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IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC13-411
L.T. Case Nos. 1D12-0858 AND 2011-CA-1653

CITRUS COUNTY HOSPITAL BOARD,

Petitioner,

v.

CITRUS MEMORIAL HEALTH FOUNDATION, INC.,
a Florida not-for-profit corporation

Respondent.

INITIAL BRIEF ON THE MERITS

ON REVIEW FROM A DECISION OF THE
FIRST DISTRICT COURT OF APPEAL

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The record citations used in this brief are references to the record in the district court as shown on the Index to the Record on Appeal.

INTRODUCTION

This appeal involves the facial constitutionality of Ch. 2011-256, Laws of Florida. The law was enacted by the Florida Legislature in the exercise of its police power to bring accountability, transparency, and financial controls to a corporation created by a special taxing district created by the Florida Legislature to operate and manage the only public hospital in Citrus County, Florida.

A two-judge majority of the district court panel held the enactment facially unconstitutional as an impairment of the obligation of contracts, in violation of Article I, Section 10 of the Florida Constitution ("the Contract Clause"). The panel majority held that the corporation – the Citrus Memorial Health Foundation, Inc. ("the Foundation") – was not a "public corporation" for which the legislature could exercise its police power, as that term is defined in *O'Malley v. Florida Insurance Guaranty Assoc*., 257 So. 2d 9 (Fla. 1971), and held that Ch. 2011-256 was unconstitutional under this Court's decision in *Dewberry v. Auto-Owners Ins. Co*., 363 So. 2d 1077 (Fla. 1978). One judge on the panel dissented on a finding that the "true nature" of the Foundation is that of a public or quasi-public corporation, so that there was no cognizable claim under the Contract Clause. The overarching question in this case is whether an entity created by a public body for the sole purpose of conducting a public function involving public property and funded by public money can unilaterally remove itself from legislative oversight of the use of public money and the operation of the public function.

STATEMENT OF THE CASE

In 2011, the Florida Legislature enacted Ch. 2011-256 ("the Act"). Immediately after its enactment, the Foundation filed a lawsuit in Leon County Circuit Court against the Hospital Board and the State of Florida, alleging that the Act impaired the obligation of the Foundation's Lease Agreement with the Hospital Board, its Agreement for Hospital Care with the Hospital Board, and its Articles of Incorporation (asserted by the Foundation to be "a contract between the Foundation and the State of Florida"). R1:13 at ¶ 2.

At the Foundation's request, the court held an emergency hearing just two days after filing its complaint [R9:1737-1800], and granted a temporary injunction enjoining implementation of the Act. R4:644-54. With more complete record information before the court, the parties filed cross motions for summary judgment on the Foundation's constitutional claims. R4:735-86. The court conducted a lengthy hearing on those motions [R10:1836-1980], and then issued a summary judgment order upholding the Act. R9:1644-1658. In its order, the court pointed out that the temporary injunction had been issued "on short notice" and a "limited record," and declared that the findings and conclusions of the summary judgment order were substituted for any inconsistent findings or conclusions in the temporary injunction. R9:1644.

In its order, the court rejected the Foundation's claim that it was a "private" corporation immune from regulatory oversight by the Florida Legislature, and found the Foundation to be a public or quasi-public entity as defined in *O'Malley*. The court then found inappropriate an application of the test for unconstitutionality

set out in *Dewberry*, and upheld the Act on an analysis of the factors which comprise the "balancing test" for determining contract invalidation under *Pomponio v. The Claridge of Pompano Condo., Inc.,* 378 So. 2d 774 (Fla. 1979).

On appeal, a majority of the three-judge panel of the district court overturned the trial court's order on the ground that the Foundation was a "private" corporation because it was formed as a not-for-profit corporation under Chapter 617, Fla. Stat., rather than by an enactment of the Florida Legislature. 2013 WL 535769, attached as Appendix 1. It then applied the diminishment of value test for impairment set out in *Dewberry*. The dissenting member of the panel agreed with the trial court's finding that the Foundation was a public entity formed to carry out the purposes of the Hospital Board as "an 'instrumentality' or 'agency' of the Hospital Board in the truest sense" (*Id.* at p. 4), and that the Act did not violate the Contract Clause.

The Hospital Board has timely appealed the district court's decision.

STATEMENT OF THE FACTS

In 1949, the Florida Legislature created the Citrus County Hospital Board as a special taxing district, to be run by five gubernatorial appointees serving as trustees, in order to acquire, build, construct, maintain, and operate a public hospital in Citrus County (*i.e.*, the Citrus Memorial Hospital). Ch. 25728, Laws of Fla., §3 (1949); R1:14. The statute was amended in 1969 to require confirmation of the trustees by the Florida Senate. Ch. 69-944, Laws of Fla., §3.

In 1982, the Florida Legislature enacted section 155.40, Fla. Stat., to give county hospital districts the authority to enter into leases with not-for-profit corporations for the operation and management of their hospitals, "[s]o that citizens and residents of the state may receive quality health care." Ch. 82-147, Laws of Fla., §§ 3, 4. In 1985, the Hospital Board issued $7,885,000 of Revenue Bonds to refund prior financing obligations undertaken for the expansion, replacement and improvement of its hospital premises. R1:79.

In 1987, the Hospital Board acted under the authority of section 155.40 to incorporate the Foundation as a not-for-profit corporation under Chapter 617, in order to "operate exclusively for the benefit of and to carry out the purposes of . . . the Citrus County Hospital Board." R1:52 at Art. 3.1. The Foundation's Articles of Incorporation provided for nine members of the board of directors, and specified that five would be the trustees of the Hospital Board. *Id.* at Art. 7.1, 7.3, and 7.4. The Articles also provided that the Articles could be amended by the board of directors (*id*. at Art. XI), and specified that the Foundation would have no members. *Id*. at Art. VI.[1]

In 1989, the Foundation amended its Articles of Incorporation to change the composition of the board of directors to not less than seven and not more than 11 members, with the Chairman and Vice Chairman of the Hospital Board mandated to serve as directors. R1:64-66 at Art. 7.1 and 7.3. The amended Articles did not

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[1] In 2006, the Articles were amended to designate the Hospital Board as the Foundation's sole member. R1:69-77.

preclude the three other trustees from serving on the board, and in fact all three were chosen as members of the nine-member board so that, together with the Chairman and Vice-Chairman, they remained a majority of the board. R1:55-56; 2:234. 300; 8:1577.

In 1990, the Hospital Board entered into a Lease with the Foundation under which the Hospital Board transferred to the Foundation all of the premises, public assets, operations, and management of Citrus Memorial Hospital, "to enable the Foundation to provide needed hospital and health care facilities in Citrus County . . . for the health and welfare of the people of Florida." R1:79-104. The Lease authorized the Foundation to charge reasonable fees for the use of the premises, and to maintain adequate reserves and an operating surplus for improving and offering new services. *Id.* at § 5.6. In consideration for receiving the premises and assets of the hospital, the Foundation had only three obligations. It agreed to pay as rent the debt service on the 1985 Revenue Bonds, the costs payable in connection with the issuance of bonds, and the Hospital Board's administrative overhead expenses. *Id*. at § 3.1.

