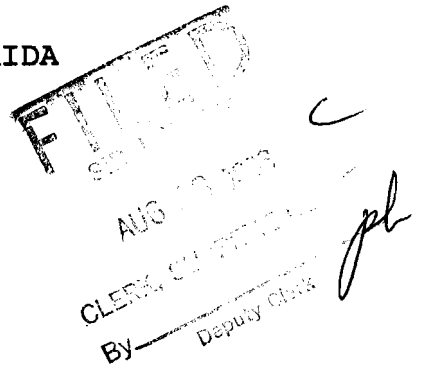
IN THE SUPREME COURT OF FLORIDA



Mark H. Feldman, Petitioner

v.

Stephen Glucroft, M.D., et.al.
Respondents

Case No. 68 - 920

Brief of Amicus Curiae Joseph W. Little in support of Petition

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SUMMARY OF ARGUMENT

Amicus Curiae asserts that if this Court answers certified question (1) in the affirmative (i.e. that §768.40(4) Fla. Stat. absolutely bars defamation actions for statements made in medical review committee proceedings), then the Court must also hold that the statute is unconstitutional when applied to bar defamation actions. This follows from the facts that the 1968 Florida Constitution explicitly secures the right of plaintiffs to seek redress for abusive defamation in Article I §4 and implicitly secures the right to seek redress for damage to reputation in Article I §§2 and 21. The exact nature of the secured right is to have a protected cause of action against a defendant who uttered the defamation with express malice (i.e. ill will, hostitility, desire to hurt, etc.). The history of the Florida Constitution beginning with the 1838 version through the 1968 version and the history of this Court's application of them, as examined in this brief, plainly establish this fundamental right.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the facts mutually agreed to by the parties.

ARGUMENT

Introduction

This petition raises the following questions of great public importance:

> (1) Does section 768.40(4) totally abolish a defamation claim arising in proceedings before medical review committees?
>
> (2) If so, is section 768.40(4) invalid as in conflict with Article I, section 21, Florida Constitution?

The statute[1] at issue purports to exclude the "proceedings and records" of medical review committees from "discovery or introduction into evidence in any civil action against a provider of health services arising out of the matters which are the subject of evalution and review of such committee..." This statute must be construed in conjunction with a related part that purports to relieve committee members of monetary liability "for any act or proceeding" taken in connection with the work of the committee, "if the committee member or health care provider acts without malice or fraud."[2] (Underlining supplied.)

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[1] §768.40(4) (Fla. Stat. 1983) The proceedings and records of committees as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters, which are the subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence to other matters produced or presented during the proceeding of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof.

[2] §768.40(2) (Fla. Stat. 1983). There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical

This Court arguably answered question (1) in the affirmative in Holly v. Auld, 450 So.2d 217, 221 (Fla. 1984), wherein a defamation plaintiff was seeking discovery of a medical review committee's records to prove that the committee had relied upon allegedly defamatory statements made outside the committee's proceedings to deny him hospital privileges. In sum, the plaintiff in Holly was seeking access to committee records, not to prove defamation had occurred, but to prove that it had harmed him. In that context, this Court, over vigorious dissent on both procedural and substantive grounds, held that the statutory privilege applied. In Holly, this Court also uttered the dictum "that the discovery privilege provided in §768.40(4) is not limited to medical malpractice actions and, in fact, includes defamation actions arising out of the matters which are the subject of evaluation and review by hospital credentials committees." Id., at 221. (Underlining supplied.)

This case raises for decision the precise point the Holly dictum purports to decide; namely, whether §768.04(4) (Fla. Stat. 1983) creates an absolute bar to actions for defamation arising

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review committee, or any health care provider furnishing any information, including information concerning the prescribing of substances listed in §893.03(2), to such committee, for any act or proceeding undertaken or performed within the scope of the functions of any such committee if the committee member or health care provider acts without malice or fraud. The immunity provided to members of a duly appointed medical review committee shall apply only to actions by providers of health services, and in no way shall this section render any medical review committee immune from any action in tort or contract brought by a patient or his successors or assigns. The provisions of this section do not affect the official immunity of an officer or employee of a public corporation.

out of the proceedings of a medical review committee. For reasons fully explained in the argument below, Amicus Curiae asserts that if the Holly dictum is confirmed in a holding, then the Court must also declare the statute unconstitutional in application to defamation actions such as this.

