IN THE SUPREME COURT OF FLORIDA

CASE NO. 66, 689

DCA CASE NO. 83-1445

DADE COUNTY, a political subdivision of the State of Florida, and the PUBLIC HEALTH TRUST OF DADE COUNTY, FLORIDA, an agency and instrumentality of Dade County, Florida,

Petitioners,

v.

AMERICAN HOSPITAL OF MIAMI, INC., a Florida corporation,

Respondent.

REPLY BRIEF OF PETITIONERS ON THE MERITS ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

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I.

INTRODUCTION

In this Brief, the parties will be referred to as Petitioners and Respondent, respectively, and alternatively, by name. Jackson Memorial Hospital will be referred to as "Jackson." The symbol "DEP." will be used to designate the deposition of Fred J. Cowell, the Chief Executive Officer of the Public Health Trust, and the symbol "BR." will be used to designate American's Answer Brief. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

FACTS

American has selectively quoted portions of the record without including other relevant portions of the record on the same point, thereby, giving a distorted version of the facts. American has also based a substantial portion of its Brief upon the allegations in its Complaint and has liberally argued facts not included in the record.

American asserts that Mr. Cowell stated in deposition that Jackson's charge from Dade Board of County Commissioners is to treat indigents (BR. 6). Mr. Cowell stated that Jackson was established to provide medical care to indigents as well as other Dade County citizens requiring its services, but only to the extent of available resources (DEP. 17-18, 29, 33-34, 42, 59).

Mr. Cowell also stated that Jackson was attempting to increase the number of private patients because in recent years, the number of private patients has been decreasing. Revenue from private patients allows Jackson to provide additional medical care for more indigents (DEP. 72-73, 137, 67-68).

Citing no portion of the record, American states that non-emergency indigents are accepted only when beds allocated for indigency are available. Mr. Cowell stated that indigent patients receive priority status at Jackson (TR. 93).

Quoting from its Complaint, American states that Jackson refuses to accept transfers of post-emergency indigent patients from American (BR. 3). The record reveals that Jackson accepts between 75-80% of post-emergency patients from all forty (40) community hospitals, including American (DEP. 89, 94-95, 101-102, 136-137).

American cites one paragraph of Jackson's policy and procedure manual wherein Jackson states that it has a responsibility to accept transfers of indigent patients from community hospitals (BR. 7, American's Appendix, page 36). In the same paragraph, Jackson also recognizes a responsibility to accept chronically ill, non-indigent patients who cannot be treated at any other hospital in the County. Paragraph 5 of that same document limits the responsibility to accept transfers of patients to available beds and to patients whose medical condition

will allow transportation. (See Also pages 89 and 95 of Deposition of Fred Cowell wherein Mr. Cowell stated that a transfer patient will be accepted if there is an available bed).

Dade County and the Public Health Trust agree with American's summarization of the Petitioners' position that there is no constitutional, statutory or common law duty compelling Jackson to accept all requests for transfers from American or any other hospital. The record reflects that Jackson does immediately accept between 75-80% of all transfer requests, including patients from American, and those that it cannot immediately accept, are rostered and admitted into Jackson as soon as possible (DEP. 101-102, American's Appendix, page 36).

III.

SUMMARY OF THE ARGUMENT

1. Section 125.01(4), Fla. Stat. (1957), which once obligated counties to provide medical care for indigents, has been replaced by Section 125.01(e), Fla. Stat. (1983), which grants each county the power to establish hospitals and other health and welfare programs.

There is nothing in the record defining "indigency" or the identity of those patients who do not qualify for governmental funded programs. Moreover, there is no authority which requires county government to reimburse private hospitals for medical care rendered to county residents in a hospital in that same county.

2. When a governmental agency provides a service to its residents pursuant to discretionary authority, the service provided pursuant to the power does not become a duty. Even if the exercise of discretionary power becomes a duty, there is no legal basis for that "assumed duty" to be expanded by judicial intervention.

3. In Article XII, Section 10 of the 1968 Constitution, those 1885 constitutional provisions converted to statutes were to be repealed in the same manner as other statutes. One method of repeal established by the Legislature is that any statute not included in the Official Florida Statutes is automatically repealed.

Many of the former 1885 constitutional provisions were re-enacted and included in the Official Statutes and many were not. Article XIII, Section 3 has never been re-enacted by the Legislature. By being excluded from the Official Statutes, Article XIII, Section 3 has been repealed.

