

IN THE SUPREME COURT OF FLORIDA

LAWNWOOD MEDICAL CENTER, INC.,
d/b/a LAWNWOOD REGIONAL MEDICAL
CENTER AND HEART INSTITUTE, a
Florida Corporation,

Appellant,

vs.

CASE NO. SC7-1300
L.T. No.:1D06-2016

RANDALL SEEGER, M.D, as President
of the Medical Staff of Lawnwood
Regional Medical Center, Inc.,
d/b/a Lawnwood Regional Medical
Center and Heart Institute, and
Member of the Medical Executive
Committee of Lawnwood Regional
Medical Center, Inc., d/b/a Lawnwood
Regional Medical Center and Heart
Institute,

Appellees.

**BRIEF FOR THE *AMICUS CURIAE* THE ASSOCIATION OF
AMERICAN PHYSICIANS & SURGEONS FILED IN FAVOR OF
THE APPELLEES AND THE DECISION BELOW**

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. (“AAPS”) is a non-profit national organization consisting of thousands of physicians in all specialties, and has many members in Florida. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service to patients who entrust their care to the medical profession. The motto of AAPS is “omnia pro aegroto,” or “all for the patient.”

AAPS files *amicus* briefs in cases of high importance to the medical profession, like the case at bar. AAPS has successfully filed *amicus* briefs in many appellate cases. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS’s submission); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (citing an AAPS *amicus* brief in the first paragraph of the decision); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

AAPS is particularly concerned about the governance of physicians on staff at hospitals, and the growing misuse of peer review commonly

known as “sham peer review.” Sham peer review consists of manipulation of peer review to eliminate physicians for economic or other disingenuous reasons. Medical staff bylaws are the last line of defense – indeed, the only real protection – against actions by hospital administrators that can be anti-competitive or even harmful to patient care. AAPS submits this brief to emphasize the importance of the medical staff bylaws, and the necessity of defending the integrity of their contractual obligations against legislative interference.

As held by the court below and further supported in this brief, the Florida legislature has interfered with private contractual relations for the anti-competitive and unconstitutional benefit of one private, powerful corporation. This contravenes judicial, constitutional, and economic norms. The contractual obligations set forth in medical staff bylaws cannot be changed by legislative fiat for the benefit of a single for-profit hospital.

AAPS respectfully submits this *amicus* brief to ensure that the patients in St. Lucie County, and their treating physicians (including an Appellee in this action), receive the bargained-for contractual protections embodied in the medical staff bylaws, and that the patients receive the highest quality medical care available. AAPS’s Motion for Leave to File this brief has been granted.

BACKGROUND

A for-profit hospital corporation, Lawnwood Regional Medical Center, Inc. (the “Hospital”), obtained *special legislation for itself* to overturn court decisions that it disliked. This violated the doctrine of separation of powers and the authority of the judiciary to interpret a specific contract. This also violated at least two provisions of the Florida Constitution, as held by the court below. Finally, special interest legislation that voids a *specific* contract – the medical staff bylaws at the Hospital – is also unconstitutional for violation of equal protection of the laws. This Court should affirm the decision below on any of these grounds.

Medical staff bylaws are the essential rules that govern the relationship between physicians on staff at a hospital and the hospital administrators. When a patient in a hospital needs to stay an additional day, or have a certain procedure performed, a physician’s medical judgment for that patient must be protected by medical staff bylaws against retaliation by a hospital attempting to cut costs. Yet the special legislation here undermined the integrity of the medical staff bylaws, and thereby weakened the quality of care to patients.

In most states, including Florida, medical staff bylaws have the legal force of a contract. They can be revised in an orderly manner that ensures

input from physicians, both on behalf of themselves and their patients. But they cannot be unilaterally revised by a hospital – or by the legislature – for financial or political motives, at the expense of patient care. Medical staff bylaws are the only meaningful safeguard for patients and the quality of their care against the ravages of self-interested hospital management. The decision below protecting the enforceability of the bylaws must be affirmed.