Amicus Curiae will not address the statutory construction questions necessary for the Court's resolution of question (1), except to say that the statute on its face suggests an orderly approach to protecting medical committees against vexatious law suits. Section 768.40(2) seems to extend to medical review committee members a qualified immunity (e.g. absent fraud or malice) to all actions equivalent to the qualified immunity that the common law would extend to defamation actions, and §768.40(4) seems to exclude all committee proceedings and records from introduction into malpractice actions arising out of incidents that have also been inquired into by such a committee. Adopting this construction, which the Court might reach by confining Holly to its particular facts, would avoid the Court's having to consider the constitutional issues. If, on the contrary, the Court adopts the Holly dictum as a holding, it must then consider the constitutional question. The remainder of this brief demonstrates why the second approach would require the Court to render the statute unconstitutional in application to defamation cases.

POINT I

THE RIGHT TO SUE FOR DEFAMATION IS PROTECTED BY THE FLORIDA CONSTITUTION AND CANNOT BE TAKEN AWAY BY THE LEGISLATURE ABSENT AN OVERPOWERING PUBLIC NECESSITY FOR WHICH NO ALTERNATIVE METHOD OF SATISFACTION IS AVAILABLE.

A. THE CONSTITUTION EXPLICITLY AND IMPLICITLY PROTECTS THE RIGHT TO SEEK REDRESS FOR INJURY TO REPUTATION.

The 1968 Florida Constitution contains three specific provisions that individually and collectively guarantee to the people of the state the right to bring legal actions to redress damage to reputation.

These are:

Article 1 §2: Basic rights.- All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.

Article 1 §4: Freedom of speech and press.- Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated. (Underlining supplied.)

And,

Article 1 §21: Access to courts.- The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The antecedents of each of these provisions appeared in the

1838 Florida Constitution and they, in turn, were based upon bills of rights incorporated in the constitutions of the original states of the United States. Insofar as the right to reputation is concerned, these provisions reflect Benjamin Franklin's view that freedom of speech does not include the liberty to "calumniate" another without legal redress for abuse of the freedom.[3] The precise manner in which the Florida Declaration of Rights secures a constitutional right to seek redress for injury to reputation has evolved to the current version through successive revisions, as follows:

Historical Development of Article 1 §2, 1968 Const.

1838 Const. (Article 1, §1):

> That all freemen, when they form a social compact, are equal; and have certain inherent and indefeasible rights, among which are those of

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[3] In 1789 Franklin wrote "An account of the Supremest Court of the Judication in Pennsylvania, Viz. The Court of the Press," wherein he said:

The Foundation of its Authority

It is said to be founded on an Article of the Constitution of the State, which establishes the Liberty of the Press; a Liberty which every Pennsylvanian would fight and die for; tho' few of us, I believe, have distinct Ideas of its Nature and Extent. It seems indeed somewhat like the Liberty of the Press that Felons have, by the Common Law of England, before Conviction, that is, to be press'd to death or hanged. If by the Liberty of the Press were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my Liberty of Abusing others for the Privilege of not being abus'd myself. (Underling supplied.)

Smyth, The Writings of Benjamin Franklin, Vol. 10., p.p. 36-38.

enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation: and of pursuing of their own happiness. (Underlining supplied)

1861 Const. (Article 1, §1): Same as 1838.

1865 Const. (Article 1, §1): Same as 1838 except "when they form a government" supplanted "when they form a social compact."

1868 Const. (Article 1, §1): Began, "All men are by nature free and equal, and have certain inalienable rights...." instead of as stated in 1838 and amended in 1865, and omitted "reputation" from the specified list of inalienable rights.

1885 Const. (Article 1, §1): Began, "All men are equal before the law, and...." instead of as in the 1868 Constitution.

1968 Const. (Article 1, §2): As shown above.

Historical Development of Article 1 §4, 1968 Const.

1838 Const. (Article 1, §5):

That every citizen may freely speak, write and publish his sentiments, on all subjects; being responsible for the abuse of that liberty; and no law shall ever be passed to curtail, abridge, or restrain, the liberty of speech, or of the press. (Underlining supplied.)

1861 Const. (Article 1, §5): Same as 1838 except for change in punctuation.

1865 Const. (Article 1, §5): Same as 1861.

1868 Const. (Article 1, §9): Same as 1865.

1885 Const. (Article 1, §13): Same as 1865, except this sentence was added:

In all criminal prosecutions and civil actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, and was given for good motives, the parties shall be acquitted or exonerated. (This provision has antecedents in Article 1, §15 of the 1838 Florida Constitution and succeeding versions.)

1968 Const. (Article 1, §4): As shown above.

Historical Development of Article 1 §21 1968 Const.

1838 Const. (Article 1, §9).

> That all Courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law; and right, and justice, administered without sale, denial, or delay. (Underlining supplied.)

