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IN THE SUPREME COURT
STATE OF FLORIDA

Case No. SC13-411
L.T. Case No. 1D12-0858

CITRUS COUNTY HOSPITAL BOARD and the STATE OF FLORIDA

Appellants,

v.

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

Appellee.

REPLY BRIEF ON THE MERITS

On Appeal from a Decision of the
First District Court of Appeal

WILLIAM J. GRANT
FLORIDA BAR NO. 547611
LAW OFFICE OF GRANT & DOZIER
123 N. APOPKA AVENUE
INVERNESS, FL 34450
WGRANT@GRANTDOZIERLAW.COM

BARRY RICHARD
FLORIDA BAR NO. 105599
GREENBERG TRAURIG, P.A.
101 EAST COLLEGE AVENUE
TALLAHASSEE, FL 32301
RICHARDB@GTLAW.COM

ARTHUR J. ENGLAND, JR.
FLORIDA BAR NO. 0022730
ARTHUR J. ENGLAND, JR. P.A.
1825 PONCE DE LEON BLVD., #512
CORAL GABLES, FL 33134
ARTHUR@ARTHURENGLANDLAW.COM

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PRELIMINARY STATEMENT[1]

The Foundation's Answer Brief has made no mention of its acts of financial mismanagement over the years that were detailed in reports of ACHA and the Auditor General (R5:876-82),[2] which were presented to legislative committees in the 2011 session of the Florida Legislature (R5:873-74), and which prompted the legislature to enact Chapter 2011-256, Laws of Florida (the "Special Act"). [3] More importantly, at no time in this lawsuit has the Foundation ever denied the accuracy of the findings of mismanagement reported by ACHA and the Auditor General.

The Foundation's constitutional challenge to the Special Act under the Contract Clause hinges on just two propositions. First, the Foundation asserts that it is immune from an exercise of the state's police power because it is a private corporation that was not created by the Legislature. Its claim to immunity rests on its contention that the "legal difference" between a corporation created by the Legislature and a not-for-profit corporation created by a local public body by the filing of articles of incorporation "is fundamental and dispositive."[4]

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[1] References to briefs are: Foundation's Answer Brief: (AB __); Foundation's Initial Brief in District Court: (DCIB __); Hospital Board Answer Brief in District Court: (DCAB ___).

[2] Those acts are set out in the Hospital Board's Initial Brief at page 10.

[3] The Special Act contains short-form findings in its Whereas clauses, pared down from the detailed recitation of Foundation mismanagement in the Whereas clauses of HB1043 in the 2010 legislature. The Court can take judicial notice of the Whereas clauses of HB 1043 pursuant to section 90.202(5), Fla. Stat.

[4] AB at 16.

The Foundation argues that any attempt by the legislature to exercise regulatory authority over the hospital is unaffected (i) by the fact it was formed for the express purpose of "operating exclusively for the benefit of and carrying out the purposes of the Citrus County Hospital Board,"[5] (ii) it has operated Hospital Board assets with public funds exclusively as a public entity throughout its entire existence, and (iii) it has always held itself out to courts, governmental agencies, and the general public as a "public" entity and instrumentality of the Hospital Board. Yet inconsistently, the Foundation acknowledges that the legislature *can* regulate not-for-profit corporations formed under chapter 617, so long as it does so for every corporation chartered under chapter 617 rather than individually.[6]

Second, the Foundation contends that it has a contract "with the state" which was created by filing its articles of incorporation, a contention on which its impairment claim *alone* hinges. It conceded below, and is readily shown here, that the Lease and Hospital Operating Agreement contain no provisions which were affected by the Special Act.[7]

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5 R2:240-49

6 AB at 32-33.

7 DCIB at 24 (It is "hardly surprising" that the Lease and Hospital Care Agreement do not address governance at all "because that is what the Foundation's Articles do.")

Arguments in Response to the Answer Brief

I. The Foundation is a "public" corporation and fully subject to the legislature's exercise of the state's police power.

The parties agree that the Foundation was incorporated under chapter 617 in order to take advantage of the authorization in section 155.40 for district hospitals to transfer their operations and management to a not-for-profit corporation in order to compete with private, for-profit hospitals. Here that was done by reducing labor costs necessitated by the state's retirement laws, and to contemplate engaging in joint ventures. The question before the Court, however, which has never been addressed by the Foundation, is why the Foundation's incorporation to achieve those two competitive benefits transmogrified a body that continued to exist solely to perform a governmental function from a public entity to a private entity.

