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.

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.
_____/

CASE NO.: SC07-1300
L.T. Case No.: 1D06-2016

ANSWER BRIEF BY APPELLEES

MAJOR B. HARDING
Florida Bar No. 0033657
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115
(850) 222-7560 (facsimile)

RICHARD H. LEVENSTEIN
Florida Bar No.: 235296
Kramer, Sewell, Sopko & Levenstein
853 S.E. Monterey Commons Blvd.
Stuart, Florida 33431
(772) 288-0048
(772) 288-0049 (facsimile)

Attorneys for Appellees

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INTRODUCTION

Appellant Lawnwood Regional Medical Center ("LRMC" or "the Hospital") has come before this Court arguing that the St. Lucie County Hospital Governance Law, H.R. 1447, 2003 Leg. ("HGL") is constitutional and should be upheld, despite decisions by the trial court and the First District Court of Appeal holding the HGL to be unconstitutional. LRMC is a Florida for-profit corporation, and its parent and sole shareholder, the Hospital Corporation of America ("the Corporation") is the owner of LRMC and of the only other primary care hospital in St. Lucie County. Appellant LRMC prevailed in passing the HGL in 2003, and promptly filed a declaratory judgment action regarding the constitutionality of that law, which is the subject of the present action.

In its initial brief before this Court, LRMC makes numerous conclusory assertions which are unsupported, and even controverted, by the facts in the record below. Moreover, in both its brief before this Court and its initial brief to the First District Court, counsel for LRMC appears to be asserting an argument that would return the judiciary to the pre-Marshall era, by challenging the competence of the courts to rule on the constitutionality of statutes. For instance, at page 21 of its brief, LRMC asserts that "[t]he district court overstepped its authority and its sphere of competence." It seems extraordinarily disingenuous for LRMC to have filed the original declaratory judgment action, seeking to have the HGL declared

constitutional, and then to attack the power of the courts to decide that very issue when it realizes the courts will not "rubber-stamp" the law.

Finally, LRMC repeatedly states that the laws existing prior to the challenged "Hospital Governance Law" gave the Hospital the power to do what it did, and therefore the HGL did not constitute an impairment, does not constitute a special benefit to a private company, and merely "clarified" the state of the law. These arguments do not explain why the law applies to only two hospitals operated by one for-profit corporation in one county, and why LRMC, prior to the enactment of this law, repeatedly tried to take actions which the courts, also repeatedly, held were improper under the laws and bylaws as they existed at that time.

As these proceedings have progressed through the courts, LRMC has placed more and more emphasis on the wrongdoing of two doctors, namely Drs. Walker and Minarcik, and the alleged threat they posed to "patient safety" as justification for the HGL—however, neither the First District nor the trial court found, nor did the pleadings before the trial court allege, that patient safety was endangered or that patients were harmed. The charges against those doctors boiled down to billing fraud. In addition, there has never been a finding of a "health care crisis", a term which LRMC uses freely but which is unsupported. LRMC makes much of the "threat to public safety" posed by Drs. Walker and Minarcik, and the related need to force the medical staff to perform peer review when requested by the Trustees.

However, LRMC obtained a special law that addresses not only peer review, but medical staff privileges, quality assurance, exclusive contracts for hospital-based services, and credentialing. See, e.g., § 5, H.R. 1447.

In the final analysis, as the First District Court recognized, it becomes clear that the HGL does not just happen to modify a contract or grant some minor benefit to LRMC in the course of the legislature's exercise of its valid police powers for the benefit of the general, statewide welfare. Instead, the Law specifically targets one preexisting contract and grants a substantial, special benefit to a for-profit corporation at the expense of a body of independent medical professionals. This situation is completely inapposite of the cases LRMC cites in support of its arguments, and is intolerable under the Florida Constitution.

For all of these reasons, as more fully set forth herein, Appellees respectfully request that this Court affirm the judgment of the First District Court of Appeal and declare the Hospital Governance Law invalid.

THE RECORD ON APPEAL

Appellees utilize herein the same record citation system as the Appellant in its Initial Brief. Citations to Appellant's Initial Brief before this Court are denoted (I.B. at ____). Following Appellant's format, the St. Lucie County Hospital Governance Law is cited as H.R. 1447.

STANDARD OF REVIEW

"The determination of a statute's constitutionality and the interpretation of a constitutional provision are both questions of law reviewed de novo." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005) (citations omitted). The reviewing court is "obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Id. However, "any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." Id.

STATEMENT OF THE CASE AND FACTS

A. Structure of the Hospital and Bylaws

Lawnwood Regional Medical Center, Inc. is a Florida for-profit corporation that operates the Hospital, and whose parent and sole shareholder also operates St. Lucie Medical Center. LRMC and St. Lucie Medical Center are the only two primary care hospitals in St. Lucie County. LRMC is governed by a Board of Directors. The Board of Directors, in turn, appoints a Hospital Board of Trustees that is charged with overseeing the Hospital's daily business decisions. LRMC is part of the Hospital Corporation of America group of for-profit hospitals.

In 1988, the Board of Trustees adopted its Bylaws. (See Excerpts of 1988 Trustee Bylaws, I.B. Tab D.) In 1993, in order to comply with Florida law and accreditation standards, the Board of Trustees and the Medical Staff signed off on and

adopted the Medical Staff Bylaws. The Medical Staff Bylaws have been amended twice, once in 1995 and once in 1999. Further, an Addendum to the Medical Staff Bylaws occurred in 2003. (Medical Staff Bylaws at 100-102, R. 124-126.) The stated purpose of the Medical Staff Bylaws is to "provide for the organization of the Medical Staff of the Hospital to provide a framework of self-government in order to permit the Medical Staff to discharge its responsibilities in matters involving the quality of medical care and to govern the orderly resolution of those purposes." (Medical Staff Bylaws Preamble at 1, R. 24.)

The Board of Trustees serves as the governing board for LRMC and, at the time this action commenced, was composed of seven to nine total members, including "four physicians…who are members of the medical staff, two on a temporary rotating basis and then two at this time who…are physicians who also practice there." (1988 Trustee Bylaws at 5, I.B. Tab D; Trans. at 70-71, R. 2651-2652.) The remainder of the Board of Trustees consists of the CEO and other lay members nominated by the CEO and appointed by the Board of Directors. (1988 Trustee Bylaws at 5-6, I.B. Tab D.)

B. History of Conflict

LRMC states that "Lawnwood's medical staff had a history of rejecting the Board's ultimate control over peer review and related quality of care functions." (I.B. at 6.) While it cites

the Pentz Affidavit,[1] (R. 2087-2091 ¶¶ 25-52) such a statement is conclusory rather than factual. Moreover, in stating that there were "substantial and ongoing disputes" for years between the Hospital and the medical staff, and that "there were seven lawsuits related to Medical Staff Bylaws issues" (I.B. at 6), LRMC fails to note that it lost all cases regarding conflicts based on medical staff privileges, and that the courts repeatedly gave LRMC other options to act under existing laws and bylaws. (Trans. at 74-75, R. 2655-2656.) However, instead of heeding the courts' decisions striking down its unilateral actions, and utilizing one of the judicially enumerated options, LRMC decided to request a special law from the Florida Legislature. (Trans. at 86, R. 2667.)

