FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

LAWNWOOD MEDICAL CENTER, INC., d/b/a LAWNWOOD REGIONAL MEDICAL CENTER AND HEART INSTITUTE, a Florida corporation,

Appellant,

vs.

RANDALL SEEGER, M.D., as President of the Medical Staff of Lawnwood Regional Medical Center, Inc., d/b/a Lawnwood Regional Medical Center and Heart Institute, and Member of the Medical Executive Committee of Lawnwood Regional Medical Center, Inc., d/b/a Lawnwood Regional Medical Center and Heart Institute,

Appellees.

CASE NO.: 1D06-2016
L.T. Case No.: 2003 CA 2865

BRIEF FOR THE *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS FILED IN SUPPORT OF DEFENDANT-APPELLEES IN FAVOR OF THE JUDGMENT BELOW

SEIDULE & WEBBER, P.A.
Attorneys for AAPS
729 S. Federal Highway, Suite 210
Stuart, Florida 34994
(772) 287-1220

Glenn J. Webber, Esquire
Florida Bar No.: 356158

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit national organization consisting of thousands of physicians in all specialties, and has many members in Florida. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. The motto of AAPS is "omnia pro aegroto," or "all for the patient."

AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. AAPS has successfully filed *amicus* briefs in many appellate cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court Justice Kennedy frequently citing AAPS submission); *Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006) (citing an AAPS *amicus* brief in the first paragraph of the decision); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

AAPS is particularly concerned about governance issues among physicians on staff at hospitals. There is a growing misuse of peer review commonly known as "sham peer review," for which the only meaningful defense is the medical staff

bylaws. Sham peer review consists of manipulation of peer review to eliminate physicians for economic or other disingenuous reasons. Medical staff bylaws are the last line of defense – indeed, the only real protection – against actions by hospital administrators that can be anti-competitive or even hurtful to patient care. AAPS submits this brief to emphasize the importance of the medical staff bylaws, and the necessity of defending the integrity of their contractual obligations against legislative interference.

As more fully explained in three arguments below, the Florida legislature has interfered with private contractual relations for the anti-competitive and unconstitutional benefit of one private and powerful corporation. This contravenes judicial, constitutional, and economic norms. The contractual obligations set forth in medical staff bylaws cannot be changed by legislative fiat for the benefit of a single for-profit hospital.

AAPS respectfully submits this *amicus* brief to ensure that the patients in St. Lucie County, and their treating physicians (including Appellees in this action), receive the bargained-for contractual protections embodied in the medical staff bylaws, and that the patients receive the highest quality medical care available.

Appellant objected to the filing of this *amicus curiae* brief, as hospitals characteristically do, but on December 14, 2006 this Court granted the motion by *Amicus* AAPS to submit this brief.

BACKGROUND

This action concerns an attempt by a for-profit hospital corporation, Lawnwood Regional Medical Center, Inc. (the "Hospital"), to overturn an adverse court decision through special legislation for itself. This for-profit corporation thereby violated several constitutional provisions and the legislature violated the doctrine of separation of powers. The casualty of this special legislation was the medical staff bylaws, a contract that plays an essential role in protecting the integrity and delivery of medical care to patients. If a hospital can unilaterally change its medical staff bylaws, then patients and physicians alike will truly be defenseless against abuse by unlicensed and uninformed hospital administrators and their self-serving financial motivations.

Medical staff bylaws are the rules that govern the relationship between physicians on staff at a hospital and the hospital administrators. In most states, including Florida, medical staff bylaws have the legal force of a contract. They have specific rules for revising their terms in an orderly manner that ensures input from physicians, both on behalf of themselves and their patients. Increasingly, however, hospital administrators seek ways to change unilaterally medical staff bylaws for their own self-serving benefit, with little concern for patient care.

When a patient in a hospital needs to stay an additional day, or have a certain

procedure performed, a physician's medical judgment for that patient is protected by medical staff bylaws against retaliation by a hospital attempting to cut costs. Similarly, when a physician's presence on staff at a hospital interferes with the plans of the hospital administration, the medical staff bylaws protect against arbitrary revocation of the physician's ability to care for his patients at the hospital.

Physicians, not untrained shareholders and executives of for-profit hospitals, have the expertise and license to care for patients. Self-governance by physicians to maximize the quality of that care is essential to the integrity of our system of medical care. Medical staff bylaws are the only meaningful legal protection for patients and their care against the ravages of self-interested hospital management.

