SUPREME COURT
STATE OF FLORIDA

ST. VINCENT'S MEDICAL CENTER, INC.,

Appellant,

vs.

CASE NUMBER: SC-06-1047
(LT CASE NO.: 1D05-1727)

MEMORIAL HEALTHCARE GROUP, INC., et al.,

Appellees,

INITIAL BRIEF OF APPELLANT, ST. VINCENT'S MEDICAL CENTER, INC.

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INTRODUCTION

In the proceeding in the trial court, Memorial Healthcare Group, Inc. d/b/a/ Memorial Hospital Jacksonville and Fawcett Memorial Hospital, Inc., were the Plaintiffs; the Agency for Health Care Administration, which is the state agency responsible for Florida's certificate of need program, was the Defendant; and St. Vincent's Medical Center, Inc., was an Intervenor. In the trial court proceeding, the Agency for Health Care Administration and St. Vincent's both took the position that the statute at issue in this case is a constitutional, general law.

The trial court ruled in favor of the Plaintiffs, and St. Vincent's appealed that ruling to the District Court. The Agency did not appeal, and thus was technically designated as an Appellee.

In this proceeding, Appellees Memorial Healthcare Group, Inc., and Fawcett Memorial Hospital, Inc. will be referred to as the Plaintiffs; Appellant St.Vincent's Medical Center, Inc., will be referred to as St. Vincent's; and the Agency for Health Care Administration will be referred to as the Agency.

The record on appeal consists of five volumes plus a supplemental record consisting of one volume. References to the record are cited as (V.5, 883-889), which indicates the volume of the record on appeal followed by the page number. This particular record reference is to the Final Declaratory Judgment of March 8, 2005, which is located in Volume 5 at pages 883-889 of the record.

There are three different transcripts in the record on appeal. Two of these transcripts are located in Volume 5, and the third transcript is located in the supplemental record. Included within Volume 5 of the record on appeal is the transcript of a summary judgment hearing which was held on May 20, 2004. Volume 5 also includes the transcript of those portions of the non-jury trial which were held on October 26, 2004 and November 4, 2004. References to this transcript will be referred to as (V.5, T.__), which will indicate Volume 5 of the record on appeal, trial transcript followed by the page number. The supplemental record on appeal contains the transcript of that portion of the non-jury trial that was held on October 27, 2004. References to the transcript contained in the supplemental volume of the record on appeal shall be referred to as (SV, T.__), which indicates supplemental volume followed by the page number of the transcript.

STATEMENT OF THE CASE

On November 7, 2003, Plaintiffs filed a Complaint in Leon County Circuit Court challenging the constitutionality of Chapter 2003-274, Laws of Florida. The Complaint alleged that the statute was an unconstitutional special or local law, and that the statute violated the Plaintiffs' right to equal protection. The Complaint named the State of Florida, Agency for Health Care Administration, as the Defendant. (V.1, 1-23).

On December 2, 2003, the Agency filed an Answer to the Complaint. (V.1, 24-29). In its Answer, the Agency denied the material allegations of the Complaint, and took the position that the challenged statute was a constitutional, general law. (V.1, 24-29).

On December 30, 2003, St. Vincent's filed a Motion to Intervene in the case. (V.1, 30-31). On March 22, 2004, the trial court entered an Order Granting Intervention. (V.1, 34). St. Vincent's thus occupied the position of a defendant intervenor.

On March 23, 2004, the Agency and St. Vincent's filed a Joint Motion for Summary Judgment on all counts. (V.1, 35-60). A hearing was held on the Motion for Summary Judgment on May 20, 2004. (V.5, SJ T., 1-46). Following the hearing, the trial court entered an Order granting Defendant's and Intervenor's

Motion for Summary Judgment on Plaintiffs' equal protection claim (Count IV), but denying the Motion as to the other counts of the Complaint. (V.1, 168-170). In that Order, the trial court found "that there is a rational basis for the classification contained in the challenged statute. Accordingly, the statute does not violate Plaintiffs' rights to equal protection, and the Court grants summary judgment to the Defendant and Defendant/Intervenor on Count IV of the Complaint." (V.1, 170). The trial court ruled that it would schedule an evidentiary hearing on the issue of whether or not the statute was a special law.

The trial took place on October 26, October 27, and November 4, 2004.

On March 8, 2005, the trial court entered a Final Declaratory Judgment finding the statute to be a special law. (V.5, 883-889). St. Vincent's filed a Notice of Appeal on April 5, 2005, (V.5, 890-898), and Plaintiffs filed a Notice of Cross Appeal on April 15, 2005. (V.5, 903-907). The Cross Appeal sought review of the trial court's ruling that the statute did not violate Plaintiffs' right to equal protection.