A careful review of the disputes preceding enactment of the HGL reveals that they arose because LRMC overstepped its contractually-delineated boundaries. Members of the Medical Staff would then take LRMC to court, and LRMC's actions would be overturned.

Despite all of the Hospital's assertions to this Court that the Medical Executive Committee ("MEC") acted improperly with regard to Drs. Walker and Minarcik, creating a threat to public health, the Hospital never sought a judicial determination, as it could have, of the reasonableness of the MEC's actions. Indeed, the pre-existing law and the 1993 Medical Staff Bylaws impose a reasonableness and "good cause" standard for both the

[1] Thomas Pentz is, and was at all times relevant to this action, the CEO of LRMC.

Trustees and the Medical Staff in carrying out the contractually mandated procedures. (See, e.g., § 395.0193(3), Fla. Stat. (2005)(providing that a peer review panel shall investigate where a "reasonable belief exists that conduct by a staff member or physician…may constitute one or more grounds for discipline as provided in this subsection"); see also R. 84, 97, 102.) Instead of seeking a judicial determination based on this standard, however, the Hospital acted unilaterally in contravention of its contract with the Medical Staff. When its actions were challenged by the doctors in question, and overturned by Judge Schack in the Nineteenth Circuit,[2] LRMC went to the Legislature.

C. Enactment of the Hospital Governance Law

In 2003, the Legislature enacted the "St. Lucie County Hospital Governance Law," H.R. 1447, 2003 Leg. ("HGL"). The legislative analysis for the new law stated that its purpose was as follows:

> 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.

[2] This case, Walker v. Lawnwood Medical Center, Inc., Case No. 99-159CA03 (Fla. 19th Jud. Cir. Ct.), is discussed in the section below.

However, in the lawsuit arising from the situation involving said two physicians, Drs. Walker and Minarcik, the trial court found, contrary to LRMC's assertions at page six of its brief, that the medical staff had indeed initiated peer review procedures "as required by hospital procedures"; the medical staff did, as required by section 395.0193(3), Florida Statutes, and their bylaws, meet to decide whether any grounds for discipline existed, and they decided that no such grounds did exist. Walker v. Lawnwood Medical Center, Inc., Case No. 99-159CA03 (Fla. 19th Jud. Cir. Ct.). Instead of bringing the MEC to court for a determination of whether grounds existed for a "reasonable belief" that the pathologists' conduct actually constituted grounds for discipline, LRMC unilaterally suspended their privileges. Id. The court in Walker invalidated LRMC's unilateral actions and criticized the Hospital, setting out various legal alternatives the Hospital had. As Judge Schack ruled, LRMC could have brought an action to compel the Medical Executive Committee ("MEC") to initiate the desired peer review, if the MEC had been in violation of any laws or regulations or in case of any loss or threatened loss of accreditation as a result thereof. Id.

As noted by LRMC, the Florida Department of Health ("DOH") later served Dr. Minarcik with an emergency order suspending his medical license. (I.B. at 7). According to Judge Schack, LRMC could have requested this action from DOH itself, rather than acting unilaterally. Moreover, Appellees agree that LRMC could have brought action against the MEC based on the reasonableness

and "good cause" standards in the Medical Staff Bylaws. LRMC was not, therefore, "unable to bring disciplinary action." Walker. Furthermore, those two physicians were no longer even members of the LRMC medical staff at the time the Governance Law was enacted. (Trans. at 85, R. 2666.)

Following enactment of the Governance Law, the Board passed resolutions proposing to amend the Medical Staff Bylaws, which the medical staff rejected. (R. 01-218). These proposed amendments, which track the language of the Governance Law, would make numerous and substantive changes to the medical staff bylaws. (R. 01-218).

D. Procedural History

After the Medical Staff rejected the amendments proposed by LRMC, the Hospital brought an action in the Circuit Court in the Second Judicial Circuit in and for Leon County. That action requested a declaratory judgment on the constitutionality of the HGL. In its Memorandum of Law in Support of Its Motion for Summary Judgment before the Circuit Court, LRMC engaged in extensive argument about the conflict between the Medical Staff Bylaws and Trustee Bylaws, particularly the amendment conflict, but barely mentioned Drs. Walker and Minarcik. (R. 2096-2182.) Rather, in that brief, LRMC argued that the legitimate government interest served by the HGL consisted of the disruption caused by the numerous legal disputes between the Medical Staff and the hospital. Id.

The trial court, however, in a lengthy opinion from Judge Ferris, pronounced the HGL unconstitutional. (R. 2697-2722.) In its appellate brief to the First District Court of Appeal, which also held the law to be unconstitutional, LRMC raised the specter of Dr. Walker and Dr. Minarcik's wrongful actions as a threat to public safety and a "health care crisis", a characterization which it repeats even more strenuously before this Court. The Hospital argues that this threat justified the HGL and provided a public purpose for the Law. (I.B. at 1, 7, 14, 15, 17, 25, 38, 46.)

The First District disagreed, holding that the "substantial contract impairment imposed by [the HGL] was not required to protect the public health, ensure the quality of care at Lawnwood, or accomplish some other legitimate public purpose." Lawnwood Medical Center, Inc. v. Seeger, 959 So.2d 1222, 1224 (Fla. 1st DCA 2007).

SUMMARY OF THE ARGUMENT

LRMC repeatedly attacks the First District's review and analysis of the Governance Law, calling the court's analysis "superficial" (I.B.at 15) and asserting that the court was "bound to uphold the legislative judgment." (Id. at 18.) In doing so, the Hospital appears to ignore the fact that interpreting the law is a uniquely judicial function, a principle which has been firmly established since at least 1803 when Chief Justice Marshall explained: "It is emphatically the province and duty of the judicial department to say what the law

is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

LRMC makes much ado about a statute's presumption of validity, and alleges that "the district court did not even acknowledge that the HGL was entitled to a presumption of validity." (I.B. at 21.) However, the succinct and well-reasoned opinion by the First District makes clear that the court implicitly acknowledged this presumption, but found the plain language of the Constitution and of the HGL overcame the presumption. Furthermore, LRMC appears to ignore this Court's admonition in Amos v. Mathews, 126 So. 308, 315 (Fla. 1930):

> "To the extent . . . that . . . an act violates express or clearly implied mandates of the Constitution, the act must fall, not merely because the court so decrees, but because of the dominant force of the Constitution, an authority superior to both Legislature and judiciary. Such an act never becomes a law."

The Governance Law therefore *never became an effective law*, because it violates multiple mandates of the Constitution.

