IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC07-1300

Lower Tribunal Case No. 1D06-2016

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,

Appellee.

AMENDED INITIAL BRIEF OF APPELLANT

Steven Wisotsky, Esq.
Stephen J. Bronis, Esq.
Zuckerman Spaeder LLP
201 S. Biscayne Blvd., Suite 900
Miami, Florida 33131
(305) 358-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

THE RECORD ON APPEAL 2

I. STATEMENT OF THE CASE AND OF THE FACTS 3
- A. The Nature of the Case 3
- B. Statement of the Facts 3
- C. Course of Proceedings and Disposition Below 12
- D. Standard of Review 14

II. SUMMARY OF THE ARGUMENT 14

III. ARGUMENT 18

I. THE HGL IS A VALID PUBLIC HEALTH MEASURE, NOT A PROHIBITED PRIVILEGE FOR A PRIVATE CORPORATION 18

II. THE HGL DOES NOT IMPAIR THE OBLIGATION OF CONTRACT 27
- A. The HGL Does Not Substantially Impair The Contract At Issue 28
- B. The Legislature Had A Significant And Legitimate Purpose In Enacting The HGL 35
- C. The HGL Ceased To Have Any Retroactive Effect On The Contractual Relationship Between The Hospital And The Medical Staff As A Result Of Mandatory Contract Renewals 39

III. THE HGL DOES NOT VIOLATE ART. III, § 6 OF THE FLORIDA CONSTITUTION BECAUSE IT DOES NOT REVISE OR AMEND ANY STATUTE..... 40

IV. THE HGL DOES NOT DENY EQUAL PROTECTION OF THE LAWS..... 43

V. IF A SECTION OR CLAUSE OF THE HGL BE DEEMED INVALID, THE REMAINDER IS SEVERABLE..... 48

VI. CONCLUSION..... 49

VII. CERTIFICATE OF SERVICE..... 50

VIII. CERTIFICATE OF COMPLIANCE..... 51

TABLE OF AUTHORITIES

Cases

Adams v. Aetna Cas. & Sur. Co.
574 So. 2d 1142 (Fla. 1st DCA 1991) 39

Agency for Health Care Admin. v. Hameroff
816 So. 2d 1145 (Fla. 1st DCA 2002) 20

Allied Structural Steel Co. v. Spannaus
438 U.S. 234 (1978) 17, 30, 33

Am. Republic Ins. Co. v. Superintendent of Ins.
647 A.2d 1195 (Me. 1994) 38

Auto Owners Ins. Co. v. Hillsborough County Aviation Auth.
153 So. 2d 722 (Fla. 1963) 41

Bayfront Med. Ctr., Inc. v. State, Agency for Healthcare Admin.
741 So. 2d 1226 (Fla. 2d DCA 1999) 45

Blue Cross & Blue Shield of Michigan v. Milliken
367 N.W. 2d 1 (Mich. 1985) 35

Citizens' Ins. Co. v. Barnes
124 So. 722 (Fla. 1929) 31

City of St. Petersburg v. Briley, Wild & Assocs., Inc.
239 So. 2d 817 (Fla. 1970) 25

City of St. Petersburg v. English
45 So. 2d 483 (Fla. 1907) 42

Concerned Residents of Gloucester County v. Bd. of Supervisors of Gloucester County
449 S.E. 2d 787 (Va. 1994) 24

Cramp v. Bd. of Pub. Instruction of Orange County
137 So. 2d 828 (Fla. 1962) 48

Cruger v. Love
599 So. 2d 111 (Fla. 1992) 20

Dade County Med. Ass'n v. Hlis
372 So. 2d 117 (Fla. 3d DCA 1979) 37

Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.
434 So. 2d 879 (Fla. 1983) 22

Dewberry v. Auto-Owners Ins. Co.
363 So. 2d 1077 (Fla. 1978) 29

Fla. Dep't of Revenue v. City of Gainesville
918 So. 2d 250 (Fla. 2005) 14

Fla. Dep't of State, Div. of Elections v. Martin
916 So. 2d 763 (Fla. 2005) 43

Grant v. State Farm Fire & Cas. Co.
638 So. 2d 936 (Fla. 1994) 31

Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.
629 So. 2d 252 (Fla. 3d DCA 1993) 27

H.B. Holding Co. v. Girtman
96 So. 2d 781 (Fla. 1957) 33

Harris v. Martin Regency, Ltd.
576 So. 2d 1294 (Fla. 1991) 28

Holly v. Auld
450 So. 2d 217 (Fla. 1984) 20

Home Bldg. & Loan Ass'n v. Blaisdell
290 U.S. 398 (1934) 30

Hopkins v. Viscayans
582 So. 2d 689 (Fla. 3d DCA 1991) 34

In re Estate of Caldwell
247 So. 2d 1 (Fla. 1971)..... 14

In re Advisory Opinion to the Governor Request of June 29, 1979
374 So. 2d 959 (Fla. 1979) 25, 26

Joyner v. Ctr. Motor Co.
66 S.E.2d 469 (Va. 1951)..... 23

Lakeland Reg'l Med. Ctr., Inc. v. State, Agency for Health Care Admin.
917 So. 2d 1024 (Fla. 1st DCA 2006)..... 20, 21

Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n.
497 So. 2d 1261 (Fla. 5th DCA 1986) 27

Lawnwood Med. Ctr., Inc. v. Seeger
959 So. 2d 1222 (Fla. 1st DCA 2007)..... *passim*

Lee County v. Brown
929 So. 2d 1202 (Fla. 2d DCA 2006) 28, 29

Linton v. Comm'r of Health & Env't
65 F.3d 508 (6th Cir. 1995)..... 34, 35

Marchesano v. Nationwide Prop. & Cas. Ins. Co.
506 So. 2d 410 (Fla. 1987)..... 40

Metro. Prop. & Liab. Ins. Co. v. Gray
446 So. 2d 216 (Fla. 5th DCA 1984) 39

Naples Cmty. Hosp., Inc. v. Hussey
918 So. 2d 323 (Fla. 2d DCA 2006) 27

Newman v. Carson
280 So. 2d 426 (Fla. 1973) 46, 47

N. Ridge Gen. Hosp., Inc. v. City of Oakland Park
374 So. 2d 461 (Fla. 1979) 44

Parkway Gen. Hosp. Inc. v. Allinson
453 So. 2d 123 (Fla. 3d DCA 1984) 37

Pomponio v. Claridge of Pompano Condo., Inc.
378 So. 2d 774 (Fla. 1979) ..... *passim*

Rubin v. Coors Brewing Co.
514 U.S. 476 (1995) 20, 38

Sch. Bd. of Escambia County v. State
353 So. 2d 834 (Fla. 1977) 21, 47

State ex.rel. Women's Ben. Ass'n v. Port of Palm Beach Dist.
164 So. 851 (1935) 29

United States v. Minarcik
Case No. 02-14013-CR-Middlebrooks (S.D. Fla. Jan. 31, 2003) 15

United States v. Walker
Case No. 02-14047-CR-Roettger (S.D. Fla. June 17, 2003) 15

U.S. Fid. & Guar. Co. v. Dep't of Ins.
453 So. 2d 1355 (Fla. 1984) 17, 18, 33, 36

Walker v. Lawnwood Med. Ctr., Inc.
No. 99-159CA03 (Fla. 19th Cir. Ct. Feb. 15, 1999) 6, 7