The Lease required that monthly meetings of the Foundation's board of directors be open to the public (*id*. at § 30), and that the premises and all assets be returned to the Hospital Board upon expiration or termination of the lease. *Id*. at § 26.[2] [3]

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[2] The return of assets was required by the lease-authorizing legislation, section 155.40. *See* Ch. 82-147, Laws of Fla., § 4.

In 1990, the Hospital Board also entered into an Agreement for Hospital Care with the Foundation "in order to assure the provision of adequate and proper medical, health, hospitalization, and emergency care for residents of the County." R1:142. The Hospital Care Agreement required the Foundation to submit to the Hospital Board an annual operating and capital budget, and obligated the Hospital Board to appropriate and pay to the Foundation the money necessary to fund such budget. R1:147.[4] The funds are raised by the levy of ad valorem taxes on Citrus County property owners. Sec. 6, Ch. 2011-256, Laws of Florida.

At the time that the Lease and Hospital Care agreement were entered into, the same Hospital Board members controlled both the Hospital Board and the Foundation. R1:55-56; 2:234. 300; 8:1577.

In 2006, the parties amended the Hospital Care Agreement to "codify the role of the Foundation in meeting the [Hospital] Board's legal responsibilities" (R5:834-35, Whereas clause), by providing:

> That the obligations of the [Foundation] are to be considered a transfer of a governmental function from the [Hospital] Board to the

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(. . . continued)

[3] In 2002, the Hospital Board and the Foundation entered into a Fourth Amendment to the Lease Agreement in order to revise the legal description of the real property subject to the lease dated October 28, 2002, and reiterated that the Hospital Board and the Foundation "have the legal authority for the original lease and the amendments thereto per F.S. 155.40." R7:1237-1240.

[4] In 1992, the parties entered into an Amended and Restated Agreement for Hospital Care containing essential the same terms as the prior agreements. R.1:160-74.

> [Foundation]; and additionally, that in carrying out its obligations, the [Foundation] will be construed to be acting on behalf of the Board, as that term is used in §155.40, Fla. Stat.

Id. at § 1.

In 2006, the Foundation amended its Articles of Incorporation to have a board of directors composed of the Hospital Board trustees, five to seven At-Large members, the Foundation's president, and the chair of hospital's medical staff. This brought the number of board members to not less than 12 or more than 14, with the consequence that the Hospital Board's five trustees could no longer constitute a majority of the board. R8:1577.

In 2006, the Foundation sought an opinion from the Florida Attorney General that it was entitled to sovereign immunity. R5:837-40. In its application letter, the Foundation's counsel represented that:

> (i) the Hospital Board created the Foundation "in order to carry out the purposes of the [act creating the Hospital Board]";
>
> (ii) "the Agreement for Hospital Care provides that the obligations of the [Foundation] "are to be considered a transfer of a governmental function from the Board to the [Foundation]";
>
> (iii) the Agreement for Hospital Care provides that, in carrying out its obligations, *the* [Foundation] *will be construed to be 'acting on behalf' of the [Hospital] Board*, as that term is used in section 155.40, Florida Statutes"; and
>
> (iv) "the [Hospital] Board agreed to appropriate sufficient funds to the [Foundation] such that [it] may fulfill its obligations to provide medical services to the residents of the County." (Emphases added).

Based on that information, the Attorney General opined that the Foundation "is acting primarily as an instrumentality of the Citrus County Hospital Board" and subject to sovereign immunity. R5:842-44.

In 2007, the Foundation moved for summary judgment in a Citrus County Circuit Court proceeding in defense of tort liability, on the basis of sovereign immunity. In its motion, the Foundation represented to the court (among other things):

> (i) that it was "created by the Hospital Board for the purpose of fulfilling the Hospital Board's public function of operating hospitals in Citrus County for the benefit of Citrus County residents";
>
> (ii) that the Agreement for Hospital Care provides that "the obligations of the [Foundation] are to be considered a transfer of a governmental function from the [Hospital] Board to the [Foundation]; and additionally, that in carrying out its obligations, the [Foundation] will be construed as acting on behalf of the [Hospital] Board, as that term is used in section 155.40";
>
> (iii) that "the Lease requires the Foundation to hold public Board of Directors meetings, just as the Board of Trustees of the Hospital Board must hold public meetings under Florida's Sunshine Law"; and
>
> (iv) that, "In the instant case, *it is beyond any reasonable dispute that the Hospital Board has delegated to the Foundation its public function of operating hospitals in Citrus County, Florida*. The Lease and the Agreement say as much, and the actual conduct of the parties is irrefutably consistent with the transfer of a public function. *In fact, the Foundation serves no purpose other than to fulfill the Hospital Board's public function of operating hospitals in Citrus County.* Accordingly, the Foundation is serving as an 'instrumentality' or 'agency' of the Hospital Board in the truest sense."

R5:846-61. (Emphases added).

The circuit court accepted these representations as a basis for finding that the Foundation was entitled to sovereign immunity in the lawsuit. R5:863-69. Thereafter, the Foundation has repeatedly used its sovereign immunity as a defense against tort liability in other lawsuits, on the ground that it was "performing a state function."[5]

In 2008, the Foundation sought authority from the Florida Agency for Health Care Administration ("AHCA") to "rebase" its Medicaid rates. In its letter request, the Foundation's attorney represented to AHCA that

> [*the Foundation*] *fulfills the Hospital Board's public function and answers to the Hospital Board regarding key operational, capital and financial decisions.* [The Foundation] is owned by the Hospital Board, and the Hospital Board provides significant funding to [the Foundation]. In addition to being found sovereign immune as a matter of law, which is reserved only for the state and its agencies, [the Foundation], acting as a public entity is compliant with all of Florida's Sunshine Laws regarding pubic [sic] records and meetings.

R5:927-30 (emphasis added).

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[5] *See Citrus Memorial Health Found. v. Citrus Orthopedics, LLC*, Case No. 2007-CA-1166, Citrus County Cir. Ct. (Aug. 2007); *Paul v. Hendrick*, Case No. 2011-CA-001327, Citrus County Cir. Ct. (Aug. 2007); *Dorpp v. Citrus Memorial Health Found.*, Case No. 2008-CA-2111 Citrus County Cir. Ct. (April 2008); *Savage v. Citrus Memorial Health Found.*, Case No. 2009-CA-5113, Citrus County Cir. Ct. (July 2009); *Patterson v. Citrus Mem'l Health Found.*, Citrus County Cir. Ct. (Sept. 2010); *Couture v. Citrus Mem'l Health Found.*, Case No. 2011-CA-810, Citrus County Cir. Ct. (March 2011); *Bogner v. Citrus Mem'l Health Found.*, Case No. 2011-CA-847, Citrus County Cir. Ct. (March 2011); *Hartong v. Bernhart*, Case No. 2010-CA-1956, Citrus County Cir. Ct. (May 2011).