4. If extant, Article XIII, Section 3 of the 1885 Constitution requires legislative initiative to impose a duty on county government to provide medical care for indigents. The phrase "[T]he respective counties of the state shall provide in the manner prescribed by law," establishes a condition precedent by which counties are obligated to provide medical care for indigents only upon enactment of implementing legislation.

5. The Public Medical Assistance Act requires contributions from the state, counties and public and private hospitals to reimburse hospitals for losses incurred by rendering medical care to indigents. There is no authority which allows a private hospital to either choose between requesting funds from the Public Medical Assistance Act or requesting funds from county government for unreimbursed medical care provided to indigents.

ARGUMENT

A.

THE EXERCISE OF A DISCRETIONARY POWER BY COUNTY GOVERNMENT DOES NOT EXPRESSLY MAKE SAME AN OBLIGATION OR DUTY

American concedes in its Brief that, Section 125.01(4), Fla. Stat. (1957), which once obligated counties to provide medical care for indigents has been repealed, and, the new statute, Section 125.01(e), Fla. Stat. (1983), grants counties the power to establish hospitals and other health and welfare programs (BR. 19). American contends that since the power has been exercised for many years, Dade County assumed a duty to continue that duty as a matter of law.

This Court in Cleary v. Dade County, 37 So.2d 248, 251 (1948), distinguished between power and duty thusly:

> Section 3(e) of the Charter of the City of Miami provides as follows: "The City of Miami shall have the power to provide for the care, support and maintenance of the orphan, dependent, delinquent or defective children, and of sick, aged, insane or indigent persons."

> This section of the charter empowers or authorizes the City "to provide for the care, support and maintenance *** of sick, aged, insane or indigent persons" and does not expressly make same an obligation or duty of the City.

This Court neither in Cleary, nor any other case, has held that when a governmental entity exercises a discretionary function, it assumes a duty to continue that function. In Cleary, this Court considered and rejected the contention of a private citizen that the City of Miami was powerless to transfer Jackson because the City of Miami which had exercised a power over a number of years could not abandon that irrevocable duty. This principle was clearly articulated in Burton v. Dade County, 166 So.2d 445, 447 (Fla. 1964):

> In the absence of some specific constitutional or legislative mandate, we are not aware of any rule that would compel the expenditure of county funds in any particular area of the county or for the benefit of any particular segment of the citizenry. County funds, generally, may be used to accomplish any legitimate county purpose....The mere fact that the expenditure will benefit all of the people of the county instead of those in a selected area, will not of itself destroy the validity of an otherwise legitimate county expenditure.

Assuming arguendo, that whenever a governmental agency exercises a discretionary power, it inexorably becomes a duty, local governments would have the power to initiate but not not the power to withdraw from governmental programs. It must follow that the level of service assumed, becomes the precedent for that particular

function. In the lower courts, American sought to have that "assumed duty" expanded and enlarged by judicial intervention. There is no precedent in law or fact that compels a governmental entity to continue a discretionary function in perpetuity, and to be subject to ever-increasing demands pursuant to the exercise of that discretionary function. Where a municipal corporation is duly authorized to exercise a particularly municipal function, and the manner of the exercise of the authority is not defined by statute but is left to the city council, the courts will not undertake to control the manner of the exercise by the city council if no applicable rule is violated and the authority is not exceeded or abused. 12 Fla. Jur. 2d Counties, Section 86.

B.

ARTICLE XII, SECTION 10 OF THE 1968 CONSTITUION REQUIRED FORMER PROVISIONS OF THE 1885 CONSTITUTION TO BE REPEALED AS OTHER STATUTES

American concedes that Section 11.2422, Fla. Stat. (1983) is a reviser's statute capable of repealing statutes enacted by the State or by the territory of Florida. Article XII, Section 10 of the 1968 Constitution states in part that the former provisions of the 1885 Constitution "shall become statutes subject to modification or repeal as are other statutes."

The framers of the 1968 Constitution never intended the new statutes to come within the ambit of Section 11.2422. But rather, Section 11.2422 is and always

has been a statutory guide for the newly created statutes. Section 11.2422 simply states that if provisions are not included in the Official Florida Statutes, they stand repealed. There are no statutes in Florida except those enacted by the Legislature of Florida or by constitutional mandate. That is, if statutes enacted by the Legislature are repealed by deletion, then the new unnumbered statutes must be repealed in the same manner.

This view is buttressed by the Legislature's re-enactment of some, but not all, of the newly created statutes.[1/] (See Also the revisers' notes at the end of each biennial tracing table of the 1885 Constitutional provisions, stating that some provisions of the 1885 Constituion were re-enacted as statutes, and some were not. Article XIII was not re-enacted and included in the Official Florida Statutes.)

