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.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This is a simple case, readily resolved by answering two questions:

1. Is the Legislature foreclosed by Art. III, § 11(a)(12), Fla. Const., from enacting a local public health law regulating hospital board authority over medical care merely because the statute targets the affairs of a single entity?

2. If the Legislature has the power to enact such a local law, do the provisions of the St. Lucie Hospital Governance Law reconciling the conflicting bylaws of the Hospital Board and its medical staff to make the hospital board "ultimately responsible" violate the Contract Clause, Art. I, § 10, Fla. Const.?

Appellant Lawnwood submits that the correct answer to both questions is "no." The decision of the First District is fatally flawed by its failure to appreciate the public health import of the St. Lucie County Hospital Governance Law, H.B. 1447 (2003) ("HGL"). Indeed, the court cursorily rejected the HGL as "not required to protect the public health [or] ensure the quality of care at Lawnwood." *Lawnwood Med. Ctr., Inc. v. Seeger,* 959 So. 2d 1222, 1224 (Fla. 1st DCA 2007). But no analysis supports that *ipse dixit.* Nor does anything in the three opposing briefs.[1] They cite no case striking down a statute as a prohibited privilege for a private corporation. They cite no case striking down a statute on Contract

[1] The Answer Brief is cited AB:___. "AAPS:___" refers to the brief of the Association of American Physicians & Surgeons. "AMA/FMA:___" refers to the brief of the American Medical Association and the Florida Medical Association. (Appellant's Appendix is in the Initial Brief).

Clause grounds where the law did not cause any financial loss to a contracting party.

Most of all, the opposing briefs ignore the fact that the situation at Lawnwood had reached an impasse in governance as a result of dueling bylaws. Breaking the impasse required a law to reaffirm that the Hospital Board is, as a matter of law, "ultimately responsible for the administration of the hospital, including . . . ensuring patient welfare, overseeing the risk management program and quality assurance activities . . . ." HGL § 4. That fundamental responsibility, and the control it requires, are what Dr. Seeger objects to and what the courts below erroneously repudiated.

ARGUMENT

Enactment of the HGL by a *unanimous* Legislature was a response to a serious threat to public health in St. Lucie County exemplified by two rogue pathologists at Lawnwood. Dr. Seeger glosses the situation: "the record below does not show that Drs. Walker and Minarcik . . . were 'dangerous' or 'malpracticing'." (AB: 19). "The charges against those doctors boiled down to billing fraud." (AB: 2). In fact, those two pathologists were misdiagnosing patients at a rate of 20-25% (R. 2298-99); were committing federal health care fraud; and were indicted by a federal grand jury for crimes including the performance of "medically necessary

services." (App. Tab HH, ¶ 12; Tab GG ¶ 12). Each pled guilty to a ten-year felony and lost his license to practice medicine. Three years after the Board had unsuccessfully sought medical staff peer review of Dr. Minarcik, the Florida Department of Health ("DOH") issued an Emergency Order suspending his medical license.[2] (R. 2089 ¶ 40).

Finally, Dr. Seeger trivializes the medical crisis at Lawnwood, one of only two acute care hospitals in St. Lucie County, with a population of nearly a quarter million, by describing it as, "a narrow, particularized internal issue." (AB:36). In this vein, Dr. Seeger argues that Lawnwood has not identified a single patient who was injured by the alleged malpractice of Drs. Walker and Minarcik. (AB: 37). Medically unnecessary procedures are by definition injurious and substantial diagnostic errors are dangerous.

In the face of compelling evidence, Dr. Seeger denies the undeniable. The threat to public health was central to enactment of the HGL. Thus, the House of Representatives Local Bill Staff Analysis states as follows:

> The hospital [Lawnwood] reports that it 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.

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[2] The offending physicians were gone before the HGL, argues Dr. Seeger (AB: 19) and Amicus (AMA/FMA: 12). The salient point is that they were removed by outside intervention, not by the action of the medical staff.