In 2011, the House Health & Human Services Quality Committee, the House Economics Affairs Committee, and the House Finance & Tax Committee heard from spokespersons for both the Hospital Board and the Foundation, and received governmental reports which revealed the following information regarding the Foundation's management and operation of the hospital:

(i) "The Hospital lease contains no provisions for any corporate performance standards regarding financial or operative compliance with industry standards by the Foundation";

(ii) "Financial Hospital Data 2003-08 compiled by the Agency for Healthcare Administration (AHCA) reported that the Foundation had incurred cumulative financial operative losses from patient services exceeding $50 million";

(iii) "2009 AHCA documents reflected corporate losses from patient services approaching $6 million. Internal financial statements of the Foundation projected 2010 corporate losses from patient services in excess of $10 million";

(iv) "AHCA Financial Hospital Data 2003-08 reported that the Foundation consistently underperformed AHCA statistically similar hospital group operating margin financial benchmarks and consistently underperformed the AHCA not-for-profit hospital group";

(v) "Consistent patient service operative losses incurred by the Foundation from 2004 to 2009 necessitated substantial increases in the ad valorem tax burden on citizens of Citrus County and decreased the Foundation's quantitative debt capacity from $11 million in 2004 to negative $22 million in 2008";

(vi) "A report of the Florida Auditor General in February 2010 noted that the Lease Agreement does not prescribe any specific good business practices to insure efficient operations of the Citrus County Hospital"; and

(vii) "In October 2010, the Executive Committee of the Medical Staff of the Citrus County Hospital expressed "no confidence" in the

> Foundation's chief executive officer and president by a super majority vote."

R5:873, 876-82.

Acting on this information, the 2011 legislature enacted Chapter 2011-256 with the observations that "meaningful oversight by the hospital board is necessitated in light of the [Foundation's] status as an instrumentality of the hospital district," and "the ability of the hospital board to continue to act in the public interest on behalf of the taxpayers of Citrus County requires mechanisms to ensure adherence to the hospital board's public responsibilities." Ch. 2011-256, Whereas clauses.

Section 3 of Chapter 2011-256 provides that the Act was enacted as a "codification of all special acts relating to the Citrus County Hospital Board . . . to provide a single, comprehensive special act charter for the district, including all current authority granted to the district by its several legislative enactments . . . ." *Id.* at § 3. The Act also repealed all of the previous special laws which had governed the Hospital Board. *Id.* at § 6.

Section 4 enacts Section 16 of the Act, which contains 15 separate, substantive subsections. The issues in this case arise from Section 16 in the Act, which begins with a declaration that it was enacted "to ensure public oversight, accountability, and public benefit." *Id.* at § 16. The Foundation's lawsuit has not challenged sections 3 and 6 of the Act, which re-enact prior enactments concerning the Hospital Board and repeal all prior special laws governing the Hospital Board.

Nor has the Foundation challenged all of the 15 subsections contained in Section 16 of the Act. It has not challenged those which require:

> separate accounting for the expenditure of all ad valorem tax moneys provided to it by the Hospital Board, approval for the expenditure for all such public tax funds in a public meeting, and separate annual accounting in a report to the Hospital Board;
>
> Hospital Board approval of capital expenditures in excess of $250,000, and non-budgeted operative expenditures in excess of $125,000;
>
> Hospital Board reimbursement for indigent care based on an annually approved budget; and
>
> construction and interpretation of provisions in the Act and the Hospital Board's lease "as furthering the public health and welfare . . . ."

Id. at subsections 16(1), (10), (13), and (14).

The subsections in Section 16 which the Foundation has challenged are those which provide:

> (2) that the Hospital Board approve the articles of incorporation, bylaws, and other governing documents of the Foundation;
>
> * * *
>
> (5) that the five trustees of the Hospital Board shall constitute a majority of the Foundation's board of directors, and directing that the governing documents shall be amended forthwith to make that a requirement;
>
> (6) that all members of the Foundation's board of directors shall be subject to approval by the Hospital Board;
>
> (7) that the chief executive officer of the Foundation, and his or her term of office, shall be approved and may be terminated by the Hospital Board;

(8) that the Hospital Board will approve borrowings over $100,000, additional loans and leases over $1,250,000, and all policies that govern travel reimbursements and contract bid procedures;

(9) that no annual operating or capital budget of the Foundation shall become effective until approved by the hospital board; and

* * *

(11) that the Hospital Board may require an annual audit of the financial management of the hospital at the expense of the Foundation.

SUMMARY OF ARGUMENT

The district court panel majority erred in concluding that, simply because the Foundation was formed as a not-for-profit corporation under Chapter 617 rather than by an enactment of the Florida Legislature, it was a "private" corporation rather than a "public" corporation. The Foundation was organized in response to the enactment of Section 155.40, Fla. Stat., which authorized public hospitals to lease its assets and delegate its public responsibilities to a corporation which would perform the functions and responsibilities of a public hospital. The Foundation was created to fulfill a public need, and to implement the state's police power, by operating the only public hospital in Citrus County. It generated no private profit for any organizer or stockholder, and consistently held itself out to the public, to Florida courts, and to Florida state agencies as an instrumentality of the Hospital Board. The Foundation fell squarely within the definition of a "public

corporation" that was established by this Court in *O'Malley v. Florida Ins. Guaranty Ass'n., Inc*., 257 So. 2d 9 (Fla. 1971).

The district court panel majority erred in finding that the Act impaired contract rights of the Foundation under its Lease and its Hospital Care Agreement. Nothing in the Act had any bearing on the Foundation's responsibilities or obligations under the Lease or the Hospital Care Agreement. The district court panel majority also erred in finding that the Act impaired contract rights of the Foundation under its Articles of Incorporation. The Articles are not a "contract" with the State which gave the Foundation rights enforceable under the Contract Clause. The legislature made crystal clear in Section 617.0125, Fla. Stat., that the Department of State is required to file articles of incorporation submitted for the formation of a not-for-profit corporation under Chapter 617 so long as the articles contain the information required by law and meet the execution and filing requirements of the statute. The State's duty is to accept the papers for filing is defined by the law as a "ministerial" duty.

The district court panel majority erred in applying the test for contract impairment set out in *Dewberry,* rather than evaluating the factors which compose the "balancing of interests" test for contract impairment which were established in *Pomponio*. The trial court meticulously explained how the undisputed record evidence indicated that the Act was enacted to deal with a broad social problem of

health care in Citrus County, operated in an area subject to ongoing state regulation, and was not severe, permanent or irrevocable.

The district court panel majority erred invalidating the Act in its entirety, and thereby effectively eliminating the Citrus County Hospital Board as a special tax entity in Florida, by failing to apply the severance clause in the Act to preserve provisions which were not at issue or held to be invalid.

STANDARD OF REVIEW

The standard of review for the constitutional issues before the Court is *de novo*. *E.g., Florida Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005).

ARGUMENT

This Court has long held that the legislative acts are accorded a presumption of constitutionality, and that challenged legislation is construed to affect a constitutional outcome whenever possible. *Florida Dep't of Revenue, supra*, at 256. The Court has also held that, before holding the Act facially unconstitutional as the district court has done, a court must conclude "that no set of circumstances exists under which the statute would be valid." *E.g., State v. Bales,* 343 So. 2d 9, 11 (Fla. 1977).