Williamson v. Lee Optical Co.
348 U.S. 483 (1955) 47

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) 23

Zapo v. Gilreath
779 So. 2d 651 (Fla. 5th DCA 2001) 44

State Constitutional Provisions

Art. I, § 10, Fla. Const. 2, 13, 27

Art. III, § 6, Fla. Const. 13, 18, 40, 42

Art. III, § 11(a)(12), Fla. Const. ..... *passim*

Art. V, § 3(b)(1), Fla. Const. 2, 3

Art. X, § 12(g), Fla. Const. 46

Florida Statutes

§ 395.003(8), Fla. Stat. (2005) 32

§ 395.0191, Fla. Stat. (2005) 10, 12

§ 395.0191(5), Fla. Stat. (2005) 32

§ 395.0193, Fla. Stat. (2005) ..... *passim*

§ 395.0193(1), Fla. Stat. (2005) 36

§ 395.0193(2), Fla. Stat. (2005) 5, 31

§ 395.0193(2)(a), Fla. Stat. (2005) 45

§ 395.0193(2)(c), Fla. Stat. (2005) 45

§ 395.0193(2)(g), Fla. Stat. (2005) 37

§ 395.0193(3), Fla. Stat. (2005) ..... *passim*

§ 395.0193(6), Fla. Stat. (2005) 32

§ 395.0197, Fla. Stat. (2005) 12

§ 395.1065(2)(a), Fla. Stat. (2005) 32

§ 766.110(1), Fla. Stat. (2005) 5, 31

§ 766.110(1)(c), Fla. Stat. (2005) 5, 31

Florida Bills

Fla. H.B. 1447 (2003) 1

Fla. H.B. 1447, § 1 (2003) ..... *passim*

Fla. H.B. 1447, § 3 (2003) 10, 48

Fla. H.B. 1447, § 4 (2003) ..... *passim*

Fla. H.B. 1447, § 5 (2003) 10, 11, 27, 48

Fla. H.B. 1447, § 6 (2003) 12, 27, 49

State Regulations

Fla. Admin. Code R. 59A-3.271(1) 34

Fla. Admin. Code R. 59A-3.272(1) 34

Fla. Admin. Code R. 59A-3.272(4) 34

Fla. Admin. Code R. 59A-3.272(5) 19

JCAHO MEDICAL STAFF STANDARD § 4.20 ..... 5, 40

Federal Statutes

42 U.S.C. §§ 299b-21-299b-26 (2007) 33

42 U.S.C. §§ 1320c-1320c-12 (2007).....33

42 U.S.C. §§ 11101-11152 (2007). 33

42 U.S.C. § 11133(a)(1), (3) (West 2007). 37

42 U.S.C. § 11135(a) (West 2007). 37

Pub. L. No. 104-191, 110 Stat. 1936 (1996) 33

Federal Regulations

42 C.F.R. § 482.1 - 482.57 (2007) 4

42 C.F.R. § 488.5 (2007).....4

42 C.F.R. § 488.8 (2007).....4

42 C.F.R. § 488.10 (2007).....4

Other Authorities

Fla. H.R. Comm. on Health Care, H.B. 1447 (2003), Staff Analysis (rev. Apr. 14, 2003). ..... *passim*

JOHN E. NOWAK and RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed. 2004) 30

INTRODUCTION

Two pathologists on the medical staff at Lawnwood Regional Medical Center and Heart Institute ("Lawnwood" or "The Hospital") had committed criminal health care fraud. They had also repeatedly misdiagnosed their patients, placing the health and safety of the public at risk. Despite repeated efforts by the Hospital's Board of Trustees ("the Board") to take corrective and disciplinary action, the Medical Executive Committee ("MEC") of the medical staff refused to investigate the offending physicians. The Medical Staff Bylaws rendered the Board powerless to compel the medical staff to review medical actions necessary to protect the safety of patients. The crimes and injurious practices of the two pathologists stopped only when a federal grand jury indicted them, and they lost their licenses to practice medicine. Similar clashes between the Board and the medical staff over quality of care were common.

To address this urgent situation, the Florida Legislature unanimously enacted the "St. Lucie County Hospital Governance Law," Florida House Bill 1447 (2003), to ensure that the Hospital's Board of Trustees could effectively police incompetent and/or criminal behavior on the part of physicians practicing at Lawnwood.

Acknowledging that the Governance Law was "a properly enacted special law," the trial judge struck it down largely because it was intended to affect the affairs of a single entity, Lawnwood. This fact was, in the court's view, the "pivotal issue" leading to the conclusion that its "alleged purpose" was in reality a "pretext" to award a "privilege" to Lawnwood's governing Board. Appendix, Tab C.

On appeal, the First District affirmed. *Lawnwood Med. Ctr., Inc. v. Seeger*, 959 So. 2d 1222 (Fla. 1st DCA 2007). The Court unanimously held that the Governance Law was a prohibited privilege for a private corporation in violation of Art. III, § 11(a)(12). Two judges agreed that it also impaired the obligation of contract in violation of Art. I, § 10. That court's declaration of invalidity confers jurisdiction upon this Court under Art. V, § 3(b)(1).

THE RECORD ON APPEAL

The record of the circuit court proceedings consists of 14 volumes, denoted R. __. For the convenience of the Court, Appellant submits contemporaneously with this brief an Appendix consisting of the following: the Hospital Governance Law (Tab A) and the Florida House of Representatives Committee on Health Care, House Bill 1447 (2003), Staff Analysis (rev. Apr. 14, 2003) (Tab AA); the opinion of the First District Court of Appeal (Tab B); and the circuit court order granting

final summary judgment to Appellee (Tab C).

The Appendix also contains excerpts of three sets of Bylaws from the record: the 1988 Board of Trustees Bylaws are Tab D; the 1993 Medical Staff Bylaws are Tab E; and the 2002 Board of Trustees Bylaws are Tab F. Tabs G and GG and H and HH contain the charges and convictions of the two physicians referred to above.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case

Lawnwood appeals from the First District Court of Appeal's opinion affirming the trial court's final summary judgment declaring that a special law, the Hospital Governance Law, is unconstitutional. This Court has jurisdiction under Art. V, § 3(b)(1).

B. Statement of the Facts

Appellant Lawnwood is a 345-bed, acute-care facility, the largest hospital in St. Lucie County. Lawnwood has more than 200 physicians on staff and more than 1200 employees. Fla. H.R. Comm. on Health Care, H.B. 1447 (2003), Staff Analysis 2 (rev. Apr. 14, 2003). Appellee is Dr. Seeger, a former President of Lawnwood's medical staff and a member of the MEC of the Hospital.

The Board of Trustees serves as the local governing body of the Hospital. R. 2084 ¶ 10. The Board of Trustees is comprised of volunteer members -- local business and community leaders as well as physicians from Lawnwood. *Id.* ¶ 9. The Board has the power to make final decisions regarding credentialing, peer review and quality assurance after considering the recommendations of the medical staff. 1988 Trustees Bylaws, Art. II, § 5 and Art. VII, § 7. These bylaws required the medical staff to establish a framework for self-governance within which medical staff members could act, while remaining accountable to the Board. 1988 Trustees Bylaws, Art. II, § 4 and Art. VII.

In 1993, Lawnwood's medical staff adopted the Medical Staff Bylaws in an effort to comply with requirements[1] of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"). These Medical Staff Bylaws were approved by the Board. R. 2086 ¶¶ 22-24. They provide for the formation of various committees, including credentialing and re-credentialing committees to review applications for initial appointments and re-appointments to the medical staff, for final determination by the Board. 1993 Medical Staff Bylaws, Art. V,

[1] As a condition of participation ("COP") in the federal Medicare program, 42 C.F.R. §§ 482.1-482.57 (2007), Lawnwood, like other hospitals, maintains accreditation from JCAHO as part of a national accreditation program. 42 C.F.R. §§ 488.5, 488.8 & 488.10 (2007).

Part C, D. JCAHO accreditation standard 4.20 requires members of the medical staff to re-apply for privileges and be re-credentialed at least every two years. R. 744. The same is also required by the Medical Staff Bylaws. 1993 Medical Staff Bylaws, Art. VI, Part B, §§ 3, 4(a).

The Hospital's Duty to Perform Peer Review of Physicians

Under Florida law, all hospitals "shall provide for peer review of physicians who deliver health care services at the facility." § 395.0193(2), Fla. Stat. (2005). "All . . . hospitals . . . have a duty to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties." § 766.110(1), Fla. Stat. (2005). The Hospital's mandate also includes "supervision of the medical staff and hospital personnel to the extent necessary to ensure that such medical review and risk management processes are being diligently carried out." § 766.110(1)(c), Fla. Stat. (2005). Furthermore, where "reasonable belief exists that conduct by a staff member or physician who delivers health care services at the licensed facility may constitute one or more grounds for discipline . . ., a peer review panel shall investigate and determine whether grounds for discipline exist with respect to such staff member or physician." § 395.0193(3), Fla. Stat. (2005).

Lawnwood's medical staff had a history of resisting the Board's authority over peer review and related quality of care functions. R. 2087-2091 ¶¶ 25-52. To justify its defiance, the medical staff relied upon conflicting provisions of its own bylaws. This resulted in "substantial and ongoing disputes" between the Board and the medical staff for many years. R. 2086 ¶ 25. Indeed, there were seven lawsuits related to governance.[2] R. 2087 ¶ 27. These lawsuits concerned peer review, discipline, credentialing and quality assurance. *Id.* ¶ 28.

One such dispute concerned quality of care issues in the Hospital's Pathology Department. In 1997, the Board of Trustees raised concerns about the quality of the medical services rendered by two pathologists on the medical staff, Dr. Walker and Dr. Minarcik. *Id*. ¶¶ 29-30. Drs. Walker and Minarcik had error rates of 20-25% in their diagnoses of patients. R. 2298-2299.