1861 Const. (Article 1, §9): Same as 1838 except for change in punctuation.

1865 Const. (Article 1, §9): Same as 1861, except the "all Courts" was changed to "courts."

1868 Const. This provision was omitted.

1885 Const. (Article 1, §4): The provision was reinstated, as follows:

> All Courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation, shall have a remedy, by due course of law, and right and justice shall be administered without sale, denial or delay. (Underlining supplied.)

1868 Const. (Article 1, §21): As shown above.

This history demonstrates that reputation was granted explicit constitutional protection in three separate declarations of the 1838 constitution and that, through successive revisions, these protections have been continued implicitly in Articles 1, §§2 and 21 and explicitly in Article 1, §4, 1968 Florida Constitution. Although the 1868 revision removed the word "reputation" from Article I, §1 and deleted the entire "access to courts" measure, it did not disturb the "abuse of liberty" language which this Court subsequently acknowledged to protect reputation in Jones, Varnum & Co. v. Townsend's Adm'rix, 21 Fla. 431 (1885), discussed below. Thus, it is quite certain that

this Court did not deem the 1868 revision to eliminate reputation as a constitutionally protected inalienable right.[4] This is further corroberated by the fact that "the courts shall be open" provision (Article 1, §4, 1885 Const.) was readopted in 1885, expressly including "reputation" as a remediable injury after that entire provision had been omitted from the 1868 Constitution. In reinstating the "access to courts" language with specific inclusion of reputation, while not also reinserting "reputation" in Article I §1, the 1885 revisers were probably struck by the fact that explicity protecting reputation twice was repetitive and, also, that the "and reputation" element of the phrase "acquiring, possessing and protecting property and reputation" theretofore found in Article 1, §1 was grammatically, infelicitous. The common understanding of the words "acquire" and "possess" does not associate them with reputation in the same physical sense as they are associated with property. The 1885 revision offered an opportunity to improve the wording while protecting the right to seek redress for injury to reputation in the readopted "access to courts" measure, and the revisers

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[4] Although Amicus Curiae has not found an authoritative commentary on the 1868 revision, history records that the preceding convention was bitterly contentious to the point that a federal military officer ultimately took charge as presiding officer. Fla. Stats. (1941), Vol. III, Helpful and Useful Matter, p. 178 Indeed, the entire convention was convened pursuant to an act of Congress (14 U.S. Stat. 428, March 2, 1867), which found that "no legal" state government "or adequate protection for life or property now exits" in certain "rebel states" including Florida. Id., at 175. It is no wonder, then, that the revision may have omitted two provisions that Floridians had not intended to abandon as fundamental values. As noted in the text, this Court and later revisions have steadfastly protected those values.

apparently took it. Thus, the constitutional protection of the right to seek redress for injury to reputation was continued in a slightly different form in 1885.

The drafters of the 1968 Constitution also sought to eliminate repetition in the "courts shall be open" provision of the constitution by substituting the short 1968 statement (Article 1, §21) for the long 1885 statement (Article 1, §4). The key change was to reduce the phrase "any injury done him in his lands, goods, person or reputation" to the statement "any injury." Quite certainly, the drafters meant to eliminate no protected interest by this removal of words, for if they meant no longer to provide constitutional protection to "lands, goods, person or reputation," then they meant to make a mockery of the reason for guaranteeing access to the courts. The only reasonable explanation is that the drafters meant to subsume all of the theretofore protected interests within the term "any injury." This point of view is precisely corroborated by the D'Alemberte commentary on the 1968 revision, Annot., 25A F.S.A. 406 (1971), which states:

> The new provision has condensed some rather specific items covered in the old one, and where the 1885 version granted every person remedy "...for any injury done him in his lands, goods, person or reputation...," the new clause provides that it is redress "...of any injury..." (Underlining supplied.)

It is also corroborated by the commentary to a 1957 recommendation that proposed to eliminate the wording "done him in his lands, goods, person or reputation," which stated that the proposed change "condensed [the section] without change in its substance." (Underlining supplied.) Handbook on Recommended

Constitution for Florida, Florida Constitution Advisory Commission, p.8 (1957).) It is apparent that the 1968 revisers adopted the work of the 1957 committee on this point. Moreover, the "responsible for abuse" language (Article 1, §13, 1885 Constitution) was continued verbatim in 1968 (Article 1, §4). It now is the sole explicit repository of constitutional protection for a right to have redress for damages to reputation but it is clearly supported by the implicit protection of a right to seek a remedy for injury to reputation that history proves resides in Articles 1, §§2 and 21.

B. THIS COURT HAS REPEATEDLY ACKNOWLEDGED THAT THE CONSTITUTION GUARANTEES A RIGHT TO SEEK REDRESS OF INJURY TO REPUTATION.