These principles of judicial review were not applied by the district court panel majority, yet they are particularly apt in this case. The panel majority's decision appears to invalidate the Act in its entirety, even though only a limited

number of subsections within Section 16 of the Act were at issue. For all intents and purposes, the district court has eliminated the Citrus County Hospital Board as a special taxing district of the state, as well as the viability of Foundation itself which depends on the Hospital Board's premises to carry out its obligation to deliver medical services to Citrus County residents. Ch. 2011-256 contains a severance clause which should have been applied to avoid these draconian results.

I. The Contract Clause was not implicated by the enactment of Ch. 2011-256 under the state's police power because the Foundation is a "public corporation" promoting the public welfare by using public assets to operate a hospital for the welfare of Citrus County residents.

In *O'Malley v. Florida Ins. Guaranty Ass'n., Inc*., 257 So. 2d 9 (Fla. 1971), this Court differentiated a "private" from a "public" corporation for the purposes of a Florida constitutional analysis. The Court explained:

> Private corporations are those which have no official duties or concern with the affairs of government, are voluntarily organized and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument of its stockholders. [citations omitted].
>
> [The business of public corporations is] to fill a public need without private profit to any organizers or stockholders. Their function is to promote the public welfare and often they implement governmental regulations within the state's police power. In a word, they are organized for the benefit of the public.

257 So. 2d at 11.[6]

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[6] The constitutional issue in *O'Malley* arose under Article III, section 11(a)(12), Fla. Const., which barred special laws "pertaining to a private corporation or from granting any privilege to a private corporation."

The district court's panel majority paid no attention to this Court's exposition of the different functions, purposes, and characteristics of "private" and "public" corporations, however. It simply accepted the Foundation's contention that the Hospital Board was not a public corporation because it was incorporated under the not-for-profit statute rather than by the legislature itself. The panel majority found it significant that the Foundation was formed to avoid "statutory and constitutional limitations which would pertain to the [Hospital] Board as a public entity," reasoning that the purpose of the Lease, the Hospital Care Agreement, and the Articles of Incorporation was to "transfer the operational control of the hospital from the [Hospital] Board's status as a public entity with such restrictions, to the private Foundation where such restrictions would not apply." 2013 WL 535769 at p. 3.[7] There are at least three fundamental flaws in the panel majority's reasoning.

First, the panel majority completely disregarded the Court's detailed explanation in *O'Malley* of the characteristics, functions, and purposes of public and private corporations, and relied entirely on the fact that the Foundation was created as a not-for-profit corporation under Chapter 617 rather than by an enactment of the Florida Legislature. The majority's disregard of the Court's

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[7] The limitations referenced by the panel majority prevented the Hospital Board from becoming a joint owner with another corporation and withdrawing from the State's public retirement program. R2:232, R2:301-02.

careful exposition of the different functions and attributes of public and private corporations confounded the dissenting judge, to whom it seemed obvious that

> if the manner of a corporation's creation were dispositive of the public/private inquiry, there would have been need for the *O'Malley* court to describe the attributes of public and private corporations . . . . The court, instead, could have started and ended its analysis by reference to the manner of the corporation's creation.

Id. at p. 5.

Second, the panel majority ignored completely the extensive and unrefuted record evidence that the Foundation has always operated exclusively with public assets and public revenues to fulfill the Hospital Board's public function of operating a hospital, and has consistently represented to state courts and governmental agencies that it is an "instrumentality" of the Hospital Board. Again, the dissenting judge said it best when she wrote that the Foundation's

> representations to the courts and officials of the state "are perhaps the best indication of its identity as a public or quasi-public corporation . . . [and that the Foundation] exists only to fulfill the delegated duty to meet Citrus County's public health needs in accordance with the Legislature's mandate for the Hospital Board.

Id. at p. 5.

Third, the panel majority misperceived the significance of the Hospital Board's incorporation of the Foundation to avoid constitutional and statutory restrictions on its hospital operations. Incorporation of the Foundation was invited by the legislature's enactment of Section 155.40 five years before the Foundation was brought into existence, so public hospitals could compete with private

hospitals. *Indian River County Hosp. Dist. v. Indian River Mem'l Hosp., Inc.,* 766 So. 2d 233, 235 (Fla. 4th DCA 2000).[8] The Foundation has produced no evidence that the Legislature intended that public hospitals necessarily *become* private in order to accomplish such purpose, and neither Section 155.40, its enacting law, or its legislative history so indicates. In fact, within two years of the enactment of section 155.40, an estimated six public hospitals had converted to private hospitals. *See* Staff Report of the House Committee on Health & Rehabilitative Services dated May 22, 1984, a copy of which is attached as Appendix 2.

At no point in the Foundation's lawsuit did it ever suggest that it met *any* of the characteristics of a "private" corporation as defined in *O'Malley*: a corporation with no official duties with the affairs of government which is not bound to perform any act solely for government benefit and has the personal emolument of its stockholders as its primary objective. Nor did the Foundation ever dispute that it met *all* of the characteristics of a "public corporation" as the term is defined in *O'Malley*: a corporation organized for the benefit of the public without private profit to any organizers or stockholders, in order to promote the public welfare and implement governmental regulations within the state's police power. In fact, until it challenged the additional regulatory oversight found necessary by the legislature when it enacted Chapter 2011-256, the Foundation had uniformly portrayed itself in publicly-filed documents, and represented itself to courts and state agencies, as a

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[8] In its initial brief in the district court, the Foundation acknowledged that the legislature's enactment of section 155.40 was designed to permit public hospitals to become competitive with private hospitals.

public entity, the sole purpose of which was to perform the function of the Hospital Board, a governmental instrumentality, and an arm of the state.

In the district court, the Foundation justified its representations to the state's courts and agencies as nothing more than an attempt to obtain sovereign immunity or a Medicaid benefit, citing to decisions which hold that private corporations can obtain sovereign immunity even when they act as instrumentalities of the state. The Foundation did not tell the Attorney General or multiple Florida courts that it was entitled to sovereign immunity *because* it was a private entity performing public functions, however. It told them that it was entitled to sovereign immunity *because it was a public agency;* more particularly, because it was an "instrumentality" and "agency" of the Hospital Board that "serves no purpose other than to fulfill the Hospital Board's public function." *E.g.,* R5:837-39.

In any event, the Foundation's motivation for representations made to state courts and agencies does not justify its new-found claim to be a private corporation. From its very inception, the Foundation has made representations in public documents and contracts which are unrelated to its desire either for sovereign immunity or Medicaid benefits. In its 1987 Articles of Incorporation, for example, the Foundation declared it was brought into existence for the purpose of "operating *exclusively* for the benefit of and carrying out the purposes of the Citrus County Hospital Board." R2:240-249 (emphasis added). In its Lease, it accepted the premises and assets of the Hospital Board in order to "provide needed hospital and health care facilities in Citrus County . . . for the health and welfare of the people of Florida." R2:353-378. In its Hospital Care Agreement with the

Hospital Board, it declared its purpose was "to assure the provision of adequate and proper medical, health, hospitalization, and emergency care" for residents of Citrus County [R3:416-430], and in a subsequent amendment to that agreement it emphasized that its obligations should be considered "a transfer of a governmental function" for which it will "be acting on behalf of the Board." R3:416-451.