STATEMENT OF FACTS

By 1997, the "the hard-charging Nashville-based chain" Columbia/HCA had acquired the Hospital and was producing profits higher than the national average. Phil Galewitz, "Despite All the Grumbling, Hospital Bottom Lines are Healthy," Palm Beach Post 1F (Dec. 21, 1997). But Columbia/HCA sought to revamp the medical staff without regard to the medical staff bylaws. Specifically, Columbia/HCA sought to circumvent a provision in the bylaws authorizing the Medical Executive Committee to reject attempts by the Hospital to grant exclusive contracts to physicians. (Medical Staff Bylaws, Article VI, Part C, Section 4.)

Instead, Columbia/HCA sought to replace independent physicians with physicians under lucrative, exclusive contracts in the hospital-based departments of radiology, anesthesiology and pathology.

Appellant Hospital concedes, for the first time on appeal, that medical staff bylaws do impose contractual obligations. "The Hospital acknowledges a 'contractual relationship' between the Hospital and the medical staff." Appellant Br. at 25 (citing *Greenberg v. Mt. Sinai Med. Ctr. Of Greater Miami, Inc.*, 629 So. 2d 252 257 (Fla. 3d DCA 1993)). But from 1997 until 2006 Columbia/HCA simply ignored the medical staff bylaws of the Hospital, pretending instead that these contractual obligations somehow did not exist. On the one hand, "the hard-charging Nashville-based" Columbia/HCA sought to maximize its profits from its acquired Hospital and to use exclusive contracts as a tool for doing that; on the other hand, Columbia/HCA simply ignored the legal obligations of its acquired Hospital.

To replace the pathologist Drs. Leonard Walker and John Minarcik with pathologists who would work under more lucrative exclusive contracts, the Hospital Board demanded a peer review of these doctors that might justify their removal from staff. Pursuant to the medical staff bylaws, the Medical Executive Committee (MEC) has the authority to initiate peer review. It was not fooled by this disingenuous tactic of Columbia/HCA, and the MEC declined to hold a peer

review. That was entirely appropriate under the circumstances and complied fully with the medical staff bylaws. Peer review is for patient safety, not for maximizing shareholder value.

Columbia/HCA did not accept that decision. The Hospital Board, which would ordinarily lack experience in quality-of-care issues, "suspended the medical staff privileges of Dr. Walker and Dr. Minarcik" despite Hospital's admission that it was a violation of the contractual obligations of the bylaws. (Appellant Br. at 25) Drs. Walker and Minarcik went to court, and won, as the Hospital explains in its brief. (*Id.*) Drs. Walker and Minarcik were reinstated at the Hospital by court order, and Columbia/HCA could not establish the exclusive contracts at its acquired property.

The Hospital pretends that the purpose for suspending Drs. Walker and Minarcik was "[t]o protect patient safety," yet cannot cite any instances of harm to a specific patient or other blemishes on their prior records. What are the odds that both pathologists simultaneously presented a serious threat to patient safety? Statistically, a very low percentage of physicians see their hospital privileges suspended each year, and the odds of two physicians deserving to have their privileges revoked in the same department of one Hospital, shortly after it was acquired by an out-of-state chain, is infinitesimal.

The "hard-charging" Columbia/HCA finally figured out how to circumvent the medical staff bylaws as it had long sought. Federal investigators were brought in to seize records and look for anything that might be challenged. A federal investigation over a mere $20,000 in disputed billings was opened against Dr. Walker and a similar investigation began against Dr. Minarcik. These investigations destroyed the physicians' ability to practice medicine in the area. They pleaded nolo contendere to one count of felony tardy placenta reports; neither was sentenced to any prison time, and at the sentencing of Dr. Walker the federal prosecutor admitted that $17,000 out of the $20,000 in dispute was actually billed by the Hospital. Mark Pollio, "Ex-Pathologist Sentenced for Fraud," Fort Pierce Tribune C1 (June 10, 2003). Dr. Minarcik subsequently became the director of pathology at a medical school in Illinois, disproving the claim that he was a threat to patients. John Minarcik, "Letters to the Editor," Fort Pierce Tribune A6 (Apr. 12, 2006).

If Drs. Walker and Minarcik were the cause of the problem to Columbia/HCA in its management of the Hospital, then their departure by force of investigation should have resolved the problem. But of course it did not. What Columbia/HCA really wanted was to alter the contractual obligations of the Hospital that preceded its acquisition. Contract law does not permit such a

unilateral modification. But Columbia/HCA was used to getting its way, and it was not going to let legalities impede its desire to control the medical staff.

