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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE

LEE MEMORIAL HEALTH SYSTEM,

Appellant,

v. CASE NO.: SC17-1993

PROGRESSIVE SELECT INSURANCE COMPANY,

Appellee.
_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL SECOND DISTRICT OF FLORIDA

SAFETY NET HOSPITAL ALLIANCE OF FLORIDA'S AMICUS BRIEF IN SUPPORT OF APPELLANT LEE MEMORIAL HEALTH SYSTEM

David A. Wallace
Florida Bar No. 0608386
BENTLEY & BRUNING, P.A.
783 S. Orange Avenue, 3rd Floor
Sarasota, Florida 34236
Telephone: 941-556-9030
Email: dwallace@bentleyandbruning.com

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STATEMENT OF AMICUS CURIAE'S IDENTITY AND INTEREST IN THE CASE

The Safety Net Hospital Alliance of Florida is a statewide organization whose members include Florida's largest and most prominent public, teaching, children's and regional perinatal care hospital systems.[1] As its name suggests, the fourteen Safety Net Alliance member hospital systems together form the primary "safety net" for Florida's citizens by providing essential medical services such as highly-specialized tertiary care, neonatal and adult intensive care, trauma care, and training of tomorrow's physicians and nurses, all while providing the highest quality of care to all patients, regardless of their insurance status or ability to pay.[2]

The member hospital systems represent only 10% of all Florida hospitals, but are responsible for 25% of statewide hospital admissions, 40% of charity care, 40% of Medicaid days, 70% of Level I trauma care, and 75% of pediatric trauma care.

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[1] Broward Health, Halifax Health, Jackson Health System, Johns Hopkins All Children's Hospital, Lee Health, Memorial Healthcare System, Mount Sinai Medical Center, Nicklaus Children's Hospital, Orlando Health, Sacred Heart Health System, Sarasota Memorial Health Care System, Tampa General Hospital, UF Health Jacksonville, and UF Health Shands Hospital.

[2] safetynetsflorida.org

The Safety Net Alliance member hospital systems bear the disproportionate burden of 39% of the statewide bad debt for hospital care.[3]

Some of the Safety Net Alliance member hospital systems were created by special act of the Florida Legislature, like the Appellant Lee Memorial Health System, and have lien authority pursuant to those special acts.[4] Some of the Safety Net Alliance members are public hospitals, while others are private not-for-profit hospital systems which have lien authority pursuant to local ordinances, for example UF Health Shands Hospital.[5] The granting of lien authority by state and local governments evidences a recognition at all levels of government that lien laws help hospitals to serve the public purpose of providing quality health care to the communities they serve.

The Safety Net Alliance has a substantial interest in this case because the outcome has a direct impact on its member healthcare systems' ability to fulfill their mission. The Second District Opinion on review holds Lee Memorial's lien authority

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[3] All calculations based on 2016 data from the Florida Agency for Health Care Administration ("AHCA"), Florida Center for Health Information and Transparency. *See* https://ahca.myflorida.com/; https://ahca.myflorida.com/MCHQ/Central_Services/Financial_Ana_Unit/fa_data/docs/FHURS_MANUAL_Jan-2010.pdf

[4] *See, e.g.,* Sarasota County Public Hospital District, Ch. 2003-359, Laws of Florida; Lee Health, Ch. 2003-439 Laws of Florida.

[5] *See, e.g.,* City of Jacksonville, Fla., Code § 482-103 (UF Health Jacksonville); Alachua County, Fla., Code § 81-03 (UF Health Shands Hospital).

to be unconstitutional under both Article III, Section 11(a)(9) of the Florida Constitution (as a special law allowing for the imposition of a lien based on a private contract) and Article I, Section 10 of the Florida Constitution (as impairing the insurance contract between Progressive and its insured). Therefore, the outcome of this case will impact all of the Safety Net Alliance hospital systems with lien authority, not just those whose lien authority arises from a special act.

