IN THE 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.

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

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ISSUE ON APPEAL

WHETHER CHAPTER 2003-274, LAWS OF FLORIDA, IS A GENERAL LAW OR A SPECIAL LAW.

STANDARD OF REVIEW

"[W]hether a law is a special or general law 'is a pure legal question subject to *de novo* review.'" Martin Memorial Med. Ctr., Inc. v. Tenet Healthsystem Hosps., Inc., 875 So. 2d 797, 892 (Fla. 1st DCA 2004) (quoting Schrader v. Fla. Keys Aqueduct Auth., 840 So. 2d 1050, 1055 (Fla. 2003)); see also City of Miami v. McGrath, 824 So. 2d 143, 146 (Fla. 2002).

Appellees argue that the constitutionality of a statute can be a mixed question of fact and law, and that factual conflicts are governed by the competent substantial evidence standard. This standard does not apply in this case because both lower courts simply applied the **wrong constitutional standards.** Specifically, the trial court erroneously focused on who qualified for an exemption at the time of the trial, and not whether it was possible for others to qualify for an exemption. Additionally, the District Court ruled that the trial court had properly applied a "reasonable possibility" standard to the evidence before it. St. Vincent's Medical Center, Inc. v. Memorial Healthcare Group, 928 So. 2d 430, 435 (Fla. 1st

DCA 2006). Since the lower courts applied the wrong constitutional standards, this Court should apply the correct legal standards to the record on appeal.

SUMMARY OF THE ARGUMENT

A careful reading of the Final Summary Judgment demonstrates that the trial court erroneously focused on who qualified for an exemption at the time of trial, and failed to consider what could have happened in the past, or what might possibly happen in the future. In addition, both the trial court and the District Court erroneously applied a recently announced "reasonable possibility" standard to the evidence. Since the lower courts applied the wrong constitutional standards, this Court must apply the correct legal standards to the record on appeal.

By failing to file a notice of cross appeal, Appellees have waived the right to argue that the classification contained in the statute lacks a rational basis. However, even if this argument is considered, the statute is a general law because it is rationally related to the legitimate state interests of ensuring access to open heart services and allowing the full use of existing physical plant resources.

ARGUMENT

I. The District Court Decision Must Be Reversed Because It Erroneously Applied A "Reasonable Possibility" Standard.

In their Answer Brief, Appellees claim that the First District Court of Appeals decision in State of Florida, Dept. of Business and Prof. Reg., Div. of

Pari-Mutuel Wagering v. Gulfstream Park Racing Ass'n, Inc., 912 So. 2d 616 (Fla. 1st DCA 2005), "is not implicated in this appeal." Answer Brief at pg. 12. That assertion is not credible given that Gulfstream Park is both the first case cited in the decision under review, 928 So. 2d at 433, and is also quoted on page 434 for the "recently enunciated" standard that was applied by the District Court to invalidate the statute.

Appellees do not attempt to distinguish this Court's numerous decisions which hold that the key to general law status is the possibility, not probability, of a statute applying to others. Instead, Appellees argue that the trial court's factual findings are dispositive of this appeal. Answer Brief at pg. 27.

A careful reading of the trial court's Final Declaratory Judgment demonstrates that the trial court focused exclusively and erroneously on present circumstances in its decision. For example, paragraph 7 of the Final Declaratory Judgment provides:

> 7. There are currently only five closed staff hospitals in the state. Of the five, only two, Cleveland Clinic-Weston and St. Luke's, currently have an open-heart program. Thus the Court finds that there are currently only two hospitals that could potentially seek an exemption under this statute. However, because Cleveland Clinic-Weston currently performs less than 300 open-heart procedures per year, it does not meet all of the other criteria for an exemption. When all of the statutory criteria are applied, there is only one hospital or group of hospitals, St. Vincent's and St. Luke's, that can

> currently take advantage of the Exemption Provision. (emphasis added.)

(V.5, 887). St. Vincent's does not contend that the above findings are incorrect; rather, they are irrelevant under the correct legal test.

Further, in paragraph 12 of the Final Declaratory Judgment, the trial court specifically rejected use of the proper legal test that both AHCA and St. Vincent's urged the trial court to apply. Paragraph 12 states:

> 12. Defendant and Intervenor argue that the Exemption Provision is constitutional because it is possible for another hospital to qualify for an exemption prior to the Exemption Provision sun-setting in 2008. In support of their arguments, Defendant and Intervenor rely on Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983), Biscayne Kennel Club v. Florida State Racing Commission, 165 So. 2d 762 (Fla. 1964), and Summersport Enterprises, Ltd. v. Pari-Mutuel Commission, 493 So. 2d 1085 (Fla. 1st DCA 1986). While relevant, these cases are distinguishable in that they all involved the pari-mutuel industry. The Exemption Provision, on the other hand, involves the field of health care, an area of great importance to the state.