On April 28, 2006, the First District Court of Appeal issued an opinion holding Section 408.036(3)(l) to be a special law enacted as a general law and thus unconstitutional. St. Vincent's Medical Center, Inc. v. Memorial Healthcare Group, Inc., 31 Fla. L. Weekly D1171 (Fla. 1st DCA April 28, 2006). In its decision, the District Court stated that it had "recently enunciated the standard for

determining whether a statutory class is open or closed" in Department of Business and Professional Regulations v. Gulfstream Park Racing Ass'n, 912 So. 2d 616 (Fla. 1st DCA 2005). St. Vincent's, 31 Fla. L. Weekly at D1172 (emphasis added). The District Court ruled that the trial court properly applied a "reasonable possibility" standard in its ruling.[1] Id.

On May 26, 2006, St. Vincent's filed a Notice of Appeal for review in this Court.

[1] The District Court did not find any merit to Plaintiffs' equal protection argument raised in the cross-appeal.

STATEMENT OF THE FACTS

This case involves the validity of Chapter 2003-274, Laws of Florida, which appears as Section 408.036(3)(l), Florida Statutes. The legislature enacted this statute as a general law.

This statute creates a certificate of need exemption for open-heart surgery programs under certain specified conditions. Other exemptions to the certificate of need requirements were already codified in Section 408.036(3), Florida Statutes, and the 2003 statute added a new exemption to the list of exemptions. The statute provides an exemption for:

> 1. [A]n adult open-heart-surgery program to be located in a new hospital provided the new hospital is being established in the location of an existing hospital with an adult open-heart-surgery program, the existing hospital and the existing adult open-heart-surgery program are being relocated to a replacement hospital, and the replacement hospital will utilize a closed-staff model. A hospital is exempt from the certificate-of-need review for the establishment of an open-heart-surgery program if the application for exemption submitted under this paragraph complies with the following criteria:
>
> a. The applicant must certify that it will meet and continuously maintain the minimum Florida Administrative Code and any future licensure requirements governing adult open-heart programs adopted by the agency, including the most current guidelines of the American College of Cardiology and American Heart Association Guidelines for Adult Open Heart Programs.

b. The applicant must certify that it will maintain sufficient appropriate equipment and health personnel to ensure quality and safety.

c. The applicant must certify that it will maintain appropriate times of operation and protocols to ensure availability and appropriate referrals in the event of emergencies.

d. The applicant is a newly licensed hospital in a physical location previously owned and licensed to a hospital performing more than 300 open-heart procedures each year, including heart transplants.

e. The applicant must certify that it can perform more than 300 diagnostic cardiac catheterization procedures per year, combined inpatient and outpatient, by the end of the third year of its operation.

f. The applicant's payer mix at a minimum reflects the community average for Medicaid, charity care, and self-pay patients or the applicant must certify that it will provide a minimum of 5 percent of Medicaid, charity care, and self-pay to open-heart-surgery patients.

g. If the applicant fails to meet the established criteria for open-heart programs or fails to reach 300 surgeries per year by the end of its third year of operation, it must show cause why its exemption should not be revoked.

h. In order to ensure continuity of available services, the applicant of the newly licensed hospital may apply for this certificate-of-need before taking possession of the physical facilities. The effective date of the certificate of need will be concurrent with the effective date of the newly issued hospital license.

2. By December 31, 2004, and annually thereafter, the agency shall submit a report to the Legislature providing information concerning the number of requests for

exemption received under this paragraph and the number of exemptions granted or denied.

3. This paragraph is repealed effective January 1, 2008.

At trial, Plaintiffs presented the testimony of Dr. Todd Sagin, who was accepted as an expert in medical staff issues and hospital relations (V.5, T. 40); Patricia Greenberg, who was accepted as an expert in health care planning (V.5, T. 101); and Ms. Elizabeth Dudek, who was accepted as an expert in health care planning and certificate of need review. (V.5, T. 212).

Dr. Sagin prepared an exhibit which summarized his opinion as to some of the ways a hospital's medical staff and board of directors could move from an open medical staff to a closed medical staff model. (V.5, 882, Plaintiffs' Ex. 3). Dr. Sagin's testimony and exhibit explored five different options for moving to a closed-staff model. While Dr. Sagin believed Options 1 through 4 would be impossible to accomplish in a 3-year period of time, he did not believe Option 5 would be impossible to accomplish in that time period. Instead, he testified that Option 5 was possible but in his opinion the odds were "remote." (V.5, T. 83).