There being a reasonable belief that the pathologists' conduct constituted grounds for discipline, the Board asked the MEC to investigate and perform peer reviews of these doctors. R. 2298-2300. The MEC refused to initiate any investigation or peer review inquiries. *Walker v. Lawnwood Med. Ctr., Inc.,* No. 99-159 CA 03 *2 (Fla. 19th Cir. Ct. Feb. 15, 1999) (hereinafter "*Walker*"); R.

[2] The seven suits are listed and briefly described in Lawnwood's Memorandum of Law in Support of its Motion for Summary Judgment at 13-15. R. 2108-2110.

2298-2300. The Medical Staff Bylaws did not require the MEC to act upon a Board request for a peer review inquiry and did not provide for review by the Board of such inaction.

To protect patient safety, the Board suspended the medical staff privileges of Dr. Walker and Dr. Minarcik. R. 2088 ¶ 31; R. 2300. The two doctors filed suit against the Board, seeking reinstatement on the ground that, under the Medical Staff Bylaws, only the medical staff had authority to recommend their suspension. R. 2088 ¶ 33. The trial court entered a temporary injunction in favor of the doctors. *Walker*, Case No. 99-159 CA 03 at *2. R. 2088 ¶ 34. It ordered their reinstatement because (1) it viewed the 1988 Trustees Bylaws as conflicting with the 1993 Medical Staff Bylaws, and (2) it ruled that conflict must be resolved against the Hospital as the drafter of the documents. *Walker,* Case No. 99-159 CA 03 at *7.

In 2001, three years after the Board first asked the medical staff to perform peer review investigations of Drs. Walker and Minarcik, the Department of Health ("DOH") served Dr. Minarcik with an emergency order suspending his medical license.[3] R. 2089 ¶ 40. The DOH order was entered because Dr. Minarcik

[3] The DOH emergency order of suspension ("ESO") is listed on the DOH Website: https://ww2.doh.state.fl.us/IRM00PRAES/PRASINDI.ASP?LicId=34553&ProfNB

presented an immediate and serious danger to the health, safety and welfare of the public. *Id.* ¶ 41. In 2002, in response to federal indictments, Drs. Walker and Minarcik pled guilty to charges of federal healthcare fraud by performing inappropriate and medically unnecessary procedures at Lawnwood. R. 2090 ¶ 43.

The Board's Efforts to Resolve the Conflicts Between its Bylaws and the Medical Staff Bylaws

The Board attempted to resolve recurring governance conflicts with the medical staff by adopting new bylaws in 2002. The key provision is section 9.1.1: "Neither the Board or the medical staff may unilaterally amend the Medical Staff Bylaws or Rules and Regulations." But "[i]n the event the Medical Staff refuses to amend their Bylaws to comply with local, State or Federal laws and regulations, the Board retains the authority to unilaterally amend the Medical Staff Bylaws to so comply after first exhausting reasonable efforts to gain Medical Staff approval." 2002 Trustees Bylaws, Art. IX, § 9.1.1. R. 146.

By contrast, the Medical Staff Bylaws prevented the Board from amending the Medical Staff Bylaws without the consent of 60% of the medical staff. R. 121. The medical staff deemed section 9.1.1 of the 2002 Bylaws illegitimate. It maintained that it had the final word on whether to act upon the Board's request to

---

R=1501.

investigate the conduct of a physician and perform peer review. The Board and the medical staff had reached an impasse.

Enactment of the Governance Law by the Legislature

The Florida Legislature responded to the governance impasse at Lawnwood by unanimously enacting a special law, the Hospital Governance Law ("HGL"), with the stated purpose of clarifying "the delineation of authority" in hospital governance:

> 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.

Fla. H.R. Comm. on Health Care, H.B. 1447 (2003), Staff Analysis 2 (rev. Apr. 14, 2003).

Section 1 of the HGL states that the legislative intent is "to provide consolidation of a hospital corporation's board of directors' power, authority, duty, and ultimate responsibility under *existing statutes* with respect to the operation of a hospital." (emphasis added). Fla. H.B. 1447, § 1 (2003). Section 1 further provides that "in the event of a conflict" between a hospital board's bylaws and those of its medical staff, "the hospital board's bylaws shall prevail" with respect

to credentialing, peer review, and related quality assurance programs. This is repeated in substance in Section 5. Fla. H.B. 1447, § 1 (2003).

Section 3 addresses the overall governance structure of a general hospital. Fla. H.B. 1447, § 3 (2003). Section 4 provides that the governing board is "ultimately responsible for the administration of the hospital, including managing the operations of the hospital, ensuring patient welfare, conducting peer review, overseeing the risk management program and quality assurance activities, and determining eligibility for medical staff membership and clinical privileges." Fla. H.B. 1447, § 4 (2003). Section 4 further notes that this grant of authority is "subject to the provisions of sections 395.0191 and 395.0193, Florida Statutes." Fla. H.B. 1447, § 4 (2003). [4]

Section 5 of the HGL provides that a governing board's authority "is not limited by the authority of its medical staff" and that it may therefore "reject or modify a medical staff recommendation." If the medical staff fails to act, the Board may initiate action concerning credentialing, peer review, and quality assurance. Fla. H.B. 1447, § 5 (2003).

[4] The legislative history repeats this reference to the existing statutes and further notes that the "authority of the governing board of any hospital in relation to its medical staff is subject to . . . the articles of incorporation and bylaws of the hospital corporation." Fla. H.R. Comm. on Health Care, H.B. 1447 (2003), Staff Analysis 2 (rev. Apr. 14, 2003).

Section 5 then establishes controlling authority in the event the bylaws conflict:

> [T]o the extent, if any, that the bylaws or other regulations of the medical staff conflict with the bylaws or other regulations of the governing board, the bylaws or other regulations of the governing board shall control with respect to medical staff privileges, quality assurance, peer review, and contracts for hospital-based services.

Section 5 requires that the governing board, before amending the "hospital's medical staff bylaws and related manuals, rules or regulations," must first submit them to the medical staff, with adequate notice, and then "carefully consider" any timely response it makes. Fla. H.B. 1447, § 5 (2003).

Section 6 provides a process for the governing board to modify a medical staff recommendation and to take timely "corrective or disciplinary action" against a physician when "a medical staff has failed to act within 75 days after a request from the governing board." Such action is subject to "a fair hearing process" that ensures the physician's right to be heard fully and represented by counsel. If after such fair hearing, the governing board "determines that corrective or disciplinary action is necessary," it must refer the matter to a six-member joint conference committee represented equally by the Board and the medical staff. This joint conference committee is to review the fair hearing recommendation and report

back to the Board. If the joint conference committee rejects the governing board's recommendation or proposes an alternative, the governing board "shall give full and complete consideration to the joint conference committee's recommendations." Fla. H.B. 1447, § 6 (2003).

Lawnwood's Attempted Implementation of The Governance Law

Following enactment of the HGL, the Board passed resolutions proposing to amend the Medical Staff Bylaws. R. 2092 ¶ 57. The Board of Trustees explained to its medical staff that the proposed amendments were necessary to enable the Hospital to comply with its responsibilities to provide effective peer review, credentialing and quality assurance under §§ 395.0191, 395.0193, 395.0197, Florida Statutes (2005). R. 160-204. The medical staff rejected the Board's proposed amendments to the Medical Staff Bylaws, citing "concerns about the constitutionality of the Governance Law." R. 205-207; R. 2093 ¶ 59. It then voted unanimously to retain counsel to attack the validity of the HGL. R. 208; R. 2093 ¶ 60.

C. Course of Proceedings and Disposition Below

Lawnwood filed suit, seeking a declaration that the HGL is constitutional; that the Board has the power and/or duty to propose valid amendments to the Medical Staff Bylaws pursuant to the HGL; and that the Board has the power

and/or duty to adopt the proposed amendments to the Medical Staff Bylaws as contained in the Board's resolutions. The parties filed cross motions for summary judgment. Following a hearing, the trial judge granted Appellee Seeger's motion and declared the HGL unconstitutional.

The trial judge declared the HGL unconstitutional on four grounds. First, the trial judge concluded that the HGL was invalid because it established "a privilege for a private corporation." R. 2721. Second, the trial judge concluded that (1) the Medical Staff Bylaws constitute a contract between the medical staff and the Board of Trustees and (2) that the HGL impermissibly impairs this contract because it "alters the standards described in the Medical Staff Bylaws" in violation of Art. I, § 10, Florida Constitution. R. 2707; R. 2709-2718.

The First District upheld the trial court on these two grounds and did not address the other two.[5] *Lawnwood Med. Ctr., Inc.*, 959 So. 2d at 1223-1224.