SUMMARY OF ARGUMENT

The Second District's Opinion impairs the ability of the Safety Net Alliance member hospital systems to fulfill their shared mission of providing the highest quality healthcare to Florida's neediest citizens. Hospital lien laws and ordinances are long-standing and essential reimbursement recovery procedures used by hospital systems such as those in the Safety Net Alliance to recover costs provided to patients without the ability to pay for unreimbursed expenses incurred during the provision of care. The loss of the hospital lien authority as a mechanism of reimbursement recovery could lead either to diminished scope and quality of safety net hospital services or the need to recover the lost reimbursement from other sources.

Hospital lien laws and ordinances are consistent with the clear legislative and local government intent to provide a reasonable framework within which a hospital can seek reimbursement from the party responsible for the injuries to a patient resulting in bodily injuries requiring hospital medical services. The liens only impact settlement proceeds so that the hospitals are paid for the care giving rise to the injury giving rise to the settlement.

The Second District erred in finding Lee Memorial's lien law to be an unconstitutional impairment of the contract between Progressive and its insured under Article I, Section 10 of the Florida Constitution. The ruling has a far-reaching impact on Safety Net Alliance hospitals and the people they serve. It effects all

Florida hospitals with lien authority, not just those whose lien authority is derived from a special act of the Florida Legislature, but also potentially those whose lien authority derives from local ordinances.

That an issue of this significance would be decided without having been fully litigated before either the trial court or the Second District, and without the Attorney General having an opportunity to participate, is of particular concern to the Safety Net Alliance. Because Progressive failed to serve the proper notice under Florida Rule of Civil Procedure 1.071, and the issue was not argued or briefed in the appeal, the issue was not properly before the Second District.

The Court also erred in its substantive ruling on the impairment of contract issue. Article I, Section 10 of the Florida Constitution applies when a new law is passed that impairs a pre-existing contract. Article I, Section 10 does not apply here, because the special act giving rise to Lee Memorial's lien authority was in existence prior to the contract alleged to have been impaired. Even the cases cited by the Second District refer to subsequent legislation impairing a pre-existing contract.

Lee Memorial's lien authority from its special act does not violate Article III, Section 11(a)(9) of the Florida Constitution because the admissions form is not a private contract but rather a public contract. Like the other public hospital systems in the Safety Net Alliance, Lee Memorial is a public hospital with a public mission to provide quality healthcare to the public. When a public hospital system enters into

a contact to provide the very service that is the subject of the hospital system's public mission, that contract is a public contract.

ARGUMENT

I. THE LIEN LAW DOES NOT VIOLATE FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST LAWS IMPAIRING CONTRACTS

A. The Contract Impairment Issue Was Not Properly Before The Second District

In the trial court, Progressive did not serve the Attorney General of the State of Florida with the notice required under Florida Rule of Civil Procedure 1.071. Because the notice was not served, the trial court properly regarded the contract impairment issue as premature and did not rule on the substance of the issue. As a result, the case went on appeal on the other constitutional issue and was not briefed on the contract impairment issue in the Second District.

Rule 1.071 requires that the party seeking to have a statute declared unconstitutional "must promptly" file the required notice and serve the notice with the pleading on the Attorney General. *See* Fla. R. Civ. P. 1.071. The rule does not require joinder of the Attorney General, but rather gives the Attorney General the opportunity to appear and defend the constitutionality of the subject law. *See id.*

Recently, in *Shelton v. Bank of New York Mellon*, the Second District held it could not "consider the constitutional issue" that had been raised in an objection to a notice of foreclosure sale because the party had not complied with Rule 1.071. 203 So. 3d 1003, 1005 (Fla. 2d DCA 2016). Additionally, in *Diaz v. Lopez*, the Third District explained "[t]he Florida Rules of Civil Procedure contain specific requisites

for constitutional challenges, which were not invoked below." 167 So. 3d 455, n.10 (Fla. 3d DCA 2015) (citing Fla. R. Civ. P. 1.071). As such, the Third District held that the constitutional issue "[was] not before [the Court]." *Id.* Therefore, because Rule 1.071 was not complied with in the trial court, the significant issue of the possible unconstitutionally of Lee Memorial's special act due to impairment of contract was not properly before the Second District and should not have been ruled upon.