These public and pronouncements express the Foundation's understanding of its *public* status, and have nothing to with its desire to benefit from sovereign immunity. For the Foundation to now claim that it is a private corporation which only touted its "public" persona as a motivation to induce governmental bodies to obtain financial benefits does not change the fact that misrepresentations were inconsistent with status declarations made in its governing charter, and in contract representations made to induce the Hospital Board to transfer to the Foundation its assets and operations. With no shareholders or private property, and with no purpose or activity providing a private benefit, the Foundation has for 26 years held itself out to the public, to the Hospital Board, to courts, and to other governmental agencies as being a *public* entity, notwithstanding that it came into existence through incorporation under Chapter 617. There is no reason for this Court to tolerate the Foundation's attempt to avoid needed regulatory oversight by taking a position that is inconsistent with 26 years of public actions and representations.

Nothing in the Contract Clause is implicated by the oversight provisions put into Section 16 of the Act which require Hospital Board approval of the Foundation's governing documents, directors, CEO, borrowings over $100,00 and

debts over $1.25 million, and annual operating and capital budgets (subsections 16(2), (6), (7), (8) and (9)), or which re-instate the Hospital Board trustees as a majority of the Foundation's board (subsection 5), or which authorize discretionary audits of the Foundation's fiscal management at the expense of the Foundation (subsection 11). Each and every one of these regulatory measures was considered by the legislature to be necessary in order to halt the Foundation's demonstrated mismanagement of public property and moneys. The panel majority of the district court erred in holding that the Foundation is a private corporation immune from the legislature's exercise of the state's police power.

II. No contract right of the Foundation was impaired by the enactment of Ch. 2011-256.

The district court's panel majority also failed to come to grips with the nature of the "contract rights" which the Foundation asserted had been diminished or lessened by the Act. The starting point for any consideration of a Contract Clause violation is a determination of what contract right (if any) has been impaired by an act of the legislature.

The Foundation's lawsuit is premised on claims that the Act impaired its Lease with the Hospital Board, its Hospital Care Agreement with the Hospital Board, and its Articles of Incorporation with the State of Florida. A careful look at those three documents, however, reveals the absence of any contract right that was affected by the Act, let alone any provision in Section 16 of the Act which impaired any right of the Foundation under the test for invalidation established by the Court in *Pomponio*.

A. No contract right in the Lease or Hospital Care Agreement was impaired by the Act.

The gravamen of Foundation's constitutional claim with respect to its Lease and Hospital Care Agreement is an allegation that they "govern the Foundation's obligation to operate the hospital and to provide hospital services, [and] the procedures for financial review and oversight by the Hospital Board." R1:12-176. The trial court could find no provision in either the Lease or the Hospital Care Agreement relating to the Foundation's governance or financial accountability. R9:1644-1658 @1651. In its initial brief in the district court, the Foundation again generalized with an assertion that the Lease and Hospital Care Agreement "govern all material aspects of the parties' relationship," but it then quickly back-tracked with an acknowledgment that it was "hardly surprising that the Lease and [Hospital Care] Agreement do not address governance because that is what the Foundation's Articles [of Incorporation] do."

The same lack of precision was reflected in the Foundation's complaints with respect to financial accountability. The Foundation generalized that its contract rights were affected because the Hospital Board was given pre-approval over a variety of financial matters, but again offered no specificity as to what contract right in either agreement was diminished or lessened by the Act. The absence of specificity there is unsurprising, given that nothing in the Act bore on any contract right of the Foundation with respect to financial accountability.

The Lease was a contract by which the Hospital Board made its premises and assets available to the Foundation for the delivery of medical services in

exchange for the Foundation paying debt service on outstanding Revenue Bonds and the administrative operating expenses of the Hospital Board.[9] No alteration in the composition of the board of directors, and no requirement for Hospital Board approval of financial matters, affected either the Foundation's contract right to deliver medical services or its contract obligation to meet the financial obligations specified in the Lease. Put another way, no oversight approval given to the Hospital Board by the Act and no shift in the composition of the board of directors affected in any way the obligations of the Foundation's board of directors – however it was composed – to meet its Lease-imposed responsibility to pay debt service on the Hospital Board's outstanding Revenue Bonds and the Hospital Board's administrative operating expenses.

Similarly, the Hospital Care Agreement was a contract that required the Foundation to deliver health care services in Citrus County in exchange for tax revenue from the Hospital Board which might be needed for operational and capital requirements. No provision in the Act interfered with the Foundation's obligation to deliver health care services at Citrus Memorial Hospital, or changed the Foundation's right to receive tax revenue raised from Citrus County citizens when needed.

If anything, provisions in the Act which gave the Hospital Board more control over the management and financial operations of the Foundation actually

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[9] The payments were to be made from revenues received from the operation of the public hospital and any shortfall was to be made up by the Hospital Board from ad valorem taxes. R1:79-104.

bolstered the Foundation's Lease and Hospital Care Agreement obligations. Greater Hospital Board involvement in the Foundation's affairs could only assist it in meeting the parties' joint commitment to use the assets of the Hospital Board, and the revenues provided by Citrus County taxpayers, for the delivery of hospital services in Citrus County. The trial court correctly perceived that the Act did not diminish or lessen any contract right arising from the Foundation's Lease and Hospital Care Agreement when it pointed out that the Foundation was subject to state audits *before* the enactment of Ch. 2011-256, that the Foundation had represented in at least one prior court proceeding that "all material actions upon the part of the Board of Directors of the Foundation are routinely referred to the Board of Trustees of the Hospital Board for ratification," and, if anything, the Act actually *adds* value to the Foundation through greater public accountability and oversight to the Foundation's only member, the Hospital Board. R9:1652; R9:1655.

B. No contract right in the Articles of Incorporation was impaired by the Act.

The Foundation's principal argument throughout this proceeding has been that its Articles of Incorporation are "a contract with the state" which established rights the legislature could not alter. The Foundation relied for that notion on verbal articulations of that proposition in a number of Florida cases such as *Marion Mortgage Co. v. State,* 145 So. 222 (Fla. 1932), *Aztec Motel, Inc. v. State,* 251 So. 2d 849 (Fla. 1971), and *Hopkins v. The Vizcayans*, 582 So. 2d 689 (Fla. 3d DCA 1991). Those cases, however, do not support the notion that articles of

incorporation filed with the Secretary of State create a bilateral contract relationship between the incorporating company and the state which is impervious to legislative alteration under the State's police power.

In *Marion Mortgage*, the Court held that trust powers conferred by a mortgage company's articles of incorporation could not be exercised because the legislature had enacted another statute which limited the exercise of trust powers to trust companies. The *Marion Mortgage* decision stands for the proposition that powers expressed in a private corporation's articles of incorporation are not immutable "contract rights" merely because the articles have been filed with the State.

The point was made even more expressly in *Aztec*. There, the Attorney General had brought an action in *quo warranto* to implement a statute which allowed revocation of the charter of a corporation whose officers were engaged in organized gambling. Although the Court sustained a due process challenge to the statute on the basis of void for vagueness, the Court made clear that the State can exercise its police power to regulate a business in order to promote the safety, health, and welfare of society, and that even if the articles of incorporation were considered a contract with the state, the legislature could not contract away its police power obligations:

> The Legislature cannot, by any contract, divest itself of the power to provide for the protection of the lives, health and property of citizens, and the preservation of good order and public morals. *All rights, including those under charters of corporations, are held subject to the police power of the State*.