This Court has repeatedly acknowledged that the constitution guarantees a right to seek redress for damage to reputation. For example, in Jones, Varnum & Co. v. Townsend's Adm'rix, 21 Fla. 431, 450 (1885), the Court made specific reference to the "responsible for abuse" provision in the constitution (Article, 1 §9, 1868 Const. now Article 1, §4, 1968 Const.) to shore up an opinion affirming the common law rule that a plaintiff may defeat a defendant's claim of privilege. And, in In re Hayes, 73 So.362, 363 (Fla. 1916), this Court held certain journalists guilty of contempt of court and, in doing so, referred expressly to the purpose of the "responsible for abuse" language, as follows:

> It may be said to the credit of the press in this state that, except in very few instances, it has upheld and maintained respect for the judiciary. But it is from the operations of the pseudo-journalist that the people expect and receive injury and insult. That class who claiming the protection of that clause in our

> Constitution which provides that "every person may fully speak and write his sentiments on all subjects" (Declaration of Rights, §13), dips his pen in the ink of morbid thoughts, and with the recklessness born of irresponsibility attacks the integrity and honor of governmental institutions, and the characters of men and women with equal abandon, ignoring the admonition contained in the same section of the Declaration of Rights, viz. that they shall be held "responsible for the abuse of that right" to speak and write their sentiments on all subjects.
>
> It was not the purpose of the framers of our Constitution, nor the people in adopting it, to permit any citizen to attack unjustly in the public prints the character of any other citizen, nor to impugn the integrity, honor and authority of our courts with impunity. There is nothing "in the language of the Constitution.....which authorizes one man to impute crimes to another, for which the law has provided the mode of trial, and the degree of punishment. .....The true liberty of the press is amply secured by permitting every man to publish his opinion; but it is due to the peace and dignity of society to inquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." Chief Justice McKean in Respublic v. Oswald, 1 Dall. 319, 1 L. Ed. 155. (Underlining supplied.)

The operative part of the constitutional language referred to in Hayes is identical to the operative part of Article 1, §4, 1968 Constitution.

This Court has also acknowledged the constitutional bases of the defamation action in post - 1968 Constitution cases such as Lieberman v. Marshall, 236 So.2d 120, 127 (Fla. 1970) wherein Justice Adkins said for the Court, "Liberty of speech also must be balanced against other state constitutional policies, such as those involved in our defamation cases." (Underlining supplied.) This exact language was quoted approvingly by Justice Roberts in his majority opinion in State v. Mayhew, 288 So.2d 243, 249 (Fla.

1974). Moreover, Justice Roberts explicitly referred to Article 1, §4 in his concurring explanation of the defamation judgment against Time, Inc. in Firestone v. Time, Inc., 271 So.2d 745, 754 1972), when he said, "In overdramatizing the news item sub judice, the magazine simply closed its eyes to that portion of our constitution which says, 'but shall be responsible for the abuse of that right.'" In addition, Justice Shaw rested his dissent in Holly v. Auld, 450 So.2d 217, 222 (Fla. 1984) upon the constitutional right to seek a remedy for damage to reputation.

POINT II

ANY ACT OF THE LEGISLATURE THAT IMPOSES AN ABSOLUTE BAR TO DEFAMATION ACTIONS IS UNCONSTITUTIONAL.

Having demonstrated that the Florida Constitution guarantees a right in the people to seek redress in courts for damage done to reputation, this brief now addresses the precise meaning of the right, and examines the limits the constitution places upon the power of the legislature to diminish it.

A. THE CONSTITUTION GUARANTEES A RIGHT TO SUE IN DEFAMATION SUBJECT TO THE COMMON LAW DEFENSES OF JUSTIFICATION AND QUALIFIED PRIVILEGE.

This petition raises no issue pertaining to the extent that the First Amendment to the United States Constitution places limits on actions for defamation. Accordingly, the arguments in this brief are addressed only to common law rights to seek redress for injury to reputation that are guaranteed by the Florida constitution.

At the time that the 1838 Florida Constitution was written

(and, also, in 1845 when the state was admitted to the Union) the common law of defamation permitted an action for the publication of defamatory words. The fact that the defendant was not negligent was no defense. As this Court said in Jones, Varnum & Co. supra., at 442, "Actionable words in libel imply, in contemplation of law, malice sufficient to sustain an action, and entitle a plaintiff to a verdict..." Nevertheless, the defendant was permitted to justify the defamation, meaning to defend on the basis of truth. Indeed, this Court at one time construed the Florida Constitution to require the defendant to prove both truth and "good motive."[5] Wilson v. Marks, 18 Fla. 322 (1881), referring to Article 1, §9, 1868 Constitution. See also Jones, Varnum & Co., supra., at 460. The cases and authorities cited by Wilson v. Marks and Jones, Varnum & Co. are of early enough vintage to document that law of defamation had achieved this status prior to the adoption of the 1838 Florida Constitution and the admission to statehood in 1845. Indeed, the law of defamation is very old, reaching back at least 1000 years in English law according to one scholar, and taking on its modern form as early as the seventeenth century.[6]

Even more relevant to the issue in this case is the status the defense of privilege had taken at those early dates.

