IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION ET AL. Appellants/Cross Appellees, v. ASSOCIATED INDUSTRIES OF FLORIDA, INC. ET AL. Appellees/Cross Appellants.	CASE NO. 86,213

AMICUS CURIAE BRIEF OF GOOD SAMARITAN AND ST. MARY'S HOSPITALS

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STATEMENT OF THE CASE

At issue in this appeal is the trial court's Final Order and Declaratory Judgment dated June 26, 1995 ("Order") granting, in part, the Plaintiffs/Appellee's Motion for Summary Judgment. As part of the Order, the trial court determined that the State's primary health care regulatory agency, the Agency for Health Care Administration ("Agency"), is unconstitutionally structured.

GOOD SAMARITAN HOSPITAL, INC. ("GOOD SAMARITAN") and ST. MARY'S HOSPITAL, INC. ("ST. MARY'S") are not-for-profit community hospitals serving the residents of Palm Beach County, Florida. As institutions that are affected, virtually on a daily basis, by decisions of the Agency, the hospitals are exceedingly concerned about the trial court's ruling that the Agency is structured in violation of the State Constitution. As a result, GOOD SAMARITAN and ST. MARY'S moved to appear in the present case and file a brief as amicus curiae.

SUMMARY OF ARGUMENT

The Agency is part of a larger effort to combat the rising cost of health care in the State of Florida and assure access to its residents. The Legislature found that the distribution of health care responsibilities among multiple agencies added excessive costs to the health care delivery system. As a result, the Agency was created to consolidate health care financing, data collection, and regulatory functions.

Today, the decisions of the Agency affect health care providers on a daily basis. Among its many functions, the Agency

is responsible for health professional boards, facility licensure and inspection (including hospitals, nursing homes, and adult congregate living facilities) and professional licensing and disciplinary actions involving doctors, nurses, dentists and other health care professionals. To permit the trial court's ruling to stand therefore would result in unprecedented confusion within the health care industry.

Several grounds exist for reversal. As a preliminary matter, the trial court violated its duty to construe the provisions of the statute creating the Agency in accord with the provisions of the Constitution. As demonstrated by the Agency in its brief, the Agency may be construed to be a permissible executive department. Consequently, the trial court's ruling is in error.

Even if the Agency could be found impermissibly structured, the trial court erred in failing to sever those portions of the statute that created the Agency within another department and enforce the remaining unchallenged provisions. Included within the findings and intent of the Legislature's plan for health care reform, the Legislature clearly sought to create a single state agency to be responsible for all health related matters, and further expressed the intent to sever any provisions of the plan which might be found unconstitutional. Applying this intent, and the test for severability previously established by this Court, leads to the conclusion that the trial court erred in failing to sever language which would permit the Agency to operate independently, rather than return the State to the disjointed

structure which the Legislature found unacceptable.

Finally, severing any offending language and permitting the Agency to operate independently would not violate the twenty-five department limit within the Constitution. Even assuming the limit had been reached when the Agency was established, a decision by this Court to sever any offending portions of the statute creating the Agency should operate prospectively only, at a time when the twenty-five department limit has clearly not been reached.

For these reasons, GOOD SAMARITAN and ST. MARY'S respectfully request that this Court reverse the trial court's order finding that the Agency was unconstitutionally structured.

ARGUMENT

1. INVALIDATION OF AGENCY WOULD SIGNIFICANTLY IMPACT FLORIDA'S HEALTH CARE DELIVERY SYSTEM

The Agency for Health Care Administration ("Agency") was created in 1992 as part of a joint legislative and executive effort to combat the rising cost of health care and assure access to health insurance. Ch. 92-33, §1, Laws of Fla. By 1992 the cost of health care in the state of Florida had spiraled out of the reach of the average resident. After spending more than $32 billion on health care in 1992, increasingly residents were exposed to rising costs due to their inability to afford health insurance. At least 2.5 million Floridians, almost 20% of the state's population, were uninsured and many others had inadequate insurance to pay the bills when illness or injury occurred. Ch. 92-33, §3, Laws of Fla. Florida also faced a growing number of unemployed, part-time, and seasonal workers who were commonly

excluded from employer based health insurance coverage. Id.

With the need for change apparent, in 1992 at the urging of Governor Chiles the Legislature passed the Health Care Reform Act of 1992 ("Act") and the Florida Health Plan (the "Plan"). The Act and Plan were part of an ambitious attempt to reform the health care delivery system by providing access to basic health services for all Floridians, reforming the health insurance system, limiting health care cost increases to manageable levels, restructuring health regulation, and establishing a comprehensive health care data system. Id.

