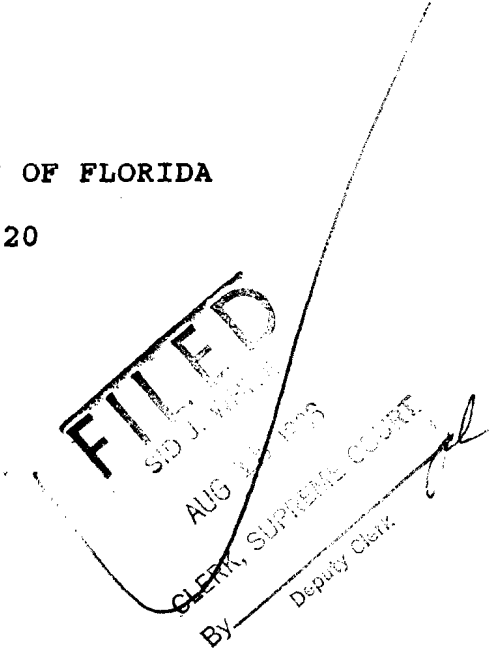
SUPREME COURT OF THE STATE OF FLORIDA

CASE NUMBER: 68-920



MARK H. FELDMAN,

Appellant,

vs.

STEPHEN GLUCROFT, M.D., et al.,

Appellees.

_____/

BRIEF BY AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND STATEMENT OF INTEREST OF THE ACADEMY OF FLORIDA TRIAL LAWYERS AS AMICUS CURIAE

The Academy of Florida Trial Lawyers, Inc. adopts the Statement of the Case of the Petitioner, Dr. Mark H. Feldman as stated in Petitioner's Initial Brief on the Merits.

The Academy of Florida Trial Lawyers, Inc. (hereinafter, The Academy) is a Florida, not-for-profit organization, organized under Chapter 617, Florida Statutes. The Academy has determined to file an amicus brief herein on behalf of the interests of Petitioner. Petitioner and Respondent have consented to the filing of this brief.

The stated charter objectives and goals of the Academy are:

(a) To uphold and defend the principles of the Constitutions of the United States and State of Florida;

(b) Promote the administration of justice for the public good;

(c) Diligently work to promote public safety and welfare while protecting individual liberties, and;

(d) ...assure that the courts of this State be kept open and assessible to every person for redress of any injury and that the right to trial by jury be secured to all and remain inviolate.

There are over two thousand members of the Academy of Florida Trial Lawyers which is made up of members in good

standing with the Florida Bar who are engaged primarily in the active representation of Plaintiffs in the civil justice system or defendants in the criminal justice system. Many of those members have in the past, now or will in the future represent the interests of health care providers who will be affected by the ruling herein.

The decision of the District Court of Appeal for the Third District of Florida, certified herein, makes clear that, for whatever justification the legislature may have had, the Statute in question totally sanctions defamation in a certain arena of the private sector in this state, regardless of the viciousness of intent and however devastating the effect of that defamation. It is the position of The Academy that the approval of an absolute privilege as stated, far from fostering the truth, in fact motivates defamation and that, therefore, protection of the right of redress to the Court is essential.

Because of the importance and novelty of the precise issues presented, the District Court of Appeal for the Third District of the State of Florida has certified that its decision herein passes upon a question of great public importance.

The decision herein has application to any medical staff member at any of the hundreds of hospitals and nursing homes in this state and members of many health care related professional societies, who have in the past been effected and are currently planning or seeking redress in the Court system or who will hereinafter be affected by any decision to suspend, deny, curtail or revoke their membership therein. In even a broader sense, the

constitutionality of any statute which creates an absolute privilege to destroy a person's profession and livelihood by defamation is an issue which deserves thorough briefing and close scrutiny.

The Respondents are represented by able and competent counsel yet Appellant is pro se, as is his right; however, others will be affected by the decision herein and they deserve some representation and assurance that this court will be as informed as possible on this issue of great public importance. The Academy files this Amicus Brief on behalf of those interests.

