IN THE SUPREME COURT OF FLORIDA

CASE NO. 68-920

MARK H. FELDMAN, Pro Se,

Appellant,

vs.

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

Appellees.

_____/

BRIEF OF AMICI CURIAE FOR SOUTH FLORIDA HOSPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS/RESPONDENTS

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IDENTITY OF AMICUS AND REASON FOR APPEARANCE

The South Florida Hospital Association is a trade association whose members include forty-four hospitals in Dade, Broward and Monroe Counties. As required by Florida law, the member organizations have appointed boards or committees to deal with a variety of critical matters.

Some of these committees handle primarily administrative work; others must deal with medical or professional matters. The scope of the responsibility of the board members and the extent to which they are to be subject to lawsuits are matters of immense concern and importance to each member and to the Association as a whole.

This case could subject board members, particularly those involved in peer review, to greatly increased risks while, at the same, time making it difficult, if not impossible, for the hospitals themselves to comply with the state's requirements concerning the staffing of the boards.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The South Florida Hospital Association adopts the Statement of Case and Statement of the Facts in the brief to be submitted by the Defendants.

SUMMARY OF ARGUMENT

If Section 768.40(4) of the Florida Statutes were to be held to create an absolute privilege and the Court then were to conclude that the statute is unconstitutional, the result would

be chaos. Indeed, even the knowledge that the constitutionality of the statute has been subjected to serious question has led to great concern and uncertainty as to the powers and liabilities of board members. Were that protection to be eliminated, common sense says that hospitals would find it significantly more difficult - if not impossible - to find qualified personnel to serve.

Moreover, even if persons could be found to sit on the committees, the risk of virtually unlimited lawsuits would have a less direct, but still potentially devastating impact on the quality of medical services in this State. The board member would feel constant pressure to avoid controversy and to "go along" in marginal cases rather than take a stand against the unqualified applicant; or for that matter, to criticize incumbents; or to support an improvement in techniques or equipment because that might be taken by outside groups, or their lawyers, as an "admission" that the status quo was "deficient (even though, in fact, the statement represented nothing more than a laudable attempt to raise standards).

There also are significant threshold questions.

Contrary to the assertions in the Plaintiff's brief, the trial judge did not rule against Dr. Feldman on the basis that the statute "absolutely" barred a defamation action. The summary judgment was based, instead, on the significantly different ground that the plaintiff had failed to provide even the limited

amount of evidence which would overcome a qualified privilege. Therefore, amicus urges that the Court consider whether Dr. Feldman has standing to raise either the existence of an absolute privilege or the constitutionality of that privilege. In our view, he did not. While each question would be important to the public, it is hypothetical insofar as Dr. Feldman's case is concerned. The statements by the Court of Appeal for the Third District also were dicta, not necessary to the ruling.

Further, if the Court is satisfied that the matter is within its permissible jurisdiction, the question still remains whether deciding an important issue on such a record would be an appropriate exercise of discretion. Neither side says that there is and should be an absolute privilege. Yet that position has respectable academic support and should not be dismissed without full consideration. In addition, the issues concern the effect of a "absolute privilege"; yet the facts of this case do not involve a trial court ruling on that basis.

I.

A RULING WHICH DECLARED FLA. 768.40 UNCONSTITUTIONAL WOULD CREATE HAVOC IN THE HEALTH FIELD, MAKING IT DIFFICULT IF NOT IMPOSSIBLE TO FILL CRITICAL PEER REVIEW BOARDS AND, AT THE SAME TIME, TENDING TO DISTORT THE DELIBERATIONS OF THOSE COMMITTEES

As the defendant's brief points out, under Florida law hospitals are required to appoint boards which deal with matters such as staff qualifications and a wide variety of other critical matters.

Service on each of these boards requires an unusual degree of technical and professional knowledge, as well as experience with the practical conditions facing hospitals in general and the individual facility in particular.

In many instances hospitals must staff boards for more than one purpose. The drain on the time of available personnel is significant.

A physician, a podiatrist or any other professional person seldom has much to gain by serving on such a board or by offering frank testimony before it. To their credit, the members of the health community have met that responsibility in recent years. It is unlikely, however, that this would true if the law were changed to make the difficult situation even more dangerous and frustrating.[1/]

A person who considers such service, after all, knows that it will involve a significant loss of time and the risk of unpleasant friction with colleagues and others. Given the increased risk of suits and harassments, fewer could be expected to make the sacrifice.

1/ When the Association learned of the suprising turn this lawsuit had taken, the staff conducted an informal and hasty survey of a number of member hospitals. The purpose was to learn how they had interpreted the privilege to date and what effects they would anticipate from a ruling of unconstitutionality. The concerns expressed in that investigation have led us to submit this amicus brief.

