; and the hospital's bylaws provided for the establishment and maintenance of an ER. *Id.* at 1382-83. Based upon these facts, the court reasoned that it could not be questioned that the hospital had a duty to provide emergency department services, and that part of that duty included providing physician care in the emergency department. *Id*. at 1383. The court found that "[i]t is the hospital's duty to provide the physician, which it may do through any means at its disposal. The means employed, however, will not change the fact that the

[16] The non-delegable duty doctrine means that the party with such a duty may not absolve itself of liability by contracting out the performance of that duty. *See*, *e.g.*, *Payas v. Adventist Health Sys./Sunbelt, Inc.*, 238 So. 3d 887 (Fla. 2d DCA 2018).

hospital will be responsible for the care rendered by physicians it has a duty to provide." *Id.* at 1385.

A New York court similarly held:

> [T]he emergency room is an integrally related part of the full-service hospital. *The hospital may not pretend that this essential element of its public service treatment facilities is a separate entity*. Moreover, the nature of the situation when people turn to the hospital and its emergency room facilities for treatment is one fraught with crisis. People are often highly emotional. There frequently is no time to choose. Indeed, time is of the essence. The chances of going elsewhere for treatment are remote. Given the relationship of the emergency room to the full-service hospital and the crisis circumstances under which people seek emergency treatment, *public policy requires that the hospital not be able to artificially screen itself*.

Martell v. St. Charles Hosp. et al., 523 N.Y.S.2d 342, 351 (1987) (quoting *Hannola v. City of Lakewood*, 426 N.E.2d 1187, 1190 (Ohio App. 1980)) (emphasis added).

As these cases demonstrate, the functions of a public hospital's ER are too central to its mission and the parallel to the instant case is clear: when a public entity outsources essential functions public access to the related records follows.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the lower court's order.

Dated: June 3, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the eDCA filing portal and sent by electronic mail this 3rd day of June, 2019, to:

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Attorney

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

Undersigned counsel hereby certifies that this brief *amici curiae* is typed in 14-point (proportionately spaced) Times New Roman and otherwise meets the requirements of Florida Rule of Appellate Procedure 9.210.

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