As a special law that rearranges the balance of power between the Hospital and the Medical Staff, granting more power and control to the former while eliminating the medical staff's rights in the process, it violates the Florida Constitution's clear prohibition on special laws that grant a privilege to private corporations. Next, the Governance Law unconstitutionally impairs the existing contract formed by the 1993 Medical Staff Bylaws. This constitutional violation is both

facial, because of the narrow scope of the law, and "as applied" to the facts of this case. Third, the Governance Law amends existing statutes that regulate relationships between hospitals and their medical staffs, and does so improperly by failing to reference properly the statutes it amends. Finally, the Governance Law violates the requirements of Equal Protection in both the federal and state constitutions. It creates an impermissible classification of hospitals and medical staff in only one county, in which the only two hospitals are operated by LRMC's parent and sole shareholder, without a legitimate legislative purpose. Moreover, the Legislature lacked any rational basis for this classification.

Based on the above constitutional violations, and as detailed in the discussion below, the Governance Law violates multiple constitutional mandates and thus should never have become law.

Since the First District ruled only on the first two issues above, namely the special grant of privilege and impairment of contract, if this Court decides that the Law is constitutional on those bases, Appellees request a remand to the First District Court of Appeal for an opinion on the other arguments.

ARGUMENT

I. THE GOVERNANCE LAW IS A SPECIAL LAW GRANTING A PROHIBITED PRIVILEGE TO A PRIVATE CORPORATION, IN VIOLATION OF ARTICLE III, SECTION 11 OF THE FLORIDA CONSTITUTION.

Article III, section 11(a)(12) of 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." A "general law of local application" is a law that uses a classification scheme based on population or some other criterion, so that its application is restricted to particular localities. City of Miami Beach v. Frankel, 363 So. 2d 555 (Fla. 1978). A "special law" is a statute relating to particular persons or things or other particular subjects of a class. State ex rel. Gray v. Stoumire, 131 Fla. 698, 179 So. 730 (1938).

LRMC argues that the First District failed to apply the presumption of constitutionality, and asserts that the definition of "privilege" should encompass only "financial give-aways", grants of "economic benefit", and grants of "competitive advantage". (I.B. at 21, 24, 26.) While the HGL does provide an economic benefit and clear competitive advantage to the Hospital, thereby satisfying even LRMC's restrictive definition of "privilege", this definition is incorrect and does not provide a basis on which to overturn the First District's decision.

A. Lawnwood brought the declaratory judgment action for a determination of the HGL's constitutionality, and modern courts are not engaged in the practice of "rubber-stamping" legislative acts

This Court is deciding the issues *de* novo, so the correct standard is laid out below.

The presumption of constitutionality must be subject to reasonable construction of a statute, as noted by LRMC itself in its case citations. See, e.g., Royal World Metropolitan, Inc. v. City of Miami Beach, 863 So. 2d 320, 321 (Fla. 3d DCA 2003); LRMC's Memo. of Law In Support of Its Motion for Sum. Judgment, at 5 (R. at 2100) (requiring that the Court "look for a reason to uphold the [Law] and adopt a reasonable view that will do so"). However, the Constitution itself expressly prohibits any "special law or general law of local application pertaining to…private incorporation or grant of privilege to a private corporation." Art. III, § 11(a)(12), Fla. Const.

If a law violates the plain meaning of that Constitutional provision, it would be manifestly *unreasonable* for the Court to find otherwise, despite LRMC's insistence to the contrary. As this Court has stated, "[i]t must be very plain, nay absolutely certain, that the people did not intend what the language they had employed in its natural signification imports before a court should feel at liberty to depart from the plain meaning of a constitutional provision." City of Jacksonville v. Continental Can Co., 113 Fla. 168, 172-73, 151 So. 488, 489-90 (1933). See also Florida League of Cities v. Smith, 607 So. 2d 397, 400

(Fla. 1992) ("the law is settled that when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language"); City of St. Petersburg v. Briley, Wild & Associates, Inc., 239 So. 2d 817, 822 (Fla. 1970) ("[i]f the language is clear…we have no power to go outside the bounds of the constitutional provision in search of excuses to give a different meaning to words used therein").

Similar rules apply to statutory construction. Continental Cas, 113 Fla. at 171, 151 So. at 489. Therefore, the Court must examine the plain language of the Governance Law and decide whether it violates the plain language of the Constitution. "Extrinsic guides to construction" come into play only if an ambiguity exists and the Court is asked to interpret that ambiguity. Still, however, the Court's interpretation must be reasonable. Royal World Metropolitan, 863 So. 2d at 321; Tyne v. Time Warner Entertainment Co., 901 So. 2d 802, 810 (Fla. 2005).

As discussed in section B below, if the Governance Law, as a special law, does grant a privilege to a private corporation, then it is invalid under the plain meaning of the Constitution. Again, "when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language." In re Advisory Opinion to the Governor, 374 So. 2d 959, 964 (Fla. 1979). The lack of case law contradicting the First District's reading of the plain language of the statute and Constitution does not indicate its failure to use the correct presumption.

B. "Privilege" Is Not Narrowly Defined as "Financial Giveaways," and Under the Proper Definition, the Governance Law Does Grant a Privilege to a Private Corporation

LRMC now acknowledges that a "privilege" includes economic or competitive advantages granted to one business over others. (I.B. at 24, 26.) It then makes the incredulous argument, however, that it has not received a special right or a peculiar benefit, because "the HGL treats all St. Lucie County hospitals equally; Lawnwood receives no special benefit above other hospitals." (I.B. at 26.) This statement indicates the Hospital's complete disregard for the constitutional prohibition. The HGL does indeed treat all (two of the) St. Lucie County hospitals equally; however, the Hospital's sole shareholder and parent happens to own both of those hospitals. Moreover, LRMC does receive a special benefit above other hospitals in Florida. The scope of the constitutional inquiry is not limited to competitors or similarly situated entities in the same county, but rather those throughout the state. The Hospital also asserts that "the HGL does not confer a benefit on the Hospital." (I.B. at 24.) That statement is a rather odd assertion, since LRMC requested the Law in the first place.

LRMC continues to try to restrict improperly the definition of "privilege" under Article III, section 11(a)(12) of the Florida Constitution. When searching for the meaning of a word in a law, however, as the First District recognized, it "should be given its plain meaning." M.W. v. Davis, 756 So. 2d 90, 101

(Fla. 2000). "When necessary, the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary." Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001). The same principle applies to constitutional interpretation. City of Jacksonville v. Continental Can Co., 113 Fla. 168, 171, 151 So. 488, 489 (1933).

The First District utilized this principle in its opinion below, quoting from dictionary definitions of "privilege" in its finding that the HGL is unconstitutional. That court stated: "[t]he [HGL]…unconstitutionally grants a *substantial* privilege to this private corporation" (emphasis added). Lawnwood, 959 So.2d at 1225.