The relevant facts are as follows. By 1997, the “the hard-charging Nashville-based chain” Columbia/HCA had acquired the Hospital and was producing profits higher than the national average. Phil Galewitz, “Despite All the Grumbling, Hospital Bottom Lines are Healthy,” Palm Beach Post 1F (Dec. 21, 1997). But Columbia/HCA sought to revamp the medical staff without regard for the medical staff bylaws. Specifically, Columbia/HCA sought to circumvent a provision in the bylaws authorizing the Medical Executive Committee (MEC) to reject attempts by the Hospital to grant exclusive contracts to physicians. (Medical Staff Bylaws, Article VI, Part C, Section 4.) Instead, Columbia/HCA sought to replace independent physicians with physicians under exclusive contracts more lucrative for the hospital-based departments of radiology, anesthesiology and pathology.

Medical staff bylaws do impose contractual obligations, as Appellant concedes. “Lawnwood freely acknowledges the existence of a ‘contractual

relationship' between the Hospital and the medical staff." Initial Brief ("I.B.") at 27 (citing *Greenberg v. Mt. Sinai Med. Ctr. Of Greater Miami, Inc.*, 629 So. 2d 252 257 (Fla. 3d DCA 1993)). But from 1997 until 2006, Columbia/HCA simply ignored the medical staff bylaws of the Hospital, pretending instead that these contractual obligations somehow did not exist. On the one hand, "the hardcharging Nashville-based" Columbia/HCA sought to maximize its profits from its acquired Hospital and to use exclusive contracts as a tool for doing that; on the other hand, Columbia/HCA simply ignored the legal obligations of its acquired Hospital.

To replace pathologists Drs. Leonard Walker and John Minarcik with pathologists who would work under exclusive contracts more lucrative for the Hospital, its Board demanded a peer review of these doctors that might justify their removal from staff. Pursuant to the medical staff bylaws, the MEC has the authority to initiate peer review. The MEC was not fooled by this disingenuous tactic of Columbia/HCA, and the MEC declined to hold a peer review. That was entirely appropriate under the circumstances and was in full compliance with the medical staff bylaws. Peer review is for patient safety, not for boosting end-of-year bonuses for hospital executives.

Columbia/HCA did not accept that decision. The Hospital Board, which would ordinarily lack experience in quality-of-care issues, "suspended

the medical staff privileges of Dr. Walker and Dr. Minarcik” despite the Hospital’s tacit admission that this was a violation of the contractual obligations of the bylaws. (“I.B.” at 27) (conceding that medical staff bylaws are a contract). Drs. Walker and Minarcik went to court, and won, as the Hospital only confusingly mentions in its brief. (I.B. at 7). Drs. Walker and Minarcik were reinstated at the Hospital by court order, and Columbia/HCA could not establish the exclusive contracts at its acquired property.

The Hospital Board unilaterally attempted to change the medical staff bylaws without the approval of the medical staff, as required by the bylaws. Columbia/HCA lobbied the state legislature to pass a special, exclusive law in 2003, descriptively entitled the “St. Lucie County Hospital Governance Law,” H.R. 1447, 2003 Leg. The primary effect of this law was to invalidate an existing contract: the medical staff bylaws at the Hospital. The stated rationale was pretextual, as the motivation cited no longer existed:

This bill responds to problems faced by one hospital, Lawnwood Regional Hospital in St. Lucie County, which has been unable to bring disciplinary action against the clinical privileges of two physicians who have been charged with criminal acts, due to the failure of the medical staff at the hospital to initiate peer review procedures as required by hospital procedures.

See House of Representatives Local Bill Staff Analysis, HB 1447. The real motivation behind the legislation was simply to give a windfall to

Columbia/HCA by invalidating the contractual obligations of its subsidiary, the Hospital.

SUMMARY ARGUMENT

AAPS urges this Court to uphold the invalidation of the St. Lucie County Hospital Governance Law on four grounds. First, this legislation improperly interfered with the independence of the judiciary in attempting to overrule a legal precedent for the sole benefit of only one party. Second, as the panel below unanimously held, this new law constituted an unconstitutional grant of privilege to a private corporation. Third, as held by the panel below, the legislation “impermissibly impairs the appellant’s obligations to its medical staff under a pre-existing contract between the appellant’s board of trustees and medical staff.” *Lawnwood Med. Ctr., Inc. v. Seeger*, 959 So. 2d 1222, 1223-24 (Fla. 1st DCA 2007). Fourth, by seeking to benefit only the Hospital, the legislation lacked a rational basis and violates equal protection of the laws.