251 So. 2d at 852-53 (emphasis added).

In *Hopkins,* the court merely repeated the *Aztec* statement that a corporate charter becomes a contract. There, the court found no impairment when a corporation effected a charter change under a process set out in a newly-enacted statute rather than by amending its articles of incorporation. The court noted that the legislature had specifically reserved to itself the power to amend the statutory provisions governing not-for-profit corporations.

The actual decisions in *Marion Mortgage* and *Aztec* are more persuasive here than the casual statement in those cases that corporate charters are a contract. Here, the record establishes that the Foundation exists *solely* to advance the health and welfare of Citrus County residents and others who use Citrus Memorial Hospital, and operates exclusively for the public welfare in an industry over which the legislature exercises broad regulatory authority.

Other cases relied on by the Foundation below are equally unavailing to suggest that articles of incorporation create contract rights that run between the incorporator and the state. As will be shown, in each of those cases the document filed with the state to create a corporate entity, or in some cases a condominium association, merely provided the legal foundation for bilateral contract rights running between persons operating under the corporate charter or condominium declaration, and not any bilateral contract right created merely by the act of filing articles of incorporation.

In *Cohn v. Grand Condo. Ass'n, Inc*., 62 So. 3d 1120 (Fla. 2011), the Court held that a declaration of condominium will act as a contract that creates rights

between unit owners in a mixed-use condominium complex. In a lawsuit brought by residential unit owners against the condominium association, the Court applied the Contract Clause to invalidate a newly-enacted law that retroactively reduced the voting power of residential unit owners vis-à-vis the voting powers of commercial and retail unit owners. The fact that the declaration of condominium was the *source* of the contract rights in *Cohn* had no bearing on the fact that the parties were disputing bilateral contract rights accorded them respectively in the condominium declaration.

In all other Contract Clause cases cited by the parties in the district court, the contract at issue also involved bilateral contract rights. *See, e.g., Pomponio* (also involving bilateral contract rights between unit owners and a condominium association and not any right between the association and the State); *Yamaha Parts Distrib., Inc. v. Ehrman,* 316 So. 2d 557 (Fla. 1975) (involving bilateral contract rights between a franchisor and franchisee); *Dewberry* (involving bilateral contract rights between an insured and insurer); *United States Fidelity & Guar. v. Department of Ins.,* 453 So. 2d 1355 (Fla. 1984) (same); *Menendez v. Progressive Express Ins. Co., Inc.,* 35 So. 3d 873 (Fla. 2010) (same); *State v. Chadbourne*, 382 So. 2d 293 (Fla. 1980) (involving a contract between a road construction contractor and the Florida Department of Transportation); and *Lawnwood Med. Ctr., Inc. v. Seeger,* 959 So. 2d 1222 (Fla. 1st DCA 2007), *aff'd on other grounds*, 990 So. 2d 503 (Fla. 2008) (involving a contract between physicians and a hospital).

In its reply brief in the district court, the Foundation sought to bolster its claim that its Articles of Incorporation are a contract with the state by citations to

sections of what it called "black letter law" – Fletcher Cyclopedia of the Law of Corporations; AM. JUR. 2D CORPORATIONS; and 18 C.J.S Corporations – asserting that Florida law is consistent with that black letter law. In fact, Florida law on the point is entirely different.

In 1990, the Florida Legislature revised Florida's corporation code to add provisions specifically designed to avoid the state being considered bound to the substance of any provisions in documents filed with the Department of State, including articles of incorporation for non-profit corporations. This provision – § 617.0125, Fla. Stat. (1990) – was in effect at the time of the 2006 amendments to the Foundation's Articles, and at the time the legislature enacted Chapter 2011-256. This provision, entitled "Filing duties of Department of State," provides as follows:

> (1) If a document delivered to the Department of State for filing satisfies the requirements of s. 607.0120, the Department of State shall file it.
>
> (2) The Department of State files a document by stamping or otherwise endorsing "filed," together with the Secretary of State's official title and the date and time of receipt. After filing a document, the Department of State shall deliver an acknowledgment or certified copy to the domestic or foreign corporation or its representative.
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> * * *
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> (4) The Department of State's duty to file documents under this section is ministerial. The filing or refusing to file a document does not:
>
> (a) Affect the validity or invalidity of the document in whole or part,

(b) Relate to the correctness or incorrectness of information contained in the document,

(c) Create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

Under this provision, the Department of State is mandated to accept for filing any document submitted by a corporation, including articles of incorporation and amendments, so long as such documents contain the information required by law and meet the execution and filing requirements of the statute. The only thing to which the State "agrees" when the papers are accepted for filing is that they meet the technical requirements for filing.

The Foundation's contention that the Foundation's Articles of Incorporation created a contract with the State which precluded legislative change, as if the State and the Foundation had contract rights, is expressly refuted by section 617.0125.

III. Even if the Foundation possessed contract rights under the Lease, the Hospital Care Agreement, or the Articles of Incorporation, the enactment of Ch. 2011-256 did not impair any such rights in violation of the Contract Clause.

Three seminal cases from this Court have defined the scope and force of the Contract Clause: *Yamaha Parts Distrib., Inc. v. Ehrman,* 316 So. 2d 557 (Fla. 1975); *Dewberry v. Auto Owners Ins. Co.,* 363 So. 2d 1077 (Fla. 1978); and *Pomponio v. The Claridge of Pompano Condo., Inc.,* 378 So. 2d 774 (1979).

In *Yamaha,* the Court held that a statute requiring a motorcycle manufacturer to give 90 days' notice to terminate a dealer/franchisee could not be applied retroactively to a franchise contract allowing termination on 30 days' notice which

had been entered into prior to the effective date of the statute. Noting that virtually no degree of contract impairment has been tolerated in Florida, the Court held that a retroactive application of the statute would collide with the Contract Clause in the Constitution which prohibits laws impairing the obligation of contracts.

Three years later in *Dewberry,* the Court again applied the Contract Clause to invalidate the retroactive application of a newly-enacted "no stacking" law to an insurance contract which had been purchased when it was lawful for an uninsured motorist to stack the coverage of more than one insured vehicle. The Court held that subsequent legislation "which diminishes the value of a contract is repugnant to our Constitution," and noted that the effect of applying the law retroactively was to immediately diminish the uninsured motorist coverage for which the insured had previously paid premiums. 363 So. 2d at 1080.

One year later in *Pomponio*, the Court was called upon to determine the constitutionality of a statute requiring condominium owners to deposit their rental payments into the registry of the court during litigation involving obligations under a condominium lease. In *Pomponio*, the Court traced the history of the federal Contract Clause, concluded that its origins were too obscure to be of any assistance in its construction, and undertook an examination of its transformation by the United States Supreme Court from a strict prohibition on impairment to a more nuanced prohibition that would ameliorate its rigid application and accommodate necessary legislation. The Court then adopted for Florida the "balancing" test which had evolved from decisions of the United States Supreme Court, "as an approach most likely to yield results consonant with the basic purpose of the

constitutional prohibition." *Id*. at 779. In doing so, the Court did not abandon the underlying principle of *Yamaha* that virtually no impairment of contract is tolerable, but explained that the notion of "virtually" no impairment "necessarily implies that some impairment is tolerable." 378 So. 2d at 780.