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[5] Franklin is said to have railed against the one-time rule of the English law of defamation that truth could not be proved to defend a libel, no matter what the motives. Sparks, The Works of Franklin, "On Freedom of Speech and the Press," p. 285 - 310. He may not have opposed liability, however, where truth was published with bad motive. Id. at 310, fn.

[6] Eldredge, The Law of Defamation (1978), pp. 5,6.

Jones, Varnum & Co, supplies that information in its adoption of the law of privilege as explained by the United States Supreme Court in its 1845 opinion in White v. Nicholls, 3 Howard 266, 11 L.Ed. 591 (1845). (White v. Nicholls, in turn, cited the 1825 Massachusetts judgment in Bodwell v. Osgood, 3 Pick. Rep. 379 (1825).) In Jones, Varnum & Co. the defendant, a newspaper company was claiming a privilege. This Court described, at 21 Fla. 449, 450, the meaning and requirements of privilege as follows:

> It is claimed by the appellants that the publication is privileged. The Supreme Court of the United States, in White vs. Nichols, 3 Howard, 291, lays down the following conclusions: "1st. That every publication, either by writing, printing or pictures, which charges upon imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous is prima facie a libel, and implies malice in the author and publisher towards the person concerning whom the publication is made; and that proof of malice can never be required in such cases of the party complaining, beyond proof of the publication itself, but justification, excuse or extenuation must each be shown, if either can be, by the defendant. 2d. That the description of cases, recognized as privileged communications, must be understood as exceptions to the above rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, prima facie, relieves it from that just implication from which the above general rule of law is deduced. The rule of evidence as to such excepted cases is accordingly changed so as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct." In these excepted cases, as we understand the law, the seeming obligations and relations of the parties standing in them create of themselves in law a presumption that the defendant was not instigated by malice in making the publication, and this presumption must be overcome by the plaintiff.

> In such excepted or privileged cases malice may exist, but it is not prima facie presumed to exist; still it may be shown by the excess of the language used by the defendant, or by other attendant circumstances indicating malice, and overcoming the presumption naturally obtaining in such excepted cases. (Underlining supplied.)

This Court then referred to the constitutional basis of right of the plaintiff to defeat the privilege by proving malice, when it said, at 21 Fla. 450:

> Our Bill of Rights provides that "every citizen may freely speak and write his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or the press. In all criminal prosecutions or civil actions for libel the truth may be given in evidence to the jury, and if it should appear that the matter charged as libelous is true, but was published for good motives, the party shall be acquitted or exonerated."
>
> The liberty of the press means simply that no previous license to publish shall be required, but not that the publisher of a newspaper shall be any less responsible that another person would be for publishing otherwise the same libelous matter.

The same right to prove abuse applies equally to privileges that are grounded in "public welfare" as opposed to the confidential relationships referred to in Jones, Varnum & Co. This was forcefully acknowledged in State v. Chase, 114 So. 856, 857, 858, (Fla. 1927), wherein this Court said:

> It is a well-settled rule that communications relating to the public welfare, if made in good faith, are privileged. Also, where one becomes a candidate for public office, he must be considered as putting his character in issue so far as it may affect his fitness and qualifications for office, and the publication of truth in regard to his qualifications for the purpose of advising electors is not libel....This privilege, however, may be lost if the communication exceeds what the occasion requires and is fostered by malice. The comment or criticism must be fair and free of malice....The privilege does not embrace, the right to make false

> statements of fact, to attack the private character of public men, or falsely to impute to them a want of loyalty or misconduct in office. (Underlining supplied.)

In sum, Jones, Varnum & Co. and State v. Chase make two points. First, that the constitutional right to seek redress for injury to reputation is limited by the common law doctrine of qualified privilege, and, second, that the constitution guarantees to plaintiffs the right to prove that the privilege was abused. In short, the constitution deprives the legislature of the power to enact absolute privileges to defamation actions.

B. THE LEGISLATURE MAY NOT DEPRIVE A PLAINTIFF OF THE CONSTITUTIONAL GUARANTEE TO HAVE A REMEDY FOR INJURY DONE TO REPUTATION BY ABUSIVE ACTS OF A DEFENDANT.

