IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

LEE MEMORIAL HEALTH SYSTEM, Appellant, vs. PROGRESSIVE SELECT INSURANCE COMPANY, Appellee. /	)	CASE NO: SC17-1993

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

APPELLANT, LEE MEMORIAL HEALTH SYSTEM'S REPLY BRIEF

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I. THE SECOND DISTRICT ERRED IN CONCLUDING THAT THE LIEN LAW VIOLATED FLORIDA'S CONSTITUTIONAL PROHIBITION AGAINST LAWS IMPAIRING CONTRACTS

A. The Second District Erred In Determining The Contract Impairment Issue That The Trial Court Found Premature And That The Parties Failed To Raise And Brief On Appeal

Progressive's tipsy coachman argument does not apply here. Where the tipsy coachman doctrine determines a case's outcome, the opposing party has always advanced the alternative basis for affirmance. *See*, *e.g.*, *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 645 (Fla. 1999); *Chase v. Cowart*, 102 So. 2d 147, 150 (Fla. 1958). LMHS first learned that the article 1, section 10 argument might support the Second District's decision when it received the court's opinion. An appellate court's reversal based on a ground not argued in a brief "amounts to a denial of due process." *Advanced Chiropractic & Rehab. Ctr., Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 869 (Fla. 4th DCA 2012).

B. Contracts Can Be Impaired Only If They Exist When The Challenged Law Is Enacted

The express language of article I, section 10, prevents the legislature from enacting a ***law*** that impairs the obligations of an existing contract. Yet Progressive claims "a contract can be impaired by a statute whose triggering event is a loss or injury that occurs after the policy was issued." (PAB at 33). Not one of the cases Progressive and amici cite support this novel assertion. *De La Fuente v. Fla. Ins.*

Guar. Ass'n, 202 So. 3d 396, 405 (Fla. 2016) (claim under policy governed by statutory definition enacted post-policy); *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1079 (Fla. 1978) (statute unconstitutional where "legislature intended a retroactive application of this statute by its pronouncement that the act shall take effect on October 1, 1976"); *Simmons v. City of Coral Gables*, 186 So. 2d 493, 495 (Fla. 1966) (no contract involved; an "accident occurred on October 31, 1962 and therefore the statutory and decisional law pertinent on that date must prevail").

Amicus GEICO adds that "there are countless insurers whose policy forms were issued before the reenactment of LMHS's Lien Law in 2000, including the forms in GEICO's appeal." (GAB at 9). Neither Progressive nor its amicus address *Marchesano v. Nationwide Property & Casualty Insurance Co.*, 506 So. 2d 410, 413 (Fla. 1987), in which this Court held that an entirely new and independent contract of insurance is created upon each renewal of an insurance policy.

Regardless, in this case, Progressive's policy was issued after the Lien Law. (1:172-173, 199). GEICO's reference to its policy in a lawsuit not before this Court is outside the record and inappropriate amicus argument.

The Second District's contract impairment ruling has drastic, and presumably unintended, consequences. Local lien law ordinances do not violate article III, section 11(A)(9). *Shands Teaching Hosp. & Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204, 211 (Fla. 2012). But article I, section 10, applies to

ordinances. *Brevard County v. Florida Power & Light Co*., 693 So. 2d 77, 81 (Fla. 5th DCA 1997). Florida's lien ordinances are now unconstitutional because they "impair" contracts, per the Second District's rationale.

C. The Lien Law's Statutory Damages Have a Rational Basis and Are Not Facially Unconstitutional

Progressive and its amici argue that even if the Lien Law is constitutional under the Second District's reasoning, this Court should limit damages to policy amounts. Their theories are flawed.

First, the Lien Law's statutory damages are unrelated to breach of an insurance policy, the basis for the insurers' due process argument. (GAB at 15-16). The statutory damages relate to violation of a law.

Second, "[w]hen a law challenged on substantive due process grounds does not infringe upon a fundamental right, we must review the law under the rational basis test, which requires that the law bear 'a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive.' " *Shands*, 97 So. 3d at 212 (citation omitted). The Lien Law damages encourage compliance to avoid disruption of funding health care for the poor, similar to other statutory incentives (e.g., double damages for violating a construction lien).[1] Neither Progressive nor its amici contest this permissible legislative objective.