SUMMARY OF THE ARGUMENT

F.S. 768.40(4) totally abolishes a defamation claim arising in proceedings before medical review committees as defined in the act. The Court below in this proceeding determined that the privilege or immunity effectively prohibited Petitioner from discovering or offering any proof which would have established his cause of action such that Summary Judgment was proper. The Act, therefore, totally abolished the Petitioner's cause of action. A similar result occurred in Holly v. Auld, 450 So.2d 217 (Fla. 1984). Other well established and constitutionally protected causes of action are totally abolished by the act including certain causes of action for violation of rights arising under by-laws pursuant to Margolin v. Morton F. Plant Hospital, 348 So.2d 57 (Fla. 2nd DCA 1977), and causes of action for malicious or bad faith denial, termination or curtailment of medical staff privileges pursuant to 395.065 Fla. Stat. (1975) (and subsequent enactments of the Statute) as established under Carida v. Holy Cross Hospital, Inc., 427 So.2d 803 (Fla. 4th DCA 1983).

F.S. 768.40(4) is unconstitutional pursuant to the Florida Constitution Article I, Section 21 in that it totally abolishes pre-existing causes of action described above without a showing of over-powering public necessity or lack of an alternative as required by Kluger v. White, 281 So.2d 1 (Fla. 1973). The Legislature abolished the causes of action because the

Legislature felt that the purposes described in the Preamble of the Act outweighed the competing interests of litigants, such as the Petitioner herein and others who may have similar causes of action as described above. Holly, supra at Page 220. There is a failure of showing of overpowering public need and lack of any alternative as was the case in Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (Fla. 1948). The Statute before the court is more analagous to that which was held unconstitutional in Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979).

In any event, the authority of the Legislature to totally abolish rights protected under Article I, Section 21 of the Florida Constitution as established in the Kluger case, supra, has no foundation in constitution or law.

F.S. 768.40(4) is invalid as in conflict with Florida Constitution Article I, Section 4, which constitutionally guarantees the right to redress for abuse of the right of freedom of speech. To the extent that 768.40(4) totally abolishes a pre-existing cause of action for defamation, the Statute unconstitutionally violates Article I, Section 4.

F.S. 768.40(4) violates the Florida Constitution and Federal Constitution guarantees of equal protection and due process of law in that an entire class of potential Plaintiffs are barred from access to the Court under the irrational presumption that

denial of access to the Court will promote social order and the public welfare.

ARGUMENT

POINT I

F.S. 768.40(4) does totally abolish a defamation claim arising in proceedings before medical review committees.

The Third District Court of Appeal agreed in its opinion in this case that F.S. 768.40(4) does indeed totally abolish a defamation claim arising in proceedings before medical review committees. The Court below stated:

> "Nevertheless, we think it clear from the Holley case, particularly when read in the light of Justice Shaw's dissenting opinion-which does directly treat the point-that the language of the statute creates an absolute privilege and means that any existing defamation action has been totally abolished."

An examination of the statute in detail is necessary to understand the true sweeping breadth of the total immunity granted by the Legislature in F.S. 768.40(4). This Court in Holly v. Auld, 450 So.2d 217 (Fla. 1984) and the Court below in this case recognized that the statute's prohibition from "discovery or introduction into evidence in any civil action..." of certain evidence and/or testimony is equivalent to a bar of any cause of action for defamation arising out of the facts thus excluded. In Parkway General Hospital, Inc. v. Allison, 453 So.2d 123 (Fla. 3rd DCA 1984) the Court stated:

> "Subsection 2 seemingly carves out a defamation exception to the Statute which Subsection 4 then makes impossible to prove."

Even the Appellees herein recognize that a privilege from discovery and/or testimony is equivalent to an absolute privilege as to the matters sought to be discovered or admitted into evidence. In their Answer Brief in the Court below Appellees state:

> "Since Dr. Feldman lacks admissible evidence outside the medical review process proving publication of a false statement of fact of and concerning Dr. Feldman, he has no cause of action under Counts I and II of his complaint." (Page 33).

Since there is an absolute privilege from liability for any matter excluded by the statute from discovery or entry into evidence, the question becomes; how broad is the category of things thus privileged. Review of the Statute shows that matters presented to a medical review committee, whether written or oral or whether informally or formally presented as testimony, are privileged. The privilege includes matters presented by any person whether health care professional, patient, or anyone else. Also, all things said, done or recorded by a medical review committee and all such things observed by any person in attendance are privileged. Lastly, and perhaps most injurious to individual rights, the "... findings, recommendations, evaluations, opinions or other action of such committee or any

member thereof..." are also totally privileged. If the statute is taken literally, it appears a health care provider could not prove that his hospital staff or nursing home staff privileges or society membership was suspended, curtailed, denied or revoked, let alone the basis for the action. This was the effect of the statute upon Dr. Auld's claim. (Holly, supra, p. 218).