Ms. Greenberg surveyed by telephone and email all of the hospitals in the state and asked them: (1) whether they currently used an open or closed-staff model; (2) whether they have any plans to replace their hospital; and (3) whether they have any plans to convert their medical staff from an open to a closed-staff

model. (V.5, 882, Plaintiffs' Ex. 5 & 6). Ms. Greenberg also prepared an exhibit entitled "Lapsed Time from CON Application Submission Date to Licensure." (V.5, 882, Plaintiffs' Ex. 7). This exhibit showed two hospitals that had gone from CON application to opening (licensure) in 33 months or less.

The last witness called by the Plaintiffs was Ms. Dudek. Ms. Dudek is the Agency's Deputy Secretary for Health Quality Assurance, and in that position she oversees all regulatory components of the Agency for Health Care Administration, including the certificate of need program and licensure of all health care facilities in the state. (V.5, T. 181). Ms. Dudek has been involved with the CON program since November, 1983. (V.5, 882, Intervenor's Ex. 1). She unequivocally testified that it was **possible** for hospitals other than St. Vincent's to potentially qualify for an exemption under the statute. (V.5, T. 202-203). She also gave several examples of hospitals with an existing open-heart program that had filed CON applications to build a replacement hospital. (V.5, T. 201-04).

At trial, St. Vincent's called Mr. Eric W. Springer, who was accepted as an expert in hospital medical staff issues (V.5, T. 281); Dr. Ronald Luke, who was accepted as an expert in health care planning and health care economics (V.5, T. 327-29); and recalled Ms. Dudek.

Mr. Springer testified that the governing board of a hospital is the body which has the authority to close the medical staff of a hospital. (V.5, T. 281). Mr.

Springer testified that if a hospital is purchased or acquired by a new owner, the new owner would have the right to create or appoint a new governing board. (V.5, T. 281). Consequently, if a hospital was purchased or acquired by a multi-specialty physician group, that multi-specialty physician group would have the right to establish a new governing board for the hospital, and that new board would have the ultimate authority to decide whether to close the medical staff of the newly purchased hospital to physicians employed or associated with the multi-specialty physician group that had purchased the hospital. (V.5, T. 282). Mr. Springer testified it would be possible for the board of a replacement hospital to close its medical staff, and that such action could be accomplished in a matter of months. (V.5, T. 287-88).

Dr. Luke identified three different categories of entities that utilize a closed-staff model and that could be interested in establishing a closed-staff model hospital in Florida. The three categories are: (1) a multi-specialty physician group such as the Mayo Clinic or Cleveland Clinic; (2) a medical school practice group; and (3) a physician group associated with a health plan such as an HMO. (V.5, T. 337). Dr. Luke prepared an exhibit that gave examples of hospitals that utilize a closed-staff model. This exhibit included the Cleveland Clinic hospitals located in Naples and Westin, Florida, and the Mayo hospital in Jacksonville as examples of closed-staff hospitals associated with a multi-specialty physician group; the 30

hospitals operated by Kaiser Permante in nine different states as examples of closed-staff hospitals operated by an HMO; and Duke University Medical Center and Emory University Hospital as examples of closed-staff hospitals associated with a medical school. (V.5, 882, Intervenor's Ex. 3).

Based on his review of the statute and research on potential entities that could establish a closed-staff model hospital in the state, Dr. Luke testified that there was "a very large number" of entities that could do what the Cleveland Clinic and Mayo Clinic have done in the past, which is to acquire a hospital in Florida and replace it with a new facility using a closed-staff model. (V.5, T. 341). Dr. Luke prepared an exhibit which showed that in 2003 there were approximately 40 hospitals in Florida with an existing open-heart program that was performing 300 or more open-heart procedures. (V.5, 882, Intervenor's Ex. 4). Dr. Luke testified that all of these hospitals could potentially have qualified for an exemption had they chosen to build a replacement facility which would utilize a closed model, or if they had been acquired by another entity that decided to replace the existing hospital with a new facility which would utilize a close-staff model. (V.5, T. 335-36).

Dr. Luke prepared a number of exhibits which identified numerous entities which could have had an interest in establishing a closed-staff model hospital in Florida. He identified nine multi-specialty groups in Florida, and over 140

nationwide, that potentially could have an interest in acquiring one of the 40 hospitals in Florida with an existing open-heart surgery program performing over 300 procedures. (V.5, 882, Intervenor's Exs. 5-7).