This Amicus Brief primarily emphasizes public policy considerations relating more specifically to the hospital lien laws and the Safety Net Alliance member hospital systems, but the Second District's ruling on the contract impairment issue without the required notice having been served gives rise to two broader public policy concerns.

The first such public policy concern derives directly from the purpose underlying Rule 1.071. The Attorney General is required by law to be given notice when a party seeks to have a court declare a law unconstitutional so that the Attorney General has a meaningful opportunity to appear and defend the subject law. *See* Fla. R. Civ. P. 1.071; *Brinkmann v. Francois,* 184 So. 3d 504, 507 (Fla. 2016) (finding that "all procedural requirements were indeed satisfied, including proper notice being furnished to the Office of the State Attorney. . . . Therefore, the State was afforded a meaningful opportunity to intervene and be heard."). The Attorney

General did not have that opportunity here, but the Second District nevertheless ruled on the issue. If an appellate court can sua sponte rule on an issue without compliance with the rule, then Rule 1.071 is rendered meaningless.

The second public policy concern is simply that the Second District ruled on an issue that was not properly before the Court and was never briefed. In a concurring opinion in *Wright v. City of Miami Gardens*, Justice Canady explained that the "basic structure of the appellate process...depends on the presentation of issues and the marshalling of arguments by the parties...." 200 So. 3d 765, 780 (Fla. 2016) (Canady, J., concurring). In the instant case, the arguments that would have been briefed by Lee Memorial were not presented because the issue was not before the Second District on appeal. As Justice Canady further explained, "The damage is compounded when a court, sua sponte—without the benefit of any argument by the parties—declares a statute unconstitutional." *Id.* at 780-81. This is exactly what happened in this case. Further, if the issue was part of the Second District appeal this amicus party, and others, might have requested to be heard on the issue before that Court.

Ironically, Lee Memorial, and, by extension, the Safety Net Alliance, would have been better off had the trial court disregarded Rule 1.071 and ruled on the contract impairment issue, even if it ruled against Lee Memorial. Had that been the

case, at least Lee Memorial would have had the opportunity to fully brief the issue in the Second District and develop the argument on appeal.

An issue of this magnitude should not be decided without the Attorney General having the opportunity to participate and without having been fully vetted at all levels of the court system. While this principle should apply in all cases, it is particularly applicable here where the potential harm to the Safety Net Alliance hospital systems and their patients is so great.

Accordingly, the contract impairment issue was not properly before the Second District and the ruling on that issue should be reversed on procedural grounds.

B. Where the Law Preexists The Contract, There Is No Impairment Of Contract Under Article I, Section 10

The special acts or ordinances providing lien authority for Safety Net Alliance member hospital systems have been in place for years and in some instances decades. These lien laws pre-exist the annual insurance contracts between an insured and an insurer, and therefore do not unconstitutionally impair those subsequent insurance contracts.

Lee Memorial's Initial Brief addresses that the prohibition against the impairment of contracts in the Florida Constitution applies only to contracts existing at the time of the enactment of the challenged law. (I.B. pp. 14-15). Lee Memorial's argument will not be repeated here. The Safety Net Alliance adds to that argument

only to point out that even the authorities cited in the Second District Opinion support Lee Memorial's argument on this particular point.

The Second District cited to three cases in holding that Lee Memorial's special law unconstitutionally impaired Progressive's contractual rights with its insured in violation of Article I, Section 10: *Citrus Cty. Hosp. Bd. v. Citrus Mem'l Health Found.*, 150 So. 3d 1102 (Fla. 2014), *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978), and *Cohn v. Grand Cond. Ass'n., Inc.*, 26 So. 3d 8 (Fla 3d DCA 2009). *Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 230 So. 3d 558, 564 (Fla. 2d DCA 2017). Because the issue was not properly before the Second District on appeal, neither Lee Memorial nor Progressive cited to any of these cases in their briefs.