It remains undetermined, however, whether even the initial complaint to a medical review committee is also privileged although this construction is suggested by the expansive interpretation given to the statute by this Court in Holly, supra, at page 219.

It follows that, if one medical review committee of a state or local professional society or of a medical staff of a licensed hospital or nursing home made a "finding, etc." as to a health care provider which was false, defamatory and untrue, not only would that "finding, etc." be absolutely privileged, but also, its publication by the first medical review committee to any other hospital, nursing home or state or local professional society medical review committee within the meaning of 768.40(1) would be absolutely privileged. The result is a privilege of defamation that is as broad as the medical profession itself.

Having examined the class of communications which are totally privileged, one has to examine also the definition of "medical review committee" under F.S 768.40(1). Such committees

are not limited simply to hospitals, but include state or local professional societies and nursing homes. No qualification as to whether the aggrieved party is a member of such societies is required under the statute. There is a requirement that such committees be created according to duly approved by-laws and for the purpose generally of improving medical care or cost containment. However, since there is a complete privilege provided to such committees and their members, there is no way to prove whether their actions are in fact related in any way to the purpose of improving health care or cost containment.

The term "health care provider" under 768.40(1) includes medical doctors, osteopaths, podiatrists, dentists, chiropractors and pharmacists. The Statute privileges not only intradisciplinary review, but also interdisciplinary review. This is an obvious fertile area for abuse. The case sub judice involves actions taken against Petitioner by Respondents allegedly because of a long standing animosity between orthopedic surgeons and podiatrists fostered by economic competition rather than legitimate peer review. This conduct, obviously intolerable in today's society, is, nevertheless, protected and even arguably fostered by the 768.40(4) absolute immunity.

Although this case deals with defamation claims, there are other causes of action or potential causes of action which are eliminated by the act. The act does not specify any particular type of cause of action that is eliminated, but, rather,

prohibits discovery or entry into evidence, evidence or testimony regarding any cause of action arising out of the activities of any medical review committee. Therefore, theoretically, many potential causes of action are totally abolished.

Under Margolin v. Morton F. Plant Hospital, 348 So.2d 57 (Fla. 2nd DCA 1977) it is recognized that the By-Laws of a Hospital represent a Contract between the Medical Staff member and the Hospital and that a cause of action for injunctive relief lies for violation of those By-Laws. 768.40(4) recognizes by its terms that medical review committees are creatures of By-Laws. If no evidence can be offered into Court regarding any aspect of a medical review committee process from the initial complaint to the final action (as is discussed above), no cause of action for violation of the By-Laws can be maintained. The Margolin theory has been abolished. It follows that regardless of whether the By-Laws afford any due process guarantees to the Hospital staff, nursing home staff or medical society member, and regardless of whether those guarantees are followed by the medical review committee, there is no cause of action. In fact, the Lower court in this case held in its Order of Final Summary Judgment, that under F.S. 768.40(4), Dr. Feldman did not have the right even to know the contents of the proceedings against him. At Paragraph 7 the Court stated:

> "The Court does not see how the Plaintiff can avoid the Statute of Limitations by claiming fraudulent concealment of the proceedings of the medical review committees because Section

768.40(4) Florida Statutes precludes discovery of or introduction into evidence of the records of such committees. Accordingly, Plaintiff was not entitled to know the contents of the proceedings of the medical review committee here at issue." (R 259-266)

In practical effect, any medical review committee, acting upon a complaint by an outsider or upon its own initiative, could find against a given health care provider, refuse to afford protection under the By-Laws and even fail to give notice that the proceeding was taking place, and then, simply carry out the verdict without fear of accountability.

Under Carida v. Holy Cross Hospital, Inc., 427 So.2d 803 (Fla. 4th DCA 1981) it was recognized that a cause of action existed for malicious denial, curtailment, termination or non-renewal of medical staff privileges without good cause and in violation of F.S. 395.065. Although the privilege apparently was not raised in that case, the 768.40(4) privilege would have obliterated Carida's cause of action. Nonsensically F.S. 395.065 (now F.S. 395.011 and F.S. 395.0115) affords due process to medical staff applicants and members, but as construed in this case F.S. 768.40(4) prevents enforcement.