Dr. Luke also prepared two time-line exhibits which demonstrated how an organization other than St. Vincent's could qualify for an exemption under the statute prior to the statute's scheduled sunset date. (V.5, 882, Intervenor's Exs. 9 and 10). Dr. Luke testified that in his opinion there was "no question" that others could have taken advantage of the exemption, and that there would have been "no practical problem with somebody having met the deadline of being able to use the exemption." (V.5, T. 348).

St. Vincent's recalled Ms. Dudek as a witness and asked Ms. Dudek if the number of hospitals that could potentially take advantage of the statute was limited to the two hospitals in the state that have an existing open-heart program and that everyone agreed utilized a closed-staff model. Her testimony was as follows:

> Q Ms. Dudek, at the close of the last day of the hearing in this case, the Court asked if the number of hospitals that could potentially take advantage of the exemption in this case was limited to the two closed-staff model hospitals in Florida that currently have an open-heart program?
>
> Do you recall that question by the Court?
>
> A Yes.

Q In your opinion, is the universe of hospitals that can potentially take advantage of the statutory exemption limited to those two hospitals?

A No. It's those two hospitals and the 38 others who at this point - - for the total of 40 - - that have 300 procedures or more.

And there are another five who are very close to 300. There is one at 299 that I'm not including in the 40. So it would be any hospital that had provided that many open-heart procedures.

* * *

Q Are you aware of any types of entities that could potentially acquire a hospital in Florida with an existing adult open-heart surgery program and change the hospital from an open staff to a closed staff?

A Yes.

Q What are some of those entities?

A Well, you could have - - as Dr. Luke mentioned, you could have an HMO, or you could have basically a teaching hospital or a medical school, you could come in with a multi-specialty clinic, you could do that.

Q How did Cleveland Clinic first enter the state?

A They came into the state and purchased a hospital that was on the coast of Florida.

Q Was that hospital subsequently replaced?

A Yes, it was.

Q Is there anything which would prohibit the Cleveland Clinic from acquiring another hospital in

Florida that already has an existing adult open-heart surgery program?

A. No, nothing at all.

Q How did the Mayo Clinic first enter the state?

A They also came into the state and purchased an existing hospital.

Q Is there anything that would prohibit the Mayo Clinic from acquiring another hospital in Florida that has an adult open-heart surgery program?

A No.

Q If a hospital with an adult open-heart surgery program gave the agency notification of its intent to build a replacement hospital within 1 mile of an existing facility, how soon could that replacement hospital potentially be built and licensed?

A If it is a provider who, like some that we have, is good at developing plans, has worked with us in past, we've had individuals come in - - even go through the CON process in less than 30 months, but build from start, you know, of the process to opening in 27 months or less.

(V.5, T. 389-94). Ms. Dudek also testified that it was not uncommon for hospitals to change ownership. (V.5, T. 209, 391). For example, in 2003 ten hospitals were sold to new owners. (V.5, T. 391). Ms. Dudek's testimony was not rebutted.

JURISDICTION

This Court has appeal jurisdiction in this case pursuant to Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii).

ISSUE

Whether Section 408.036(3)(l), Florida Statutes, creates a closed class and is therefore a special law.

STANDARD OF REVIEW

The standard of review in this appeal is de novo. Schrader v. Florida Keys Aqueduct Auth., 840 So. 2d 1050, 1055 (Fla. 2003).

SUMMARY OF THE ARGUMENT

The District Court erroneously applied a "reasonable possibility standard" in ruling that the classification contained in Section 408.036(1)(l) is closed. That new standard, first announced by the District Court in Department of Business and Professional Regulation v. Gulfstream Park Racing Ass'n., 912 So.2d 616 (Fla. 1st DCA 2005), appeal pending, Supreme Court Case Number SC05-2131, cannot be reconciled with how this Court has historically interpreted Article III, Section 10 of the Florida Constitution.

Prior to Gulfstream, Florida courts had consistently held that a statute created a closed class only where there was **no possibility** of the statute applying to others. A class that is completely closed is a special law because the members of the class are fixed; it is no different than if they had been named. However, if a class is not completely closed, and it is possible for others to become members of the class, then it is not a special law. Based on this Court's decisions, the key to general law status is the possibility, not probability, of a statute applying to others.

The District Court's "reasonable possibility standard" also fundamentally and impermissibly alters the legal burden of proof that is required in order for a statute to be declared unconstitutional. Someone challenging the validity of a statute must show, beyond a reasonable doubt, that the statute is unconstitutional.