Notably, the definitions employed by the First District encompass much more than "financial give-aways", "economic benefits", or even "competitive advantage". LRMC attempts to advance its own definitions by citing to three out-of-state cases in which grants of privilege were found, then promptly distinguishing them from the case before this Court by pointing out that each of them involved a privilege with a financial aspect. (I.B. at 22-24).[3] However, although the few published privilege cases in other states happened to involve fairly direct financial benefits to private corporations, it does not

[3] Citing Joyner, Jr. v. Center Motor Co., 66 S.E. 2d 469 (Va. 1951); World Trade Ctr. Taxing Dist. v. All Taxpayers, Prop. Owners and Citizens of World Trade Ctr. Taxing Dist. and Nonresidents Owning Prop. or Subject to Taxation Therein, 894 So. 2d 1185 (La. Ct. App. 2005); and Concerned Residents of Gloucester County v. Bd of Supervisors of Gloucester County, 449 S.E. 2d 787 (Va. 1994).

follow that the meaning of "privilege" under the Florida Constitution is restricted to such. LRMC's conclusion is a logical fallacy. Based on the definitions set out by the First District Court under the plain meaning rule, as well as LRMC's acknowledgment that "privilege" also includes competitive advantage, the Hospital's suggested outcome would be absurd.

Thus, in order to determine whether the Governance Law granted a privilege to LRMC, a private corporation, the Court must determine whether the Governance Law constituted "a law for or against a private person, or a right or immunity granted as a peculiar benefit, advantage, or favor[; or]…a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty." Lawnwood, 959 So.2d at 1225 (internal citations and quotations omitted).

Based on these definitions, and under the constitutional provision's status as an absolute prohibition, the Governance Law did grant a privilege to LRMC and is therefore invalid. Even if the definition were restricted to some economic benefit, the HGL gives the Hospital administration the right to avoid its preexisting contractual obligations. Specifically, the HGL allows LRMC to control the medical staff unilaterally, through the use of economic credentialing and exclusive contracts, as well as through the right to unilaterally amend the Medical Staff Bylaws. These rights provide direct and indirect financial benefits to the Hospital. The Hospital argues that "[h]elping Lawnwood to discipline or de-credential dangerous, malpracticing physicians bears no semblance of [sic] a privilege to a private

corporation…." (I.B. at 25.) Again, however, the Hospital engages in inflammatory statements without record support. The record below does not show that Drs. Walker and Minarcik, or any other physicians, were "dangerous" or "malpracticing." In addition, as noted above, Drs. Walker and Minarcik were gone by the time the HGL was passed.

Interestingly, LRMC focuses its arguments under the prohibited privilege section on the definition of privilege. It musters up only two sentences that contradict the grant of a privilege under the definition above. LRMC asserts that "the Governance Law does not confer a benefit on the Hospital.…the purpose of the HGL [is] to enable the Hospital to comply with its existing legal obligations over credentialing, peer review and quality assurance." (I.B. at 24-25). This conclusory statement actually supports the finding of a privilege. In this case, an existing statutory scheme[4] creates legal obligations and guidelines for all private hospitals in the state, then gives those hospitals great latitude in deciding how to fulfill those obligations. LRMC used this latitude to create and agree to a set of procedures[5] that complied with the law but did impose some restrictions on itself. When it later encountered a situation in which it could not act as it wished, rather than seeking redress from the courts, LRMC requested from the Legislature the right to retract and amend its earlier arrangements in order to "facilitate" its compliance with its purported obligations and

[4] Chapters 395 and 766, Florida Statutes (2005).
[5] The Trustee and Medical Staff Bylaws.

avoid compliance with the contractually-imposed reasonableness and "good cause" standards. LRMC did, however, have other options, both statutory and judicial, to comply with its legal obligations; the Governance Law simply made its compliance easier. In doing so, the Law rearranged the balance of power between the Hospital and the Medical Staff, granting more power and control to the former while eliminating substantive and procedural rights of the latter.

This rearrangement constitutes "a right or immunity granted as a peculiar benefit, advantage, or favor." Lawnwood, 959 So.2d at 1225 (citing *Webster's Ninth New Collegiate Dictionary* 936 (1989)). The record below exhaustively sets out the particulars. Just as an example, section 395.0193(g), Florida Statutes, provides that *"a peer review panel* shall investigate and determine whether grounds for discipline exist with respect to such staff member or physician." (Emphasis added). Section 6 of the Governance Law, meanwhile, provides:

> [W]here a medical staff has failed to act within 75 days after a request from the governing board to take action against, or with regard to, an individual physician…a governing board may take action independent of the actions of the medical staff….

This provision gives the right to decide whether grounds for discipline exist to the *governing board*, instead of a *peer review panel* ("board determines that corrective or disciplinary action is necessary"). That right is a "peculiar benefit, advantage, or favor" since the law is a special law by definition, applying only to private hospitals in St. Lucie

County. Private hospitals in every other county must still allow a peer review panel to make the determination of whether grounds for discipline exist.

As discussed in the following sections, the Governance Law grants other rights and immunities to the Hospital, such as a more lax standard for revising and amending a negotiated contract, the ability to practically ignore standard contract law, a separate peer review and appeal process, and an enormous advantage over the medical staff in case of conflict. It also permits economic credentialing, entrance into exclusive contracts, and gives the Hospital the right to eliminate the medical staff's participation in deciding medical care.

III. THE GOVERNANCE LAW IMPAIRS THE OBLIGATION OF CONTRACT

The Florida Constitution, like the U.S. Constitution, contains a prohibition against impairment of contracts. "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Art. I, § 10, Fla. Const. The Florida courts, while following an approach similar to that of the U.S. Supreme Court's interpretations of the federal provision (Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774, 779-80 (Fla. 1979)), have made it clear that Florida is stricter about defending contracts from impairment. Id. *at 780.* Specifically, in Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978), the Florida Supreme Court stated that "[a]ny conduct on the part of the legislature that

detracts in any way from the value of the contract is inhibited by the Constitution."[6]

Despite extensive briefing on the issue below, LRMC again confuses which test applies when. Citing Lee County v. Brown, 929 So. 2d 1202 (Fla. 2d DCA 2006), cert. den. 950 So. 2d 1238 (Fla. 2007), the Hospital nevertheless misses the point of that case. (I.B. at 28.) In a contract impairment case, the threshold question is whether a valid contract exists. The Court must then decide how to measure impairment and what test to apply to determine the permissibility of any impairment.

LRMC and Appellees agree that the Medical Staff bylaws form a contract. (I.B. at 27.) Therefore, this Court need only decide whether the HGL impairs that contract and, if so, whether such impairment is permissible under the "facial" and "as applied" tests.