(V. 5, 887-88). The trial court erred when it failed to follow these cases.

The trial court made the same error as the two lower courts in Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879 (Fla. 1983) . Specifically, the trial court ruled the statute was a special law because at the time of the trial, only one hospital met the requirements for an exemption under the statute. The trial court ruled that Sanford-Orlando was distinguishable because it

involved the "pari-mutuel industry," whereas the instant statute "involves the field of health care, an area of great importance to the state." (V.5, 888). There is no legal basis, in either our State Constitution or the cases interpreting it, for distinguishing Sanford-Orlando on that basis.

The constitutional standards that this Court has consistently applied in determining whether a statute is a general law or a special law do not vary based upon whether the statute involves the pari-mutuel industry or the health care industry. Rather, the constitutional standards applied by this Court in Sanford-Orlando are the same constitutional standards this Court has applied in cases involving municipalities (Ex parte Wells, 21 Fla. 280 (1885), and City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002)), counties (Givens v. Hillsborough County, 35 So. 88 (Fla. 1903)), railroads (Bloxham v. Florida Central & Peninsular Railroad, 17 So. 902 (Fla. 1895)), and banks (Cesary v. Second National Bank of North Miami, 369 So. 2d 917 (Fla. 1979)). Therefore, the constitutional standards utilized by this Court in Sanford-Orlando apply in this case.

The trial court refused to follow Sanford-Orlando, and erroneously focused on who qualified for an exemption at the time of trial, to the exclusion of any analysis of what could have happened in the past, or what might happen in the future. Because the trial court focused on present circumstances, and erroneously applied a "reasonable possibility" standard to those circumstances, this Court

cannot simply affirm this case based on the trial court's "findings." Because the wrong standards were applied, this Court must reverse the District Court's decision and apply the correct legal standard to the record on appeal.

II. By Failing to File A Cross Appeal, Appellees Waived Any Claim That The Statute Lacks A Rational Basis.

In Point II of their Answer Brief, Appellees argue that the statute's classification is arbitrary and bears "no rational basis to any recognizable state interest." Answer Brief at pg. 29. St. Vincent's would initially note that both the trial court and the District Court rejected Appellees' claim that the statute did not contain a reasonable classification and thus violated their right to equal protection. Because Appellees did not file a notice of cross appeal with this Court, they have waived their right to argue that the statute lacks a rational basis.

"[T]he filing of a notice of cross appeal is a prerequisite to a claim of error by the appellee." Philip J. Padovano, Florida Appellate Practice, § 21.9, at 424 (2006 ed.). See Wiccan Religious Cooperative of Florida, Inc. v. Zingale, 898 So. 2d 134, 136 (Fla. 1st DCA 2005), appeal pending, Supreme Court Case No. SC05-873 ("Generally, a cross-appeal must be filed to challenge an unfavorable portion of a final judgment substantially favorable to the appellee.").

The trial court granted St. Vincent's Motion for Summary Judgment on Appellees' claim that the statute violated their rights to equal protection. In that

Order, the trial court ruled "there is a rational basis for the classification contained in the statute." (V. 1, 170). Appellees cross appealed that ruling to the First District Court of Appeal, but the District Court found "no merit to Appellees' equal protection argument on cross-appeal." 928 So. 2d at 435.

Appellees did not file a notice of cross appeal of the District Court's decision with this Court. Therefore, they have waived the argument that the statute lacks a rational basis.

III. The Statute Is A General Law Because There Is A Rational Basis For The Statute's Classification.

Without waiving St. Vincent's contention that the arguments raised in Point II have been waived, there is indeed a rational basis for this statute. The statute deals with open-heart surgery programs in existing and replacement hospitals. If there is a hospital with an existing open-heart program and that hospital chooses to relocate and replace its existing hospital with a new closed staff hospital, then the old hospital building can still be fully used if the exemption in this statute is applied for and used by another hospital. Further, under criterion "h", the new open-heart surgery program at the old facility can promptly come on-line. Indeed, the criterion in "h" of the new statute states the goal of "continuity of available services" and allows the newly licensed hospital to apply for a CON before taking actual possession of the older physical facility. Thus, continued access to an open-

heart surgery program at an existing location is greatly encouraged and made possible by this statute.