An unquestioned principle of Florida constitutional law (and of most other states) is that the state constitution is a limitation on the power of the legislature and not a grant of power. See, e.g., Fowler v. Turner, 157 Fla. 529, 26 So.2d 792 (1946), among the many cases that could be cited. The corollary principle is that the effect of preserving a right of the people in the constitution is to deprive the legislature and the executive of the power to abridge it. As this Court stated in Boynton v. State, 64 So.2d 536, 552 (Fla. 1953):

> Our Constitutions were ordained and established for the purpose of setting up orderly governments. The first thirteen amendments to the United States Constitution and the Declaration of Rights of the State Constitution were inserted and adopted primarily for the purpose of guaranteeing to the people the enjoyment of certain inalienable rights and for the protection of the people against arbitrary power from whatever source it may emanate. It matters not whether the unsurpation of power and the violation of rights guaranteed to the people by the organic law results from the activities of the executive or legislative branches of the government

> or from officers selected to enforce the law, the rights of the people guaranteed by the Constitutions must not be violated.

It necessarily follows that a protected right, such as the right of a plaintiff to prove abuse when his reputation has been injured, may not be abridged by statute. Indeed, this Court has strongly condemned in no uncertain terms attempts to suppress the rights secured by the Florida Declaration of Rights:

> If the executive or legislative branches of the government deliberately attempt to deny to the people any of the rights guaranteed to them by the fundamental law hereinabove enumerated, they would be guilty of violating their oaths of office to support, protect and defend the Constitution and would receive the just condemnation of an enlightened and enraged citizenship.

Boynton v. State, supra., at 552.

It is also a principle of constitutional law that even fundamental rights, such as those at issue, may be abridged when the state demonstrates a compelling state interest to do so and demonstrates clearly and convincingly that no measure less intrusive of the protected right will satisfy the state's purpose. See, among other cases, Liberman v. Marshall, 236 So.2d 120, 127, 131 (Fla. 1970), wherein this Court refers to "public necessity" and "clear and present danger" as what it takes to justify abridgment, even temporarily, of fundamental rights, and Kluger v. White, 281 So.2d 1, 4 (Fla. 1973), wherein the Court required "overpowering public necessity" and the presence of "no alternative."

Speaking to a related point in Department of Education v. Lewis, 416 So.2d 455, 161, (Fla. 1982), this Court said:

> The scope of the protection accorded to freedom of

> expression in Florida under article I, section 4 is the same as is required under the First Amendment....This Court has no authority to limit constitutional protection and must apply the principles of freedom of expression announced in the decisions of the Supreme Court of the United States.

Moreover, this Court has also said that each right secured by the Florida Declaration of Rights stands on equal footing with every other right protected therein:

> Every particular section of the Declaration of Rights stands on an equal footing with every other section. They recognize no distinction between citizens. Under them every citizen, the good and the bad, the just and the unjust, the rich and the poor, the saint and the sinner, the believer and the infidel, have equal rights before the law. It is just as much a violation of the Constitution to deny a person the right to worship in accordance with the dictates of his conscience, to suppress the freedom of speech or of the press, or to deny a trial by jury, as it is to violate his right to be secure in his person, house, papers and effects against unreasonable searches and seizures except upon warrant secured by an affidavit showing probable cause, etc.

Boynton v. State, supra., at 552, 553. Similarly, in Annenberg v. Coleman, 163 So. 405, 406 (Fla. 1935), this Court said:

> Section 4 of the Declaration of Rights, providing that the courts of Florida shall always be open, so that every person for any injury done him in his reputation shall have remedy by due course of law therefor, must be construed as being of equal force with section 13 of the Declaration of Rights, providing that every person may fully speak and write his sentiments on all subjects, being responsible only for the abuse of that right, and both sections of the Constitution must be given effect. (Underlining in original.)

And, in Local Union No. 519, etc. v. Robertson, 44 So.2d 899, 903 (Fla. 1950), this Court again said:

> What has been said by the Supreme Court with respect to the Federal law would seem to apply with equal force to our own constitutional provisions. Though section 13 of the Declaration of Rights provides that "Every person may fully speak and

> write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press", the section must necessarily be construed to harmonize with other provisions of the same document, including section 1 which asserts that "All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing happiness and obtaining safety", and section 12 which prescribes that "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union ....."

It, thus, necessarily follows that the legislature is no less restrained in its power to abridge the rights of plaintiffs to seek redress in the courts for injury to reputation than it is to abridge any others of the rights secured to the people by the Florida Declaration of Rights.