The Hospital Board unilaterally attempted to change the medical staff bylaws without the approval of the medical staff, as required by the medical staff bylaws. Columbia/HCA lobbied the state legislature to pass a special law in 2003 just for it, named the "St. Lucie County Hospital Governance Law," H.R. 1447, 2003 Leg. The primary effect of this law was to invalidate an existing contract: the medical staff bylaws at the Hospital. The stated rational was pretextual, as the motivation cited no longer existed:

> This bill responds to problems faced by one hospital, Lawnwood Regional Hospital in St. Lucie County, which has been unable to bring disciplinary action against the clinical privileges of two physicians who have been charged with criminal acts, due to the failure of the medical staff at the hospital to initiate peer review procedures as required by hospital procedures.

See House of Representatives Local Bill Staff Analysis, HB 1447. The real motivation for the legislation was simply to give a windfall to Columbia/HCA by invalidating the contractual obligations of its subsidiary, the Hospital.

As more fully discussed in the parties' briefs, the court below invalidated the law on multiple constitutional grounds. That ruling should be affirmed.

ARGUMENT

The St. Lucie County Hospital Governance Law is repugnant to the Florida Constitution in many ways, as demonstrated by the judgment below and by Appellees' Brief before this Court. To avoid repetition, *Amicus* builds upon those arguments and reasons with additional considerations here. As this Court should affirm a judgment on any grounds, see *Carraway v. Armour & Co.*, 156 So.2d 494, 497 (Fla. 1963), the following points are well worth considering.

The new law improperly interferes with the judiciary in attempting to overrule a legal precedent for the sole benefit of only one party. Moreover, this new law constitutes an unconstitutional grant of privilege to a private corporation. This has always been disfavored and disallowed in our legal tradition.

The concession by Appellant Hospital in its brief (p. 7), that medical staff bylaws constitute contractual obligations, provides sufficient basis for this Court to affirm. The St. Lucie County Hospital Governance Law impairs those obligations, and that is impermissible under the Florida Constitution. Basic economic doctrine militates against such an impairment as well.

I. The St. Lucie County Hospital Governance Law Violates Separation of Powers based on "Vested Rights" Doctrine.

While the Hospital argues here that the trial judge "violated fundamental separation of powers rules" (Appellant Br. at 14), it was actually the legislature that offended separation of powers based on "vested rights" doctrine.

Vested rights doctrine was first explained in *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898): "It is not within the power of the legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases."

Vested rights doctrine safeguards legal precedents against legislative attempts to overrule a decision for the sole benefit of the losing party. This doctrine has two components. First, it protects the property right obtained by the victorious party against a taking of that property by the legislature. In this sense the protection is similar to constitutional protections for contract rights discussed below in Point III.

Second, and perhaps more importantly, vested rights doctrine safeguards separation of powers against overreaching by the legislature. "[C]onsistent with the separation of powers, it protects judicial action from superior legislative review, 'a regime [that would be] obviously inconsistent with due process of law and

subversive of the judicial branch of government.'" *Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988), *cert. denied*, 490 U.S. 1090 (1989) (quoting *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974)).

Appellant Hospital argues that the legislation was motivated by and designed to overturn the decision against the Hospital in *Leonard Walker M.D. and John R. Minarcik M.D. v. Lawnwood Med. Ctr.*, Case No. 99-159CA03 (Fla. 19th Cir. Ct. Feb. 15, 1999) (R. 2096-2182, Appellant Br. at 6-7), and reverse the Hospital's court losses in the six out of six other lawsuits related to these issues. (Appellees Br. at 2-3). But the Hospital lost, and collateral estoppel prevents relitigating this issue against the other physicians on staff. Appellant Hospital even emphasizes how the legislature expressly admitted that its bill "responds to problems faced by one hospital, Lawnwood Regional Hospital … in St. Lucie County …." (Appellant Br. 9). The legislation applied directly to benefit the Hospital with respect to an issue decided by the judiciary, rather than having general application to many hospitals. This is precisely the sort of "superior legislative review" that is prohibited by the separation of powers doctrine. *Georgia Ass'n of Retarded Citizens*, *quoted supra.*

Allowing the legislature to overturn a specific decision for the benefit of a single litigant would have dire consequences for the independence of the judiciary.

If the legislature is able to trump the judiciary in this case, then it will have a powerful precedent to do likewise in many other cases in the courts. There could be no end to this newly found power by the legislature to second-guess specific court decisions. Holding for the Hospital here would constitute an erosion of the independent authority of the courts.

II. The St. Lucie County Hospital Governance Law Confers an Unconstitutional Private Advantage upon a Public Corporation

The Florida Constitution provides that "[t]here shall be no special law or general law of local application pertaining to … grant of privilege to a private corporation." Article III, section II(a)(12). Where, as here, the legislature simply transferred contractual rights from the staff physicians to the Hospital, it plainly violates this clause of the Constitution.