Fla. H.R. Comm. on Health Care, H.B. 1447 (2003), Staff Analysis (rev. Apr. 14, 2003) (Appendix, Tab AA:3).

Neither the distortions of the opposing briefs nor their jury-oriented, extra-record insinuations[3] about HCA's putative political power can obscure the fact that enactment of the HGL was triggered by the justifiably perceived necessity to protect the public health. The courts below disregarded the separation of powers in striking down the HGL.[4]

I. The Governance Law Is A Valid Public Health Measure, Not A Prohibited Privilege For A Private Corporation.

The heart of Dr. Seeger's argument is that because the Hospital Governance Law changes "the balance of power" (AB: 11, 20, 24) at Lawnwood, it confers a "privilege" upon Lawnwood and is therefore invalid as a "grant of privilege to a private corporation" under Art. III, § 11(a)(12) of the Florida Constitution. There are two simple points to be made in reply.

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[3] AAPS' submission is less of a legal brief (containing no record cites) than a straight-out political diatribe, citing a 1997 news article to portray HCA/Columbia as a "hard charging" corporation (AAPS: 4) and condemning the HGL as "special interest legislation" (AAPS: 3), the product of "pure lobbying power." (AAPS: 14).

[4] The circuit judge was particularly contemptuous of the law, deeming it "nothing more than a pretext." (App. Tab C: 19). Elsewhere, the judge "found" that the HGL "does not serve a legitimate public interest, but rather provides a benefit to a special interest." *Id.* at 15. Deference to the Legislature required by the separation of powers is nowhere to be found.

First, despite 7 ½ pages of argument, he fails to cite a single case supporting his position that a law changing governance authority over hospital care is a prohibited privilege. By contrast, Appellant has cited cases showing that the prohibited "privilege" occurs when the Legislature improperly uses public funds to grant a financial benefit[5] to advance purely private interests.

Dr. Seeger's response to these cases is tepid: they "happened to involve fairly direct financial benefits to private corporations, [but] it does not follow that the meaning of 'privilege' under the Florida Constitution is restricted to such." (AB: 17-18). Of course, as a matter of pure logic, Lawnwood's interpretation is not mandated. But, as a matter of history and sensible meaning, it does "follow." One of the most often-cited aphorisms in American law advises that "[t]he life of the law has not been logic; it has been experience." Oliver Wendell Holmes, THE COMMON LAW (Howe ed. 1963), cited in *Gosa v. Mayden,* 450 F. 2d 753, 760 (5th Cir. 1971).

By contrast, Dr. Seeger relies on sterile dictionary argument. Undoubtedly, a court may refer to a dictionary to determine the meaning of statutory or constitutional terms. *Seagrave v. State,* 802 So. 2d 281, 286 (Fla. 2001). The First District did so. *Lawnwood,* 959 So. 2d at 1225. But the

[5] *See Joyner v. Center Motor Company,* 66 S.E.2d 469, 473 (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, 1190 (La. Ct. App. 2005).

cited definitions do not support the court's conclusion. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 936 (1989) defines privilege as a "law for or against a private person" or "a right or immunity granted as a peculiar benefit, advantage, or favor." The HGL is not "for or against a private person" but rather for the benefit of the 250,000 people of St. Lucie County. For the same reason, the HGL is not a "peculiar benefit, advantage or favor" to or for Lawnwood.[6] It protects patients by facilitating the Lawnwood Board's ability to control peer review.

Dr. Seeger's argument boils down to this simplistic equation: because Lawnwood is treated differently than hospitals in *other* counties, it has *ipso facto* received a prohibited "privilege for the benefit of a private corporation" in St. Lucie County. First, that equation is illogical. Second, it is an equal protection argument in disguise, an argument so weak it was ignored by the First District. By such reasoning, almost all special or local laws would be invalid.