[5] The trial judge also concluded that the HGL impliedly amended § 395.0193, Florida Statutes, (2005) "by creating a special exemption for Lawnwood Medical Center, Inc. . . . without referencing the amendment in the law's title" in violation of Art. III, § 6, Florida Constitution. R. 2721. Finally, the trial judge ruled that the statute violated the Equal Protection Clauses of both the Florida and U.S. Constitutions by creating two classes of hospitals in Florida, those subject to the peer review process of § 395.0193, Florida Statutes (2005), and those subject to the peer review process of the HGL. R. 2722. The trial judge ruled that this classification was made "without any legitimate government purpose, and without

Because it held the HGL invalid, Lawnwood timely appealed to this Court.

D. Standard Of Review

The determination of a statute's constitutionality and the interpretation of a constitutional provision are legal questions subject to *de novo* review. *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). This presumption of constitutionality continues on review after the lower court holds the law unconstitutional, and no deference is given to the lower court's ruling. *In re Estate of Caldwell*, 247 So. 2d 1, 3 (Fla. 1971). Further, a determination that a statute is facially unconstitutional means that no set of circumstances exists under which the statute would be valid. *City of Gainesville*, 918 So. 2d at 256.

SUMMARY OF THE ARGUMENT

In its origin, this case is aptly described as "the case of the dueling bylaws." Unlike ordinary contract disputes, this one uniquely affected the public interest. The ability to provide safe and effective medical care to the 250,000 people of St. Lucie County at its largest acute care hospital was endangered by the medical staff's irresponsible passivity, as exemplified by the two rogue pathologists whose malfeasance went unchecked by the medical staff's MEC. It took intervention by

---

a reasonable expectation that the classification would serve a governmental purpose." *Id*. These issues are addressed in Points III and IV.

the DOH through its emergency suspension order, and then federal indictments charging the performance of inappropriate and unnecessary pathology procedures[6] to put an end to the imminent danger to public health posed by those physicians.

In striking down the HGL, the First District gave no weight at all to the HGL's stated public health purpose, *i.e.* to insist that the Board would remain "ultimately responsible" for "ensuring patient welfare." The First District was dismissive of this concern, asserting that "this legislation was not required to protect the public health, ensure the quality of care at Lawnwood, or accomplish some other legitimate public purpose." *Lawnwood Med. Ctr.*, 959 So. 2d at 1224. No facts follow this *ipse dixit*, nor any mention of the medical staff's past and continuing derelictions of duty.

The First District's assessment of the validity of the HGL under Art. III, § 11(a)(12) was thus superficial. It agreed with the trial judge that the law conferred an unconstitutional "privilege" on the Hospital. But the "privilege" conferred by the HGL was not economic favoritism of one competitor over another and not a benefit such as a tax credit, subsidy, or other monetary preference.

---

[6] Each pled guilty to a ten year felony; *United States v. Minarcik*, Case No. 02-14013-CR-Middlebrooks (S.D. Fla. Jan. 31, 2003) (Tabs G and GG); *United States v. Walker*, Case No. 02-14047-CR-Roettger (S.D. Fla. June 17, 2003) (Tabs H and HH).

Far from providing a "privilege" in the common sense of that term, the HGL merely reinforced Lawnwood's existing duties under Chapters 395 and 766 of the Florida Statutes and Agency for Health Care Administration's ("AHCA") regulations to perform credentialing, peer review and quality assurance timely and effectively. The law simply clarified the governing role of a hospital's board of trustees within the existing state regulatory scheme: the Board has ultimate authority over the operations of the hospital. The First District Court did not assess the law in this legal context. It did not look beyond an excessively broad and rather literalistic interpretation of the word "privilege" from a Webster's Dictionary. *Id.* at 1225.

With respect to the Contract Clause issue, the court of appeal arrived at its conclusion of invalidity without proper analysis. First, the court could cite no case striking down a statute under the Contract Clause where the law did not impose a financial burden or loss on a contracting party. *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774 (Fla. 1979), on which it purported to rely, is a case of economic loss imposed on one of the contracting parties. Here, only governance and control were affected, not money.

Second, because the HGL restored Board control and specified procedures applicable in cases of bylaws conflict, it constituted no more than a "minimal

alteration" of contractual relations. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978). Third, the court of appeal overlooked the extensive body of case law finding no impairment of contract when the Legislature further regulates an already heavily regulated industry in the existing area of regulation. *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984).

In short, there is no impairment at all. But assuming there be some impairment wrought by the HGL and that it further be deemed substantial, it is fully justified by the Legislature's significant and legitimate public health purpose. The court of appeal did not engage in the carefully calibrated balancing of costs and benefits required by *Pomponio*. Indeed, it did not weigh the benefit side of the equation at all—other than to cursorily dismiss it as unnecessary. Yet, it failed to acknowledge that the Hospital's Board had been repeatedly thwarted in its efforts to administer effective peer review, as exemplified by the physicians who were convicted of felony federal health care fraud arising from their conduct as members of the medical staff at Lawnwood.

Confronted with these facts, the Legislature, by unanimous votes in both the House and the Senate, took appropriate remedial action to protect the quality of care at St. Lucie County's largest hospital. The HGL is well drafted and specifically targeted, as a special law should be, to redress the governance failures

at Lawnwood. The courts below were bound to uphold the legislative judgment that "the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective." *Pomponio,* 378 So. 2d at 780. Under the circumstances, even a substantial impairment of contract would have been justified. *U.S. Fid. & Guar. Co.,* 453 So. 2d at 1361.

The circuit court's rulings of statutory invalidity under Art. III, § 6 and the Equal Protection Clauses were not formally addressed by the First District. As shown below, they lack sufficient merit to warrant judicial analysis and decision.

ARGUMENT

I. THE HGL IS A VALID PUBLIC HEALTH MEASURE, NOT A PROHIBITED PRIVILEGE FOR A PRIVATE CORPORATION.

Article III, § 11(a)(12) of the Florida Constitution provides "[t]here shall be no special law or general law of local application pertaining to . . . private incorporation or grant of privilege to a private corporation." The court of appeal concluded that the HGL violates this prohibition because it "diminishes or eliminates many of the hospital's contractual obligations to its medical staff." *Lawnwood Med. Ctr., Inc.,* 959 So. 2d at 1224. The court did not specify the obligations diminished or eliminated.

In truth, all the HGL did was to abrogate the several veto powers claimed by

the medical staff over Board action, including its assertion of supremacy over the Board respecting peer review. The HGL restored control to the Board, a control that was already required by Chapters 395 and 766 of the Florida Statutes, AHCA regulations and by other provisions of law.

To be more specific, the Medical Staff Bylaws do not allow the Board to compel the medical staff to investigate the conduct of a physician and to perform peer review. Article VII, Part C, § 2(a) of the 1993 Medical Staff Bylaws, gives the MEC the final say. The 1993 Medical Staff Bylaws do not even provide a timeframe or deadline for the MEC to conduct an investigation or make a decision or recommendation. Under the 1993 Medical Staff Bylaws, such inaction on the part of the MEC is not subject to review by the Board. This is contrary to the mandate imposed by state law on both the medical staff and the Board.

More specifically, under § 395.0193(3), Florida Statutes (2005), the Hospital has the duty to ensure that a peer review panel will "investigate and determine whether grounds for discipline exist" when it has a "reasonable belief" that a violation has occurred. Florida Administrative Code Rule 59A-3.272(5) confirms the right of the governing body to suspend, deny or revoke staff privileges for good cause. These laws were the basis for the Board's suspension of Drs. Walker and Minarcik before their action was overturned by a circuit court.

The 1993 Medical Staff Bylaws were thus deployed to thwart the Hospital from discharging its overriding legal responsibilities. The HGL corrected this danger to the health of the public by providing a specific remedy to compel peer review by the MEC; a specific remedy for unreasonable inaction by the MEC; and a 75-day time frame for the MEC to take action when requested by the Board to do so. The public health reasonableness of these remedies and their consistency with state law is self evident. As this Court has recognized, effective peer review is vital to the ability of a hospital to self-police its quality of care. *Cruger v. Love,* 599 So. 2d 111, 113 (Fla. 1992); *Holly v. Auld,* 450 So. 2d 217, 219-220 (Fla. 1984).

Laws regulating health care lie at the core of the state's police power. *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 485 (1995). For that reason, they are entitled to great respect by judges. The presumption of constitutionality "is a paradigm of judicial restraint and an acknowledgment of separation of powers principles." *Agency for Health Care Admin. v. Hameroff,* 816 So. 2d 1145, 1149 (Fla. 1st DCA 2002).