In Zambrano v. Devanesan, 484 So.2d 603 (Fla. 4th DCA 1986) a Jury held and the Appellate Court upheld the finding that Dr. Zambrano had been defamed so as to warrant compensatory and punitive damages. Again, apparently the privilege was not invoked; however, under 768.40(4), Dr. Zambrano's legitimate

right of redress for a serious wrong to his professional life would have been denied.

Any body of any professional society, hospital or nursing home in this State which has as its purpose or outcome the limitation of the ability of a health care professional to practice his profession, is essentially absolutely privileged to do so, even if its actions are malicious and in bad faith. Likewise, the re-publication of those findings to any other medical review committee of any state or local society, hospital or nursing home is absolutely privileged. It is not the publication by one physician to another physician of a false statement of fact or perhaps the off-hand, but incorrect comment by one nurse to another about an individual health care professional which is most likely to devastate that individual's professional career; but, rather it is the publication of a false statement or opinion to a medical review committee which has the power to devastate the accused's life and livelihood. It is precisely this conduct which the Legislature has absolutely privileged.

In Overland Construction Company, Inc. v. Sirmons, 369 So. 2d 572 (Fla. 1979) this Court made clear that it is the application of the statute in question to the particular case that determines whether a statute is an absolute bar. This Court stated:

> "Section 95.11(3)(c), insofar as is relevant to this proceeding, creates absolute immunity from suit for certain professionals and contractors connected with the construction of improvements to real property after the expiration of twelve years from the completion of the building. It unquestionably abolished Jerry Sirmons' right to sue Overland for his injuries and provided no alternative form of redress." (p. 574).

The identical language in Overland, is applicable to this case. Just as in Overland, the section sub Judice, F.S. 768.40(4), in so far as is relevant to this proceeding creates absolute immunity from suit for certain professionals connected with medical review committees at hospitals, nursing homes and professional socities in this state. It unquestionably abolished Dr. Mark H. Feldman's right to sue Dr. Steven Glucroft, M.D. and others for his injuries and provided no alternative form of redress.

POINT II

> F.S. 768.40(4) is invalid as in conflict with the Florida Constitution Article I, Section 21.

A.

> F.S. 768.40(4) totally abolishes defamation and other pre-existing causes of action without a showing of overpowering public necessity or lack of a substitute or alternative.

The second issue presented on this Appeal is whether the absolute privilege violates the Florida Constitution Article 1, Section 21.

In Kluger v. White, 281 So.2d 1 (Fla. 1973) this Court set down the standard by which the legislature may constitutionally totally abolish a pre-existing right without substitution of a viable alternative. The Court stated :

> "...where a right of access to the Court for redress for a particular injury has been provided for 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. Section 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 overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown. (Page 4).

The only instance referred to in Kluger where the Florida Legislature had in fact totally abolished a pre-existing right without substituting a viable alternative, wherein the abolition was found constitutional was Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (1948).

In that case, the Legislature had abolished the right of action to sue for damages for alienation of affections, criminal conversation, seduction or breach of promise. The Court determined the abolished causes of action had become "instruments of extortion and blackmail" rather than instruments of good for which they were originally intended. In this situation, causes of action for libel and slander and other causes of action

discussed above have been abolished in certain situations involving peer review committees. These causes of action are recognized as viable protections to the rights of injured persons Zambrano, Margolin, and Carida, supra. In this case, unlike Rotwein, the legislature simply weighed valid rights and protections of one class of individuals against another and abolished the rights of one group in the name of a greater good. Holly, supra, page 220. The legislature in this case, has wholly failed to show the overpowering public necessity required by the Rotwein and Kluger courts, but, rather, attempted to abolish legitimate causes of action of one class of plaintiffs to benefit another segment of society which was found impermissible in Overland.

The purpose of F.S. 768.40(4) renumbered from F.S. 768.131 (4) is stated in the original House bill Number 1104 of the Laws of Florida, Chapter 73-50 as follows:

CHAPTER 73-50

House Bill No. 1104

AN ACT relating to medical review committees; renumbering Section 458.20, Florida Statutes as Section 768.131, Florida Statutes; Amending Subsection (1) of said Section and adding Subsection (4), exempting proceeding of medical review committee from discovery except under certain conditions; providing an effective date.