The simple truth is that there is no "plain meaning" of the never-before interpreted prohibition of Art. III, § 11(a)(12), Fla. Const. It forbids

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[6] The BLACK'S LAW DICTIONARY 1234 (8th ed. 2004) definition also comes to naught: "a special legal right, exemption, or immunity granted to a person or class of persons; an exemption to a duty." The HGL is the opposite of an exemption, immunity, or exception to a duty. It was passed so that Lawnwood could overcome medical staff opposition and fulfill its pre-existing legal duties of peer review and health care quality assurance.

"private incorporation or grant of privilege to a private corporation." In context, the only sensible reading of "privilege" is to confer an unprincipled financial or competitive[7] advantage, contrary to the public interest, comparable to the nineteenth century Florida amendment banning "the use of public credit for the benefit of any individual or private corporation . . . ." G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 114 (Princeton 1998).

Even if there were a "plain meaning" supporting Dr. Seeger's position, it would not trump common sense. "No literal interpretation should be given that leads to an unreasonable or ridiculous conclusion." *Maddox v. State,* 923 So. 2d 442, 452 (Fla. 2006). "Common sense is often more reliable than rote repetition of canons of statutory construction." *Koons Buick Pontiac GMC, Inc. v. Nigh,* 543 U.S. 50, 65-66 (2004) (Stevens, J. and Breyer, J., concurring).

"The fundamental object to be sought in construing a constitutional provision is to ascertain the intent of the framers . . . ." *Florida Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005). What did they intend? A prohibited "privilege" is not anything that helps a

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[7] Dr. Seeger asserts that Lawnwood commits a fatal "logical fallacy" in arguing that "privilege" "includes competitive advantage" (AB: 18). This mindset is emblematic of the impasse at Lawnwood. Lawnwood does not compete with its medical staff. It must be able to govern its medical staff, as mandated by Florida law, in order to deliver safe and effective health care to its patients.

corporation, especially if the law accomplishes a valid public purpose. It is, as suggested by Professor Tarr's history, abusing the power of the public purse to give an improper economic advantage to one business over others. Abuse is exemplified by the cases cited above in footnote 5: a grant of a monopoly and a special tax exemption. The "privilege" prohibited by the Florida Constitution is, likewise, economic favoritism over other entities. But the HGL treats all St. Lucie County hospitals equally; Lawnwood receives no special advantage over other hospitals in that county.[8]

The opposing briefs argue that the medical staff is entitled to equality with the hospital board. But Lawnwood provides a physical plant, technical equipment, and general administration. The medical staff provides diagnosis and treatment to patients. Valid legislation must take account of these differing responsibilities. The HGL restores Lawnwood's power to govern effectively over its medical staff consistent with Chapters 395 and 766 and other provisions of Florida law. To label such board authority a prohibited "privilege" in the constitutional sense is nonsense.

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[8] The opposing briefs emphasize that only HCA hospitals "benefit" from the HGL. This is false and irrelevant. Ownership is irrelevant to the public health purpose of the law. It is false because HGL is a regulation of health care governance, not a "benefit," and because all new hospitals in St. Lucie County will be bound by the HGL. AHCA has recommended that a Certificate of Need be issued for another hospital in the county. http://ahca.myflorida.com/MCHQ/CON_FA/Batching/pdf/9981.pdf.

"Rules of construction . . . require that courts look for a reason to uphold the acts of the legislature and adopt a reasonable view that will do so." *Royal World Metro., Inc. v. City of Miami Beach*, 863 So. 2d 320, 321 (Fla. 3d DCA 2004). Appellant's interpretation is the "reasonable view," the only one consistent with the case law, history, and common sense. It realistically recognizes political pressures upon legislators to divert public funds or to bestow financial favors upon well-connected constituents.

Unless the Legislature is deemed to have acted pretextually,[9] it acted to protect public health. Hence, Dr. Seeger's concession that Lawnwood had "other options, both statutory and judicial,[10] to comply with the legal obligations, [but] the Governance Law simply made its compliance easier" (AB: 20) is fatal to his attack on the statute. "Easier compliance" with legal obligations for the provision of health care exemplifies a legitimate public health purpose and defeats the "private benefit" epithet.