On cross motions for summary judgment, the trial court in this case held that the Act was constitutional under the "balancing" test of *Pomponio*. The panel majority of the district court reversed that determination by applying *Dewberry*, however, with the observation it has been applied in numerous cases after *Pomponio* "when there is an immediate diminishment in the value of a contract." 2013 WL 535769 at p.3. That observation by the panel majority offers no guidance in the circumstances of this case, however. The validity of *Dewberry* is sound in situations where it is applicable, but so too is the validity of *Pomponio* in situations where it is applicable. In this case, the trial court correctly perceived that *Pomponio* and not *Dewberry* was germane to the Foundation's Contract Clause challenges.

A. The challenges raised by the Foundation, even if they involved contract rights, do not implicate the *Dewberry* line of impairment cases.

The *Dewberry* line of court decisions has invalidated legislation with one significant feature that is not present here. All of them involved contract rights which arose from a contract that created mutual legal obligations between two parties. None involved a contract right with the State in its capacity as the

recipient of a document that must be publicly filed with the Secretary of State in Tallahassee in order to do business in corporate (or condominium) form.

In *Dewberry* the state was not involved at all. The contract at issue was a bilateral contract between an insured and insurer. The Court had no difficulty applying the Contract Clause to invalidate retroactive application of a newly-enacted anti-stacking law to the insured's contract, since the effect of the law "was to reduce his uninsured motorist coverage from $200,000 to $100,000 albeit he had paid premiums for the increased coverage." 363 So. 2d at 1080.

In *State Farm Mut. Auto. Ins. Co. v. Gant,* 478 So. 2d 25 (Fla. 1985), the Court addressed a statute which had the same adverse effect on insurance companies as the enactment in *Dewberry* had on insureds. The legislature had enacted a law which gave retroactive application to a statute which allowed the stacking of uninsured motorist coverage. The Court held, as it had in *Dewberry,* that the retroactive application of the law diminished the insurance company's contract rights by exposing it to a larger amount of additional coverage for which it had not bargained.

The same bilateral contract situation was present, as earlier noted, in *Cohn*. There the Court dealt with a statute that had retroactively increased from two to four the number of votes by residential unit owners for a seven-person board of directors in a mixed use condominium facility. The Court applied the Contract Clause because the statutory reduction in the voting power of commercial and retail unit owners diminished their contract voting rights "in contravention of their contractual agreement." 62 So. 2d at 1122.

In *State v. Leavins*, 599 So. 2d 1326 (Fla. 1st DCA 1992), lessees of permits to harvest oysters on submerged land in Apalachicola Bay brought a lawsuit to challenge a special law enacted by the legislature to prohibit mechanized dredging for oysters in the bay. Citing *Dewberry,* the court held the law diminished the value of the existing lease agreements between the oyster fishermen and the state.

In *Lee County v. Brown,* 929 So. 2d 1202 (Fla. 2d DCA 2006), the court considered an amendment to a county ordinance which had prospectively imposed a school impact fee on building permits, but exempted pre-existing building permits that had been issued within three months of the effective date of the original ordinance. In light of the fact that different contracts would be affected differently by the amendment, the court reversed a summary judgment holding the amendment to be facially unconstitutional. The court remanded the case for the trial court to apply *Dewberry* to those contracts which would experience an immediate diminishment in value of a contract. Notably, the court also directed the trial court to apply the balancing test of *Pomponio* to contracts where that was not the case.

These post-*Dewberry* cases do not suggest that the balancing test adopted in *Pomponio* is not appropriate in situations where legislation has either not diminished or lessened contract rights or done so with far less severity. In fact, *Pomponio* was cited as authoritative precedent along with *Dewberry* in *Cohn* (62 So. 2d at 1122), in *State Farm* (478 So. *2d* at 26), and in *Lee County* (929 So. 2d at 1204-05, 1207), and *Pomponio* was held determinative in *Coral Lakes Comm. Ass'n, Inc. v. Busey Bank, N.A.,* 30 So. 3d 579 (Fla. 2d DCA 2010). In *Coral*

Lakes, the retroactive application of a statute altered the bank's mortgage contract by denying its priority lien over unpaid home owner's assessment charges in the event of foreclosure. In holding that an application of the statute would immediately lessen the value of the bank's mortgage and the power of its priority position, the court applied *Pomponio* but made no mention of *Dewberry*.

B. Nothing in Ch. 2011-256 impaired contract rights of the Foundation or lessened a right sufficiently to warrant invalidation under the balancing test of *Pomponio.*

As noted earlier, this Court held in *Pomponio* that some degree of contract impairment is tolerable. The Court drew on U.S. Supreme Court precedents which brought reasonableness into an evaluation of Contract Clause violations, in order to balance one party's contract interest against vital interests of the state. In *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), the Court held that a finding of technical impairment "is merely a preliminary step" in resolving a Contract Clause challenge (431 U.S. at 21-22), and one year later in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the Court explained:

> The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage.

438 U.S. at 244-45. The Court identified as factors to be considered in a balancing test (i) whether the law was enacted to deal with a broad, generalized economic or social problem, (ii) whether the law operates in an area already subject to state regulation, and (iii) whether the contract alteration is temporary or severe, permanent and irrevocable.

These decisions by the U.S. Supreme Court led the Florida Supreme Court in *Pomponio* to hold that the tolerability of impairment is determined by weighing the source of the state's authority and the evil sought to be remedied. 378 So. 2d at 780. That's precisely what the trial court did in this case. R9:1644-1658.

The trial court rejected the Foundation's argument that the Act has no "broad social purpose" because it is applicable only to a public hospital in Citrus County and not all hospitals in Florida. The court correctly observed that a "broad social purpose" is not defined by geography, but by whether the legislature is exercising the police power rather than providing a benefit to special interests. *See, U.S. Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355, 1360 (Fla. 1984). Here, the legislature made crystal clear that the Act was an exercise of the police power, in a provision under Section 16 of the Act which the Foundation does not challenge. Subsection 16(14) declares that the Act "shall be construed and interpreted as furthering the public health and welfare."

The trial court also held that the Act met the second prong of the *Pomponio* balancing test, by noting that Act operates in an area that was already subject to regulation at the time the parties entered into their contractual relationship. Hospitals in Florida, of course, are in a heavily regulated industry. *See West Florida Regional Med. Ctr., Inc., v. See*, 18 So. 3d 676 (Fla. 1st DCA 2009). In *United States Fidelity and Guaranty Co.,* this Court found this fact *alone* to be

dispositive on the impairment issue, quoting with approval from *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), that "one whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." 453 So. 2d at 1360-62 (internal citations omitted). The Foundation would have this Court hold that by unilateral contract, a party can permanently foreclose the Legislature from reasonably regulating a business in the conduct of activities that have a significant impact upon the public health and welfare. Public policy has never permitted such a result.