Amicus AAPS sets forth in detail below each of these four arguments. This Court may, of course, affirm a judgment below on any ground, including grounds not mentioned or used by the lower court. *See Carraway v. Armour & Co.*, 156 So.2d 494, 497 (Fla. 1963). The unprecedented and unjustified St. Lucie County Hospital Governance Law

infringed on the Florida Constitution and separation of powers in more ways than one, and AAPS respectfully argues not only for an affirmance below but also a strong ruling that clarifies the importance of respect for medical staff bylaws by hospitals and the legislature.

ARGUMENT

I. The St. Lucie County Hospital Governance Law Violates the Independence and Autonomy of the Judiciary.

It is extraordinary, and unconstitutional, for the legislature to act like an appellate court and pass a law that overturns a court decision for the limited benefit of one side. The decision below correctly struck down the legislation, and preservation of the independence of the judiciary requires affirmance.

The legislation was motivated by and designed to overturn the decision against the Hospital in *Leonard Walker M.D. and John R. Minarcik M.D. v. Lawnwood Med. Ctr.*, Case No. 99-159CA03 (Fla. 19th Cir. Ct. Feb. 15, 1999), which Appellant references only in passing in its brief at bar (I.B. at 7), and to reverse the Hospital's losses in six out of six other lawsuits related to these issues. Answer Brief ("A.B.") at 6. But the Hospital lost, and collateral estoppel prevents re-litigating this issue against the other physicians on staff. The legislation applied directly to benefit the Hospital with respect to an issue decided by the judiciary, rather than having general

application to many hospitals. This is precisely the sort of “superior legislative review” that the separation of powers doctrine prohibits. *See Georgia Ass’n of Retarded Citizens, infra.*

Allowing the legislature to overturn a specific decision for the benefit of a single litigant would erode the independence of the judiciary. If the legislature is able to trump the judiciary in this case, then it will have an appellate-like power to do likewise in many other cases in the courts. Holding for the Hospital here – and upholding the legislation – would undermine judicial independence.

Such appellate assumption of power by the legislature is not permitted under vested rights doctrine, as explained by the U.S. Supreme Court in *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898): “It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.”

The vested rights doctrine safeguards legal precedents against legislative attempts to overrule a decision for the sole benefit of the losing party. It protects the property right obtained by the victorious party against a taking of that property by the legislature, and also safeguards separation of

powers against overreaching by the legislature. “[C]onsistent with the separation of powers, it protects judicial action from superior legislative review, ‘a regime [that would be] obviously inconsistent with due process of law and subversive of the judicial branch of government.’” *Georgia Ass’n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989) (quoting *Daylo v. Administrator of Veterans’ Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974)).

II. The St. Lucie County Hospital Governance Law Confers an Unconstitutional Private Advantage upon a Public Corporation.

The court below *unanimously* and correctly held that the St. Lucie County Hospital Governance Law was an impermissible grant of privilege to a private corporation. The Florida Constitution provides that “[t]here shall be no special law or general law of local application pertaining to ... grant of privilege to a private corporation.” Art. III, § 2(a)(12). Where, as here, the legislature simply transferred contractual rights from the staff physicians to the Hospital, it plainly violates this clause of the state Constitution.

The economic vice prohibited by the Constitution is the taking of property from some simply to give to others. The grant of a privilege to a private corporation entails the deprivation of that corresponding privilege from others. Government is not empowered to take from Peter to give to

Paul. That is an invalid exercise of the governmental function. The U.S. Supreme Court held over two centuries ago:

An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority A few instances will suffice to explain what I mean. ... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.

Calder v. Bull, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798) (emphasis deleted).

In this case the for-profit Hospital, a subsidiary of the wealthy Columbia/HCA, demanded a transfer of contractual rights from physicians who hold those rights on its staff. No one doubts that those contractual rights have an economic value, and that the for-profit Hospital could purchase those rights from the physicians. When Columbia/HCA bought the Hospital, it must have been clear that the medical staff bylaws were part of the deal and that the Hospital was bound by them. There are probably many things that the Hospital could negotiate in exchange for its requested modifications to the medical staff bylaws. Or perhaps the physicians would never agree to a changing of the medical staff bylaws, and this was simply part of the deal when Columbia/HCA purchased the Hospital. Regardless, what the Florida Constitution prohibits is for the Hospital to procure

legislation that simply transfers property (contractual rights) from the physicians to the for-profit Hospital.