Assessing health care cost, financing, access, and quality, the Legislature found that the distribution of health care responsibilities among multiple state agencies added excessive costs to the health care delivery system. As a result, a special work group recommended that:

> [a] single authority or department of state government should be responsible for health policy development and the current functions of the Certificate-of-Need, the Health Care Cost Containment Board, and professional and facility regulation in coordination with the Department of Insurance, which should certify and regulate plans offering health care coverage in Florida.
>
> Quoted in House of Representatives Committees on Insurance Health Care Final Bill Analysis & Economic Impact Statement, dated May 14, 1992

Based upon this recommendation, the Legislature created the Agency to consolidate health care financing, data collection, and regulatory functions.

Although placed within the Department of Business and Professional Regulation, the Agency is a separate budget entity headed by its own independent director who answers to the

Governor. Ch. 92-33, §1, Laws of Fla. Under the command of the director, the Agency is responsible for health related professional boards, facility licensure and inspection, certificates of need, health policy and planning, the administration of the Medicaid program, the activities of the Health Care Cost Containment Board, and state health purchasing. Id.

Since its inception in 1992 the responsibilities of the Agency have steadily increased. In 1993 the Legislature gave the Agency regulatory authority over nursing homes, adult congregate living facilities and home health agencies. Ch. 93-129, Laws of Fla. In 1994 the Agency assumed licensing and disciplinary power over doctors, nurses, dentists and other health care professionals. Ch. 94-218, Laws of Fla.

Today, the decisions of the Agency affect each and every health care provider in the State of Florida on a daily basis. The Agency has reviewed over 1,078 applications for certificates of need and granted approvals for capital expenditures exceeding $1 billion. In addition, the Agency regulates 325 hospitals, 677 nursing homes and a staggering 353,635 health care practitioners. Finally, the Agency must coordinate over $6 billion of Medicaid allocations each year.

Upholding the trial court's ruling that the Agency is unconstitutionally structured would call into question, among other actions, the validity of:

- The licenses of each and every hospital and nursing home in the state of Florida;

- Every certificate of need issued (or denied) by the Agency;
- The approval of each hospital budget since the Agency's inception;
- The administration of over $19 billion of Medicaid funds; and
- Every license issued to and professional disciplinary action taken against health care professionals since July 1, 1994.

The resulting confusion could have significant adverse effects on Florida's health care delivery system. Health care facilities which question the validity of their license might be forced to close, or curtail all but emergency services, to avoid the potential for liability. The construction of projects based on previously issued certificates of need might come to a halt. Coordinated health care delivery by rural health care networks might be threatened due to concerns over the removal of the antitrust protection provided by the Agency.

In short, Florida's health care delivery system could be thrown into absolute turmoil, leaving the residents of Florida in a position far worse than that which the Governor and Legislature found unacceptable in 1992. Several independent grounds justify reversal of the trial court's finding to avoid such a clearly undesirable result.

2. THE TRIAL COURT IMPROPERLY RULED THAT THE AGENCY IS UNCONSTITUTIONALLY STRUCTURED.

In finding the structure of the Agency unconstitutional, the trial court failed to follow the principles of statutory

construction. The Appellees argue that the structure of the Agency violates Article IV, §6 of the Florida Constitution because the functions of the Agency are not allotted to an executive department. As a result, the Appellees assert that the Agency is an impermissible "hybrid" which is neither an executive department nor under the direct control of such a department.

Apparently adopting this argument, the trial court's Order ruled in pertinent part that:

> The Agency for Health Care Administration ("AHCA") was created "within" the Department of Business and Professional Regulation ("DBPR") but AHCA is not subject to the "control, supervision, or direction" of DBPR. §20.42, Fla. Stat. (1993). A "function" cannot be "allotted" to a department if the department has no control over that function. Since DBPR has no control or supervision over AHCA, AHCA is unconstitutionally structured in violation of the 25 department limit of Article IV, §6 of the Florida Constitution.

The trial court's interpretation of §20.42, however, neglects the duty of the court to harmonize statutory provisions with those of the Constitution.

Legislative statutes are presumed constitutional. As a result, it is the duty of the examining court, if reasonably possible, to construe them in harmony with the Constitution. Capital City Country Club v. Tucker, 613 So. 2d 448, 452 (Fla. 1993)("[i]f it is reasonably possible to do so, we are obligated to interpret statutes in such manner as to uphold their constitutionality")(emphasis added).