II. The HGL Does Not Impair The Obligation Of Contract

[9] The trial judge so assumed. (App. Tab C: 18, 19). AAPS: 6 likewise argues that "the real motivation" for the HGL was an economic "windfall."

[10] "Bringing the MEC to court" to compel peer review as suggested by Dr. Seeger (AB: 8-9) is illusory as a "remedy." The time frame for litigation is much too long to secure prompt peer review. Furthermore, statutory prohibitions on introducing evidence of peer review investigations present serious obstacles to a Court's ability to resolve quality of care issues. *See* Fla. Stat. § 395.0191(8) and 395.0193(8).

The true gravamen of Dr. Seeger's complaint against the HGL is that it "re-arranged the balance of power" (AB: 20) at Lawnwood. That is half true; it *restored* the balance of power that prevailed before the medical staff adopted conflicting bylaws (in 1993) that gave it the putative power to ignore Board requests for peer review of physicians. Second, that legislative restoration of balance is a non-financial regulation. Economic loss suffered as a result of a retroactive change to a contract is the *sine qua non* of a Contracts Clause violation.

Although Dr. Seeger contends there is no legal authority for this interpretation (AB: 24), constitutional scholars tell us that the primary purpose of the Contracts Clause was to "restrict the power of the states to annul or avoid valid credit arrangements." John E Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW, § 11.8, 475 (7th ed. 2004). Indeed the classic Contracts Clause impairments stricken by the U.S. Supreme Court follow that model: the Depression-era mortgage foreclosure relief statute stricken in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), and the Minnesota law retroactively imposing on voluntary pension plans additional obligations to employees beyond those required by the original plan in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Economic loss is also central to Florida Contracts Clause law. "A statute which retroactively turns otherwise profitable contracts into losing propositions is clearly such a prohibited enactment." *In re: Advisory Opinion to the Governor*, 509 So. 2d 292, 314-15 (Fla. 1989). Thus, *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077 (Fla. 1978), upon which Dr. Seeger places heavy reliance (AB: 21, 22, 23), struck down a statute that retroactively deprived the father of two dead sons of the benefit of his $200,000 uninsured motorist coverage insurance for each boy. In that context, 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" thus means economic value. Likewise, *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 781 n.41 (Fla. 1979), struck down a statute that diminished the value of condominium leases by retroactively requiring deposit of rents into the court registry during litigation.[11]

Dr. Seeger's claim that unconstitutional impairment of contract "extends beyond direct financial implications" (AB: 24) is bereft of

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[11] *Pomponio*, cited by Dr. Seeger (AB: 23), in turn, drew its "lessen in power" definition from a case also cited by him (AB: 24), *Women's Benefit Ass'n v. Port of Palm Beach Dist.*, 164 So. 851 (1935). But that case presents yet another example of direct economic impairment (of bond obligations). *Id*. at 856.

authority. He cites no case in which the Contracts Clause was used to strike down a statute effecting a non-financial alteration of a contract. There is simply no support in the law for the district court's hyperbolic and unspecific conclusion that the HGL violates the Contracts Clause merely because, without causing financial harm, it "dramatically alters many of the rights and obligations specified in the contract . . . ." *Lawnwood,* 959 So. 2d at 1224. HGL's principal change is one of control -- the Board power to override the medical staff "veto" (by inaction) of a Board request to initiate peer review of suspect physicians. Art. VII, Part C, § 2(a) of the Medical Staff Bylaws gives the medical staff the final say in the matter. But that is illegal under Florida law.[12] HGL § 4 reinforces that the Board is "ultimately responsible" for peer review by setting a 75-day time frame for the medical staff to act or fail to act. HGL § 6.