The parties agree that the distinction between a public and private corporation was established by this Court in *O'Malley v. Florida Insur. Guaranty Ass'n., Inc.*, 257 So. 2d 9 (Fla. 1971). The Foundation dismisses *O'Malley* on an assertion that the "dispositive" difference from this case is that *O'Malley* was dealing with a creature of legislation while the Foundation was created by articles of incorporation.[8] The Foundations reads into *O'Malley* a difference that has no relevance to the Court's decision.

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[8] AB at 19.

The Foundation was created by the Hospital Board, a public body appointed by the Governor and confirmed by the Senate pursuant to law, for the express purpose of "operating *exclusively* for the benefit of and carrying out the purposes of the Citrus County Hospital Board."[9] At no time during its 26-year history did the Foundation modify its function, purpose, or characteristics, and throughout that period the Foundation has publicly touted that (i) it has continued "meeting the [Hospital] Board's legal responsibilities," (ii) its obligations were "a transfer of a governmental function from the [Hospital] Board," (iii) it discharges its obligations by "acting on behalf of the Board,"[10] and (iv) it "[i]n fact . . . serves no purpose other than to fulfill the Hospital Board's *public* function of operating hospitals in Citrus County."[11] Conversely, the Foundation has identified no private interests that it serves whatsoever.

The Foundation has also failed to identify anything in section 155.40, or in its legislative history, which indicates that the legislative mechanism created for public hospitals to compete with private hospitals withdrew from legislative oversight and accountability a public entity's use of public assets to perform legislatively-assigned public responsibilities to discharge the public obligations of a county, district, or municipal hospital. It is for that reason that the operational

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9 R2:240-49

10 R5:834-35, Whereas clause and §1of the Special Act; R5:842-44.

11 R5:846-86 (emphasis added).

characteristics of the hospital, as opposed to its formational underpinning, is why the Foundation falls squarely on the "public" side of the distinction between public and private corporations which this Court drew in *O'Malley*. There, the Court held that FIGA falls within the category of "a public or quasi-public corporation" because it was a business organized "for the benefit of the public" and its "function is to promote the public welfare." 257 So. 2d 11. FIGA was simply a "legislatively declared 'mechanism' to benefit citizens." *Id.* That same rationale applies to section 155.40. Nowhere in *O'Malley* did the Court say that the manner of FIGA's formation had any bearing whatsoever on the Court's determination that it was a public corporation.[12]

The *O'Malley* Court's reliance on purpose and function, as opposed to formation formality, is further reflected in the *Forbes* decision which the Court cited immediately following its declaration that FIGA is a public corporation "created for public purposes." 257 So. 2d at 11. In *Forbes Pioneer Boat Line. v. Board of Commissioners,* 77 Fla. 742, 82 So. 346 (Fla. 1919), the Court held that a private corporation "loses its strictly private character and becomes quasi-public"

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[12] The *O'Malley* Court noted in its explanation of the case that FIGA had been legislatively created. But there is not one word in the Court's decision which indicates that the manner by which FIGA was formed had any bearing on the Court's decision, let alone that formation in and of itself was the "fundamental and dispositive" factor on the issue.

when "it is invested with certain powers of a public nature to permit it to discharge duties to the public." 77 Fla. at 756.

Nor is the rationale of *O'Malley* affected by the fact the Court was dealing with a different constitutional provision than the one at issue in this case. Other than to merely note the difference, the Foundation has nowhere explained why the function and operational characteristics which made FIGA a public entity for purposes of Article III, Section 11(a)(12) of the Florida Constitution are no less the appropriate criteria for determining the Foundation's status under Article I, Section 10.[13] The Foundation suggests that the "personal emolument for shareholders" element of private corporations was irrelevant to the context of the constitutional issue addressed in *O'Malley*,[14] but it ignores completely the criteria on which the Court found FIGA to be a public entity -- fulfilling a public need, promoting the public welfare and, as critically significant here, acting to "implement governmental regulations within the state's police power" (in this case the legislature's pervasive regulation of hospitals). 257 So. 2d at 11.

II. The Foundation has *no* contract right which was impaired by the Special Act.

The Foundation contends that the Special Act impairs its Lease Agreement and Hospital Care Agreement with the Hospital Board, and its Articles of

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13 *See* AB at 17, 19.

14 AB at 18-19.

Incorporation "with the state." There is no support for these contentions in the documents or the law.