As demonstrated by the Agency's brief, with which GOOD

SAMARITAN and ST. MARY'S are in accord and adopt by reference, the Agency may reasonably be interpreted to be an executive department. Consequently, the trial court's ruling that the Agency is unconstitutionally structured is in error and must be reversed.

3. THE TRIAL COURT IMPROPERLY FAILED TO SEVER OFFENDING PORTIONS OF AGENCY STATUTE AND ENFORCE REMAINING TERMS

Even if the structure of the Agency could be found unconstitutional, the trial court should have only stricken those portions of the creating statute (Ch. 92-33, §1, Laws of Fla., codified as §20.42, Fla. Stat.) which it found offensive and enforced the remaining provisions. While statutory construction which calls for the addition of phrases or judicial rewriting is prohibited, offending words and provisions, whenever possible, should be severed to preserve the constitutionality of a statute. Schmitt v. State, 590 So. 2d 404 (Fla. 1991).

This mandate is even stronger in the presence of a severability clause. A severability clause indicates that in the event of an invalidation of unconstitutional provisions of a statute the remaining independent and constitutional provisions shall remain valid. State v. Tirohn, 556 So. 2d 447, 449 (Fla. 5th DCA 1990). While "the absence of a severability clause does not prevent the Court from exercising its inherent power to preserve the constitutionality of an Act by the elimination of invalid clauses," Tirohn, 556 So. 2d at 449, "[a] legislatively expressed preference for severability of voided clauses, although not binding, is highly persuasive." St. Johns County v. N.E. Fla. Builders, 583 So. 2d 635 (Fla. 1991).

In examining the issue of severability, this Court has consistently applied the four part test set forth in Cramp v. Board of Public Instruction of Orange County, 137 So. 2d 828 (Fla. 1962); see, Schmitt v. State, 590 So. 2d 404, 415 (Fla. 1991); Waldrup v. Dugger, 562 So. 2d 687, 693 (Fla. 1990); Smith v. Department of Insurance, 507 So. 2d 1080, 1089 (Fla. 1987). Under Cramp,:

> When a part of a statute is declared unconstitutional, the remainder of the Act will be permitted to stand provided:
>
> > 1) the unconstitutional provisions can be separated from the remaining valid provisions,
> >
> > 2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void,
> >
> > 3) the good and bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and,
> >
> > 4) the act complete in itself remains after the invalid provisions are stricken.

Cramp, 137 So. 2d at 830.

Applying the Cramp test requires examining not only the provisions of §20.42 (Ch. 92-33, §1, Laws of Fla.), but also the context of the comprehensive plan adopted by the Legislature in Chapter 92-33 ("Chapter"). Within Section 3 of the Chapter, the Legislature made specific findings and expressly stated its intent, including the desire to consolidate health care responsibilities into a single state agency. The Legislature found:

> that the distribution of health care responsibilities among multiple state agencies has added excessive costs to the health care delivery system. In order to reduce administrative costs and to improve the state's efficiency in addressing the health care crisis, it is the intent of the Legislature to consolidate health care financing, data collection, and regulatory functions into a single state agency. The Legislature intends that this single state agency serve the Governor and the Legislature in all health-related matters.
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> Ch. 92-33, §3, Laws of Fla. (emphasis added).

Also within the Chapter, the Legislature expressed an intent to sever any provisions which may be found unconstitutional while enforcing the remaining valid provisions. Section 150 of the Chapter provides:

> Severability:
>
> > If any provision of this act or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the act and the application of such provision to other persons or circumstances shall not be affected thereby.

With this context in mind, the Cramp test is easily satisfied. Under the first provision, reference within the preamble to §20.42 to the Department of Professional Regulation ("Department"), or its control, can be separated from the remainder of the section without affecting its validity or the creation and structure of the Agency. Presently, §20.42 provides:

> There is created the Agency for Health Care Administration within the Department of Professional Regulation. The agency shall be a separate budget entity, and the director of the agency shall be the agency head for all purposes. The agency shall not be subject to control, supervision, or direction by the Department of Professional Regulation in any

manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.

(emphasis added).

Severing the highlighted references to the Department would permit the Agency to operate on an independent basis. The ability to excise these provisions is supported by both the severability clause and the legislative intent under the Chapter to create one state agency, rather rather than return health care to its previous format.

Likewise, the second and fourth portions of the Cramp test are met. Within the Chapter, the Legislature expressed the intent to create a single state agency. Striking those provisions linking the Agency to the Department in no way violates the purpose of the remaining sections of the Chapter, which remain complete after this severance.