This Court "harmonized" several of the provisions of the Declaration of Rights in Ross v. Gore, 48 So.2d 412 (Fla. 1950), an action in which a defamation plaintiff challenged provisions in §§770.01 and 770.02, Fla. Stat. (codifying Chap.16070, Laws of Florida, Acts of 1933.) as violating Article 1 §§4 and 13, 1885 Constitution (i.e. both the "open courts" and "abuse of liberty" provisions). The plaintiff in Ross alleged that the statutes transgressed upon his protected right to secure a remedy for damage to reputation. Those provisions required a plaintiff to give notice as a condition precedent to commencing an action (§770.01) and limiting a plaintiff to the recovery of "actual damages" if the defendant had published the original matter "in good faith," as a result of an "honest mistake" and with the belief that the matter was true, and also printed a retraction.

(§770.02)

This Court found that the statute deprived the plaintiff of no constitutional right. First, the Court cited authorities for the proposition that the implied abolition of punitive damages denied plaintiff of no right because the "right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there, is no vested right in a claim for punitive damages." Id., at 414. The Court might also have cited Montgomery v. Knox, 23 Fla. 595, 3 So.211, (Fla. 1887), for the proposition that the common law of defamation did not permit recovery for punitive damages unless the plaintiff proved express malice. In Montgomery this Court said, "If there is nothing in the character of the publication itself to show express malice, - that is ill will, hostility, civil intention to defame and injure, - the occasion for punitive or exemplory damages does not arise, unless there is some proof to establish such express malice; in other words, proof of malice in fact." Id. 217. Any such proof would, of course, have lifted the limitation to "actual damages" found in §770.02. Hence, because what the constitution secures is the right of the plaintiff to seek a remedy for injury done to reputation with malice, the Court was correct to hold that the particular statutes involved in Ross denied no constitutional right. The statute involved in this case is different, however, because unlike those in Ross, it imposes an absolute bar to defamation actions.

As to the limitation of recovery to "actual damages," this Court read the language to permit recovery of "actual damages

sufficient to compensate him for any harm sustained and remaining unsatisfied after the publication of the retraction." Ross at 214. Under this construction, this Court found that "the statute has not relieved [defendants] from their responsiblity, in a proper case, for abusing their right to 'fully speak and write [their] sentiments on all subject.'" Id. In sum, Ross v. Gore acknowledged both the constitutional right to seek redress for damage done to reputation by abusive publications, and the power of the legislature to restrict non-protected aspects of defamation actions. The critical point is that the legislation in question did not attempt to cut off the right of action against defendants who had abused the liberty to speak.

Finally, in consideration of the question of whether the legislature may entirely cut off the right to seek redress for injuries to reputation, this Court must consider the jurisprudence of Kluger v. White, 281 So.2d 1, 4 (Fla. 1973). In invalidating the legislature's flat abolition of the right to seek a remedy for damage to property, this Court said:

> We hold,...., that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. §2.01,F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

See, also, Sunspan Eng. & Const. Co. v. Spring-Lock Scaffold Co., 310 So.2d 4 (Fla. 1975) wherein this Court applied Kluger to

invalidate a provision of the workers' compensation statute that purported to cut off the common law action of indemnity, an action that is not explicitly secured in the constitution.

If the rule of Kluger v. White applies to remedies to injuries that have no specific foundation in the Declaration of Rights, then, a fortiori, it must apply with equal or greater rigor to remedies that are explicitly secured in the Constitution, such as the one at issue in this litigation. It necessarily follows that to survive constitutional challenge, legislative abolition of the remedy to seek relief from abusive injury to reputation must be clearly supported by "an overpowering public necessity" for which "no alternative method" of satisfaction is available. Needless to say, no such showing has or can be made for the statute in question. It necessarily follows, that if this Court must construe the statute to erect an absolute immunity to defamation actions, then it must also pronounce the statute to be unconstitutional and void in that application.

POINT III

MOST STATE COURTS THAT HAVE CONSIDERED THE MATTER HAVE CONSTRUED SIMILAR CONSTITUTIONAL PROVISIONS AS THOSE DISCUSSED HEREIN TO SECURE A CONSTITUTIONAL RIGHT THAT MAY NOT BE ABOLISHED BY STATUTE TO SEEK REDRESS IN COURTS FOR INJURY TO REPUTATION.