A.B.A. Indus., Inc. v. City of Pinellas Park, 366 So. 2d 761, 763 (Fla. 1979). The District Court's "reasonable possibility standard" eviscerates the well-established principle that statutes are presumed constitutional unless and until proven unconstitutional beyond a reasonable doubt.

In this case, there was abundant evidence that the statute was open and could potentially apply to others. The evidence included in the testimony of Ms. Elizabeth Dudek, the Agency's Deputy Secretary for Quality Assurance, and the only witness accepted at trial as an expert in certificate of need review. She testified that it was possible for entities other than St. Vincent's to qualify for an exemption prior to the statute sunsetting in 2008. Her testimony was confirmed by the testimony and exhibits of Dr. Luke.

Because the District Court erred in applying a "reasonable possibility standard," this Court should reverse the District Court and uphold the statute as a valid general law.

ARGUMENT

I. The District Court Erred In Declaring That Section 408.036(3)(l) Created A Closed Class Based Upon A "Reasonable Possibility Standard."

The District Court erred in imposing a "reasonable possibility standard" in determining whether the statute is a general or special law. That standard, which the District Court acknowledged that it had "recently enunciated" in Department of Business and Professional Development v. Gulfstream Park Racing Ass'n., 912 So. 2d 616 (Fla. 1st DCA 2005), appeal pending, Supreme Court Case Number SC05-2131, cannot be reconciled with past decisions of this Court.

For over 100 years, this Court has given Article III, Section 10 of the Florida Constitution a generous interpretation and upheld statutes as general laws even though they initially applied to but one individual or entity. The first Supreme Court decision to so rule was Ex parte Wells, 21 Fla. 280 (1885), where a statute authorizing the dissolution of municipal corporations under certain specified circumstances was at issue. It was undisputed that Pensacola was the only municipality in the state that came within the terms of the act, and this Court stated that it "will not perpetrate an insincerity by denying that the reputed condition of that city led to its enactment." Id. at 309. However, this Court found that that circumstance did not deprive the act of its character as general legislation. Id. at 318.

This Court followed Ex parte Wells in Bloxham v. Florida Central & Peninsular Railroad, 17 So. 902, 924-25 (1895).[2] The Bloxham Court explained how a statute could be a general law even though only one individual or company met the requirements for the class:

> A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special, and comes within the constitutional prohibition. It might be that the railroad of the complainant is the only property affected by the act. Such a state of affairs would not make it a special law. Speaking upon a similar contention, this court has also quoted with approval, in case of Ex parte Wells, supra, from the supreme court of New Jersey, the following language: '**A law so framed [i.e. general by its terms] is not a special or local law, but a general law, without regard to the consideration that within the state there happens to be but one individual of the class, or one place where it produces effects.'** It has also been said, as applied to statutes, that the word 'general,' as distinguished from 'special,' means all of a class, instead of part of a class. 23 Am. & Eng.Enc. Law, p. 148, and authorities cited. In the case of McAunich v. Railroad Co., 20 Iowa 338, it is said, speaking of statutes of this character: 'These laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. **They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not**

[2] While Bloxham was decided in 1895, this Court expressly reaffirmed its holding in Cesary v. Second National Bank of North Miami, 369 So. 2d 917, 920 (Fla. 1979).

> **affected by the number of persons within the scope of operation**. (emphasis added)

This Court relied on Ex parte Wells and Bloxham in Givens v. Hillsborough County, 35 So. 88 (Fla. 1903), where the Court upheld a statute despite the fact that only one county met the statute's classification. In discussing the Court's prior decisions in Ex parte Wells and Bloxham, the Givens Court stated at page 91:

> The principle underlying these decisions is sound. The basis of the division into classes must be one founded in reason, and not an arbitrary selection of individuals; but where the classification is well founded, and the legislation general in terms, **the mere incident that but one of the class exists should not defeat the right of the Legislature to deal with the subject, nor tie its hands until a second individual shall be added to the class**. (emphasis added)

In Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983), this Court reviewed a statute permitting certain harness race tracks to be converted to dog racing. At the time the statute was passed there were only two harness racing tracks and it was clear that only one track (Seminole) fell within the provisions of the law. This Court held the statute a valid general law. This Court first explained:

> A general law operates uniformly, not because it operates upon every person in the state, but because every person brought under the law is affected by it in uniform fashion. Uniformity of treatment within the class is not dependent upon the number of persons in the class.

> *Cesary v. Second National Bank*, 369 So. 2d 917 (Fla. 1979).