If a physician or any other person were willing to serve on the board in spite of these risks, there is still a danger that his or her views would be changed and distorted. There would be a constant temptation to keep quiet and to give the marginally qualified applicant the benefit of the doubt, to avoid a disruptive and expensive defamation suit. Further, even if the board member were willing to take the personal risk, he or she still might believe that it would not be in the institution's best interests that criticism of an applicant (or, perhaps, of some aspect of hospital administration or practice) be aired publicly.

More specifically, anyone pointing to deficiencies of a health care provider or a similar consideration would have to balance the benefits to the public and to the institution of improving the situation against the likelihood that the person adversely affected would sue or that there would be other such repercussions. The courts have recognized that reality:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hosptial care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.
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> Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (U.S.D.CT.D.C. 1970)

A leading academic comment on the privilege has made the same point. The authors conclude that an absolute privilege from discovery is essential and a qualified privilege is unlikely to be sufficient even though it may be attractive in theory. Note, The Privilege of Self Critical Analysis, 96 Harv. L. Rev. 1083 (1983) particularly pp. 1096-1099. (Appendix "A" to this brief)].

II.

THIS CASE IS NOT AN APPROPRIATE ONE FOR A DECISION AS TO WHETHER THE PRIVILEGE IS ABSOLUTE RATHER THAN QUALIFIED

In view of the practical dangers and problems we have discussed, amicus agrees with the Court of Appeal that the questions whether the Statute creates an absolute freedom from defamation actions or, rather, a qualified privilege is a matter of great public importance. The second question - raising as it does the danger of the total abolition of the statute - is equally significant. Nevertheless, we ask whether these issues are yet properly before the Supreme Court.

(A) Dr. Feldman Lacks Standing as to the "absolute privilege" issue

Dr. Feldman was given a fair opportunity to provide affidavits or other evidence which would meet the far more lenient standard of a qualified privilege. It was only when he failed to offer any evidence (other than an affidavit as to what he believed was said before the Committee) that the trial judge granted the defendant's summary judgment motion. Thus he was not the "victim" of and ruling that the privilege is absolute. It

follows that he has no standing to attack such a hypothetical ruling, or the statute on which it supposedly would be based.

The controlling doctrine is familiar and basic. The constitutionality of legislation is open to attack only by a person whose rights or duties are affected or prejudiced by it. State ex rel. Utilities Operating Co. v. Mason, 172 So.2d 225 (Fla. 1965); and not by one who does not come within its purview, or who is not a member of the class against which the statute is alleged to discriminate.

The Court also has held, that a litigant may not attack a statute on the basis of "overbreadth" unless the issue is one of the First Amendment. Sandstrom v. Leader, 370 So.2d. 3 (Fla. 1979).

Even more to the point, a person who is not denied a constitutional right or privilege may not raise constitutional questions on behalf of some other person who, at some future time, may be affected. Steele v. Freel, 157 Fla. 223, 25 So.2d 501 (1946).

In particular, note State v. Hill, 372 So.2d 84 (Fla. 1979). There a defendant was prosecuted for shrimping within the three mile limit. The Supreme Court held that he did not have standing to contend that the statute was unconstitutional because it also would have prohibited shrimping further out to sea (and outside the geographical limits of Florida). Setting the stage, Chief Justice England noted:

> "Unlike the the trial judge, we regard the uncontested fact that Hill's conduct occurred within the territorial jurisdiction of the state to be not only material, but dispositive of this case. Regardless of whether or not the state may prohibit shrimping in waters outside its boundaries, it clearly possesses the authority to proscribe such activities in areas subject to its jurisdiction. It is a longstanding principle of constitutional adjudication that
>
> > [a] statutory regulation may, consistently with organic law, be applied to one class of cases in controversy, and may violate the Constitution as applied to another class of cases, This does not destroy the statute; but imposes the duty to enfoce the regulation when it may be legally applied.

This was the holding he reached:

> Since this statute may be legally applied to Hill under the factual circumstances presented here, he has no standing to complain that it might not be constitutionally enforceable against one who commits a violation in that portion of the prohibited area lying outside the territorial jurisdiction of the state....
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> State v. Hill, 372 So.2d 84 at 85 (Fla. 1979) (Emphasis supplied)

The result must be the same in this case. It is our understanding from Dr. Feldman's brief that he does not contend a qualified privilege is unconstitutional (just as the ban on shrimping within the three mile limit was not contended to be unconstitutional in Hill). Dr. Feldman did not present evidence to defeat the qualified privilege; therefore he cannot complain of the theoretical wrong of an absolute privilege.

(B) The dicta in the Court of Appeal opinion does cure the lack of standing

While Chief Judge Schwartz's opinion speaks of an absolute privilege, those remarks were not necessary to the decision. The Court of Appeal only affirmed the trial court order which entered summary judgment on the basis of Dr. Feldman's failure to overcome a qualified privilege. Thus the certification is not from the holding or the judgment below, but instead from the dicta of the Third District.