[1]*See also* § 542.22, Fla. Stat. (permitting recovery of threefold the actual damages sustained by any person injured in her or his business or property by

In truth, the insurers do not like the underlying policy of law they broke. Allstate goes so far as to question why public hospitals that receive funds to treat the poor should receive favorable treatment over insurance companies. (AAB at 11, n.3). GEICO criticizes and demands a statewide legislative fix of "the patchwork of inconsistent hospital lien laws." (GAB at 2-5, 19).

Insurance companies are given the privilege of doing business in this State. Part of that privilege requires honoring the legislative mandate of hospital liens. Even if this Court agreed with the insurers that the Lien Law somehow inconveniences insurers, "[w]hether or not the legislature has acted wisely in the premises is not a matter for judicial determination." *United Teachers of Dade v. Dade Cty. Sch. Bd.*, 500 So. 2d 508, 509 (Fla. 1986) (citation omitted). "The courts are not arbiters of legislative wisdom, but function as a check upon unauthorized and unconstitutional assumptions of power." *Id*.

The Lien Law was reenacted by the legislature in 2000. The Lien Law has not changed in any material respects since the legislature first adopted it in 1978. The insurers' opportunity to avoid the Lien Law was before the legislature during those 22 years, not the judiciary today.

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reason of any violation of §§ 542.18 or 542.19, plus attorneys fees); § 772.104, Fla. Stat. (permitting recovery of threefold the actual damages sustained for any violation of § 772.103, plus attorneys fees).

II. THE SECOND DISTRICT WRONGLY CONCLUDED THE STATE AND ITS AGENCIES CAN ENTER INTO PRIVATE CONTRACTS

A. Organically, Governmental Entities Cannot Enter Into Private Contracts When They Exist Only to Conduct Business Related To Their Public Purpose

Contrary to Progressive and its amici's argument that the Lien Law permits LMHS to enter into "all kinds of contracts," (PAB at 27; ABB at 11-12), such language could not allow a public entity to do what is organically impossible. "Contracts of all kinds," when read in its entirety, logically contemplates different subject matters of contracts – not the public versus private dichotomy.

Progressive cites to LMHS briefs in an unrelated case to argue that LMHS has previously taken the position that its contracts are private. (PAB at 23). Not only is Progressive improperly citing outside the record, the statements are taken out of context. The term "private" contract meant only two parties were privy to the contract in the context of addressing an equal protection claim.

None of the Florida cases Progressive cites stands for the proposition that public entities can enter into private contracts. (PAB at 24-25). The passing references to a "private settlement agreement" in *Ass'n for Retarded Citizens v. State*, 619 So. 2d 452, 454 (Fla. 3d DCA 1993), and to a "private contract" in *Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 4th DCA 1981), and *J.C. Vereen & Sons, Inc. v. City of Miami*, 397 So. 2d 979, 983 (Fla. 3d DCA 1981), do not remotely address the issue before this Court.

In fact, *Palm Beach County Classroom Teacher's Ass'n v. School Board of Palm Beach County*, 411 So. 2d 1375, 1376 (Fla. 4th DCA 1982), supports LMHS's position. The Fourth District found that any attempts to characterize a collective bargaining agreement between a teacher's association and school board as private would defeat the purpose of the Public Records Act. "To rule otherwise and hold that an arbitration hearing may be closed to the public even though the grievance and other documentation on which it is based is a ***public document*** makes little sense to us." *Id*. (emphasis supplied).

Contrary to Progressive and its amici's assertion, *Shands* did not resolve the issue of whether a public entity could ever enter into private contracts. (PAB at 21-25; AAB at 5-7). This Court could not have decided an issue never before it. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1227 (Fla. 2004) (citing *Coastal Petroleum Co. v. Am. Cyanamid Co*., 492 So. 2d 339, 344 (Fla. 1986)) (concluding that any statements in a prior case about the effect of MRTA on navigable waterbeds were non-binding dicta because there were no navigable waterbeds at issue in the prior case). And if this Court had, the Second District's opinion below would have been short, indeed.