WHEREAS, the Legislature is deeply concerned over the rising costs of health insurance which are directly related to the costs of hospital and medical services and increasing

problems in the area of medical malpractice insurance; and

WHEREAS, the various health services, professional societies and associations in the State of Florida are promulgating programs and establishing committees for the purpose of reviewing standards of care, utilization and expense in the rendering of health services in an effort to deter or eliminate some of the causes of the increased claims and costs of providing health services and to provide a statistical base for further analysis, study and recommendations; and

WHEREAS, the Legislature recognizes the advisability of immunity for peer review committees so that the medical profession can explore over-utilization of medical services, improper charging for medical services, and acts of malpractice in order that it can have better control over its members and experience rate its physicians for malpractice coverage.

Nowhere in the Preamble or the Statute, is there a recitation of overpowering public necessity. Indeed, the Preamble speaks more to the costs of providing health care services, statistical analysis and rate experience for malpractice coverage than it does of improving health care.

There is no indication in the act as to how an individual becomes a member of a medical review committee or assurance that those individuals are motivated by a duty to carry out the best interests of the public expressed in 768.40(4). Perhaps the most foreboding statement of purpose of the absolute immunity is indicated in Paragraph 4 of the Preamble where it is stated:

> "In order that it (i.e. the medical profession) can have better control over its members."

The Legislature is not empowered to take away constitutionally protected rights of individuals so that unnamed and uncontrolled members of the medical profession can "have better control over its members".

Individual health care providers motivated by a sense of duty to do what is right are protected by the judicial system should they speak up and be unjustly sued. A fear of expansive litigation should not deter Courts from granting relief in meritorious cases. Stewart v. Gilliam, 271 So.2d 466-475 (4th DCA 1972) ultimately approved in Champion v. Gray, 478 So2d 17 (Fla. 1985). Speculation of an increased burden on the Courts or on litigants likewise does not overpoweringly necessitate the Legislature to totally abolish rights otherwise guaranteed by the Florida Constitution, Article 1, Section 21.

The proper perspective on the balance between freedom of expression and the right to redress of grievances is stated in Finkel v. Sun Tattler Company, Inc., 348 So.2d 51 (Fla. 4th DCA 1977) as follows:

> "Under such circumstances, any litigant whether public official or private individual is entitled to a trial on the merits of his or her claim. Our traditional sense of justice and fair play demands no less, particularly where one's reputation or good

> name is alleged to have been impugned. The free speech protection of the First Amendment and the right of access of our Courts under the Florida and United States Constitutions can be properly recognized, balanced and preserved in the sunshine of a trial on the merits."

The second requirement under Kluger is that the Legislature show there is no viable alternative to total abolition of constitutionally protected rights. The Legislature has failed entirely to address this point in the Preamble.

768.40 does recognize that damage can be inflicted by abuse of the Medical Review Committee Forum in Section (2) thereof where a cause of action appears to have been created. Such an alternative cause of action, had it not been simultaneously abolished by subsection (4), would have made the statute constitutionally permissible under Kluger. However, the alternative cause of action granted by Section (2) of the Statute was taken away by Section (4). In Parkway General Hospital, Inc. v. Allison, 453 So.2d 123 (Fla. 3rd DCA 1984), the Court through Judge Hendry stated:

> "The perplexing question up to this point has been how to reconcile Section 768.40(2), which provides immunity from liability for providing information to or participating on a medical review committee-as long as the acts are done without malice, or fraud, with Section 768.40(4), which prohibits, in any civil action, discovery of the proceedings and records of medical review committee. Subsection 2 seemingly carves out a defamation exception to the statute which subsection 4 then makes impossible to prove.

> Holly v. Auld, supra at 221 (Shaw, J. dissenting). That result seems harsh, especially when confronted with the facts of a case such as this; where the allegations are that the respondent successfully practiced at petitioner hospital for over two years; that the suspension of staff privileges is a direct result of his problems with a better established and economically more powerful doctor."

It should be noted, that Judge Hendry, found the result in Parkway, to appear harsh in that case where it was alleged a medical review committee setting had been abused so as to injure a previously successful physician for economic gain. A similar situation is alleged herein.