The United States Supreme Court also disfavors such transfers in property. In 2003, it considered a challenge to a Washington law requiring attorneys to deposit client trust funds in a common account for the benefit of a legal aid program, when the individual accruing interest was less than individual administrative costs. *Brown v. Legal Foundation*, 538 U.S. 216 (2003). While the Court split 5-4 against compensating the client for the taken interest based on the likely excess of administrative costs over income, all Justices agreed that seizure of this interest did constitute a taking for purposes of the Fifth Amendment. By analogy, the legislative taking here of contractual rights of physicians under the medical staff bylaws, to transfer that property to a single for-profit entity, is not a legitimate legislative function and is unconstitutional.

III. The St. Lucie County Hospital Governance Law Lacks any Legitimate Purpose in Interfering with Contractual Obligations.

The panel below correctly held that St. Lucie County Hospital Governance Law unconstitutionally impairs the contract of medical staff bylaws for the benefit of the for-profit Hospital. ““The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law.””

Lawnwood Med. Ctr., Inc. v. Seeger, 959 So. 2d at 1224 (quoting *Chiles v. United Faculty of Florida*, 615 So. 2d 671 (Fla. 1993)).

The impairment of contract here was particularly unjustified because it would have an anti-competitive effect in granting the for-profit Hospital the power to establish exclusive contracts in violation of the medical staff bylaws. In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), the Ninth Circuit upheld a judgment *against a hospital* for allowing a group of anesthesiologists to coerce it into abandoning a contract with a nurse anesthetist, who charged lower fees, in order to enter into an exclusive contract with the group.

Exclusive contracts by hospitals with physicians limit the supply of medical services, and limiting output is the *sine qua non* of antitrust violations. Exclusive contracts reduce patient choice among physicians. Patients using the Hospital would have less choice of physicians if the Hospital were able to violate the medical staff bylaws and enter into exclusive contracts for pathology, anesthesiology and radiology.

Though the U.S. Supreme Court held that exclusive contracts should no longer be “per se” illegal under antitrust laws, exclusive contracts nevertheless remain disfavored and are only legal if they are reasonable under the “rule of reason” test. See *Jefferson Parish Hospital Dist. No. 2 v.*

Hyde, 466 U.S. 2 (1984). Exclusive contracts survived scrutiny in that case only because 70% of the local patients entered different hospitals, making it doubtful that Jefferson Parish Hospital hurt the overall local market by having an exclusive contract with anesthesiologists. Patients do not usually have the luxury of so many hospitals from which to choose. There is no plausible argument that patients are better off by having *fewer* physicians to choose from.

The anti-competitive goals of the Hospital, including its desire to have only those pathologists on staff whom it could control through exclusive contracts, reinforces the unconstitutionality of the impairment of the medical staff bylaws by the legislature. This is not a case where there is a public safety or welfare justification for an unusual law. This is a case where pure lobbying power enabled the Hospital to obtain something that is disfavored by the court system: the granting of exclusive contracts. A quarter of all hospitals do not have any exclusive contracts, and there was no legitimate purpose for granting the Hospital *carte blanche* to create as many exclusive contracts as it likes. Michael A. Morrisey and Dean Chandler Brooks, “The Myth of the Closed Medical Staff,” *Hospitals* 75-77 (July 1985). The law lacked any justification for its impairment of the contractual obligations.

If this Court were to allow the legislature to rewrite contractual obligations, then the economic harm would be severe. No longer could physicians and patients be confident in the enforceability of medical staff bylaws, and numerous transactions in the medical field and beyond would be subject to a new risk of shifting property rights at the whim of the legislature. No longer would the invisible hand ensure an efficient result in the purchase and sale of hospitals, but rather lobbyists' hands and potential corruption would ensure an inefficient result subject to legislative whim. James Madison explained that the prohibition in the U.S. Constitution on impairment of contract is essential to "inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44.