Progressive premises its private contract argument by highlighting that this "contract provides medical care directly and solely to one person – the patient." (PAB at 21, 28). Exactly. LMHS's sole public purpose is to provide medical care

to individual patients. *Pinillos v. Cedars of Lebanon Hosp. Corp*., 403 So. 2d 365, 368 (Fla. 1981) (finding a "legitimate state interest of protecting the public health by ensuring the availability of adequate medical care for the citizens of this state."). Concomitantly, LMHS's form admission agreement with individual patients can only be in furtherance of this public purpose.

Amici cite Florida's lien law history to support the Lien Law's unconstitutionality. (AAB at 9-11; GAB at 3). They reference the 1951 legislative repeal of a statewide hospital lien law, which was a general law of local application. Amici note that a general law presents constitutional issues where it favors local interests. Based on this repeal, they theorize that the Lien Law, which is a special law, is equally unconstitutional because it favors "local interests." (AAB at 10-11).

Amici confuse the issue. Special or local laws apply to a specific area or group. *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 509 (Fla. 2008). General laws do not. *Id*. Thus "the test of constitutionality" the amici reference prohibits disguising special laws as general laws. Disguising a special law as a general law fails the constitutional test for enacting a special law, which contains strict procedural requirements. Neither amicus suggests the legislature failed to follow the proper procedure for enactment of a special or local law when it reenacted the Lien Law.

Second, LMHS is not a "local business," "local interest," "private interest," or "corporation." (AAB at 8-11). LMHS is an arm of state government. The Florida legislature declared the operation and maintenance of the hospital system, which is a "public body," a "public purpose." Act, §§ 2-3. Indeed, the system "exists to provide health care to all persons, including non-residents of Lee County," who may seek such services. Act, § 11.

The Lien Law hardly offends the intent of article III, section 11, by ensuring the finances necessary to support public health care in Lee County, or to any other Florida residents who might seek it. Progressive and its amici fail to reference one case in which a law supporting a public purpose of a public agency violates the intent, much less the actual language, of article III, section 11.

The amici's constitutional construction argument is equally flawed. Allstate claims the drafters' addition of "private contracts" refers to the nature of the contract rather than the parties to the contract because other parts of the Constitution reference parties, such as "public bodies." (AAB at 4-5). If by definition a private contract excludes contracts to which a public entity is a party, no reason exists to list the parties to which this constitutional provision applies.

Allstate asserts "private contracts" must reference the nature of the contract because such a construction would give broader applicability to the constitutional restriction. (AAB at 7). But the first priority is to give effect to the drafters'

intent. *Lowry v. Parole & Prob. Comm'n*, 473 So. 2d 1248, 1249 (Fla. 1985) ("[L]egislative intent must be the polestar of judicial construction.").

To that point, Allstate relies on Meta Calder, *Florida's Hospital Lien Laws*, 21 Fla. St. U. L. Rev. 341 (1993), authored before the 2000 Lien Law reenactment, to support its constitutional construction argument. (AAB at 8). In the article, the author explored whether private or public hospital liens violated article 11, section (a)(9). *Id*. at 362. The author favored focusing on the public purpose "served by the entity that holds the lien rather than the relationship between the contracting parties." *Id*. The author cited to historical evidence from a Florida Bar sponsored revision "to the constitution that prohibited special or local laws pertaining to the '[c]reation, enforcement, extension, or impairment of liens, except liens levied or ***imposed by municipalities***, or fixing of interest rates on private contracts.' " *Id*. (emphasis supplied). The author found "this proposal suggests that there should be some distinction between liens created to serve public bodies and those imposed for the benefit of private interests." *Id*.

The author also highlighted that an "amendment, proposed during the 1966 Constitutional Convention, to a different portion of section 11" supports this view. "During the discussion of this amendment, the constitutional commission clearly communicated its desire not to hamper public bodies, such as hospitals, in

exercising liens."[2] *Id*. at 363. Because the polestar of construing the constitution is the intent of the drafters, this specific intent of the drafters to protect hospital liens further validates LMHS's constitutional construction.