Id. at 881. This Court then went on to state:

> Neither does it matter that, once the law was passed, Seminole was the only track to benefit from it. **The controlling point is that even though this class did in fact apply to only one track, it is open and has the potential of applying to other tracks.**

Id. at 882 (emphasis added).

Based on this unbroken line of Florida Supreme Court decisions dating back to 1885, whether a statute is a general law or special law is not dependent upon the number of persons who are in a position to take advantage of the statute. A statute can be a general law even if there is only one person or entity which meets the classification contained in the statute. The key factor in determining whether a statute is a general or special law is whether the classification in the statute is potentially open to others at the time of enactment. Only where a statute is completely closed, i.e. where it is impossible for others to meet the statute's classification at the time of enactment, does a statute constitute a special law.

In the instant case, the District Court erred in imposing a newly enunciated "reasonable possibility standard" and in ruling that the statute is a special law because it did not meet that standard. The new "reasonable possibility standard"

was first announced by the District Court in the Gulfstream case. 912 So. 2d at 622.

In Gulfstream, the District Court cited Biscayne Kennel Club, Inc. v. Florida State Racing Commission, 165 So. 2d 762 (Fla. 1964), as support for the "reasonable possibility standard" it adopted in that case. Biscayne Kennel Club does not support a "reasonable possibility standard." The statute at issue in Biscayne Kennel Club permitted a harness track, of which there were only two in the state, to transfer its permit to counties "which have by previous referendum for two years approved the operation of race track pari-mutuel pools, excluding those having more than one horse track permit or one with a average daily pari-mutuel pool less than a specified minimum." 165 So. 2d at 763-64. This Court quoted with approval the legal reasoning and standards applied "by the able chancellor below." Id. at 764. Included among the quoted language was the following:

> But the plaintiffs quote facts and figures which, they say, establish the **great improbability** of other race tracks ever falling into this classification.
>
> **The validity of legislative classification is not dependent upon the probability of others entering or leaving a class**. The criteria are: Is the class open to others who may enter it? And, is there a rational distinction between those in the class and those outside it, when the purpose of the legislation and the subject of the regulation are considered? (Emphasis added.)

Id.

After quoting the above language from the trial court's order, this Court stated: "The decree in our opinion properly disposes of these and other points presented here contrary to appellants' contentions and should accordingly be affirmed. Id. at 765.

If this Court had been utilizing a "reasonable possibility standard" in Biscayne Kennel Club, it would not have gone out of its way to not only quote but approve of the lower court's reasoning and the lower court's rejection of the plaintiffs' "great improbability" arguments. Consequently, the Biscayne Kennel Club decision does not support a "reasonable possibility standard." To the contrary, based on Biscayne Kennel Club, the standard for determining whether a statutory classification is open "is not dependent upon the probability of others entering or leaving a class." Id. at 764.

The "reasonable possibility standard" recently enunciated by the District Court in Gulfstream and applied by the District Court in the instant case is a new standard, and one that is inconsistent with how this Court has historically interpreted and applied Article III, Section 10.[3] Prior to Gulfstream, Florida courts

[3] Gulfstream also cites to City of Coral Gables v. Crandon, 25 So. 2d 1 (Fla. 1946), as support for the "reasonable possibility standard." While the Crandon decision uses the word "reasonably" in one sentence, the two cases cited at the end of that sentence both involved classifications that were completely closed. State ex rel. Levine v. Bailey, 168 So. 12 (Fla. 1936) (statute only applied to counties "having a population of not less than 18,500 and not more than 18,800 according to the last Preceding Census."); State ex rel. Crim v. Juvenal, 163 So. 569 (Fla. 1935) (Statute

had consistently found a class to be closed only when there was **no possibility** of the statute applying to others. See e.g., Dept. of Business Regulation v. Classic Mile, Inc., 541 So. 2d 1155, 1158 (Fla. 1989) ("Section 550.355(2) is clearly a special law because it applies only to Marion County and there is no possibility that it will ever apply to any other county."); State ex rel. Coleman v. York, 190 So. 599, 601 (Fla. 1939) ("There is no possibility of any other county falling in the classification because it is anchored to one particular census."); Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc. 793 So. 2d 899, 901 (Fla. 2001) (statute "created an impenetrable barrier to all other intertrack wagering applicants"); Martin Memorial Med. Center v. Tenet Hospitals, 875 So. 2d 797, 802 (Fla. 1st DCA 2004) ("Although passed as a general law, by its express terms chapter 2003-289 creates an exemption that is available only to hospitals located in five counties, and there is no possibility of its applying to hospitals in any other counties."); Alachua County v. Fla. Petroleum Marketers Ass'n, 553 So. 2d 327, 329 (Fla. 1st DCA 1989) ("Chapter 88-156 is clearly a special law because it

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found a special law because "[t]his court judicially knows that Broward county is the only county that possibly could ever have not less than 19,000 nor more than 22,000 population according to federal census for the specified and limited year 1930.").

affects only Alachua County and there is no possibility that it will ever affect or apply to any other county since no other county meets the statutory criteria nor can any other county meet it in the future.").