Amicus Curiae asserts that the history of the Florida constitution and jurisprudence, discussed above, fully demonstrates that the right to seek redress for injury to reputation is constitutionally protected in this State, but nevertheless adds the following brief discussion of cases in other jurisdictions to demonstrate that courts in most states with similar constitutional provisions agree. As described earlier, the Florida retraction and limitation of damages statute (§770.02, Fla. Stat.(1985)) does not cut off a remedy for redress of injury to reputation. Consequently, this Court correctly held in Ross v. Gore that the statute does not abridge a plaintiffs' right to sue for abusive defamation. Several courts have reached the same conclusion in applying similar constitutional provisions to similar statutes. These include Allen v. Pioneer Press Co., 41 N.W. 936 (Minn. 1889), Holden v. Pioneer Broadcasting Co. 365 P.2d 35 (Or. 1961), and Davidson v. Rogers, 574 P.2d 624 (Or. 1978) all of which upheld retraction statutes because none abolished the right to recover actual damages in remedy of defamation.

In addition, Parks v. The Detroit Free Press Co., 40 N.W. 731 (Mich 1888), specifically approved by McGee v. Baumgartner, 121 Mich. 287, 80 N.W. 21 (1899); Hanson v. Krehbiel, 75 P. 1041 (Kan. 1904), and Madison v. Yunker, 589 P.2d 126 (Mont. 1978),

held that substantially similar statutes were in fact unconstitutional in the face of similar constitutional provisions securing the right to seek redress for injury to reputation. The Michigan court said, "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization." Park v. The Detroit Free Press Co., supra., at 733. In light of similar reasoning, the Montana court held, "....the state constitution fixes the right to a remedy and where it ought to be sought. The legislature is without power to provide otherwise." Madison v. Yunker, supra., at 131.[7]

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[7] Since Gertz v. Robert Welch, Inc, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) most states have adopted a negligence rather than an "actual malice" standard in cases involving defamed private individuals and media defendants. A number of state constitutions mandate a remedy for injury to reputation. Hence, an actual malice standard denies a remedy to plaintiffs who can prove only negligence. Troman v. Wood, 340 N.E.2d 292 (Ill. 1975), Gobin v. Globe Publishing Co., 531 P.2d 76 (Kan. 1975), McCall v. Courier Journal, 623 S.W.2d (Ky. 1981), and Gazette v. Harris, 325 S.E.2d 713 (Va. 1985). Other states adopted a negligence standard after balancing the First Amendment right of Freedom of the Press against the state's interest in protecting citizens' right to reputation. See, e.g. Miami Herald Publishing Co. v. Ane, 458 So.2d 239 (Fl. 1984), Stone v. Essex Co. Newspapers , Inc., 330 N.E.2d 162 (Mass. 1975), Madison v. Yunker, 589 P.2d 126 (Mont. 1978), Marchiondo v. Brown, 649 P.2d 462 (N.M. 1982), Memphis Publishing Co. v. Nichols, 569 S.W. 2d 412 (Tenn. 1978), Seegmiller v. KSL, Inc., 626 P.2d 968, Taskett v. King Broadcasting, Co., 546 P.2d 81 (Wash. 1976). Contra., Walker v. Colorado Springs Suns, Inc., 538 P.2d 450 (Colo. 1975) cert. denied 423 U.S. 1025 (1975) required defamed private individuals to show "reckless disregard" by media. The Colorado court based its holding, on Gertz and Rosenbloom v. Metromedia Inc., 403 U.S. 29, 91 S.Ct. 1811, 20 L.Ed.2d 296 (1979). In a later case, the court stated the Colorado Constitution's "abuse of liberty" language meant the same thing as "actual malice."

By the same token, the constitution of Florida has also fixed an inalienable right to seek a remedy for injury done to reputation by abusive act and, under the jurisprudence of this Court, "the legislature is without power to provide otherwise."

Conclusion

The history of the constitution of Florida shows that since its inception in 1838 down to the present date, the Florida Constitution has secured to the people of the state an inalienable right to seek redress in the courts for damage done to reputation by abusive defamation. Because that right is secured in the constitution, the legislature cannot deprive them of it except by a showing of an overpowering public necessity for which no alternative method of satisfaction is available. No such a showing has been made in respect of the statute in question. It necessarily follows that if the Court construes §768.40(4) to be an absolute bar to defamation actions, then the Court must also hold the provision to be unconstitutional in application.

For these reasons, Amicus Curiae respectfully urges this Court either to answer certified question (1) in the negative, thus avoiding the constitutional issue, or, if the Court must

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Diversified Management, Inc. v. Denver Post, 653 P.2d 1103 (Colo. 1982). Even that standard would require invalidation of the statute in question if it is construed to be an absolute bar to a defamation action.

answer certified question (1) in the affirmative, then also to answer certified question (2) in the affirmative.

Respectfully submitted

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Certificate of Service

I hereby certify that copies of the foregoing were placed in the United States mail on the 12th day of August, 1986 for the addresses of:

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