The economic vice prohibited by the Constitution is the taking of property from some simply to give to others. The grant of a privilege to a private corporation entails the deprivation of that corresponding privilege from others. Government is not empowered to take from Peter to give to Paul. That is simply not a valid exercise of the governmental function. The U.S. Supreme Court held over two centuries ago:

> An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority .... A few instances will suffice to explain what I mean.

> ... [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.

Calder v. Bull, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798) (emphasis deleted).

In this case there is the for-profit Hospital, a subsidiary of the wealthy Columbia/HCA, seeking a transfer of contractual rights from physicians who hold those rights on its staff. No one doubts that those contractual rights have an economic value, and that the for-profit Hospital could purchase those rights from the physicians. When Columbia/HCA bought the Hospital, it was clear to anyone that the medical staff bylaws were part of the deal and that the Hospital was bound by them. There are probably many things that the Hospital could negotiate in exchange for its requested modifications to the medical staff bylaws. Or perhaps the physicians would never agree to a changing of the medical staff bylaws, and this was simply part of the deal when Columbia/HCA purchased the Hospital. Regardless, what the Florida Constitution prohibits is for the Hospital to procure legislation that simply transfers property (contractual rights) from the physicians to the for-profit Hospital.

In 2003, the United States Supreme Court considered a challenge to a Washington law requiring attorneys to deposit client trust funds in a common account for the benefit of a legal aid program, when the individual interest amounts to less than individual administrative costs. *Brown v. Legal Foundation* affirmed,

538 U.S. 216 (2003). While the Court split 5-4 against compensating the client for the taken interest based on the likely excess of administrative costs over income, all Justices agreed that seizure of this interest did constitute a taking for purposes of the Fifth Amendment. Here, the legislative taking of the contractual rights of physicians to transfer that authority to the Hospital is far from *de minimis*, and the legitimate public use identified in *Brown* is also lacking. *Id.* at 240.

III. The St. Lucie County Hospital Governance Law Lacks any Legitimate Purpose in Interfering with Contractual Obligations

Appellant Hospital has conceded that medical staff bylaws are contractual (Appellant Br. at 25), and there is no doubting that the St. Lucie County Hospital Governance Law impairs that contract for the benefit of the for-profit Hospital. The Florida Constitution prohibits such impairment of contract.

Legislatures in the past have impaired contracts to help debtors, or tenants, or other disadvantaged segments of society. The St. Lucie County Hospital Governance Law stands alone in impairing contractual obligations so that a wealthy, for-profit corporation may enter into anti-competitive exclusive contracts. That purpose is not legitimate, and certainly does not justify impairing a contract.

Moreover, it is contrary to basic economic principles and would establish a hurtful precedent to allow legislative impairment of contracts. The utter lack of economic justification provides another compelling reason for affirmance.

A. The St. Lucie County Hospital Governance Law Merely Advanced the Anti-Competitive Goals of the Hospital.

For-profit companies, including hospitals, can maximize profits through anti-competitive behavior. There is nothing new or shocking about that, and antitrust laws combat it. What is astounding is that a for-profit company, the Hospital, lobbied the legislature to pass a law that impairs its contractual obligations (the medical staff bylaws) *in order to* enter into anti-competitive exclusive contracts.

In *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440 (9th Cir. 1988), the Ninth Circuit upheld a judgment against a hospital for allowing a group of anesthesiologists to coerce it into abandoning a contract with a nurse anesthetist, who charged lower fees, in order to enter into an exclusive contract with the group. Exclusive contracts by hospitals with physicians limit the supply of medical services, and limiting output is the *sine qua non* of antitrust violations. Exclusive contracts reduce patient choice among physicians. Patients using the Hospital would have less choice of physicians if the Hospital were able to violate the medical staff bylaws and enter into exclusive contracts for pathology, anesthesiology and radiology.

The U.S. Supreme Court did hold that exclusive contracts should no longer be "per se" illegal under antitrust laws, but they remain disfavored and are

only legal if they are reasonable under the "rule of reason" test. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Exclusive contracts survived scrutiny in that case only because 70% of the local patients entered different hospitals, making it doubtful that Jefferson Parish Hospital hurt the overall local market by having an exclusive contract with anesthesiologists. Patients do not usually have the luxury of so many hospitals from which to choose. While exclusive contracts can survive legal challenge, there is no plausible argument that patients are better off by having *fewer* physicians to choose from.