C.

ARTICLE XIII, SECTION 3 OF THE 1985 CONSTITUTION, IF EXTANT, DOES NOT IMPOSE ANY OBLIGATION ON COUNTY GOVERNMENT UNTIL THE LEGISLATURE ENACTS IMPLEMENTING LEGISLATION

In construing Article XIII, Section 3, American asserts that the statutory command to provide indigent care creates an absolute duty on counties to provide universal

1/ This Court can take judicial notice that some provisions of the 1885 Constitution were re-enacted with language identical to the language employed as Constitutional provisions. Other provisions were re-enacted with minor changes but having identical meaning and intent.

care for indigents. That only the manner in which that duty is to be discharged is left to be prescribed by law. A fair reading of the Article reveals that the duty and the extent of that duty are so inextricably woven, that the duty is created when, and only when, the Legislature enacts implementing legislation:

> The respective counties of the state shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity, or misfortune, may have claims upon the aid and sympathy of society; provided, however, the Legislature may by general law provide for a uniform state-wide system for such benefits, and appropriate money therefor...2/

Prescribe is defined as "to write at the beginning, order, direct, prescribe; to lay down authoritatively as a guide, direct; to describe in advance." Webster's New International Dictionary 3rd Ed. The Legislature, in its discretion, has enacted a uniform statewide Medicaid program for indigents of this State, the latest enactment being the Public Medical Assistance Act. Sections 409.266(6)(a)(b)(c)(1)(2)(3)(d), Fla. Stat. (1984); 395.101, Fla. Stat., 154.32 et. seq., Fla. Stat. (1984).

By implication, American asserts that the Legislature has created two classes of indigents; one group

2/ Article XIII, Section 4 provides further indication of the need for implementing legislation to impose a duty on county governments pursuant to Article XIII, Section 3. "The first Legislature that convenes after the adoption of this Constitution shall enact the necessary laws to carry into effect the provision of this Article."

of indigents eligible for medical assistance under the well-defined Public Medical Assistance Program in which the State, the counties and public and private hospitals donate funds for its implementation, and an undefined group of indigents who must seek medical assistance in unspecified amounts from the counties. Even if American's premise is correct, there is no authority which imposes on county government an obligation to define indigency more liberally than the State.[3/]

D.

THE LEGISLATURE HAS ENACTED LEGISLATION TO REIMBURSE PRIVATE HOSPITALS FOR TREATING INDIGENT PATIENTS

American correctly states that apart from emergencies, those hospitals choosing not to participate in Medicaid or the Public Medical Assistance Act are not reimbursed for its losses.

There is nothing in the record that reflects that American is ineligible to participate in these medical reimbursement programs. In fact, the record reflects that American participated in Medicaid until the time it brought the instant litigation in the trial court.

3/ Even where there is a clear duty to provide care for indigents who receive medical care in another county under the Health Care Responsibility Act, a county's eligibility standards need not exceed the indigency income standard set by the State of Florida. Fla. Admin. Code Rule 10C-26.06(3)(c)(4).

The Public Medical Assistance Act, emphatically states that its purpose is to reimburse hospitals in this State for unreimbursed losses for providing health care for indigents. There is no authority which allows American, or any other hospital similarly situated to choose between participating in State programs or seeking reimbursement by billing counties.

CONCLUSION

Section 125.01(e), Fla. Stat. (1983) grants power to each county in Florida to provide hospitals in its discretion. Dade County owns Jackson, a 1250 bed hospital that seeks to serve as many indigents as possible. This service is in addition to its other obligations required by various statutes.

American has cited no constitutional, statutory or case law compelling Dade County to reimburse hospitals in Dade County for treating patients who American has considered to be indigents.

In the absence of such authority, the Petitioners respecfully request that this Court reverse the decision of the Third District Court of Appeal with appropriate instructions to enter a judgment for the Petitioners.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed to Darrey A. Davis, Esquire, Steel Hector and Davis, 4000 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2398; Thomsom, Zeder, Bohrer, Werth, Adorno and Razook, 1000 Southeast Bank Building, Miami, Florida 33131; Paul Curran, Esquire, 425 Park Avenue, New York, New York 10022; Kenny, Nachwalter & Seymour, 400 Edward Ball Building, 100 Chopin Plaza-Miami Center, Miami, Florida 33131; and Janet Lander, Assistant General Counsel, Government Center, Suite 423, 115 South Andrews Avenue, Fort Lauderdale, Florida 33301, this 31st day of May, 1985.

Respectfully submitted,

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