The exemption makes good sense for numerous reasons. The existing program of the hospital wishing to relocate will be currently staffed by doctors serving an existing patient population. This same patient population can continue to be served by the new hospital and the new open-heart surgery program when the relocating hospital makes its decision to leave the area. The building housing the existing hospital will already have space specifically designed and built for open-heart surgery. Such space should not be wasted, and certainly the Legislature was entitled to act based on this public health purpose.

The requirement for a new "closed-staff model" hospital also makes imminently good sense. The doctors previously practicing at the existing facility will not be able to practice at the new relocated hospital unless those physicians become actual direct employees of the new replacement hospital. These same doctors now serving an established patient population are likely to remain at the old hospital which will be newly licensed with a new open-heart surgery program without having to go through a time consuming CON application process. Thus, the pieces all fit together in a rational relationship. Indeed, this court must assume that this state of facts was in the mind of the Legislature when they passed the statute.

Replacement hospitals and closed staff hospitals are not uncommon in this state and the Florida Legislature is on notice of the existing case law so stating. The decision in Cleveland Clinic Florida Hospital v. Agency for Health Care Adm., 679 So. 2d 1237, 1238 (Fla. 1st DCA 1996), discusses a factual situation involving three different hospitals seeking to replace existing facilities with new replacement hospitals. In addition, Cleveland Clinic, one of the hospitals in that litigation, was a closed staff hospital. The establishment of a closed staff replacement hospital is not unique to the Mayo Clinic, and has occurred in the past.

There is absolutely nothing in the statute that would prevent other Florida hospitals from applying for an exemption under it. The Legislature has not limited the statute to any specific hospital, imposed any arbitrary population brackets, or favored one area of the state over another. Indeed, Appellees Memorial Hospital Jacksonville and Fawcett Memorial Hospital, Inc. are not prohibited from making an application for an exemption under this statute if they were to find another hospital wishing to relocate to a replacement hospital with a closed staff.

When the constitutionality of a statute is challenged, a court must find the statute valid and constitutional if there is any reasonable basis for doing so. Anderson v. Bd. of Pub. Constr., 136 So. 334 (Fla. 1931); Cesary v. Second Nat'l Bank, 369 So. 2d 917 (Fla. 1979). Further, the Legislature is to be given great deference in any classification scheme employed in a statute.

A leading case is Lewis v. Mathis, 345 So. 2d 1066 (Fla. 1977). The statute in Lewis established different salaries for county judges based upon the population of various counties. The statute was challenged on equal protection grounds and as an unconstitutional local act. The trial court held the statute unconstitutional, but this Court reversed stating:

> The Legislature has wide discretion in choosing a classification, and therefore the presumption is in favor of the validity of the statute. When a classification of counties for governmental purposes based upon population or otherwise is made by the Legislature in the enactment of general laws for governmental purposes in regard to the counties classified, **if any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.**

345 So. 2d at 1068 (emphasis added) (internal citations omitted); accord, North Ridge Gen. Hosp., Inc. v. City of Oakland Park, 374 So. 2d 461 (Fla. 1979).

The cases relied upon by Appellees in their Answer Brief are easily distinguishable. In Waybright v. Duval County, 196 So. 430 (1940), and West Flagler Kennel Club, Inc. v. Florida State Racing Commission, 153 So. 2d 5 (Fla

1963), the statutes were invalidated because no one, including the appellees in both cases,[1] was able to articulate a reasonable relationship between the classification and the purpose of the statute.

State ex rel. Coleman v. York, 190 So. 599 (Fla. 1939), and City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002), are easily distinguishable. In both of these cases, a simple reading of the statute demonstrated that the statute created a closed class because each statute tied its qualifying criteria to a fixed date in the past.

York involved a statute that was enacted in 1935 and which applied only to counties having a certain population as of the 1930 census. This resulted in only two counties meeting the requirement of the statute. This Court stated: "There is no possibility of any other county falling in the classification because it is anchored to one particular census." 190 So. at 601.