Amici's additional arguments bear little value. GEICO's reliance on cases addressing municipal corporations is irrelevant to whether LMHS serves a private function. (GAB at 8-9). LMHS is not a municipality. It is Lee County's independent special purpose district. Chapter 2000-439 ("An act relating to Lee County . . . ."). Moreover, a special district can serve only a public purpose. §

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[2]"MR. EARLE: Mr. Chairman, members of the Commission, subparagraph (r) of this section we are working on reads as follows:

'Transfer of any property interest to persons under legal disabilities or of estates or decedents'

Mr. Pettigrew desires to add the following language: 'Except in enforcement of public liens'

It is his view that this section, as worded here, may preclude local bills enabling public bodies, such as hospitals and others, from exercising liens on the people - on property of the people described in this section. In light of what has been happening here the last two motions, I don't intend to argue this one extensively either.

I move its adoption. . . . .

MR. BARKDULL: Mr. Earle, is the purpose of this to protect, for instance, a welfare hospital lien?

MR. EARLE: That is my understanding, sir.

MR. BARKDULL: Thank you.

MR. EARLE: And I don't believe it is necessary.

CHAIRMAN SMITH: Gentlemen, we debated the issue already; didn't we?

MR. YOUNG: Mr. Chairman, I was going to point out we already had and the committee opposed this in keeping with the philosophy that has been established here several times this morning." *Id*. at 363, n.185 (emphasis supplied).

189.011(2), Fla. Stat. In fact, Section 189.031(3)(b) ***requires the legislature*** to address the power of each special district regarding liens.

Allstate legally errs in arguing that a public entity serves a private purpose by creating or purchasing a private company and/or its assets. (AAB at 12). The Constitution does not prohibit a public entity from creating or purchasing a private entity and operating it for a public purpose. *State v. Dade County*, 142 So. 2d 79, 88 (Fla. 1962); Op. Att'y Gen. Fla. 96-12 (1996); Op. Att'y Gen. Fla. 93-83 (1993). The Lien Law requires LMHS entities to serve LMHS's public purpose. Act, § 10(3). Regardless, none of the affiliated entities were a party to the admissions agreement at issue.

1. Because Lee Memorial Is A Public Entity All of Its Documents – Which Includes Its Contracts – Are Public

Progressive misunderstands LMHS's argument. LMHS does not argue that the form admission agreement "converts" into a public contract once labeled a public record. (PAB at 28). Just the opposite: it is impossible for a document to be a public record unless it is already a public document. That is because a public record is a document "made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. The form admission agreement becomes a public record only because LMHS made it "in connection" with "official business."

Gadd v. News-Press Publishing Co., 412 So. 2d 894, 896 (Fla. 2d DCA 1982), confirms this point. In *Gadd*, the Second District held that LMHS's (1) personnel or "personal" files of present and past medical staff physicians and (2) minutes and other documents pertaining to activities of the Utilization Review Committee of the hospital were public in nature and subject to the Public Records Act. It is difficult to imagine anything more personal than an employee's personnel file. Yet when a public body creates documents, or documents are turned over by a private entity to a public one, they are public – and are then subject to the public records act. LMHS is not putting the cart before the horse.

Progressive and its amicus are similarly wrong that public contracts are limited to public works procurement contracts. (PAB at 21). Implicit in its argument is that every other contract a public entity signs ***must be private***. Yet the state enters into myriad contracts unrelated to public works:

- Section 286.031, Fla. Stat., authorizes state to execute any and all instruments to consummate the sale of licenses, trademarks, and patents;
- Section 288.006, Fla. Stat., authorizes state contracts with eligible recipients to fund loans for economic development;
- Section 159.28(5), Fla. Stat., authorizes the state the power to sell, lease, or exchange real or personal property to assist with public projects;
- Sections 420.504 and 420.506(5), Fla. Stat., authorize the Florida Housing Finance Corporation to enter into all types of contracts, including the power to sell real estate; and

- Section 243.54(6), Fla. Stat., authorizes contracts with persons or companies for the sale of any project to assist higher education with construction of facilities.

The commonality in these statutes is that the contracts are part of an overall plan to fund, operate, and maintain public services.

The form admission agreement is no different. It is an integral and necessary component of the overall financing of LMHS's operations, which provides medical services to the indigent. *See Hosp. Bd. of Dir. of Lee Cty. v. McCray*, 456 So. 2d 936, 939 (Fla. 2d DCA 1984) ("[T]he legislature afforded [LMHS], the only public hospital in Lee County, a solution to the problem of payment for medical services furnished to insolvent patients [as] . . . a manifestation of the legislature's concern for the public welfare in that the Hospital is assured of compensation and should not be reluctant to treat indigents.").