In *Citrus County*, this Court held that a special law violated a pre-existing contract because subsequent law had the effect of rewriting the pre-existing contract. 150 So. 3d at 1108. In *Cohn*, the Florida Legislature passed a law in 2007 that made retroactive a prior law relating to voting in condominium associations. 26 So. 3d at 9. The 2007 law was held to be an impairment of a pre-existing 1986 agreement. *Id.* at 10-11. In *Dewberry*, a law that took effect after a pre-existing insurance policy was held to be unconstitutional. 363 So. 2d 1077. In fact, the quotation in the parenthetical to the *Dewberry* citation in the Second District's Opinion actually includes the crucial language specifying that unconstitutional impairment of contract

turns on the legislation being subsequent to the contract: "It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution." *Lee Mem'l Health Sys.*, 230 So. 3d at 564 (quoting *Dewberry*, 363 So. 2d at 1080) (emphasis added).

Therefore, the Second District's ruling on the contract impairment issue should be reversed on substantive grounds, as well.

II. LEE MEMORIAL'S ADMISSIONS FORM IS A PUBLIC CONTRACT, NOT A PRIVATE CONTRACT

The Second District's ruling limits the term "public contract" to contracts between "a governmental entity and a private party to perform a task (such as construction) or for the provision of equipment, goods or services that is financed by public funds." *Lee Mem'l Health Sys.*, 230 So. 3d at 563. The Second District improperly concluded that "the admissions contract between a hospital, whether public or private, and its patient is a private contract." *Id.*

Five of the Safety Net Alliance member hospital systems are public, and those public hospital systems operate a total of fourteen public hospitals.[6] One example is the Sarasota Memorial Health Care System, operated by the Sarasota County Public Hospital Board, the governing body of the Sarasota County Public Hospital District. The Sarasota County Public Hospital District was established by special act

[6] Broward Health, Halifax Health, Lee Health, Memorial Healthcare System, Sarasota Memorial Healthcare System.

of the Florida Legislature in 1949. Ch. 26468 Law of Florida (1949). The special act, as amended, was recodified in 2003. Ch. 2003 – 359, Laws of Florida. The members of the Sarasota County Public Hospital Board are elected. *Id.* Section 1 of Section 3. The Sarasota County Public Hospital District was created for the public purpose of building and operating a public hospital system within Sarasota County. *Id.* The Florida Legislature provided that "[t]he purposes for which any hospital created under the provision of this act shall be used are hereby declared to be for a public purpose." *Id.* Section 18 of Section 3. (emphasis added). Similarly, the Florida Legislature stated "[i]n order to secure and promote the provision of quality medical services to the public, the authority provided herein is found by the Legislature to be within the public policy of this state." *Id.* Section 25 of Section 3. (emphasis added). Further, the Sarasota County Hospital Board's lien authority derives from its special act, and therefore the lien authority is included in the powers granted to the Hospital Board that were specifically declared by the Florida Legislature to be for a public purpose. *Id.* Section 23 of Section 3.

The powers granted to the Sarasota County Public Hospital Board by the Florida Legislature and the broad scope of its stated public purpose are comparable to those of Lee Memorial and the other public hospitals in the Safety Net Alliance. The Second District's ruling means that a public hospital, such as those in the Safety Net Alliance, created solely to provide quality medical care for the citizens of a

hospital district, and whose powers were expressly declared by the Legislature to be for a public purpose, nevertheless enters into a "private contract" with a patient. The Second District's ruling is illogical and creates irreconcilable inconsistencies.

The central mission of every public hospital is, of course, the provision of hospital care services to all citizens. Therefore, the admissions form relates directly to the central mission of any public hospital. The admissions form is the contract that initiates the relationship between the member of the public and the public hospital to provide the very service for which the public hospital was created. The public employee would have been acting in the scope of his or her employment on behalf of the public hospital in connection with the completion of the admissions form. Under these circumstances it defies logic that the admissions form could be regarded as a private contract.