Dr. Seeger next attempts to conjure up indirect financial "injury" from the HGL's alleged diminution of the financial value of the power to control exclusive contracts and departmental closings. (AB: 27). But Dr. Seeger admits that the medical staff *never had such power* and that it was entitled

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[12] In addition to Chapters 395 and 766, Fla. Admin. Code R. 59A-3.272(4) requires the hospital board to ensure the competence of its medical staff.

only to "a significant voice in decisions regarding exclusive contracts." *Id*. at 26-27. The medical staff fully retains its advisory role.[13]

Another specious argument invokes an imaginary shift in standards allegedly depriving the medical staff of the "benefit of the bargain" concerning intangible "rights." (AB: 25). Before the HGL, goes the argument, the Board needed "good cause" to override a medical staff recommendation, whereas § 5 of the HGL requires only that the Board "carefully consider" such recommendations. (AB: 27). This argument is doubly wrong. Section 5 of the HGL applies only to "proposed amendments or revisions" to medical staff bylaws, *not* to departmental closures, exclusive contracts or other intangible matters. (AB: 25-26).

Additionally, the argument that the two standards differ in substance borders on the irrational. Dr. Seeger defines the duty to "carefully consider" as a power to "carefully consider and arbitrarily reject" a medical staff recommendation and castigates "carefully consider" as "no standard at all." (AB: 28). To "consider," however, means "to deliberate about" and to "give heed to." BLACK'S LAW DICTIONARY 306 (6th ed. 1990) Good faith is

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[13] Indeed, the HGL confers greater protection upon the medical staff than provided under statewide law, which protects the right of hospitals to practice economic credentialing. *See Hospital Corp. of Lake Worth v. Romaguera,* 511 So. 2d 559, 561 (Fla. 4th DCA 1986).

implied. It does not grant the power to capriciously reject a medical staff proposal.

Even if this Court concludes that the HGL is an impairment in the constitutional sense, it would still on balance be valid under the law. 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.[14] The HGL readily passes this test. It constitutes no more than a "minimal alteration" of contractual relations as to non-financial matters of hospital board governance. *Allied*, 438 U.S. at 245. Therefore, even if the "least restrictive means" test invoked by Dr. Seeger were applicable[15] (AB: 37), the HGL goes no further than reconciling dueling bylaws to re-establish hospital board control over medical care.

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[14] Dr. Seeger argues that there are two different impairment tests: one "as applied" under *Dewberry* ("per se") and one for facial challenges ("balancing") under *Pomponio* (AB: 23, 33). This court has never said so. The only support for dual tests arises from an extended *obiter dictum* in *Lee County v. Brown,* 929 So. 2d 1202, 1209 (Fla. 2d DCA 2006).

[15] Dr. Seeger advocates the circuit judge's "narrowly tailored remedy" that would "create a standard on which the parties could seek review." (AB: 37) This is coherent only on the false assumption that the parties are equal partners who may need a referee or arbitrator. As a matter of law, the hospital board has "ultimate responsibility" for hospital care, and therefore *must* have the final word over its medical staff.

With respect to public purpose under *Pomponio,* the protection of the quality of hospital medical care in a large community is unquestionably a serious, legitimate matter for legislative regulation. Florida and federal law require the medical staff to be accountable to the hospital for the quality of medical care provided to patients. The hospital is, in turn, liable.[16]

The persistent refusal of the medical staff to investigate repeated acts of malpractice by rogue physicians at Lawnwood provided the Legislature a significant, legitimate purpose for enacting the HGL. The fact that the need was "only" in St Lucie County (AB: 29, 36), home to an estimated quarter million people, makes it no less a valid "public" purpose. Remediation of a geographically confined problem is the essence of a valid local law.

CONCLUSION

The decision below should be reversed and judgment entered for Appellant upholding the validity of the HGL.

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[16] 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) F.S.

Respectfully submitted,

s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 16th day of January, 2008, to the following:

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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/
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