In Carida, supra at 806, the Court considered whether the Legislaure had limited causes of action arising out of the medical staff peer review process yet created a new and alternative cause of action based upon malice and lack of good cause when it enacted 395.065 Florida Statutes 1975. In rejecting the argument that all causes of action had been abolished, the Court, in footnote #6 at Page 806, recognized that such a construction would violate Article I, Section 21, of the Florida Constitution. 768.40(4) has already been interpreted in Holly to be an absolute bar to any cause of action arising out of medical review committees. Under the ruling in Carida, F.S. 768.40(4) must unconstitutionally deny access to the Courts of this State since the legislature has failed to provide an alternative or any showing as to why no alternative is possible.

POINT II

F.S. 768.40(4) is invalid as in conflict with the Florida Constitution Article I, Section 21.

B.

The overpowering public necessity doctrine is itself in violation of the Florida Constitution, Article I, Section 21.

The right of the Legislature to totally abolish a pre-existing right in spite of the protection of the Florida Constitution, Article I, Section 21 has become rooted in the law of the State of Florida particularly since the enunciation of the criterion in Kluger v. White, 281 So.2d 1 (Fla. 1973).

In fact, the guarantee under Section 21 is absolute in its scope and does not provide for exceptions as enunciated in the Kluger case. The article states:

> "Section 21: **Access of Courts**
>
> The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Although the logic of the Kluger case is compelling, it simply does not comport with traditional concepts of constitutional law. The Constitution makes clear that political power in the State of Florida flows from the people through the

Constitution to the divisions of State government. Article I states:

> "Section I: **Political Power.**
>
> All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people.

The Preamble states as follows:

> "We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, ensure domestic tranquility, maintain public order and guarantee equal, civil and political rights to all, do ordain and establish this Constitution.

The Legislative department has no authority to amend, add to, detract from or alter constitutional provisions, Steuart v. State Dolcimascolo, 161 So. 378 (1935); and every legislative enactment must accord with the commands and limitations in the Federal and State constitutions, Atlantic Coastline R. Co. v. State, 143 So. 255 (1932). The authority to construe and interpret the Constitution of the State of Florida is vested in the Supreme Court under Article 5, Section 4.

Although a compelling argument is made that where there is an overpowering public need, the Legislature should be able to amend the Constitution, this is, however, not the law of the State under the Florida Constitution. Should the Legislature foresee a need for amendment, the Constitution has provided for such amendments. Should the manner of amendment of the

Constitution need to be amended, then this can be accomplished as well under Article 11. It is submitted that the Legislature under the doctrine in Kluger can always, simply by reciting an overpowering public need and the lack of an alternative, effectively amend the Constitution of the State of Florida and abolish rights guaranteed to the people. It is submitted that it the Constitution was drafted to prohibit this result.

POINT III

F.S. 768.40(4) is invalid as in conflict with Florida Constitution, Article I, Section 4

Dr. Feldman, in the Court below, raised the issue that 768.40(4) is in conflict with and in violation of Article I, Section 4 of the Constitution of the State of Florida (Initial brief of Appellant, Page 9). Section 4 was not specifically referred to by the Court below in its opinion, nor was the issue of conflict of the subject statute with Section 4 certified to this Court; however, since the issue was raised by the litigants below and this Court does properly have jurisdiction. This Court can and should review this point on appeal.

The Constitution of the State of Florida, Article I, Section 4 states as follows:

SECTION 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 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 parties shall be acquitted or exonerated.

Section 4 above goes beyond preserving the right to free speech to specifically preserve the right to redress for abuse of that right. Section 4 goes on to state that truth and good motives are defenses to either a criminal or civil action. Clearly it is the intention of the people of the State of Florida to preserve a cause of action for redress when the right to free speech is abused. Interpreting Article I, Section 4 in conjunction with Article I, Section 21, the statutory and common law in the area of freedom of speech and defamation were intended to be preserved and guaranteed to the people of this State.

Defamatory statements are not protected free speech. Miami Hearld Publishing Company v. Ann, 423 So.2d 376, Approved, 458 So.2d 239; State v. Mayhew, 288 So.2d 243 (Fla. 1973) The issue of interpretation of the guarantee of civil responsibility for abuse of the right of free speech provided in Article I, Section 4, is a matter of first impression and has not been considered previously by any Florida Court. Similarly, there is no

corollary provision in the Federal Constitution so that there are no federal cases which consider the point.