In analogous situations, the Supreme Court has treated dicta as an insufficient basis for certification. See Neimann v. Neimann, 312 So.2d 733 (1975) (conflict must be between the holdings of different districts of the Court of Appeal, not mere dicta; Dade County v. Philbrick, 162 So.2d 266 (Fla. 1964) question certified rejected where it presented a mere abstract question of law, not necessary to resolution of the case).

(C) Amicus may raise such a jurisdictional issue even though it would be foreclosed from arguing substantive points not raised by the parties

This situation is unusual in that it is an amicus brief which, alone, raises the question of standing.

We recognize that an amicus, normally, is limited to supporting contentions offered on behalf of one of the parties to the litigation. We urge, however, that standing is a matter of personal jurisdiction, fundamental to the case. New York State Civil Service Comm. v. Snead, 425 U.S. 457, 48 L.Ed. 2d 88 (1976) (Supreme Court vacated lower court opinion on learning that the statute in question had not been applied to individual

plaintiff). This type of jurisdictional issue is one of the few that can be raised at any stage of the litigation even though not argued below, Judice v. Vail, 430 U.S. 327, 331-332, 51 L.Ed. 2d 376 (1977). Indeed, the courts are obligated to consider such jurisdictional issues on their own motion and they often have done so. [2/] See, for example East River Steam Ship Corp. v. Transamerica Delaval, Inc., 54 U.S. L.W. 4649 (U.S. June 16, 1986) in which the United States Supreme Court recently dismissed a case for lack of standing even though it had been litigated for several years through the District and Circuit levels. Indeed, the Court itself has urged litigants to raise potential jurisdictional bars, specifically including the point that the constitutional issue is not necessary to the determination of the case. Coffin v. State, 374 So.2d 504 at 508 (Fla. 1979).

It follows that an amicus has far greater scope to raise a question of jurisdiction than would be true in most areas. [3/]

2/ Other questions seem too hypothetical to justify extended discussion. For one, we recognize that the Appellate Rules do not permit a "jurisdictional brief" when the Court accepts a case on a certified question. Our belief, however, is that, the point of the prohibition is to discourage parties from arguing that an issue is not one of "importance to the public". Amicus readily concedes that the certified issues are of great practical significance. The basis of our objection to jurisdiction is far different, i.e. that if Dr. Feldman has no standing, the importance of the legal issue is irrelevant. Further, we suggest that the very importance of the question is an additional reason why the Court should be reluctant to deal with it in a context in which no party is in a position to urge the case for the absolute privilege with full vigor.

3/ See American Meat Institute v. Environmental Protection Agency, 526 F.2d 442 (7th Cir. 1975) and In re: Columbia

Footnote Continued

CONCLUSION

Amicus joins with the defendants in urging that the trial court did not rule against Dr. Feldman on the basis of any "absolute privilege" and, further, that the doctor had every opportunity to satisfy the qualified privilege and failed to do so. The trial court decision should be affirmed on that basis.

If the Court feels it necessary and appropriate to consider the broader issues, we also join the defendants, whole-heartedly, in urging that the legislation should be held to be constitutional.

Footnote Continued from Previous Page

Real Estate Co., 101 F.965 (D.IND. 1900) which reasoned that a question of jurisdiction is a point which the court could address on its own motion and, accordingly, that it could and should be addressed when raised by an amicus.

Nevertheless, we suggest that the still better course would be for the Court to exercise its discretion not to accept the certified questions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of October, 1986 to: MARK H. FELDMAN, 1550 N.E. Miami Gardens Drive, Suite 201, North Miami Beach, Florida 33179; CHARLES C. POWERS, ESQ., Charles C. Powers, P.A., counsel for Amicus Curiae, The Academy of Florida Trial Lawyers, 1801 Australian Avenue South, Suite 201, P.O. Box 15021, West Palm Beach, Florida 33416; JOSEPH W. LITTLE, ESQ., Amicus Curiae, 3731 N.W. 13 Place, Gainesville, Florida 32605; and DAN PAUL, ESQ., Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 777 Brickell Avenue, Suite 1000, Sun Bank Center, Miami, Florida 33131.

EDWARD T. O'DONNELL

CERTIFICATE OF INTERESTED PARTIES

The undersigned, counsel of record for *amici curiae* South Florida Hospital Association, certifies that the following persons have an interest in the outcome of this case.

(1) Mark H. Feldman

(2) Charles C. Powers, Esq.

(3) Joseph W. Little, Esq.

(4) Dan Paul

(5) Mark H. Feldman, M.D.

(6) Stephen Glucroft, M.D.

(7) South Florida Hospital Association

(8) Mershon, Sawyer, Johnston, Dunwody & Cole, Attorneys of Record of *Amicus Curiae*, South Florida Hospital Association

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