But the court of appeal disregarded the strong presumption of statutory validity. A statute should not be overturned unless "it is determined to be invalid beyond a reasonable doubt." *Lakeland Reg'l Med. Ctr., Inc. v. State, Agency for*

Health Care Admin., 917 So. 2d 1024, 1030 n.1 (Fla. 1st DCA 2006). One searches the opinion in vain for any such deference to the Legislature. The district court simply asserted that the HGL was "not required to protect the public health." *Lawnwood Med. Ctr., Inc.*, 959 So. 2d at 1224. The district court overstepped its authority and its sphere of competence.

In *School Board of Escambia County v. State*, 353 So. 2d 834, 838-39 (Fla. 1977), the Court upheld the validity of a special act, explaining that courts

> are not here concerned with the wisdom or policy of this statute. . . . That was a matter for the Legislature to determine. We are only concerned with the question as to whether or not the statute here under review constitutes such a *clear violation* of the Constitution as would require this court to hold it invalid. As the majority of the court are of the opinion that the statute is not shown by the respondents to be unconstitutional *beyond all reasonable doubt*, the validity of the statute should be upheld.

(Emphasis added). In this case, the district court did not even acknowledge that the HGL was entitled to a presumption of validity and did not acknowledge the Legislator's factual basis for enacting the HGL.

Second, the district court gave no weight at all to the stated intent of the Legislature: to ensure "ultimate responsibility" by the Hospital over its operations.[7]

[7] How the Board lost control over its physicians by approving the 1993 Medical Staff Bylaws is not clear. The Board's ratification may have been an oversight or a misunderstanding or the result of bad legal advice. The record does not reflect

Fla. H.B. 1447 § 1 (2003). "It is a well established rule of construction that the *intent* of the Legislature *as gleaned from the statute* is the law." *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 882 (Fla. 1983) (emphasis added).

Under a proper analysis, stripped of any improper attribution of pretextual legislative motive, the HGL is a straightforward exercise of the police power to protect "patient welfare" by clarifying that the "ultimate responsibility" of the governing Board remained where it had been all along under "existing statutes." Fla. H.B. 1447 § 4 (2003). The HGL did not by any reasonable understanding grant Lawnwood a "privilege" prohibited by Art. III, § 11(a)(12), Florida Constitution. The opinion below rests on a mechanical view that restoring control to the Board, even though control was mandated by pre-existing law, was *ipso facto*, an improper "privilege."

Appellant has not found a Florida case interpreting Art. III, § 11(a)(12)'s use of the term "privilege". The First District cited none, only a Webster's dictionary. The court should have considered case law under similar provisions in other states. It would have found that the rare cases invalidating special laws as privileges

---

what happened. It does not matter. The people of St. Lucie County should not be made to suffer. In determining the validity of the HGL, it is apparent that the Legislature had a good faith basis for passing the law.

conferred upon a private corporation are easily distinguished and highly instructive.

In *Joyner v. Center Motor Co.*, 66 S.E.2d 469, 472-473 (Va. 1951), the special law challenged was found unconstitutional because it permitted only enfranchised car dealers to obtain licenses to sell new cars, a "valuable business privilege." The court condemned the law as the grant of a monopoly: "The effect would be that the business of selling new cars would be monopolized by dealers enfranchised by the manufacturers. It constitutes an attempt to create a monopoly, a power that the legislature does not possess." *Id.* at 473.

Similarly, a Louisiana court struck down a special law that exempted an existing entity from having to pay certain taxes because it constituted a privilege. The law "exempt[ed] a facility to be operated as a hotel from paying already existing sales taxes imposed by statutes and ordinances and grant[ed] a private entity (the developer) a special privilege to use taxes imposed by the WTC TIF statute for private purposes." *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, 1190 (La. Ct. App. 2005).

By contrast, one decision upholds a special law passed in furtherance of

public health, even though it incidentally helped a private party. In *Concerned Residents of Gloucester County v. Board of Supervisors of Gloucester County*, 449 S.E.2d 787 (Va. 1994), the Virginia Supreme Court interpreted the Virginia Constitution, which like the Florida Constitution, contains a prohibition against special laws conferring privileges on private companies. The court analyzed a county contract with a waste management company, which contained provisions favorable to the company, and reviewed it as a special or private law. The court held that the county contract did not confer a prohibited benefit on the waste management company because it was reasonably related to the municipality's goal of ensuring public health and safe disposal of garbage, trash and refuse. *Id*. at 792-793.

These cases, taken together, strongly suggest that the constitutional prohibition against granting privileges to private corporations is intended primarily to protect the public fisc by preventing financial give-aways or to prevent the Legislature from conferring a competitive advantage upon a favored constituent. Nothing implies that the anti-privilege proviso is intended to inhibit the proper exercise of regulatory police power. As in *Concerned Residents of Gloucester County*, the HGL does not confer a benefit on the Hospital. There is no tax break, subsidy, land grant or monopoly. There is no competitive advantage over other

hospitals.

The First District dismissed this argument as "technical." *Lawnwood Med. Ctr., Inc.* 959 So. 2d at 1224. This myopic view overlooks the purpose of the HGL to enable the Hospital to comply with its existing legal obligations over credentialing, peer review and quality assurance. Indeed, Sections 1 and 5, which resolve bylaws conflicts in favor of the Hospital, are probably redundant, as board supremacy was already mandated by state law under Chapters 395 and 766 and AHCA regulations.

The First District was wrong in equating the Legislative righting of the balance at Lawnwood with conferring a special benefit upon it. Helping Lawnwood to discipline or de-credential dangerous, malpracticing physicians bears no semblance of a "privilege" for the benefit of a private corporation, even applying, as the court of appeal claimed to do, the "usual and ordinary meaning" of the word. *Id.*

Deriving plain meaning is not a mechanical process; all words have some flex in them.[8] Even *City of St. Petersburg v. Briley, Wild & Associates, Inc.* 239

[8] Statutory words are written symbols and therefore subject to contextual interpretation. The plain meaning rule simply counsels courts to choose the most appropriate of competing interpretations. Foolish literalism is to be avoided if it would be "strained or lead to absurd results." *In re Advisory Opinion to the*

So. 2d 817, 822 (Fla. 1970), cited by Appellee (AB: 9) in the court of appeal for the plain meaning rule, construed the phrase "exclusively for the benefit of the property or residents in unincorporated areas" to allow for some degree of benefit to non-residents.

Nor do dictionary definitions support Appellee. Both dictionaries cited by Appellee in the First District (AB:15) define privilege consistent with the common-sense definition advanced by Lawnwood's brief—a "special" right or a "peculiar benefit" (IB:23). To be special or peculiar means different from the mass. To be unconstitutionally "privileged" requires that competitors or others similarly situated be denied the same right or power at issue. But the HGL treats all St. Lucie County hospitals equally; Lawnwood receives no special benefit above other hospitals.

A prohibited "privilege" is not simply anything that helps a corporation. It is using the power of the state to give an economic or competitive advantage to one business over others, as exemplified by the cases cited by Appellant: a grant of a monopoly and a special tax exemption. The "privilege" prohibited by the Florida

---

Governor Request of June 29, 1979, 374 So. 2d 959, 964 (Fla. 1979).

Constitution is, likewise, economic favoritism over other entities similarly situated. Here, there is none.

II. THE HGL DOES NOT IMPAIR THE OBLIGATION OF CONTRACT.

Lawnwood freely acknowledges the existence of a "contractual relationship" between the Hospital and the medical staff. *Greenberg v. Mount Sinai Med. Ctr. of Greater Miami, Inc.*, 629 So. 2d 252, 257 (Fla. 3d DCA 1993). The contract arises under state law when a hospital's governing board adopts medical staff bylaws. *Lawler v. Eugene Wuesthoff Mem'l Hosp. Ass'n.*, 497 So. 2d 1261, 1264 (Fla. 5th DCA 1986). The court of appeal was correct in this part of its opinion. *Lawnwood Medical Center, Inc.*, 959 So. 2d at 1224 (citing *Naples Cmty. Hosp., Inc. v. Hussey*, 918 So. 2d 323, 325 (Fla. 2d DCA 2005)).

Article I, § 10, Florida Constitution provides that "[n]o . . . law impairing the obligation of contracts shall be passed." Unconstitutional "impairment" in a heavily regulated industry is rarely found. It is never found without monetary loss, and there is none here. The HGL effects no more than a "minimal alteration" insofar as it adds more explicit provisos to deal with medical staff refusal to conduct peer review and, when necessary, Board power to amend medical staff bylaws. Fla. H.B. 1447 §§ 5, 6 (2003).

Even were the HGL deemed a substantial impairment, it would be fully justified by the public health purpose of the legislation. The prohibition against impairment of contracts is subject to the inherent police power of the State to enact laws that are "reasonably necessary to secure the health, safety, good order, [and] general welfare." *Harris v. Martin Regency, Ltd.*, 576 So. 2d 1294, 1297 (Fla. 1991) (internal citations omitted).