The Lease Agreement and Hospital Care Agreement. The Foundation asserts that the Lease Agreement and Hospital Care Agreement "govern all material aspects of the parties' relationship."[15] That was *exactly* the same grandiose assertion made by the Foundation in the district court,[16] one page before it backtracked from that position by admitting that, "It is hardly surprising that the Lease and Agreement do *not* address governance because that is what the Foundation's Articles do."[17] The Foundation's inconsistency and non-specific generalizations in the district court continue here.

In the district court, the Hospital Board pointed out that the Lease did nothing but lease the Hospital premises to the Foundation, and that the Hospital Care Agreement did nothing but authorize the Foundation to deliver health care services in Citrus County.[17] Neither agreement said anything concerning control, financial management, or any other administrative aspect of the Foundation.

The Foundation now offers two new arguments, not presented to either the trial or district court, as to why the Special Act impaired both contracts. It suggests the Act alters the Agreement's requirement that tax funds received from the

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15 AB at 27-29.
16 DCIB at 23.
17 DCAB at 32.

Hospital Board be used in accordance with the Foundation's budget, because the Act requires Hospital Board approval "for a wide variety of expenditures irrespective of whether it is spending tax funds received from the [Hospital Board]."[18] But nothing in the Act changes the Foundation's continuing requirement to use tax funds in accordance with its budget. The fact that the Special Act requires Hospital Board approval of expenditures *other than* tax dollars has no relevance to the Foundation's existing obligation to spend tax dollars pursuant to its budget.

The Foundation argues that the Special Act's audit provision impairs the Hospital Care Agreement. No "governance" aspect of the parties' relationship is affected by the Foundation's possibly having to bear the cost of a possible audit which the Special Act now allows the Hospital Board to require.[19]

The Articles of Incorporation. In some cases, Florida courts have characterized articles of incorporation as a "contract." The Foundation seizes on that terminology, to assert that its Articles of Incorporation "are a bilateral contract *with the State*."[20] It supports that claim with law treatises and decisions from

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[18] AB at 28.

[19] Even if the audit provision had some effect on the parties' agreement, the Foundation surely could not suggest that the legislature is powerless to require that a portion of tax dollars be used to fund an audit of the use of those same dollars to fund a public function.

[20] AB at 35 (emphasis added).

Texas, Ohio, and Oregon, but not one court decision from Florida.[21] In fact, each of the Florida cases the Foundation seeks to distinguish expressly holds that the state's regulatory powers are not immobilized by the so-called "contract" nature of articles of incorporation.[22]

Critically, the Foundation makes no attempt to address the unique provision of Florida's law which belies any "bilateral" contractual tie between incorporating entities and the state as to the substantive provisions of a corporation's articles. In Florida, the Secretary of State is obliged to accept any formality-compliant articles of incorporation as a purely *ministerial* act, and by law the filing of articles neither affects their validity nor creates a presumption that they are valid. *See* Section 617.0125(4), Fla. Stat. The Foundation offers no explanation for its claim that a ministerial act by a Florida state official, based solely on a review of technical filing requirements, can create a bilateral contract that binds the state to the substantive contents of the articles. Nor does the Foundation suggest how one party to a "bilateral" contract can unilaterally change its terms without the consent

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21 AB at 29, 33-35.

22 *Marion Mortgage Co. v. State,* 107 Fla. 472, 481 (Fla. 1932) (recognizing that "the state may impair charter contract to protect health, public morals, public safety, or public welfare"); *Aztec Motel, Inc. v. State,* 251 So. 2d 849, 852 (Fla. 1971) ("All rights, including some under charters of corporations, are held subject to the police power of the State"); *Hopkins v. The Vizcayans,* 582 So. 2d 689, 692 (Fla. 3d DCA 1991) (the legislature's reserved power over corporations is "part of the corporate 'contract'").

of the other party, as the Foundation has done twice with its articles of incorporation.[23]

III. The Special Act is valid under the three-part test established in *Pomponio*.

The Special Act was enacted to address mismanagement of a public hospital and public funds in an area subject to extensive state regulation. As the trial court explained, to the extent the new mechanisms for accountability constituted impairment, they were minimal to non-existent, given the Foundation's acknowledgement in public documents that it already "answers to the Hospital Board in key operational, capital and financial decisions" (R9:1655-56) and "all material actions" of the board of directors are already "routinely referred to the … Hospital Board for ratification." *See* IB 38-41. The Special Act quite readily passes the three-prong test of validation articulated in *Pomponio v. The Claridge of Pompano Condo., Inc.,* 378 So. 2d 774 (1979).