At issue in McGrath was the constitutionality of a statute which was signed by the Governor into law on June 8, 1999, and which became effective on July 1, 1999. 824 So. 2d at 144, n.1. By its express terms, the statute only applied to

[1] Waybright, 196 So. at 433 ("Our perusal of the briefs here and of the record … leads us to the conviction that every reasonable doubt being resolved in favor of the soundness or validity of the act, still there is not a just relationship between the governmental plan and the population of the counties where it may be employed."); West Flagler, 153 So. 2d at 8 ("Appellees do not attempt to demonstrate a reasonable relation between these factors and the primary purpose of the act, which was to provide for harness racing in Broward County on certain legislatively prescribed conditions, and we perceive none.")

municipalities with a population of 300,000 or more as of April 1, 1999. Therefore, the qualifying date of April 1, 1999 had already expired before the legislation was passed. Id. at 150. The combination of the historical date and the population requirements resulted in a closed class consisting of only three cities. Id. Because the statute's classification was tied to a date in the past, it was impossible for any other city to qualify.

Similarly, in Department of Business Regulation v. Classic Mile, 541 So. 2d 1155 (Fla. 1989), the challenged statute was enacted in 1987 and only applied to pari-mutuel wagering in "any county in which there has been issued by the … Division … as of January 1, 1987, two quarter horse racing permits … and one jai alai permit." 541 So. 2d at 1156, n.1. Because the January 1, 1987 limiting date preceded the effective date of the legislation, the statute created a closed class consisting of a single county.

As seen above, in each of these cases the statute contained a provision limiting its effect to cities or counties with a specified population as of a specific date, thus creating a closed class. No other city or county could ever meet the qualifications, because eligibility was tied to a fixed point in time in the past. In the instant case, not only is there no historical date limiting this statute's application, there is also no limitation on the number of exemptions that can be granted under the statute.

Appellees state that the CON statutes have traditionally been concerned with ensuring access to the service and quality of care. Answer Brief at pg. 32. The statute furthers both of these goals. It ensures continued access to open-heart services at an existing location and contains a number of standards to ensure that a high quality of care is provided at that location.

The New Jersey Supreme Court upheld a CON exemption statute challenged on nearly identical grounds. The New Jersey Legislature passed a law exempting certain non-profit corporations from the statutory requirement to obtain a certificate of need to operate as a hospital. At the time, only one entity had been identified that met the criteria for the exemption. The plaintiff challenged the act on the grounds that it violated the plaintiff's right to equal protection, and because it allegedly violated a provision of the state constitution that, like the Florida Constitution, prohibited "special" acts. The New Jersey Supreme Court rejected both of these arguments and upheld the statute. Paul Kimbell Hosp., Inc. v. Brick Township Hosp., Inc., 432 A. 2d 36 (N.J. 1981).

On page 33, Appellees assert that "the state's regulation of hospitals does not create limited specialized distinctions and classifications." To the contrary, the state's regulation of hospitals also includes a plethora of specialized distinctions and classifications. This is true not only of hospital regulation in general, see Chapter 395, Florida Statutes, and Chapter 59A-3, Florida Administrative Code,

but also certificate of need (CON) regulation specifically. See Fla. Stat. §§408.031-408.045; Fla. Admin. Code Ch. 59C-1. Indeed, in the area of CON exemptions, the Legislature has historically made multiple specialized distinctions and classifications. See Fla. Stat. §408.036(3) (2004) (exempting 18 different types of projects from CON review). Thus, the health care industry is not at all unlike the pari-mutuel industry in terms of specialized distinctions and classifications.

The wisdom of this statute is not for a court to judge. Even if a court were to decide that the Legislature "made an improvident, ill-advised, or unnecessary decision," it still must uphold the act if it bears a rational relationship to a legitimate governmental purpose. Mizrahi v. N. Miami Med. Ctr., 712 So. 2d 826, 830 (Fla. 3d DCA 1998). Courts simply do not have the power to review and rule on the policy or wisdom of a statute.

Because the legislative dassification is rationally related to the legitimate state interests of ensuring access to open-heart services and using existing physical resources, the statute must be upheld.

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

Appellees make no attempt to distinguish Wheeler School District v. Hawley, 137 P. 2d 1010 (Wash. 1943), or State ex rel. Atty. Gen. v. Lee, 99 S.W.

2d 835 (Ark. 1936). Moreover, Appellees' claim on page 42 of their brief that Walters v. City of St. Louis, 259 S.W. 2d 377 (Mo. 1953), is "strikingly similar" to McGrath, supra, is incorrect. As noted on pages 11-12 above, the statute at issue in McGrath was a special law because the classification was based upon a date in the past. The statute at issue in Walters, on the other hand, was a general law because it was not tied to a date in the past.

CONCLUSION

The District Court erred in applying a "reasonable possibility" standard. The statute is a valid general law because it contains a rational classification that is potentially applicable to other hospitals in the state.

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

Respectfully submitted this _____ day of August, 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 August, 2006.

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