Further, a number of cases could not have been decided as they were if the District Court's "reasonable possibility standard" had been applied. For example, in Department of Legal Affairs v. Sanford-Orlando Kennel Club, 434 So. 2d 879 (Fla. 1983), this Court rejected a special act challenge to a statute that permitted the conversion of a harness permit to a dog racing permit based upon average daily pari-mutuel handle [amount wagered] during the preceding 10 years not exceeding $125,000 and average gross revenue to the state for the prior 10 years not exceeding $350,000 per year. Again, only two harness permits existed. This Court held:

> It matters not at all that when the legislation was wending its way through the House and Senate that the members were aware that it would benefit Seminole.
>
> * * *
>
> Neither does it matter that, once the law was passed, Seminole was the only track to benefit from it. The controlling point is that even though this class did in fact apply to only one track, it is open and has the potential of applying to other tracks. As we said in Biscayne Kennel Club, Inc. v. Florida State Racing Commission, 165 So. 2d 762, 763 (Fla. 1964):
>
> > Because all of the classifications effected (sic) by this act are made on the basis of

> factors which are potentially applicable to others and which are not purely arbitrary in relation to the subject regulated or the conduct authorized, we conclude that the current effect of the law stipulated to by the parties is not controlling and it must be sustained as a general act of uniform operation.
>
> (footnote omitted). The requirement of a ten-year history would not in and of itself preclude another track sometime in the future from converting. The fact that matters is that the classification is potentially open to other tracks.

Id. at 882. See also Biscayne Kennel Club, 165 So. 2d 762 (Fla. 1964); Summersport Enterprises, Ltd. v. Pari-Mutuel Commission, 493 So. 2d 1085 (Fla. 1st DCA 1986), rev. denied, 501 So. 2d 1283 (Fla. 1986).

The District Court's "reasonable possibility standard" also fundamentally and impermissibly alters the legal burden of proof required to be shown before a law will be declared unconstitutional. One challenging the validity of a statute must show, beyond a reasonable doubt, that the statute is unconstitutional. A.B.A. Indus., Inc. v. City of Pinellas Park, 366 So. 2d 761, 763 (Fla. 1979). The same legal burden of proof applies when one alleges that a statute is unconstitutional as a special law. See, e.g., State v. Rose, 876 So. 2d 1240, 1241 (Fla. 2d DCA 2004) (holding a law general and constitutional pursuant to Sanford-Orlando and because "all reasonable doubts as to [a statute's] validity are resolved in favor of [its] constitutionality."). A "reasonable possibility standard" eviscerates the well-

established principle that laws are constitutional unless and until a challenger proves otherwise beyond a reasonable doubt.

Finally, the new "reasonable possibility standard" changes what has historically been a "bright line" test for determining whether a statutory classification is opened or closed to a grey one. The new standard is inherently subjective and will be difficult to consistently apply in future cases. Will a five percent chance of someone else meeting a statute's classification constitute a reasonable possibility? What about a one percent chance? If a one percent chance is reasonable, what about a .05 percent chance? The constitutionality of state statutes should not depend on subjective estimates of probability which can never be exact or properly quantified.

Prior to Gulfstream, a statute was a special law only if it: (a) specifically named the person(s) or thing(s) to which it applied; or (b) established a class that was closed. A closed class is a special law because the members of the class are fixed; it is no different than if they had been named. However, if a class is not completely closed, and it is possible for others to become members of the class, then it is not a special law. Based on the above, the District Court committed reversible error when it applied a newly contrived "reasonable possibility standard" in this case.

Based on this Court's decisions, the key to general law status is the **possibility**, ***not probability***, of a statute applying to other entities. Thus, even if at the time of enactment of a statute, only one entity in the state could benefit from a statute, and even if the intent of the Legislature was to benefit that entity, the statute would still be a general law if the potential exists for other entities to enter into the class and come under the auspices of the law. See Sanford-Orlando, 434 So.2d at 882; Biscayne Kennel Club, Inc. v. Florida State Racing Comm'n, 165 So.2d 762, 764 (Fla. 1964); Summersport Enterprises, Ltd. v. Pari-Mutuel Commission, 493 So.2d 1085, 1088 (Fla. 1st DCA 1986), rev. denied, 501 So.2d 1283 (Fla. 1986). Therefore, if it was possible for another hospital to qualify for an exemption under the statute at issue in this case, it is a valid, general law.