The anti-competitive goals of the Hospital, including its desire to have only pathologists on staff whom it could control through exclusive contracts, reinforces the unconstitutionality of the impairment of the medical staff bylaws by the legislature. This is not a case where there is a public safety or welfare justification for an unusual law. This is a case where pure lobbying power enabled the Hospital to obtain something that is disfavored by the court system: the granting of exclusive contracts. A quarter of all hospitals do not have any exclusive contracts, and there was no legitimate purpose for granting the Hospital *carte blanche* to create as many exclusive contracts as it likes. Michael A. Morrisey and Dean Chandler Brooks, "The Myth of the Closed Medical Staff," *Hospitals* 75-77 (July 1985). The law lacked any justification for its impairment of the contractual obligations.

B. The St. Lucie County Hospital Governance Law Lacks any Rational Economic Justification.

In addition to the constitutional prohibition against impairment of contracts, basic economic doctrine also militates against it. Millions of transactions each day rely on respect for contractual rights. Countless negotiations for the purchase and sale of contractual rights depend on freedom from impairment by the legislature. Accepted economic doctrine, including the Nobel-Prize winning Coase Theorem, teaches that the optimal or most efficient market activity results when property rights are respected and the parties are left to negotiate among themselves. *See, e.g.*, Ronald H. Coase, "The Problem of Social Cost," 3 *J. Law & Econ.* 1 (1960). Appellant Hospital now concedes that the medical staff bylaws were contractual (Appellant Br. at 25), and basic economic principles hold that the parties can negotiate best among themselves.

Columbia/HCA is a highly sophisticated for-profit company that knows well how to negotiate with others to obtain what it wants. The contractual obligations of its subsidiary Hospital, like virtually all contractual obligations in the commercial context, had a value to the medical staff and a cost to the Hospital. While the Hospital pretends to be protecting public safety, that duty rests with the state medical licensing authorities; the Hospital, a for-profit entity, is devoted to maximizing profits. At all times the Hospital was free to bargain for relief from the

contractual burdens imposed by the medical staff bylaws, but evidently the for-profit Hospital did not want a free-market solution. Columbia/HCA bought a Hospital having medical staff bylaws that denied it the power to revoke privileges and replace physicians on staff at will, and presumably the market price for the Hospital was lower to the extent it lacked desired power. But having bought exactly what it paid for, the Hospital flouts economic reason by insisting on legislative relief from its own bargain.

If this Court were to allow the legislature to rewrite contractual obligations, then the economic harm would be severe. No longer could persons be confident that they obtain what they pay for, and numerous transactions in the medical field and beyond would be subject to a new risk of shifting property rights at the whim of the legislature. No longer would the invisible hand ensure an efficient result in the purchase and sale of hospitals, but rather lobbyists' hands and potential corruption would ensure an inefficient result subject to legislative whim. James Madison explained that the prohibition in the U.S. Constitution on impairment of contract is essential to "inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44.

Once Appellant Hospital conceded, as it must, that medical staff bylaws are contractual, and given the Hospital's status as a sophisticated, successful for-profit company, there is no economic justification for government to intercede and relieve

the Hospital of its private contractual obligations. Such a precedent would cause untold economic disruption as no private contractual negotiations in Florida would be safe from the risk of legislation to invalidate contracts for the sole benefit of a sophisticated party.

CONCLUSION

Amicus respectfully argues that the judgment below should be affirmed, either on the grounds stated or on additional grounds related to the arguments set forth in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Charles w. Hall, Esquire/William A. Kebler, Esquire/Mark D. Tinker, Esquire**, P.O. Box 210, St. Petersburg, Florida 33731; **Stephen J. Bronis, Esquire/Steven Wisotsky, Esquire**, 201 South Biscayne Boulevard, Suite 900, Miami, Florida 33131; **Harold R. Mardenborough, Jr., Esquire**, 305 South Gadsden Street, Tallahassee, Florida 32301; **Richard H. Levenstein, Esquire**, 853 SE Monterey Commons Boulevard, Stuart, Florida

34996; and **Thomas P. Crapps, Esquire**, 133 North Monroe Street, Tallahassee, Florida 32301 on this _____ day of _____, 2006.

SEIDULE & WEBBER, P.A.
Attorneys for AAPS
729 S. Federal Highway, Suite 210
Stuart, Florida 34994
(772) 287-1220

_____
Glenn J. Webber, Esquire
Florida Bar No.: 356158

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Motion for Leave to File Brief has been prepared in Times New Roman 14 point font in compliance with appellate font requirements of Rule 9.210(a)(3).

SEIDULE & WEBBER, P.A.
Attorneys for AAPS
729 S. Federal Highway, Suite 210
Stuart, Florida 34994
(772) 287-1220

_____
Glenn J. Webber, Esquire
Florida Bar No.: 356158