Where, as here, a statute does not impair a contract on its face, *Pomponio* asks if the statute violates the contract clause as applied. The reviewing court must determine if "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. The HGL readily passes this test.

A. The HGL Does Not Impair The Contract At Issue.

1. <u>The HGL Imposes No Financial Injury or Loss.</u>

Economic loss suffered as a result of a retroactive change to a contract is the *sine qua non* of contract impairment. Thus, a statute that results in an "immediate diminishment in value . . . that 'retroactively turns otherwise profitable contracts into losing propositions'" is unconstitutional on its face and does not receive *Pomponio* balancing. *Lee County v. Brown*, 929 So. 2d 1202, 1209 (Fla. 2d DCA

2006). On that basis, *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978) struck down a statute that retroactively deprived the father of two deceased sons the benefit of his $200,000 uninsured motorist coverage insurance for each boy. Financial loss is the context in which this Court stated that "[i]t is axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution." *Id.* at 1080. "Value" clearly means economic value.

In the court below, Appellee argued and (succeeded in persuading the panel) that the "lessen[s] in power" language of *Pomponio*, applies also to non-monetary terms such as governance power under a contract. (AB: 23). But the *Pomponio* Court struck down a statute that diminished the value of condominium leases by retroactively requiring deposit of rents into the registry of the court during litigation. *Pomponio*, 378 So. 2d at 782-783.

Pomponio, in turn, drew its "lessen in power" definition from *State ex. rel. Women's Ben. Ass'n v. Port of Palm Beach Dist.*, 164 So. 851, 856 (1935). That case is yet another direct economic impairment, of bond obligations: "Does the elimination or the abandonment of a substantial portion of the source of such [bond repayment] revenue impair the obligation of the contract? We think it does." *Id.* at 855. Neither Appellee nor the court of appeal was able to cite a single Contracts Clause invalidation that did not involve financial injury.

Indeed, the classic Contracts Clause cases in the U.S. Supreme Court fit exactly that model. They include the Depression-era mortgage foreclosure relief statute in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), and the Minnesota law which retroactively imposed upon certain private companies with voluntary pension plans additional obligations to employees who would not have been entitled to such benefits under the original terms of the plan. *Allied Structural Steel Co.*, 438 U.S. 234. Thus, John E. Nowak and Ronald D. Rotunda identify the primary purpose for adoption of the Contracts Clause in the U.S. Constitution as "restrict[ing] the power of the states to annul or void valid credit arrangements." JOHN E. NOWAK and RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 11.8, 475 (7th ed. 2004).

The HGL clearly is not of that breed. It is not an impairment because it lacks economic impact. It does not diminish the monetary value of the bylaws-based contract at issue. Governance reform is not what the Contracts Clause was designed to prohibit. The court of appeal completely missed this dimension of Contracts Clause law.

2. The HGL Works No More Than a "Minimal Alteration"

When parties "contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their

engagements with reference to such statute, and the same enters into and becomes a part of the contract." *Citizens' Ins. Co. v. Barnes*, 124 So. 722, 723 (Fla. 1929). *Accord Grant v. State Farm Fire & Cas. Co.*, 638 So. 2d 936, 938 (Fla. 1994). The contracting parties, the Hospital and its medical staff, are both bound by legal duties under Chapters 395 and 766 and AHCA regulations to conduct effective peer review and related duties of risk management, credentialing and quality assurance. Both are likewise bound by law to enforce the ultimate authority of the Board over these functions.

The HGL provides procedures to deal with unreasonable refusals by the medical staff to perform its delegated duty of peer review. "Each licensed facility, as a condition of licensure, shall provide for peer review of physicians who deliver health care services at the facility." § 395.0193(2), Fla. Stat. (2005). "All health care facilities, including hospitals . . . have a duty to assure . . . the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties." § 766.110(1), Fla. Stat. (2005). The duties include "supervision of the medical staff and hospital personnel to the extent necessary to ensure that such medical review and risk management processes are being diligently carried out." § 766.110(1)(c), Fla. Stat.

(2005). Sanctions may be imposed on the hospital, not the physicians, for failure to discharge these duties.[9]

These statutes *demand* that the Hospital be the ultimate guarantor of effective peer review and physician credentialing. The HGL law is wholly consistent with the Board's pre-existing duty to bear "ultimate responsibility" for compliance with the laws. The HGL reinforces that "ultimate responsibility" by explicitly stating in Sections 1 and 5 that in the event of a bylaws conflict, "the hospital board's bylaws shall prevail with respect to medical staff privileges, quality assurance, peer review, and contracts for hospital-based services." In this regard, the HGL is essentially a more detailed and localized application of the laws of statewide application that already existed but were ineffective to control the medical staff at Lawnwood.

3. No Impairment Results When a Legislature Passes Additional Laws to Govern a Heavily Regulated Industry In Areas Of Existing Regulation.

A significant factor in determining whether a claimed "impairment" of a

[9] *See* §§ 395.003(8), 395.0193(6), 395.1065(2)(a), Fla. Stat. (2005). Penalties for a hospital's failure to provide for meaningful peer review include revocation or suspension of its license or the imposition of fines up to $1,000 per day per violation. Similar penalties may be imposed on only the Hospital for failure to establish, implement and administer standards and procedures to be applied in its consideration of physician's applications for clinical privileges (credentialing). *See* §§ 395.0191(5), 395.1065(2)(a), Fla. Stat. (2005).

contract is substantial is whether the law modifies a contract in an industry that has been heavily regulated. *See U.S. Fid. & Guar. Co.*, 453 So. 2d at 1360 ("When he purchased into an enterprise already regulated in the particulars to which he now objects, he purchased subject to further legislation upon the same topic") (quoting *Allied Structural Steel Co.*, 438 U.S. at 247 n.13).

Every person or entity conducting business in the health care industry is subject to a vast network of changing laws and regulations. The duty to comply with such laws and regulations is "implicit in every contract." *H.B. Holding Co. v. Girtman*, 96 So. 2d 781, 783 (Fla. 1957). Modification does not equal impairment. Neither of the courts below considered this aspect of Contract Clause law in its analysis.

The provision of health care is among the most heavily regulated industries. An alphabet soup of state and federal regulatory agencies (DOH, ACHA, JCAHO and CMS) provides oversight and regulation. Another alphabet soup of federal statutes applies.[10] State law likewise imposes pervasive statutory regulation in

[10] E.g., ("HIPPA"), the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996); ("HCQIA"), the Health Care Quality Improvement Act, 42 U.S.C. §§ 11101-11152 (2007); ("PSQIA"), the Patient Safety and Quality Improvement Act of 2005, 42 U.S.C. §§ 299b-21-299b-26 (2007); ("PRIA"), the Peer Review Improvement Act of 1982 [part of Medicare], 42 U.S.C. §§1320c-1320c-12 (2007).

Chapters 395, 458 and 766, Florida Statutes, as well as administrative regulations promulgated by the Agency for the Health Care Administration under the aegis of the Department of Health.[11]

Thus, the power structure of the relationship between the medical staff and the Hospital embodied in the Medical Staff Bylaws approved by the Board is mandated by law and is subject to continuing and pervasive regulation. The medical staff had no legitimate reliance expectation that every term of the contract would remain static and immune from legislative evolution. *Cf. Hopkins v. Viscayans*, 582 So. 2d 689 (Fla. 3d DCA 1991) (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.)

Courts in other states have recognized that the nature of the healthcare industry requires laws regulating healthcare providers. Consequently, changes to existing contracts resulting from new legislation are readily upheld. In *Linton v.*

[11] *E.g.*, Fla. Admin. Code R. 59A-3.271(1) mandates a planned system for improving the quality of health care. Fla. Admin. Code R. 59A-3.272(1) mandates that "a governing body [be] responsible for the conduct of the hospital as a functioning institution." Fla. Admin. Code R. 59A-3.272(4) requires the governing body to set the standards for credentialing the medical staff and ensuring competence.

Commissioners of Health & Environmental, 65 F.3d 508, 518 (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." Likewise, *Blue Cross and Blue Shield of Michigan 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."

As explained above, the HGL implements existing Florida law regulating medical staff privileges, quality assurance and peer review. It also supplements that regulatory regime with special provisions and procedures to deal with a medical staff that refuses to act responsibly in discharging its peer review duties. Having entered into a contract that was a creature of statute and was subject to pervasive regulation, members of the medical staff have no legitimate constitutional complaint when that contract is subjected to additional regulation *in the precise area that was already regulated*.