Brown is one of the few cases to cite to both Pomponio and Dewberry, and reconciles the balancing test in the former with the strict prohibition in the latter by distinguishing between "facial" and "as applied" challenges. Brown held that the

[6] See also Pomponio, 378 So. 2d at 780 (citing a case "which applied the well-accepted principle that virtually no degree of contract impairment is tolerable in this state"). A later case, Metropolitan Property and Liability Ins. Co. v. Gray, 446 So. 2d 216, 218-19 (Fla. 5th DCA 1984), cited to Dewberry and later stated: "But for Article I, section 10…[the] issue would be merely one of legislative intent. However, regardless of the intent of the legislature, a statute may not, constitutionally, alter, amend or impair the rights of the parties to an existing contract." (Approved by the Florida Supreme Court upon certified conflict, in State Farm Mut. Auto. Ins. Co. v. Gant, 478 So. 2d 25 (Fla. 1985)).

Pomponio balancing test applies to facial challenges, while the Dewberry strict prohibition should be used in "as applied" challenges. Because the Governance Law is a special law applying to a very limited set of circumstances, the outcome should be the same whether deciding its facial or "as applied" validity.

The issue of contract impairment should be bifurcated, and the questions of facial and "as applied" constitutionality decided separately. In order to find a statute facially unconstitutional, Florida courts have required that "no set of circumstances exists under which the statute would be held valid." Fla. Dep't of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005); see also State v. Bales, 343 So. 2d 9, 11 (Fla. 1977). The court should then apply a "balancing test" "to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." Pomponio, 378 So. 2d at 780.

On the other hand, in order to find a statute unconstitutional "as applied" the court should apply the "per se test of Dewberry and [Department of Revenue v. Florida Home Builders Assoc., 564 So. 2d 173 (Fla. 1st DCA 1990)] …if it determines that the [law] results in an immediate diminishment in value of the contract that 'retroactively turns otherwise profitable contracts into losing propositions.'" Brown, 929 So.

2d at 1209. Under either branch of analysis, however, the Governance Law is unconstitutional.

A. The Substantial Impairment of the Contract Between the Medical Staff and Lawnwood is Clear

1. The HGL effects an impairment of contract under either a broad definition or the narrow definition advanced by the Hospital

Echoing its argument regarding privilege, LRMC then asserts that "[e]conomic loss suffered as a result of a retroactive change to a contract is the *sine qua non* of contract impairment." (I.B. at 28). LRMC provides no citation for this statement, and indeed cannot. Florida courts have employed a broader definition of contract impairment:

> ...to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken. Whatever legislation lessens the efficacy of the means of enforcement of the obligation is an impairment.

Pomponio, 378 So. 2d at n.41 (citing State ex rel. Women's Benefit Ass'n v. Port of Palm Beach Dist., 164 So. 851, 856 (1935)). Like the definition of "privilege," the plain meaning of "impairment" extends beyond direct financial implications. Since a contract is, in essence, a negotiated bargain that is recognized and upheld by the law, a statute that weakens the benefit of the bargain for one side or the other or changes the balance of power is an impairment of that contract, regardless of the profitability. Moreover, a law that removes the right of

a party to enforce it should be considered an impairment under the definition above. Prior to enactment of the HGL, the Board and the medical staff operated under a "reasonableness" standard, with procedures to be followed as outlined in the 1993 Medical Staff Bylaws. However, the HGL changed those procedural rights and also removed the "reasonableness" requirement for the Board. Under the HGL's standards, it does not appear that the medical staff would be able any longer to challenge unreasonable actions by the Board.

The Governance Law changes the entire structure of the relationship between the Medical Staff and the Hospital, a relationship already governed by general law and by negotiated contract. By diminishing the benefit of the bargain obtained by the Medical Staff in its 1993 Bylaws, the Governance Law impairs the purposes and value of that contract. For example, the Medical Staff bargained for, and the Hospital agreed to, the following provisions:

1) The Hospital may not unreasonably withhold ratification of a medical staff decision or medical staff matters, or take independent action against the medical staff's recommendation without "good cause." (Art. XI, §3, Medical Staff Bylaws, R. 112; also Art. VII, §7, Trustees Bylaws 1988, I.B. Tab D, p. 21.)

2) The Medical Executive Committee shall review and make recommendations to the Board of Trustees regarding exclusive arrangements for hospital-based services, regarding decisions to execute exclusive contracts in new departments or services, decisions to renew or modify exclusive contracts in existing departments or services, and decisions to terminate exclusive contracts in

existing departments or services. (Art. VI, Part C, §4, Medical Staff Bylaws, R. 71.)

3) The Medical Staff is to initiate bylaws amendments, which are then referred to the Medical Executive Committee, must satisfy various procedural requirements, and go to a Medical Staff vote. In order to be adopted, an amendment must receive a sixty percent majority of the entire voting staff eligible to vote. (Art. X, Medical Staff Bylaws, R. 111.)

The Governance Law impairs and minimizes the rights of the Medical Staff on all of the above issues.

First, it provides that, "in the event of a conflict…the hospital board's bylaws shall prevail with respect to medical staff privileges, quality assurance, peer review, and contracts for hospital-based services." § 1, H.R. 1447. Essentially, then, if and when the Trustees amend their bylaws, which of course they may do and have done regularly, and they do so in a way which conflicts with the Medical Staff bylaws, then the Trustee bylaws will control. The medical staff, of course, is not party to the Trustee Bylaws. The Trustees can thereby escape the "reasonable" and "good cause" standards in the Medical Staff bylaws by merely amending their own bylaws.

Second, and as a consequence of the first point, the direct economic impact of the Governance Law suddenly becomes clear. By providing that the board's bylaws will control "with respect to…contracts for hospital-based services", the HGL allows the board to overcome the contractual restriction in the second point above, namely that the Medical Staff, through the Medical Executive Committee, was to have a significant voice in

decisions regarding exclusive contracts.[7] Decisions regarding exclusive contracts affect the quality of patient care, as well as the livelihood and careers of the Medical Staff members, and while those members do not have final authority under the 1993 Medical Staff Bylaws, LRMC would at least need to show "good cause" for ignoring their recommendations. A reasonableness or "good cause" standard is, of course, enforceable by the courts. Under a "carefully considered" phrasing, on the other hand, LRMC is not subject to any enforceable standard under which it must defend its actions. This change permits economic credentialing. It also undermines or eliminates the independence and self-governance of the medical staff. Such an effect would run contrary to provisions of chapters 395 and 766 of the Florida Statutes.[8] It could also potentially endanger the quality of patient care, as hospital administrators could overrule and undermine medical professionals with regard to patient care decisions, without affording them bargained-for procedural safeguards.

Finally, the Law changes the procedure and standards for amending the Medical Staff bylaws. In section 5, the Governance Law requires that amendment proposals be submitted to the medical staff for its recommendations, but requires only that "any response timely made shall be *carefully considered* by the governing board prior to its approval of the proposed amendments or revisions." As the trial judge noted, the "Governance Law

[7] Art. VI, Part C, §4, Medical Staff Bylaws.
[8] § 395.0191, Fla. Stat.; Medical Staff Bylaws Preamble at 1.

therefore substantially alters the standards described in the Medical Staff bylaws, and gives the Hospital powers to unilaterally amend the Medical Staff bylaws that it did not have." (R. 2710). She based this conclusion on the difference between a "reasonably" and with "good cause" standard, versus "carefully considered" which provides no standard at all. The First District followed that line of analysis, holding that "a private corporation is specially benefited by this law which provides a means for a private corporation to avoid its preexisting contractual obligations." Lawnwood, 959 So.2d at 1225.