Given that medical staff bylaws are contractual, and given the Hospital's for-profit status, there is no economic justification for government to intercede and relieve the Hospital of its private contractual obligations. Such a precedent would cause untold economic disruption as no private contractual negotiation in Florida – inside hospitals or out – would be entirely safe from the risk of powerful lobbyists using legislation to invalidate contracts for the sole benefit of a well-connected party.

IV. The St. Lucie County Hospital Governance Law Lacks a Rational Basis in Singling Out One County, and Thereby Violates Equal Protection.

By singling out one county, the St. Lucie County Hospital Governance Law relied on a classification that is not reasonable, and thus it violates the equal protection clauses of the Florida and United States Constitutions. See Florida Const. Art. I, § 2; U.S. Const. amend. XIV; *Gammon v. Cobb*, 335 So. 2d 261 (1976). For a statutory classification to satisfy the equal protection clauses, it must utilize distinctions that bear a just and reasonable relation to the statute in respect to which the classification is proposed. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

The St. Lucie County Hospital Governance Law fails the same equal protection analysis as prior cases confronting irrational statutory differences. A special benefit for hospitals in just one county is as irrational as a distinction between billiards played in a billiard parlor and billiards played in a bowling alley, see *Georgia Southern & Florida Railway v. Seven-up Bottling Co.*, 175 So.2d 39 (Fla. 1965); a distinction between used car dealers and other businesses with respect to being open on Sundays, see *Moore v. Thompson*, 126 So.2d 543 (Fla. 1960); and a distinction between cockfighting in one's backyard rather than on steamboats, see *Mikell v. Henderson*, 63 So. 2d 508, 509 (Fla. 1953). In short, “[t]his Court will not

sustain legislative classifications based on judicial hypothesis, but must ascertain clearly enunciated purposes to justify the continued existence of the legislation.” *Rollins v. State*, 354 So. 2d 61, 64 (Fla. 1978) (citing *McGinnis v. Royster*, 410 U.S. 263 (1973)).

Moreover, the St. Lucie County Hospital Governance Law lacks any rational economic justification. Accepted economic doctrine, including the Nobel-Prize winning Coase Theorem, teaches that the optimal or most efficient market activity results when property rights are respected and the parties are left to negotiate among themselves. *See, e.g.*, Ronald H. Coase, “The Problem of Social Cost,” 3 *J. Law & Econ.* 1 (1960). Because the medical staff bylaws were contractual (I.B. at 27), economic principles hold that the parties can negotiate changes to the bylaws best among themselves.

Columbia/HCA is a highly sophisticated for-profit company that knows well how to negotiate with others to obtain what it wants. The contractual obligations of its subsidiary Hospital, like virtually all contractual obligations in the commercial context, had a value to the medical staff and a cost to the Hospital. While the Hospital pretends to be protecting public safety, that duty rests with the state medical licensing authorities; the Hospital, a for-profit entity, is devoted to maximizing profits and executive salaries. At all times the Hospital was free to bargain for relief from the

contractual burdens imposed by the medical staff bylaws, but evidently the for-profit Hospital did not want a free-market solution. Columbia/HCA bought a hospital having medical staff bylaws that denied it the power to revoke privileges and replace physicians on staff at will, and presumably the market price for the Hospital was lower to the extent it lacked desired power. But having bought exactly what it paid for, the Hospital flouted economic reason by insisting on legislative relief from its own bargain.

CONCLUSION

Amicus respectfully argues that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Charles W. Hall, Esquire/William A. Kebler, Esquire/Mark D. Tinker, Esquire**, P.O. Box 210, St. Petersburg, Florida 33731; **Stephen J. Bronis, Esquire/Steven Wisotsky, Esquire**, 201 South Biscayne Boulevard, Suite 900, Miami, Florida 33131; **Harold R. Mardenborough, Jr., Esquire**, 305 South Gadsden Street, Tallahassee, Florida 32301; **Richard H. Levenstein, Esquire**, 853 SE Monterey Commons Boulevard, Stuart, Florida 34996; and **Thomas P. Crapps, Esquire**, 133 North Monroe Street, Tallahassee, Florida 32301 on this 3rd of January, 2008.

Glenn J. Webber, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief has been prepared in Times New Roman 14-point font in compliance with Rule 9.100 of the Florida Rules of Appellate Procedure.

Glenn J. Webber, Esquire