There is no provision under Florida law for any responsibility of any member of a medical review committee to any state agency or state authority for abuse of the right of free speech during medical review committee activity. The only "responsibility" would be to the injured party by civil action for damages. The Florida Constitution elevated the right to redress for abuse of the right to freedom of speech to a constitutionally protected right. The intent of F.S. 768.40(4) is to obliterate any cause of action including libel or slander arising out of medical review committee activity.

In Holly v. Auld, 450 So.2d 217 (Fla. 1984), this Court considered the effect of the subject statute, 768.40(4) on discovery, but apparently, constitutional issues were not raised. There, this Court recognized the intent and effect of the statute was to eliminate rights to certain individuals to a cause of action for libel or slander and the legislature had used a balancing test in this regard:

> "Inevitably, such a discovery privilege will impinge on the rights of some civil litigants to discovery of information which might be helpful or even essential to their causes. We must assume that the Legislature balanced this potential detriment against the potential for health care containment offered by effective self-policing by the medical community and found the latter to be of greater weight. It is precisely this sort of

> policy judgment which is exclusively the province of the legislature rather than the Courts. P. 220.

It is agreed that balancing is exclusively the province of the Legislature, in the legitimate exercise of its police power, but this is not so when the Legislature is balancing a perceived need against rights to redress for abuse of free speech protected by the Florida Constitution, Article 1, Section 4.

POINT IV

> F.S. 768.40(4) violates the Florida Constitution and Federal Constitution guarantees of equal protection and due process of law

The Lower Court in its final judgment determined as follows:

> "(i) Section 768.40(4) does not violate the due process clause of the 14th Amendment to the United States Constitution, because the United States Supreme Court in Martinez v. California, 444 U.S. 277 (1980) held that a state may abolish a cause of action entirely to achieve any state purpose which is not `wholly arbitrary or irrational'. The purpose for the enactment of Section 768.40(4), as explained by the Florida Supreme Court in Holly v. Auld, supra, is to encourage peer review under medical providers and thereby reduce health care costs, and therefore Section 768.40(4) is neither arbitrary nor irrational."

It is conceded that the "wholly arbitrary or irrational" test of the Martinez case grants wide latitude to the Florida Legislature to enact legislation for the benefit of the citizens of the State of Florida. Nevertheless, it is not a boundless

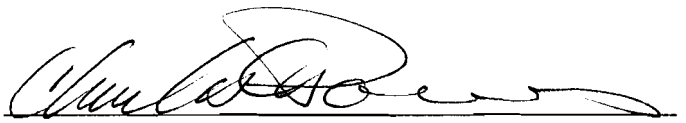
grant of authority. In this case, the legislature has specifically stated in the Preamble its intent is to grant private citizens, (i.e. providers of professional health services including medical doctors, osteopath, podiatrists, dentists, chiropractors and pharmacists) "... Immunity... in order that it can have better control over its members..."

There is no authority for an intentional legislative grant of immunity for the purpose of fostering vigilantism. It cannot be considered a valid exercise of the "police power" of the legislature to grant a legal void in an entire area of human endeavor for the purpose of promoting domination by one group over another. The concept that the absence of the right to redress for wrongs in an area of professional activity will promote professionalism, quality control, and cost containment as opposed to economic infighting between competitors (as is alleged in this case) is, in and of itself, naive and irrational. The statute sub judice contradicts the fundamental philosophy of the United States Constitution and the Florida Constitution that the freedoms, rights, privileges and immunities of citizens are guaranteed by due process of law and not by its absence.

In conclusion, 768.40(4) violates even the most liberal due process requirements of some rational relationship to legitimate state purposes.

CONCLUSION

F.S. 768.40(4) totally abolishes certain causes of action for libel, slander and other civil remedies. The total immunity violates the Florida Constitution Article I, Section (4) and Section (21). F.S. 768.40(4) violates the due process and equal protection requirements of the United States and Florida Constitution. Section (4) should be determined unconstitutional to give effect to the remainder of the act.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Dan Paul, Esquire, 100 South Biscayne Blvd., 13th Floor, Miami, Florida 33131 and to Dr. Mark H. Feldman, 1281 N.E. 163rd Street, North Miami, FL 33162 and MR. JOSEPH W. LITTLE, University of Florida, College of Law, Gainesville, Florida 32611 this 13th day of August, 1986.

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