2. The HGL works a substantial, rather than a minimal, impairment of contract

LRMC next strenuously argues that the HGL impairs the contract only minimally, if at all. (I.B. at 28-32.)

The discussion in the subsection above provides only a few specific examples in which the Governance Law does substantially impair the contract between the Medical Staff and the Hospital. Overall, the Law changes the entire negotiated balance between LRMC and the Staff. This conclusion is bolstered by a brief look at how the Board of Trustees attempts to actually use the Governance Law to amend the Medical Staff Bylaws: to close currently open hospital-based departments or services, in direct contradiction to existing bylaws; to execute, renew, extend or modify exclusive contracts in any hospital-based department or service, without meaningful consultation with the medical staff;

to make broad and independent decisions about the initial appointment and credentialing, discipline, suspension, reappointment or credentialing of physicians; and to change the mechanisms the medical staff has in place for peer review, clinical privileges, discipline, suspension, and credentialing of physicians practicing at the Hospital. (R. 01-218).

4. The HGL does not constitute a new law governing the healthcare industry such that the medical staff could reasonably expect such an alteration of its contract

Continuing its argument against a finding of impairment, LRMC next asserts that there is no impairment because the healthcare industry in Florida is highly regulated by the Legislature and subject to further regulation, and therefore "[t]he medical staff had no legitimate reliance expectation that every term of the contract would remain static and immune from legislative evolution." (I.B. at 34). However, LRMC ignores the obvious error in its logic, which is that the existing regulations apply on a statewide basis and govern an entire industry. The Governance Law, meanwhile, applies to only one county and one corporation, and impairs contracts in that county only. Indeed, the Law specifically targets one contract in one county. Such a law cannot be said to regulate an "industry".

The Hospital cites Hopkins v. The Viscayans, 582 So. 2d 582 (Fla. 3d DCA 1991) in support of its argument, as a case "holding that articles of incorporation could be amended by newly enacted statutory procedure because the legislature had

power to amend, repeal, or modify non-profit corporation statute, regardless of its status as a contract." (I.B. at 34).

However, Hopkins differs markedly from the present case. In Hopkins, a nonprofit corporation "amended its Articles of Incorporation in accordance with the procedure outlined in [statute], instead of employing the amendment procedure in its articles of incorporation." Hopkins, 582 So. 2d at 690. The Court found that the statute at issue did not constitute a contract impairment as applied, because of a reservation of power to the Legislature "to prescribe such regulations, provisions and limitations as it may deem advisable, which…shall be binding upon any and all corporations subject to the provisions of this chapter…." Id. at 692 (quoting Section 607.411, Florida Statutes (1989))(emphasis added). Since the amendment procedure statute was a valid general law, thereby binding upon any and all corporations subject to the chapter, it fit within the reservation of power. The present case, on the other hand, involves a special law, which applies only to one corporation in one county and therefore is not included in the reservation of power that saved the statute in Hopkins.

The mere existence of extensive regulation does not mean that new laws in that field cannot be held invalid for impairment of existing contracts. For instance, in Dewberry, State Farm Mut. Auto. Ins. Co. v. Gant, 478 So. 2d 25 (Fla. 1985), and Metropolitan Property & Liability Insurance Co. v. Gray, 446 So. 2d 216 (Fla. 5th DCA 1984), Florida courts held unconstitutional certain statutory amendments as applied to auto

insurance policies entered into before the effective date of the amendments, based on impairment of contract. The insurance industry, however, is also highly regulated.[9]

LRMC next cites two out-of-state cases for the proposition that "changes to existing contracts resulting from new legislation are readily upheld." (I.B. at 34.) However, the cases it cites are easily distinguishable. In the first case, Linton v. Commissioner of Health and Environment, 65 F.3d 508 (6th Cir. 1995), "the court held that any impairment of contracts to provide Medicare services was not substantial because the nursing home industry was 'pervasively regulated.'" (I.B. at 35). The main difference, again, is that the statute in Linton applied to the entire industry. Just as importantly, the court found that the statute did not undermine the "benefit of the bargain" for the contracting parties, and also found a legitimate public purpose, "such as the 'remedying of a broad and general social or economic problem.'" Linton, 65 F.3d at 517. The Governance Law, by contrast, is aimed only at hospital governance in St. Lucie County, at the two hospitals owned by LRMC's parent corporation and sole shareholder, which can hardly be termed a "broad and general" problem.

LRMC cites a second case for the idea that extensive regulation will defeat a claim of contract impairment. It asserts that the court in Blue Cross and Blue Shield of Michigan

[9] For instance, a search on December 3, 2007 for "insurance" within the Florida Statutes online database (http://www.flsenate.gov/statutes/) provided 2,198 returns. A search for "'hospital' or 'health care'" provided 1,243 returns.

v. Milliken, 367 N.W.2d 1, 16 (Mich. 1985), "applying the same balancing rule as Florida does, also found no substantial impairment of contract because 'the industry has been subject to extensive state regulation in this area.'" (I.B. at 35.) In Milliken, the legislature gave the commissioner additional statutory authority to regulate Blue Cross. Again, however, there are important distinctions between Milliken and the present case. Blue Cross in Michigan was a "unique statutory creation" (Milliken, 367 N.W.2d at 14), while LRMC is a private corporation. Except for specific provisions, Blue Cross was "not subject to the laws of [the] state with respect to insurance corporations,…nor with respect to corporations generally." Id. at 15 (quotation and citation omitted). LRMC, on the contrary, is subject to the general laws of the state; except for the Governance Law, it is not the subject of its own statutory scheme. Finally, the statute in Milliken gave increased authority to the Commissioner, a governmental figure, not to a private corporation which contracts with other private entities.

Based on these distinctions and the analysis above, the Governance Law clearly impairs the bargain negotiated between and agreed to by the Board of Trustees and the Medical Staff of LRMC. The impairment is substantial, notwithstanding the cases cited by the Hospital, because it involves a change in the entire balance and relationship between the Hospital and the Medical Staff, and directly contravenes multiple terms of the contract. The Law attempts to limit and even eliminate the medical staff's statutory right to self-governance.