Section 408.036(3)(l) is a general law because the classification it creates is open to any number of other hospitals throughout the state. There is absolutely no limitation in this statute as to the number of exemptions that can be granted. Indeed, the statute expressly contemplates the issuance of multiple exemptions. Subparagraph 2 of the statute provides:

> 2. By December 31, 2004, and annually thereafter, the agency shall submit a report to the Legislature providing information concerning the number of requests for exemptions received under this paragraph and the number of exemptions granted or denied. (emphasis added)

This reporting requirement, and many of the other requirements contained in the challenged statute, are contained in another certificate of need exemption. Compare Section 408.036(3)(l) to Section 408.036(3)(m), Florida Statutes (2006). While not at issue in this case, the similar exemption statute that is codified at Section 408.036(3)(m), Florida Statutes, was also challenged as an unconstitutional special law. The special law challenges to that similar statute were rejected in Delray Medical Center, Inc. et al. v. Agency for Health Care Administration, Second Judicial Circuit Case Nos. 04-CA-1546, 04-CA-1551, 04-CA-1857 and 04-CA-1912.

By statute, the Agency is "designated as the single state agency to issue, revoke, or deny certificates of need, and to issue, revoke, or deny exemptions from certificate-of-need review. . ." Section 408.034, Florida Statutes (2004). At trial, both sides called Ms. Elizabeth Dudek. Ms. Dudek is employed by the Agency as the Deputy Secretary for Health Quality Assurance. (V.5, T. 181). In that position, Ms. Dudek has oversight over all regulatory components of the Agency, including the certificate of need program. (V.5, T. 181). She was the only witness to be accepted as an expert in certificate of need review. (V.5, T. 212, 389). Ms. Dudek testified that it was possible for hospitals other than St. Vincent's to qualify for an exemption under the statute before January 1, 2008. (V.5, T. 210).

Ms. Dudek's testimony was supported by that of Mr. Jeff Gregg, who is also employed by the Agency, and is the Chief of the Bureau of Health Facility Regulation. (V.4, 701). He testified that it would be difficult but not impossible for a hospital other than St. Vincent's to obtain an exemption under the statute. (V.5, 785). Thus, the two Agency officials who oversee the CON program both testified that the statute was not limited to St. Vincent's, and that it was possible for other entities to qualify for an exemption.

Their testimony that it was possible for other entities to qualify for an exemption was confirmed by Dr. Luke. As detailed in the Statement of the Facts, Dr. Luke gave numerous examples of other entities that could potentially have sought an exemption under the statute. Based on their testimony, and applying the correct constitutional standards, Section 408.036(3)(l) is clearly a constitutional, general law.

II. The 2008 Sunset Provision Has No Effect On The Statute's Classification As A General Law.

The challenged statute contains a sunset provision which provides for the repeal of the statute effective January 1, 2008. The sunset provision does not transform the statute from a general law to a special law. Simply because a statute is time-limited does not mean the statute's class is closed, or turn an otherwise general law into either a special or a local law. Walters v. City of St. Louis, 259

S.W.2d 377 (Mo. 1953) ("The fact that a statute is limited as to the time of its duration does not make it local or special so long as it applies to all within, or that may come within, the enumerated class during its effective period."); Wheeler Sch. Dist. v. Hawley, 137 P.2d 1010 (Wash. 1943) ("[W]e do not think that a limitation on the duration of a legislative enactment makes of it a special law. . . ."); State ex rel. Atty. Gen. v. Lee, 99 S.W.2d 835 (Ark. 1936) ("[T]he fact that a statute is limited as to the time of its duration, does not make it a local or special act."); see also 73 Am. Jur. 2d *Statutes* § 265 (2001).

CONCLUSION

The District Court erred in applying a "reasonable possibility standard." Based upon the constitutional standards that have been utilized by this Court since 1885, the statute is a valid general law.

This Court should reverse the District Court's decision, and uphold the statute as a constitutional general law.

Respectfully submitted this _____ day of June, 2006.

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CERTIFICATE OF TYPE AND STYLE

This brief was typed in Times New Roman 14-point font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by hand delivery to the following this _____ day of June, 2006:

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