The trial court also considered the third *Pomponio* factor which asks whether the law effects a temporary alteration of the contractual relationship or works a severe, permanent, and immediate change. The trial court found the degree of impairment here, if any, to be "minimal to non-existent," given (i) that the Foundation has acknowledged in public filings that is already subject to such oversight by the Hospital Board, (ii) that it is currently subject to state audits, (iii) that it has that "all material actions upon the part of the Board of Directors of the Foundation are routinely referred to the Board of Trustees of the Hospital Board for ratification,"[10] and (iv) that it "answers to the Hospital Board regarding key operational, capital and financial decisions." R9:1655-56.

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[10] *Citrus Memorial Health Foundation v. Citrus Orthopedics, LLC.* Case No. 2007-CA-1166 2007 (Citrus County Cir. Ct. 2007). R5:846-61.

The accuracy of the trial court's analysis is brought into focus by considering exactly what contract rights are claimed by the Foundation to have been impaired. One of the complaints is that the Hospital Board may, in its discretion, require an annual audit at the expense of the Foundation. Ch. 2011-256, subsection 16(11). The right of a corporation in a regulated industry not to be subject to the minimal expense for an audit that may never be imposed is not permanent, severe, or irrevocable when the state is exercising its police power to address a broad social policy.

Other complaints by the Foundation are directed at provisions in the Act which give the Hospital Board approval authority over various actions taken by the Foundation's board of directors: the adoption of governing documents; the selection of board members and the CEO; the entry into borrowings and leases which exceed certain dollar amounts; the formulation of annual operating and capital budgets; and the adoption of policies (of which there were never any adopted) for travel and contract bids. *Id.* at subsections 16(2), (6), (7), (8) and (9). These approval requirements do not diminish or lessen the Foundation's contract right, as expressed in Article VII of its original 1987 Articles of Incorporation, its 1989 Amended Articles of Incorporation, and its 2006 Restated Articles of Incorporation, that "the affairs of the [Foundation] are to be managed by a Board of Directors." R1:54; R1:64; R1:72.

Under the Act, the board still retains full power to direct the operational and financial affairs of the Foundation. Rather than "impairing" any right conferred on the board by the Articles of Incorporation, the legislature's

imposition of these approval requirements merely assures the Hospital Board that its assets, its debt requirements, and the delivery of the hospital services with which it has been legislatively-tasked, will *not* be impaired as they have been by recent board actions which are inconsistent with the public welfare. Thus, to the extent the Act alters the finality of the Board to independently control the Foundation's assets and public responsibilities, the modest degree of oversight approval imposed by the Act is a reasonable balance between the Foundation board's self- interest and the vital interests of the state.

> The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end.

Pomponio, 378 So. 2d at 780, quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, at 438 (1934).

The provision of the Act which commanded the most attention from the Foundation in the lower courts was the directive in subsection 16(5) that the five trustees of the Hospital Board would compose a majority of the Foundation's board of directors going forward, and directing the Foundation to take the necessary steps to accomplish that forthwith. As noted earlier, the Foundation has over the years not only unilaterally varied the number and types of its directors, but from 1989 through 2006 thought it to be in the Foundation's best interest to make the trustees of the Hospital Board a majority of its board.

From 1987 to 1989, the Articles provided that the Foundation would have nine directors, composed of the five Hospital Board trustees, two At Large directors, and two Ex Officio Directors. R1:55-56. Obviously, the trustees comprised a majority of the board. From 1989 to 2006, the Articles provided that Foundation would have seven to eleven board members composed of the two Hospital Board trustees, between five and nine At Large directors, and two specially-designated directors. R1:65. The trustees of the Hospital Board still constituted a majority of the board, however, since the Foundation elected to have a nine-person board and elected the other three Hospital Board trustees to serve. R1:55-56; 2:234. 300; 8:1577. From 2006 to date, the Articles provided that board of the Foundation would have all five trustees, five to seven At Large directors, the chair of the medical staff, and the Foundation's president. R1:72-73. In that configuration, the trustees could no longer constitute a majority of the board members.

Prior configurations of the board are notable for the fact that, in changing the board's composition over the years, the Foundation did not seek permission from the State for the privilege of doing so, as would be required if it had a bilateral contract with the State imposing reciprocal obligations. It simply filed a document with the Secretary of State that set out the new number and classes of board members. In other words, the State merely performed the purely ministerial act

when, over the years, it accepted the Foundation's periodic designations of who and how many directors would manage the affairs of the Foundation.

It follows that, to the extent the Act now lessens the autonomy of the current board to determine the composition of its board, it is no more than a modest alteration of authority. The representations of the Foundation include its declaration that "all material actions upon the part of the Board of Directors of the Foundation are routinely referred to the Board of Trustees of the Hospital Board for ratification."[11]

Finally, it should be noted that the Foundation cannot claim that any current director has a right to retain his or her seat on the board. Any such notion was laid to rest 135 years ago in *State v. Knowles*, 16 Fla. 577 (1878). The Court was faced with a statute that changed the trustees of the Florida Agricultural College. The plaintiff argued, just as the Foundation does in this case, that the college was a private corporation whose corporate charter constituted a contract impaired by the statute. The Supreme Court rejected that assertion, and in discussing the interest claimed by the plaintiffs pointed out that the trustees were made agents of the state by the statute to collect and disburse property appropriated by the government to the state for a public purpose:

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[11] *Citrus Memorial Health Foundation v. Citrus Orthopedics, LLC.* Case No. 2007-CA-1166 2007 (Citrus County Cir. Ct. 2007).

> There is not and never was any private property in the trustees in the funds. . . . It never was the purpose of the State of Florida to give these trustees any private right to this property. Throughout the whole legislation they are shown to be simple public agents to manage public property. The only right they have to it is by the legislation of the State, and every section of these acts shows that it was founded by public funds and for a public purpose.

Id., 16 Fla. at 616.

Whether acting pursuant to a state-created statute, as were the trustees in Florida Agricultural College, or under the aegis of Chapter 617, as is the Foundation, board members who discharge a public function with public assets have no personal interest which is protected by the Contract Clause. But even if some contract right can be imagined, the level of impairment brought to bear on the Foundation by the Act is insubstantial at best, when analyzed under *Pomponio*.

IV. The district court failed to consider the Act's severance clause.

The action of the district court panel majority in vacating the trial court's summary judgment order appears to have the effect of indiscriminatorily invalidating the entire Act. As the trial court had recognized, however, the Act was a re-enactment of all prior special acts creating and granting powers to the Citrus County Hospital Board [R9:1654], and it also repealed all prior legislation which had created the Hospital Board. Thus, the district court appears to have eliminated the Hospital Board as a special taxing district, with the consequential

invalidation of the Foundation which uses its premises and assets to operate Citrus Memorial Hospital.

The legislature was careful not to jeopardize the viability of the Hospital Board, however, by including a severance clause in the Act which provided that if any provision of the Act was held invalid "the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application." R1:34-50 at § 7. Should the Court find any provision of the Act to violate the Contract Clause, it should affirmatively declare that all other provisions in the Act are *not* invalid.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to reverse the decision of the District Court and affirm the Circuit Court's holding that Chapter 2011-256 is constitutional in its entirety. Alternatively, the Court should reverse the District Court decision to the extent that it holds unconstitutional those portions of Chapter 2011-256 that were not challenged.

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I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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