B. Under the Dewberry *per se* Test, the Governance Law is Unconstitutional as Applied Because it Impairs an Existing Contract

In Florida, a law that impairs an existing contract is unconstitutional as applied to the facts of the case. This "per se" test, articulated in Dewberry, is necessarily stricter than the balancing test used for facial challenges, which is the test LRMC discusses.[10]

The Florida Supreme Court decided Dewberry one year before Pomponio, discussed in the next section. Dewberry has never been overruled. In this 1978 case, the Court stated: "It is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution….Any conduct on the part of the legislature that detracts in any way from the value of the contract is inhibited by the Constitution." Dewberry, 363 So. 2d at 1080. The Court held an "antistacking" statute unconstitutional, due to contract impairment, as applied to an insurance contract entered into prior to the statute's effective date. That contract allowed stacking. The Court further decided that, "[i]n view of our disposition of appellant's second argument [that the statute was invalid as applied], it is unnecessary for us to pass upon the facial constitutionality of [the statute], and we decline to do so." Id. at 1079. By its disposition and articulation of the issues, therefore, the Court

[10] See quotes and citations on pp. 21-23 of this Answer Brief for cases articulating this stricter standard.

in Dewberry indicated the existence of two prongs under the issue of contract impairment and constitutionality.

Because the Governance Law substantially impairs the preexisting contract between the Hospital and the Medical Staff, as discussed above, the Law meets the requirements of the *per se* test and is unconstitutional as applied.

C. Under the Pomponio Balancing Test, the Legislature Did Not Have a Significant and Legitimate Purpose In Enacting the Governance Law Sufficient to Justify the Impairment of Contract, and the Law is Not Narrowly Tailored

The year after Dewberry, the Florida Supreme Court decided Pomponio, adopting the balancing test articulated by the U.S. Supreme Court in Allied Structural Steel v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978). Pomponio, 378 So. 2d at 779-80. The Court in Pomponio was asked to decide whether a statute, intended by the Legislature to apply retroactively, could require the deposit of rents into the registry of the court during litigation involving obligations under a condominium lease. Id. at 775. The Court was persuaded "that in the absence of contractual consent significant contract rights [were] unreasonably impaired by the statute's operation." Id. at 780. In order to reach this conclusion, the Court employed the balancing test in Spannaus:

> (a) Was the law enacted to deal with a broad, generalized economic or social problem?
>
> (b) Does the law operate in an area which was already subject to state regulation at

> the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
>
> (c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

Pomponio, 378 So. 2d at 779.

In contrast to LRMC's implication that the First District should have accepted the Legislature's rationale (I.B. at 38), this Court, in Pomponio, made its own determination as to the validity of possible objectives for the law at issue. ("There is to our knowledge neither a documented threat of massive condominium foreclosures in Florida nor any documentation of the underlying premise that unit owners would withhold rents from landlords pending litigation with them.") Id. at 781.

Finally, Pomponio and subsequent Florida cases have articulated a "least restrictive means" requirement for laws that impair contracts.[11] "Bearing on our view is the fact that the manner in which the police power has been wielded here is not the least restrictive means possible." Id. at 781-82. "The regulation must not unreasonably intrude into the parties' bargain to a greater degree than is necessary to achieve the stated public purpose." Southwest Florida Water Management

[11] LRMC curiously ignores this element of the balancing test in its brief.

District v. Charlotte County, 774 So. 2d 903 (Fla. 2d DCA 2001) (citation omitted).

Applying the test as set out above, it is clear that the Governance Law was not enacted to deal with a broad, generalized economic or social problem, and that it works a severe, permanent, and immediate change in a contractual relationship, irrevocably and retroactively. Moreover, it does not wield the police power in the "least restrictive means possible." Rather, the Law is much broader in scope and sweep than the issue it was purportedly enacted to address.

First, the "consolidation of a hospital corporation's board of directors' power, authority, duty, and ultimate responsibility" (§1, H.R. 1447) in one single county does not qualify as a "broad, generalized economic or social problem." By definition, this law is a special law, and was enacted to deal only with a conflict between a private hospital and its medical staff in one county. This constitutes the opposite of a legitimate goal: a narrow, particularized internal issue.

LRMC spends several pages of its brief arguing that the Legislature "appropriately redressed an 'evil' in St. Lucie County." (I.B. at 38). Despite its statements that the Medical Staff "prevented the Board from carrying out its duties to safeguard the quality of patient care at Lawnwood" (Id.), the lack of evidence on this point refutes LRMC's assertions that the situation constituted an "evil" that required the Governance Law to step in and protect health care. Not only did LRMC lose all prior litigation between itself and the Medical Staff,

decided under existing laws that the Governance Law purports to "clarify," but LRMC cannot point to a single person harmed by the supposed "evil" other than the for-profit Hospital itself, which happens to be the main beneficiary of the Law.

Next, the balancing test weighs against the validity of the Governance Law because the Law works a severe, permanent, and immediate change in a contractual relationship, irrevocably and retroactively. The Law changes the standards under which private hospitals in St. Lucie County are required to act, effectively contradicts the JCAHO standards and its own language prohibiting unilateral amendment of bylaws,[12] and effects other substantial impairments as outlined above. These changes are irrevocable and retroactive, removing some of the Medical Staff's previously bargained-for rights, such as amendment of their own bylaws, and allowing the Trustees to ignore the product of their agreement and to make their own rules indefinitely.

Finally, the Governance Law does not wield the police power in the "least restrictive means possible." The trial judge made an express finding to this effect. (R. 2717). She suggested:

> A narrowly tailored remedy would recognize that the Hospital has final authority, and create a standard on which the parties could seek review. Moreover, the special law's grant of absolute power is contrary to the statutory scheme set out in Chapter 395 and the JCAHO standards that recognize mutual responsibilities for the medical staff and the hospital's governing body.

[12] JCAHO Accreditation Standards, Medical Staff Standard 4.20 (R. 744).

Id. In addition, although the "evil" asserted by LRMC involved only a conflict about initiation of peer review, the Governance Law addresses "medical staff privileges, quality assurance, peer review, and contracts for hospital-based services." §1, H.R. 1447. These measures exceed any demonstrated necessity.

Even assuming *arguendo* that the Pomponio and Spannaus balancing test applies to this case, the Governance Law fails and is facially unconstitutional, as the First District Court decided. Lawnwood, 959 So.2d at 1224 (finding that there was no legitimate public purpose justifying the "substantial contract impairment imposed by this legislation"). The Law was not enacted to solve a broad, general economic or social problem. It works a severe, permanent and immediate change in contractual relationships by upsetting the entire balance between contracting parties. As the final nail in the coffin, it is not narrowly tailored as the least restrictive means of accomplishing a legitimate goal. Because it fails most of the balancing test factors, the Governance Law constitutes an invalid impairment of contract, thereby violating Article I, section 10 of the Florida Constitution.

D. Lawnwood's Renewal Argument Constitutes a Circular Argument and is Impermissible on Appeal

LRMC argues that the HGL "would not have any constitutional impact on members of the medical staff who renewed their privileges after the HGL was passed and became part of the new contract." (I.B. at 40.) It bases this argument on case law indicating that "renewal [of a contract] creates a new contract

that incorporates existing statutory and other law regulating hospitals, including the HGL." (Id.)(citing Marchesano v. Nationwide Prop. & Can Co., 506 So.2d 410, 413 (Fla. 1987)). In Marchesano, however, the plaintiff failed to reject the new contract. In contrast, the Medical Staff Appellees promptly notified the Hospital of their objection to the law and to the incorporation of the law into the Bylaws. A type of "Catch-22" would indeed arise if courts were bound to uphold a law that was otherwise unconstitutional merely because the contracts to which that law applied had been renewed while the constitutionality of such law was being litigated, as is the situation here.