B. The Legislature Had A Significant And Legitimate Purpose In Enacting The HGL.

Taking into account the pre-existing duties under Chapters 395 and 766 and other provisions of law, the HGL has only minor effects on control and governance

aspects of the Medical Staff Bylaws. This "minimal alteration" is not an impairment in a constitutional sense. But assuming *arguendo* that impairment exists and assuming further that it be deemed substantial, the HGL is constitutional because the Legislature had a legitimate and substantial public health purpose in enacting it.

Even a substantial economic impairment is valid if there is a significant and legitimate public purpose for the law. On that basis, *United States Fidelity and Guaranty Company v. Department of Insurance*, upheld a retroactive refund of excess insurance profits because the impairment was "outweighed by the state's interest in eliminating unforeseen windfall profits." 453 So. 2d at 1361.

Was the state interest legitimate and substantial? Before enactment of the HGL, the Board had requested the MEC to perform peer review on physicians whose clinical competence and compliance with law were reasonably in doubt. The MEC refused to act. This was consistent with a contentious two-decade history of conflict and controversy over governance and control. The Legislature acted in that context; and its judgment is entitled to great deference.

Section 395.0193(1), Florida Statutes (2005), provides that ensuring "quality medical services to the public" is "the public policy" of the State. The "[f]ocus of the peer review process" is "to reduce morbidity and mortality and to improve

patient care." § 395.0193(2)(g), Fla. Stat. (2005). Peer review meetings are "essential to the continued improvement in the care and treatment of patients." *Dade County Med. Ass'n v. Hlis*, 372 So. 2d 117, 120 (Fla. 3d DCA 1979). Numerous statutes mandate self-policing through credentialing, peer review and risk management processes.[12] Federal law places similar emphasis upon self-policing.[13]

The HGL Section 1 clearly states its purpose to consolidate a hospital board's "power, authority, duty and ultimate responsibility under existing statutes with respect to the operation of a hospital, including, but not limited to, the granting, denial, and discipline of medical staff." Fla. H.B. 1447, § 1 (2003).

---

[12] So crucial is self-policing that state law provides immunity from liability to participants in the peer review process. Such immunity is proper even though it may "encroach upon certain rights held by others." *Parkway Gen. Hosp. Inc. v. Allinson*, 453 So. 2d 123, 125 (Fla. 3d DCA 1984).

[13] Congress also considered effective self-policing to be an essential tool in limiting medical malpractice in passing HCQIA. The HCQIA establishes a National Practitioner Data Bank ("NPDB") and requires hospitals to report certain information to the NPDB when it makes a determination affecting a physician's credentials for more than 30 days. 42 U.S.C.A. § 11133(a)(1), (3) (West 2007). A hospital must consult the NPDB to review whether reports have been filed concerning a new physician applicant and the physicians on its staff once every two years. 42 U.S.C.A. § 11135(a) (West 2007). If a hospital's governing board fails to conduct the required peer review effectively, the hospital could not generate reliable information for the NPDB. The Governance Law enables Lawnwood to fulfill its duties under the HCQIA.

Section 4 makes the Board responsible for patient welfare. Fla. H.B. 1447, § 4 (2003). These and other provisions of the law were perfectly reasonable responses to the medical staff's refusal to discharge its delegated peer review responsibilities, which in turn prevented the Board from carrying out its duties to safeguard the quality of patient care at Lawnwood.

To sum up, the Legislature appropriately redressed an "evil" in St. Lucie County. The Medical Staff Bylaws had been used to thwart effective hospital governance and peer review. The HGL does not substantially impair contractual rights. But even if a section or clause of the law is deemed a substantial contractual impairment, it is a justifiable one. Improving health care "cannot be considered other than significant and legitimate." *Am. Republic Ins. Co. v. Superintendent of Ins.*, 647 A.2d 1195, 1197 (Me. 1994) (upholding a statute that imposed additional obligations on contracts previously issued by insurers).

The First District's perfunctory assertion that the law does not serve a legitimate public health interest disregards and disrespects the facts found by the Legislature. The HGL is not an invalid impairment of the obligation of contract but a wholly justified exercise of a core police power to protect public health. *Cf. Rubin*, 514 U.S. at 485.

C. The HGL Ceased To Have Any Retroactive Effect On The Contractual Relationship Between The Hospital And The Medical Staff As A Result Of Mandatory Contract Renewals.

For the reasons stated above, the HGL does not impair the obligation of contract in a constitutional sense, imposing only additional, non-financial contract terms in a heavily regulated industry. Even if it did, the "minimal alterations" to governance policies would be completely justified under *Pomponio* balancing. The Court's analysis should end there. But out of an abundance of caution, there is yet one more defense of the HGL to be made if one be needed.

A statute that "has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts," may be an impairment; but there can be no impairment when the statutory change is prospective only. For example, "the renewal of a contract of insurance constitutes the making of a new contract for the purpose of incorporating into the policy changes in the statutes regulating insurance contracts." *Metro. Prop. & Liab. Ins. Co. v. Gray*, 446 So. 2d 216, 218 (Fla. 5th DCA 1984); *Accord Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142, 1148 (Fla. 1st DCA 1991) (holding that each renewal of an insurance policy creates "an entirely new and independent contract" that must conform to the newly amended law).

In this case, the contract at issue is effectively renewed every two years as to

each physician. Members of the medical staff must reapply for privileges at least every two years, under JCAHO Rule 4.20. Its own Bylaws, Art. VI, Part B, Section 2(d) and Art. VII, Part A, Section 3, impose the same mandate. Under the case law, such renewal creates a new contract that incorporates existing statutory and other law regulating hospitals, including the HGL. *Marchesano v. Nationwide Prop. & Cas. Inc. Co.*, 506 So. 2d 410, 413 (Fla. 1987). Therefore, even if there had been an impairment of contract resulting from the HGL upon its enactment, it would have impacted only the Medical Staff Bylaws in effect when the HGL was passed on July 16, 2003. It 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. By the date the trial court entered the summary Judgment (February 24, 2006), all members of the medical staff must of necessity have joined the staff or renewed their staff membership after the effective date of the HGL. Therefore, no member of the medical staff had a pre-existing contract with the Hospital which pre-dated the HGL when the trial court declared the law unconstitutional.

III. THE HGL DOES NOT VIOLATE ART. III, § 6 OF THE FLORIDA CONSTITUTION BECAUSE IT DOES NOT REVISE OR AMEND ANY STATUTE.

This issue and issue IV were part of the ruling of the circuit court striking

down the HGL; the substance of those rulings is summarized at page 13 n.5 above. The First District chose not to address either issue, deeming them "unnecessary" to its decision. *Lawnwood*, 959 So. 2d at 1224. A fair inference from the court's silence on those two issues is that they were perceived as weak claims. This Court should give them equal inattention. Nonetheless, because there was no formal adjudication of those two issues, Appellees may argue them in this Court as alternative grounds on which to strike down the HGL. Therefore, Appellant will present below the arguments it made to the First District in order to avoid the delay and expense that would result if the Court remanded to the First District for disposition of those two issues.

The trial judge incorrectly concluded that the Governance Law violates the Florida Constitutional requirement that "[l]aws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection." R. 2719. The law limits the application of this provision to statutes that "purport in terms to revise, alter, or amend some particular prior statute or section thereof." *Auto Owners Ins. Co. v. Hillsborough County Aviation Auth.*, 153 So. 2d 722, 725 (Fla. 1963). Absent such explicit intent, "[i]t is not the meaning of this provision of the Constitution that upon the passage of each new law all prior laws which it may modify by implication shall be re-enacted and published at length as

modified." *City of St. Petersburg v. English*, 45 So. 483, 487 (Fla. 1907).

It is clear that the HGL does not by its terms revise or alter § 395.0193, Fla. Stat. (2005). The HGL specifically references the statute only once (in Section 4), and only to recognize the pre-existing responsibility of the governing board of a licensed hospital to provide for peer review and related quality-of-care functions.

There is an exception when a statute by necessary implication repeals or amends an existing law. But a court should be reluctant to make an inference of amendment by implication. *State v. J.R.M.*, 388 So. 2d 1227, 1229 (Fla. 1980) ("It is well established that amendment by implication is not favored and will not be upheld in doubtful cases"). Courts find an implied amendment only where there is "irreconcilable repugnancy between the two [statutes], so that there is no way the former rule can operate without conflicting with the latter." *Id.* That is not the case with the Governance Law and § 395.0193, Fla. Stat.

The trial judge's view was that:

> The special act defines a *separate process* whereby the Hospital's governing board can take independent action regarding a physician's medical staff membership, clinical privileges, peer review, or quality assurance, as well as the mechanics of conducting peer review, and disciplinary appeals for this Hospital. Therefore, this Court holds that the *Hospital Governance Law* violates Article III, section 6, Florida Constitution because it improperly amends section 395.0193 without reference to the statute in the *Law's* title.