The following example may help to further illustrate some of the anomalies with the Second District's ruling. Mr. Smith is a member of the public who owns a lawn service. He lives near a large public hospital, either Lee Memorial or one of the other public hospitals that are members of the Safety Net Alliance. He enters into a contract with the public hospital to provide lawn services to the public hospital. Mr. Smith gets sick and requires hospitalization at the public hospital. He signs the admissions form, and is admitted to the public hospital. Under the Second District's ruling, Mr. Smith's lawn service contract is a "public contract," but his admissions

form is a "private contract." Both contracts involve exactly the same parties, the public hospital and Mr. Smith. The lawn service contract involves the public hospital hiring Mr. Smith to perform a service that, while necessary, is ancillary to the core purpose of the public hospital. In contrast, the admissions form relates directly to the core public purpose the public hospital was created by the Florida Legislature to provide. As Lee Memorial correctly argues, both contracts in the above example should be public contracts. (I.B. pp. 23-25). The Second District erred in holding the admissions form to be a private contract even where it involves a public hospital carrying out the public purpose for which it was created.

One potential source of confusion here may be that the service to be provided pursuant to an admissions form is health care to an individual. We are all conditioned, particularly in this day and age, to consider anything related to the provision of health care as personal and, in that sense, "private." Yet, the word "private" has different connotations in different contexts. The ingrained perception about the confidential handling of an individual's personal medical records should not be permitted to confuse the issue. The foundational contract between a patient and a public hospital, the admissions form, is a public contract regardless of whether it, along with the patient's other medical records are exempt from disclosure for privacy reasons.

The Second District erred in holding Lee Memorial's admissions form to be a "private contract." Lee Memorial, like the other public hospital systems in the Safety Net Alliance, acts only in its public capacity and in furtherance of its public purpose when entering into an admissions contract. The admissions form is a public contract.

CONCLUSION

The Second District Opinion should be reversed on both grounds. First, Lee Memorial's special act does not impair Progressive's contract with its insured within the meaning of Article I, Section 10 of the Florida Constitution, and that issue was not properly before the Court on appeal. Second, the Second District erred in finding Lee Memorial's admissions form with the patient to be a private contract. The Safety Net Alliance member hospital systems and the citizens of the communities they were created to serve would be harmed by the decision as it presently stands.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 3rd, 2018, a true and accurate copy of the foregoing has been filed in the e-filing Portal and furnished via e-Service to:

Valerie A. Dondero, Esquire vad@kubickidraper.com KUBICKI DRAPER 25 W. Flagler St., PH Miami, FL 33130	Joel W. Walters, Esquire jwalters@walterslevine.com drich@walterslevine.com WALERS LEVINE & LOZANO 1819 Main Street, Suite 1110 Sarasota, FL 34236

Attorney for Appellee, Progressive	Attorney for Plaintiff
John P. Joy, Esquire jjoy@waltonlantaff.com dingram@waltonlantaff.com Sara M. Sadler, Esquire ssandler@waltonlantaff.com dingram@waltonlantaff.com WALTON LANTAFF SCHROEDER & CARSON LLP 110 E. Broward Blvd., Suite 2000 Fort Lauderdale, FL 33301-3503 Attorneys for Allstate Insurance Company	Angela C. Flowers, Esquire af-kd@kubickidraper.com KUBICKI DRAPER, P.A. 101 S.W. Third Street Ocala, Florida 34471 Attorney for GEICO

BENTLEY & BRUNING, P.A.

DAVID A. WALLACE, ESQ.
Florida Bar No. 0608386
783 South Orange Ave., 3rd Floor
Sarasota, Florida 34236
Telephone: 941-556-9030
Facsimile: 941-312-5316
Primary Email: dwallace@bentleyandbruning.com
Secondary Email: osullivan@bentleyandbruning