Moreover, the physicians at LRMC are governed by the Bylaws for the entire duration of their practice with the Hospital. Those bylaws are continually updated and amended to conform with law. The renewal of staff membership, which is performed on an individual basis, does not create a new contract in the form of the Medical Staff bylaws at the time of each individual renewal. Rather, those bylaws provide for their own amendment procedures.

Finally, LRMC first made this argument before the First District Court; however, "[f]or an issue to be preserved for appeal…it must be presented to the lower court…." Archer v. State, 613 So. 2d 446, 448 (Fla. 1993), cert. den., 126 S.Ct. 2359 (2006) (internal citations and quotations omitted). LRMC denied the existence of a contract before the trial court, and certainly never raised the issue of renewal as creating a new contract that would incorporate new Trustee Bylaws and the

Governance Law. Therefore, it may not now raise this inherently flawed argument on appeal.

VI. THE GOVERNANCE LAW ALSO VIOLATES THE PROHIBITION ON REVISING AND AMENDING EXISTING STATUTES WITHOUT SUFFICIENT NOTICE, AS WELL AS CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION

As noted in the Summary of Argument above, the First District Court of Appeal declined to address the parties' arguments regarding equal protection and the revision and amendment of existing statutes without sufficient notice, finding them unnecessary to its decision. Lawnwood, 959 So.2d at 1224. For this reason, if this Court reverses the First District, which decided only on the grounds of a special grant of privilege and contract impairment, Appellees request that this Court remand the case to the First District. However, Appellees provide below a very brief summary of each argument.

First, the HGL creates an "irreconcilable conflict" with prior statutes. It therefore constitutes an amendment by implication and is unconstitutional as prohibited by Article III, section 6, Florida Constitution. Merely as examples, the Board of Trustees' power to amend its own bylaws and thereby trump the procedures agreed to in the medical staff bylaws prevents any procedures they adopt from being *binding*, as is required by section 395.0193(2), Florida Statutes. As another example, contrary to the clear scheme articulated in section 395.0193(3) of the Florida Statutes, the HGL defines a separate process whereby the Hospital's governing board can take

independent action regarding peer review. For these and other reasons, the HGL violates the constitutional prohibition on revising and amending existing statutes without sufficient notice.

The HGL also denies equal protection. Changing the balance of power with regard to corporate governance in one county does not qualify as a legitimate exercise of the state's police power. The HGL creates an impermissible classification in pursuit of this goal, giving LRMC an advantage compared to other hospitals throughout Florida, while removing contractual protections from the medical staff in St. Lucie County that remain intact for medical staff at all other hospitals in the state. In addition, the legislature lacked any reasonable belief that the HGL would serve a legitimate government interest. For the above reasons, the Governance Law violates equal protection requirements and is unconstitutional.

The parties fully briefed these issues for the First District Court. Therefore, if this Court overturns the district court's decision and wishes to guide that court upon remand, Appellees respectfully refer this Court to its Answer Brief below.

V. THE VIOLATIVE PROVISIONS OF THE GOVERNANCE LAW ARE NOT SEVERABLE, AND THEREFORE THE ENTIRE LAW IS INVALID

The violative provisions of the Governance Law are crucial to carrying out the Legislature's intent, which cannot be accomplished by the Law in the absence of these provisions.

Therefore, the invalid provisions cannot be severed and the entire act fails. This Court has explained that "severability…is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." Ray v. Mortham, 742 So. 2d 1276, 1280 (Fla. 1999). In order to make this determination, this Court in Cramp v. Board of Public Instruction of Orange County, 137 So. 2d 828 (Fla. 1962), set out a four-prong test for analyzing whether an unconstitutional portion of a statute is severable from the remaining portions, focusing on whether:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Cramp, 137 So. 2d at 830. The Governance Law fails these tests, mainly because the unconstitutional provisions cannot be separated from most of the valid provisions, and because the good and the bad features are inseparable in substance.

Every section of the Law, except sections 2 and 7, containing the popular name and the effective date, respectively, contains at least one unconstitutional provision. Section 1 provides for the "consolidation of a hospital corporations' board of directors' power, authority, duty, and

ultimate responsibility" and effects this "consolidation" by requiring that "in the event of a conflict…the hospital boards' bylaws shall prevail." Without this effecting phrase, the intent as expressed accomplishes nothing. Section 3 provides for "amendment, rescission, or revocation" of the board of directors' delegation of authority; a provision that may be valid at a superficial level, but which is invalid if it violates an existing contract. Section 4 requires that the "governing board shall also be…responsible for…conducting peer review," which is impossible based on the definition of "peer review" and the membership of the board. Section 6, meanwhile, provides procedures for the board to "take action independent of the…medical staff" and apparently conduct peer review as envisioned in Section 4. Section 6, by providing for new procedures, also changes the fundamental balance between the governing board and the medical staff, and impairs their contractual relationship. Section 5 likewise provides that the governing board may "take action independent of the medical staff…in accordance with the procedures specified in section 6." Section 5 again allows for effective unilateral amendment of the medical staff bylaws by the governing board.

The pervasiveness and character of the unconstitutional provisions shows that they are crucial to the legislative intent and to the understanding of any valid provisions and, as such, are not severable. Therefore, the entire Governance Law is invalid.

CONCLUSION

Although the Governance Law violates multiple constitutional provisions, any one of those violations would suffice to invalidate the Law. Severing any or all of the unconstitutional provisions would leave a law that would fail to effect the legislative intent behind the original. Therefore, the entire Law is invalid. Appellee Seeger, on behalf of LRMC's medical staff, therefore respectfully requests that this Court affirm the decision of the First District Court of Appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Courier New 12 point, a font which is not proportionately spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy was mailed to the following on December 3, 2007:

Steven Wisotsky
Stephen J. Bronis
Zuckerman Spaeder LLP
201 S. Biscayne Blvd., Ste. 900
Miami, FL 33131

Charles W. Hall
William A. Kebler
Mark D. Tinker
Fowler White Boggs Banker P.A.
P.O. Box 210
St. Petersburg, FL 33731

Harold R. Mardenborough, Jr.
Carr Allison
305 S. Gadsden Street
Tallahassee, FL 32301

/s/ Major B. Harding

MAJOR B. HARDING
Florida Bar No. 0033657
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302
(850) 224-9115
(850) 222-7560 (facsimile)

RICHARD H. LEVENSTEIN
Florida Bar No.: 0235296
Kramer, Sewell, Sopko &
Levenstein
853 S.E. Monterey Commons Blvd.
Stuart, Florida 33431
(772) 288-0048
(772) 288-0049 (facsimile)

ATTORNEYS FOR APPELLEES