Finally, under the third test of Cramp, there is nothing to suggest that the absence of any reference to the Department would have deterred the Legislature from reforming the state's health care system. To the contrary, there is a strong evidence that the Legislature would have passed the Chapter without reference to the Department based upon its stated desire for a single independent agency to centralize all health care related functions.

The Cramp test therefore indicates that the trial court erred in failing to severe those portions of §20.42 which it found offending rather than ruling that the structure of the Agency was unconstitutional. As a result, the trial court's ruling must be reversed.

Reversal of the trial court's holding is also supported by Smith v. Department of Insurance, 507 So. 2d 1080 (Fla. 1987), an analogous case which, like the case at hand, involved a dramatic and much debated legislative reform. In Smith, this Court examined the constitutionality of several provisions of the 1986 Tort Reform and Insurance Act ("Reform Act"). Similar to the Health Care Reform Act of 1992 and the Florida Health Plan, the Reform Act was a sweeping legislative pronouncement. The preamble of the Reform Act included detailed legislative findings on the nature of the crisis, the dramatic increases in costs and the resulting inability of businesses to obtain insurance. Smith, 507 So. 2d at 1084.

In an effort to combat these problems, and reduce liability expenditures, Section 59 of the Reform Act established a $450,000 cap for recovery for noneconomic damages, such as pain and suffering. The cap was in turn challenged as an unconstitutional denial of access to the courts. After finding Section 59 unconstitutional, this Court turned its attention to whether it could be severed from the remaining portions of the Act.

Applying the Cramp test, the Court noted that:

> the legislature specifically stated that any provision of the act found to be invalid should be severed from the remaining sections of the act. Moreover, the sense of crisis and the need to meet that crisis expressed by the legislative preamble suggest that we should sever section 59 if need be. To declare the entire act unconstitutional would undo much of the work already accomplished and return the state to the condition which the legislature found unacceptable. We answer question one in the affirmative. We also answer question two and

> four in the affirmative. The portions of the statute which remain are viable and complete. We see no reason why the absence of section 59 should prevent the remaining portions of the act from having the ameliorative effect which the legislature sought and stated in the preamble to the act. As to question three, we conclude also, from an objective viewpoint, that there is a strong likelihood that the legislature would have passed the act without the inclusion of section 59. This conclusion is supported by the severance clause in the act. The legislature was faced with what it considered to be an insurance crisis. ... We hold that section 59 is severable from the remaining portions of the act.

Smith, 507 So. 2d at 1090.

The reasoning of the Smith case fully supports reversal of the trial court in the present case. As in Smith, in the case at bar the Legislature specifically stated that any provision of the Chapter found to be invalid should be severed from the remaining sections of the Chapter. Likewise, the sense of crisis in the health care industry and the need to meet that crises was expressed by the Legislature in its findings of fact and intent, suggesting that placement of the Agency under the Department should be severed if need be. To declare the entire Agency invalid would be to undo much of the work already accomplished and return the state to the multiple agency condition which the Legislature found unacceptable.

Finally, those portions of the Chapter and §20.42 which remain are viable and complete. Nothing suggests that the absence of reference to the Department would prevent the remaining portions from having the effect which the Legislature intended. Moreover, there is a strong likelihood that the Legislature would have

passed the act without mention of the Department. As a result, the trial court erred in its finding that the Agency is unconstitutionally structured and must be reversed.

4. **SEVERING THE AGENCY FROM THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION DOES NOT VIOLATE LIMIT ON EXECUTIVE DEPARTMENTS**

Severing any reference to the Department from §20.42, and permitting the Agency to operate as a separate entity does not violate the constitutional limitation on the number of executive departments. As noted, the trial court held that the Agency was "unconstitutionally structured in violation of the 25-department limit of Article IV, §6 of the Florida Constitution." While the trial court did not elaborate, implicit in this finding is the belief that at the time of the Agency's creation in 1992 the twenty-five department limit had already been reached. However, even if the Agency for Health Care Administration were considered a department, it would not violate the limitation found in Article IV, Section 6.

As a preliminary matter, Article IV, §6 does not limit the number of executive departments to twenty-five. Rather, the Constitution provides:

> All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for and authorized in this constitution.

Article IV, §6, Fla. Const. (emphasis added).

The language of the Constitution itself is unclear as to whether the use of the word "those" refers to departments or functions.

Research reveals that no case law specifically addresses the 25-department limitation, and this Court has not had occasion to construe the language.

In light of the fact that there were no entities specifically delineated as "departments" in the 1968 Constitution, it would appear that those "functions" specifically provided for or authorized in the new Constitution were intended to be excluded. Accordingly, any count of "departments" should not include those departments whose functions are authorized or provided for in the Constitution.