2. The Lien's Attachment To Private Assets Does Not Convert the Public Form Admissions Agreement into a Private Contract

Other than cite the *Mercury Insurance Co. of Florida v. Shands Teaching Hospital & Clinics, Inc.*, 21 So. 3d 38 (Fla. 1st DCA 2009), holding (PAB at 25), Progressive does not otherwise address this point on appeal.

III. AMICI ARE WITHOUT STANDING TO RAISE POINTS ON APPEAL NEVER RAISED BY THE PARTIES

Amici raise issues not raised in the principal briefs (AAB: Point I, II and p.14-16); (GAB: Point III, IV), a fact Allstate admits. (AAB at 16, n.4). "[T]his

court cannot grant relief on an issue raised by the amicus brief but not by the appellant." *Nationwide Mut. Ins. Co. v. Chillura*, 952 So. 2d 547, 554 (Fla. 2d DCA 2007); *Michels v. Orange Cty. Fire/Rescue*, 819 So. 2d 158, 160 (Fla. 1st DCA 2002). Because neither LMHS nor Progressive – the parties to the appeal – raised these issues "and because amici lack standing to raise issues not raised by the parties," these issues are "not properly before this court." *Turner v. Tokai Fin. Servs. Inc*., 767 So. 2d 494, 496 n.1 (Fla. 2d DCA 2000). Notwithstanding, LMHS responds within its briefing limits.

LMHS's lien is not "based on" the private insurance contract between the insurers and its insured or a settlement agreement. (AAB Points I & II). LMHS's lien right extends only from the fact that LMHS and its patient have a contract. In the absence of that contract – express or implied – no lien would exist. The existence of the lien is "based on" a public contract with its patient, not on the source of funds available to pay the lien.

Amici complain the Lien Law regulates an occupation regulated by a state agency, in violation of article III, section 11(a)(20). (GAB Point III; AAB at 16-16, n.4). It does not; it provides funds for indigent healthcare. *See McCray*, 456 So. 2d at 939. This legitimate state interest passes constitutional muster. *State v. Perkins*, 436 So. 2d 150 (Fla. 2d DCA 1983), *rev. denied*, 436 So. 2d 100 (Fla. 1983) (state limit on use of certain fishing nets not regulating commercial fishing

industry but merely governed access to marine resources in the Pinellas County area); *see also State v. Leavins*, 599 So. 2d 1326, 1333 (Fla. 1st DCA 1992) (same). And, this law imposes no different burden on insurance adjusters than federal Medicaid liens. *Giraldo v. Agency for Health Care Admin*., 43 Fla. L. Weekly s279 (2018) (describing federal lien).

Contrary to Allstate and GEICO's parade of horribles (AAB at 17, n.5, 20; GAB at 16), due process exists to avoid an insurer's alleged Catch-22 of "who should we pay (1) LMHS under its lien or (2) the patient recovering under the policy?" Insurers can interplead or deliver joint checks. *Gov't Emps. Ins. Co. v. Gonzalez*, 512 So. 2d 269, 270-271 (Fla. 3d DCA 1987) ("The company could also have filed an interpleader action through which claims of [the insured] and Lee Memorial would have been resolved by the court."); *Bell v. GEICO Gen. Ins. Co*., 489 Fed. Appx. 428, 433 (11th Cir. 2012) ("Florida courts have long held that an insurer faced with competing demands for payment from the insured and a hospital has the option to 'ma[k]e a check for the limits [of the policy] payable to both of the competitors, the hospital and the insured.' " (alterations in original)).

At bottom, the damages claimed in LMHS's lien impairment lawsuit against an insurer are completely caused by the insurer when it pays LMHS's patient without obtaining a release from LMHS or availing itself of the above procedural tools.

Respectfully submitted,

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I HEREBY CERTIFY that on August 1, 2018, a true and accurate copy of the foregoing has been furnished via Florida's E-Portal to:

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CERTIFICATE OF COMPLIANCE

I HERBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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