The panel majority of the district court considered the Special Act a violation of the Contract Clause under *Dewberry v. Auto Owners Ins. Co.,* 363 So. 2d 1077 (Fla. 1978); 108 So. 3d at 678. The Foundation attempts to support that conclusion with rhetorical characterizations at odds with its public positions.[24] The real question before the Court on impairment is whether it will allow the

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[23] The Foundation unilaterally amended its 1987 articles of incorporation in 1989 and in 2006. R1:63-67; R1:69-77.

[24] *E.g.,* AB 28.

Foundation to turn its back on 26 years of declared representations that it was a public entity performing a governmental function on behalf of a public agency, now that its gross mismanagement of public funds has been exposed and the legislature has exercised its police power to make modest alterations to the very oversight and accountability mechanisms the Foundation has long claimed were already in place. "The question is . . . 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).

IV. The Special Act does not violate due process.

The Foundation alternatively argues that the Special Act violates due process because it impairs vested rights, citing *Florida Hospital Waterman v. Buster*, 984 So. 2d 478, 490 (Fla. 2008), and *Menendez v. Progressive Ins. Co.*, 35 So. 3d 873, 880 (Fla. 2010).[25] These are hardly supportive authorities for claiming a violation of due process, however. *Menendez* was not decided on the basis of due process,[26] and due process was held *not* to have been violated in *Florida Hospital Waterman*.

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25 AB at 45-46.

26 The case was decided under the impairment clause. 35 So. 3d at 875.

The Foundation has made no attempt to address the jurisprudential hostility of Florida courts to considering due process in Contract Clause cases.[27] Challenges to retroactive legislation related to contracts are analyzed under the more specific Contract Clause and, if found valid, are not then re-analyzed for a due process violation of the same conduct. *See e.g., R.A.M of South Florida, Inc. v. WCI Communities, Inc.,* 869 So. 2d 1210, 1219, n. 3 (Fla. 2d DCA 2004); *Weingard v. Miles,* 29 So. 3d 406, 413 (Fla. 3d DCA 2010). The introduction of due process principles into Contract Clause cases would render the Contract Clause superfluous, and nullify the entire body of case law interpreting that clause.

In any case, for the reasons discussed above as to why the Special Act does not impair any contract right of the Foundation, those same reasons establish that it did not retroactively affect any vested rights.

Conclusion

Chapter 2011-256 does not violate the Contract Clause or due process. The decision of the district court should be reversed, with directions to reinstate the final judgment entered in the circuit court.

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[27] DCAB at 45.

S/ BARRY RICHARD

BARRY RICHARD
FLORIDA BAR NO. 105599
GREENBERG TRAURIG, P.A.
101 EAST COLLEGE AVENUE
TALLAHASSEE, FL 32301
TELEPHONE: (850) 222-6891
FACSIMILE: (850) 681-0207
RICHARDB@GTLAW.COM
S: ABBUHLC@GTLAW.COM

WILLIAM J. GRANT
FLORIDA BAR NO. 547611
LAW OFFICE OF GRANT & DOZIER
123 N. APOPKA AVENUE
INVERNESS, FL 34450
TELEPHONE: (352) 726-5111
FACSIMILE: (352) 726-7244
WGRANT@GRANTDOZIERLAW.COM

ARTHUR J. ENGLAND, JR.
FLORIDA BAR NO. 0022730
ARTHUR J. ENGLAND, JR. P.A.
1825 PONCE DE LEON BLVD., #512
CORAL GABLES, FL 33134
TELEPHONE: (305) 967-8489
ARTHUR@ARTHURENGLANDLAW.COM

Counsel for Appellee
Citrus County Hospital Board

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail this ___ day of June, 2013 to:

Peter Webster
Christine Davis Graves
Carlton Fields, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301
pwebster@carltonfields.com
cgraves@carltonfields.com

Sylvia H. Walbolt
Gary L. Sasso
Carlton Fields, P.A.
4221 West Boy Scout Boulevard,
Suite 1000
Tampa, FL 33607-5780
swalbolt@carltonfields.com
gsasso@carltonfields.com

Pam Bondi, Attorney General
Enoch J. Whitney,
Asst. Attorney General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, FL 32399-1050
jon.whitney@myfloridalegal.com
diane.dewolf@myfloridalegal.com
rachel.nordby@myfloridalegal.com

Clark A. Stillwell
LAW OFFICE OF CLARK A.
STILLWELL, P.A.
Bank of Inverness Building
320 United States Hwy. 41 South
Inverness, FL 34450
caslaw@tampabay.rr.com

S/ BARRY RICHARD

CERTIFICATE OF COMPLIANCE

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.

S/ BARRY RICHARD