Using this "functional" analysis, a number of "departments" referenced in Chapter 20 of the Florida Statutes, which sets forth the organizational structure of the Executive Branch,[1] would not be included within the 25-department limitation. The excluded entities that would include: the Department of the Lottery (Article X, §15); the Department of Military Affairs (Article X, §2); the Parole Commission (Article IV, §8); the Game and Freshwater Fish Commission (Article IV, §9); the Department of Veteran's Affairs (Article IV, §11); the Department of Elderly

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[1] The Attorney General has opined that the Board of Trustees of the Internal Improvement Fund and the Department of Militia are executive branch departments. See, Op. Att'y Gen. Fla. 72-153 (1972); Op. Att'y Gen. Fla. 74-291 (1974). Whether the Board of Trustees may be a department after the enactment of Chapter 75-22, 1975 Laws of Florida, wherein the Trustees were merged into the Department of Natural Resources, is questionable. Moreover, as demonstrated, even if these agencies may be considered executive branch "departments," they are not subject to the 25-department limitation since they are expressly provided for within the Constitution.

Affairs (Article IV, §12); the State Board of Administration (Article XII, §9); and the Board of Trustees of the Internal Improvement Fund (Article X, §11). Consequently, the Agency for Health Care Administration would fall well within the 25-department limitation contained in Article IV, §6.

Even if the Court rejects this analysis and proceeds on the assumption that twenty-five departments existed at the time of the creation of the Agency, severing the Agency from the Department would not violate the executive department limit since severance should operate on a prospective basis only.[2]

In determining whether a statute is void ab initio or only upon declaration by the court, this Court has consistently examined two factors: 1) whether constitutional authority, or power existed for the enactment of the statute (the absence of which results in a statute being inoperative from the time of its enactment) or whether merely the form of the enactment was

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[2] Severance today would clearly not violate the 25-department limit. The 1992 Legislature merged the Department of Administration and the Department of General Services (effective January 1, 1993). See, Ch. 92-279, §4, Laws of Fla.; Ch. 92-326, §55, Laws of Fla. In 1993 the Department of Natural Resources and the Department of Environmental Regulation were merged to form the Department of Environmental Protection and the Department of Business Regulation and the Department of Professional Regulation were merged to form the Department of Business and Professional Regulation. See, Ch. 93-213, Laws of Fla.; Ch. 93-220, Laws of Fla. Since these three mergers, only one new executive department, the Department of Juvenile Justice, has been created. See, Ch. 94-209, Laws of Fla. At no time since have more than 25 departments existed, even if the Agency were considered an executive department.

improper (resulting in a prospective only application); and 2) whether a retroactive determination of unconstitutionality would result in undue hardship. See, Martinez v. Scanlon, 582 So. 2d 1167, 1174 (Fla. 1991). See also, City of Miami v. Bell, 634 So. 2d 163 (Fla. 1994); Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973) (affirming trial court's ruling that retroactive application would work great hardship); Interlachen Lakes Estates, Inc. v. Snyder, 304 So. 2d 433 (Fla. 1973) (due to reliance on statute regarding taxing of plotted land, court's decision would operate prospectively from date of opinion).

In the present case, there is no challenge to the Legislature's power to enact the provisions of the Chapter and §20.42. At most, only the form of the Legislature's actions are questioned. As a result, any severance made by the Court should be prospective only.

The prospective nature of a severance is further supported by the potential hardship which could result from a retroactive determination of the unconstitutionality of the Agency and §20.42. A decision that the Agency was improperly created in 1992 could result in significant hardship, if the Court also found that twenty-five executive departments subject to the Constitutional "cap" existed at that time. Not only would the powers and duties of the Agency revert to the inefficiency of multiple departments as a result of such a ruling, but also each of the Agency's innumerable decisions made since its inception would be called into question. Clearly, to avoid even the possibility of such

substantial hardship, severance by the Court of those provisions linking the Agency with the Department should be effective on a prospective basis only.

CONCLUSION

For the reasons set forth above, ST MARY'S and GOOD SAMARITAN respectfully request that this Court find that the Agency was properly organized from its inception and reverse the trial court's order finding that the Agency was unconstitutionally structured. Alternatively, if the Court finds that the Agency's structure is constitutionally suspect, GOOD SAMARITAN and ST. MARY'S request that the offending provisions of the Chapter and §20.42 be severed and the Agency's status and operations be confirmed as proper and constitutional.

Respectfully submitted,

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