R. 2719. (emphasis added). This analysis is wrong. The doctrine of *in pari materia* requires that statutes relating to the same subject "be construed together to harmonize the statutes." *Fla. Dep't of State, Div. of Elections v. Martin* 916 So. 2d 763, 768 (Fla. 2005).

There is no repugnancy between the HGL and Section 395.0193(3), Fla. Stat. The latter assumes that the peer review panel will act responsibly and do its duty. It does not address the situation that had prevailed at Lawnwood where the MEC refused a specific Board request to investigate physicians whose diagnoses, clinical competence and legality of conduct were justifiably in doubt. The HGL was enacted to re-assert Board supremacy under state law where there is such an impasse affecting the quality of medical care. The HGL and § 395.0193, Fla. Stat. thus function together. The HGL does not implicitly amend any statute and its title is not defective. This conclusion is so compelling that it is easy to understand why the First District chose to bypass the issue altogether.

IV. THE HGL DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

The trial judge correctly noted that the Governance Law does not involve a fundamental right or a suspect classification. R. 2720. Nonetheless, the judge misapplied the two-part test to determine the validity of a challenged classification:

whether the challenged statute serves a legitimate governmental purpose; and whether it was reasonable for the Legislature to believe that the challenged classification would promote that purpose. *Zapo v. Gilreath*, 779 So. 2d 651, 655 (Fla. 5th DCA 2001).

This "rational relationship" test requires great deference to the classification made by the Legislature. The court must defer to the legislative judgment unless "the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made." *N. Ridge Gen. Hosp., Inc. v. City of Oakland Park*, 374 So. 2d 461, 464-65 (Fla. 1979). A challenged statute meets the rational relationship test if any set of facts can reasonably be conceived supporting the legislative classification. *Id*. at 464. The HGL passes that test with flying colors.

The trial court failed to give required deference to the Legislature's judgment. The trial court dismissed the Legislature's stated purpose, calling it an "alleged" purpose and concluding that it was "nothing more than a pretext" to deprive the medical staff of its contractual powers under the Medical Staff Bylaws. R. 2715. This was a gross intrusion into the legislative domain.

The trial court condemned the HGL because it "creates two classes of hospitals: first all hospitals statewide that are governed by section 395.0193 in

regard to peer review; and second, the two St. Lucie County hospitals that are given additional powers to reject the peer review process findings and physician's appeal rights." R. 2720.

This is a misreading of the law. The HGL does not give a governing board additional powers to reject a peer review finding. It does not affect appeals procedures at all.[14] Section 395.0193 already empowers the governing board to reject a medical staff recommendation. The governing board must "consider[] the recommendations of its peer review panel." § 395.0193(3), Fla. Stat. *See also Bayfront Med. Ctr., Inc. v. State, Agency for Healthcare Admin.*, 741 So. 2d 1226, 1229 (Fla. 2d DCA 1999) ("The peer review panel makes recommendations to the hospital governing board which then considers the recommendations and decides upon its action").

Likewise, § 5 of the HGL does not bind the Governing Board to the peer review panel's recommendation but allows the Board to "reject or modify" the recommendation. Thus, the HGL and § 395.0193(3), Fla. Stat., both give the peer review panel recommendation the same advisory weight. While the phrasing is

[14] Physicians are entitled only to a process with "rules of order" and "fair review." § 395.0193(2)(a) & (c), Fla. Stat. Section 6 of the HGL, providing review by a joint conference of members of the governing board and the medical staff, certainly meets that standard.

slightly different, both statutes are substantially similar in according the medical staff an important, but not dispositive, professional reviewing role in ensuring the quality of medical care.

The fact that the Legislature might have made the HGL state-wide in application is of no consequence. St. Lucie County presented a special and urgent case for action. Relying on the putative authority of the Medical Staff Bylaws, the medical staff was refusing to perform peer review or to respect the superior authority of the Board with respect to governance. The DOH had ordered the emergency suspension of a physician on the medical staff. This aberrational situation was not adequately addressed by existing state law mandating effective peer review. As a result, a special law was necessary.

Finally, the trial court reached the astonishing conclusion that if the Governance Law was really good legislation, it would have been enacted on a statewide basis. R. 2714-2715. This reasoning would nullify the validity of most "special or local law[s]" under Art. X, § 12(g), Fla. Const. By definition, they affect a limited number of people or entities. Additionally, it is an elementary rule of equal protection analysis that a law does not fail simply because it might have had a wider application. *See Newman v. Carson*, 280 So. 2d 426, 430 (Fla. 1973) ("a statute is not invalid under the Constitution because it might have gone farther

than it did"). The legislature is empowered to address a problem "one step at a time." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). "A great deal of discretion is vested in the Legislature to determine public interest and the measures for its protection." *Newman*, 280 So. 2d at 428. The Legislature saw fit to make the HGL apply only in St. Lucie County based upon unique facts. That decision was eminently reasonable.

School Board of Escambia County, 353 So. 2d at 835, exemplifies the permissibility of legislating for special cases. This Court reviewed a statute that affected the composition of the school board in Escambia County only and reduced the salaries of the Escambia County School Board members below what was paid in other counties. *Id.* at 835, 839. If the Court had applied the rationale of the trial judge here, the Court would have invalidated the statute because it did not apply throughout the state. The Court upheld the law.

The Equal Protection Clause protects against invidious discrimination. Here there was none. The Legislature had a legitimate and significant governmental purpose to protect health care. Enacting the HGL was a reasonable way to achieve that purpose. The conclusion that the HGL violates the Equal Protection Clause cannot stand, again suggesting why the First District avoided reviewing it.

V. IF A SECTION OR CLAUSE OF THE HGL BE DEEMED INVALID, THE REMAINDER IS SEVERABLE.

The HGL meshes harmoniously with the existing statutory framework and is constitutionally valid in its entirety. But if the Court should strike down any clause or section, the Court should save that which can stand independently. *Cramp v. Bd. of Pub. Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962). The court of appeal paid no attention to the different purposes served by the several sections of the HGL.

Sections 1 and 5 of the HGL mandate that "in the event of a conflict" between a board's bylaws and those of its medical staff, the board's bylaws shall prevail. Fla. H.B. 1447, §§ 1, 5 (2003). This power is also mandated by state law. But assuming arguendo the invalidity of that proviso, striking it down would have no necessary impact on Section 4 of the HGL, which simply notes that the Board is "ultimately responsible" for administration of the hospital. Fla. H.B. 1447, § 4 (2003). Again, that is already mandated by existing State law. In that respect, Section 3 of the HGL is similar to Section 4. *See* Fla. H.B. 1447, § 3 (2003).

Section 6 of the HGL provides that a Board may take "corrective or disciplinary action" against a physician when the medical staff fails to act within

75 days. Fla. H.B. 1447, § 6 (2003). This proviso is "freestanding" in the sense that it does not depend for its validity on any other section of the HGL. Indeed, it is mandated (except for the precise number of days) by the Board's duties under State law (Chapters 395 and 766 and AHCA regulations) to assure effective peer review. That duty includes the power to modify a medical staff recommendation. Finally, the fair hearing procedures provided by Section 6 of the HGL do not depend upon the validity of any other sections.

CONCLUSION

The judgment of the First District Court of Appeal should be reversed and summary judgment upholding the validity of the HGL should be entered for Appellant.

Respectfully submitted,

/s/

STEVEN WISOTSKY
Florida Bar No.: 130838
STEPHEN J. BRONIS
Florida Bar No.: 0145970
ZUCKERMAN SPAEDER LLP
Miami Center
201 South Biscayne Blvd., Suite 900
Miami, FL 33131
Tel: (305) 358-5000
Fax: (305) 579-9749

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief and accompanying Appendix has been furnished by U.S. Mail this 28th day of September, 2007 to the following:

Richard H. Levenstein, Esq. Kramer, Sewell, Sopko & Levenstein 853 Southeast Monterey Commons Blvd. Stuart, FL 33431 Attorneys for Appellee	**Charles W. Hall, Esq.** **William A. Kebler, Esq.** **Mark D. Tinker, Esq.** Fowler White Boggs Banker P.A. P.O. Box 210 St. Petersburg, FL 33731 Co-counsel for Appellant
Harold Mardenborough, Jr., Esq. Carr Allison 305 South Gadsden Street Tallahassee, FL 32301 Attorneys for AMA and FMA	**Major B. Harding, Esq.** Ausley & McMullen Post Office Box 391 Tallahassee, FL 32302 Attorneys for Appellees

/s/
STEVEN WISOTSKY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared using the Times New Roman in 14-point font pursuant to the requirements of Rule 9.100 of the Florida Rules of Appellate Procedure.

/s/
STEVEN WISOTSKY