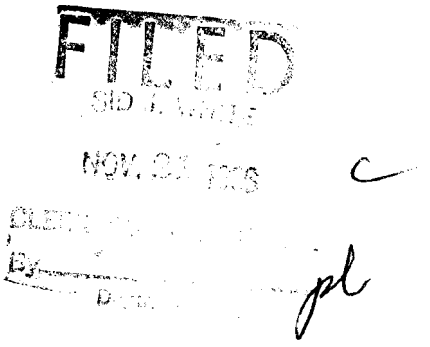
IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 68-920



MARK H. FELDMAN, PRO SE,

Appellant,

vs.

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

Appellees,

_____/

REPLY BRIEF BY AMICUS CURIAE
THE ACADEMY OF FLORIDA TRIAL LAWYERS

CHARLES C. POWERS, ESQUIRE
CHARLES C. POWERS, P.A.
1801 Australian Avenue South
Suite 201
Post Office Box 15021
West Palm Beach, Florida 33416
Telephone: (305) 478-5400

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I.

The complete abolition of a remedy for injury to reputation by false publication within a medical review comittee does not bear a reasonable relationship to the stated legislative intent to reduce the cost of medical care

Both the Florida Hospital Association and the Florida Medical Association have joined in filing an amicus curiae brief herein with the alleged purpose of protecting their members' complete immunity from accountability for the conduct of medical peer review so as to thereby allegedly protect the quality of medical care rendered in this state.

Although the Florida Medical Association and the Florida Hospital Association discuss extensively their duty to police their ranks and purge their medical staffs of incompetent physicians, and although they speak highly of their own diligent efforts in this regard, they argue strenuously in their brief against disclosure of any of those efforts (most of which take place in peer review committees). It is submitted common sense dictates the Florida Medical Association and the Florida Hospital Association labor so diligently here to protect their immunity from discovery of peer review records so that they can protect their right to be completely free from any true responsibility to conduct peer review. It is this simple observation which renders the subject statute, 768.40(4) arbitrary and not reasonably related to its intended purpose.

It is argued by the FMA and FHA that the privilege is essential because physicians would allegedly refrain from complete frankness in their opinions about cases if peer review committee information could later be used against the affected practitioner in a medical negligence action (pages 4 and 5). Although this admitted lack of candor of physicians in this state is regretable, the point is not relevant to this action. The prohibition of discovery of peer review records in a Plaintiff's malpractice action is not at issue here. The issue is the constitutionality of the act as interpreted in Holly v. Auld, supra., to effectively prohibit a physician's claims for damages to his reputation by false statements concerning him made in a peer review committee setting.

Is it logical to believe that peers who by implication are fellow members of a profession, friends, and co-workers, will ever meaningfully discipline themselves for negligence, incompetence, or impairment of function? The answer is simply that physicians do not discipline their own in an effective way. This is why there is, as Amici readily admit, an abundance of medical negligence litigation in this state. The vast majority of which is valid. The allegations of Amici, that physicians effectively police their own in an atmosphere of cloistered secrecy, runs contrary to basic concepts of human nature which have become the foundation of our judicial system.

It is fundamental that persons with interest or personal knowledge of an accused should not be the judge.

It is fundamental in our concept of justice that any process

whereby the rights of an individual are judged should be open to the public to insure freedom from abuse.

It is fundamental that an accused have a right to meaningful appellate review.

It is fundamental that the judge or judges be chosen in some fair and unbiased manner; that they meet basic qualifications and that they be accountable to some higher authority for violation of a code of ethics.

The list is far from exhaustive and is meant only to point out some obvious necessities of any fair system which are commpletely lacking in the system of closed peer review advocated by the FHA and FMA.

One only has to use common sense to know whether or not a complete privilege for the peer review system encourages or discourages quality medical care. What are the potential motivations of a physician who would, in good faith, recommend or actually take corrective action to curtail or revoke the medical staff privileges of a fellow physician? If the criticisms are legitimate, then the only proper motivation is the unselfish intent to see that truth prevails and quality care is rendered. On the other hand, what motivations are there to criticize another or to actually take corrective action to curtail or revoke medical staff privileges unjustly and in bad faith? Some obvious examples are economic competition, personal animosity, and intra-professional rivalries (e.g. orthopedists vs. podiatrists). The economic, social and political motivations to abuse the power are real.

Which of the two motivations would persevere if there were a right of recourse by the accused for libel and slander? A physician who would risk the personal animosity of the accused and the accused's friends and supporters within the hospital setting to try to right a wrong would be equally unintimidated by a frivolous counter-suit by the accused for libel and slander. Whereas, an improperly motivated accuser would be more hesitant to libel or slander his peer knowing that a counter-suit were possible.

In any case where corrective action is recommended by a physician, there is likely to be attempted retaliation by the accused and the accused's supporters. This point is admitted by Amici. What defense does a physician have against such maliciously motivated counterattacks if they are successful without the right of self-defense by way of suit for libel or slander? It is submitted few physicians would be foolhearty enough to throw the first stone at another physician in an absolutely privileged review committee setting. An absolute privilege for peer review committees only invites such unfair tactics as frivolous accusations, frivolously motivated reviews of cases and conduct at the hospital, frivolous denials of requested medical staff privileges, denial of due process, and the like. The absence of the rule of law creates a situation ripe for abuse and does not promote fair play and due process.

Amici FHA and FMA point out that under Florida law there can be responsibility for negligent failure to carry out the peer review process (Page 13-15). They cite existing case law (Page

11-12) allegedly imposing liability for negligent peer review, prior statutes (Page 12), federal regulations (Page 12) and current Florida law (Page 13) in the form of the recently adopted statute, F.S. 768.60, which imposes liability on hospitals for failure to exercise due care in fulfilling peer review duties where such failure proximately causes injury to a patient. These legal responsibilities are unenforceable if the privilege discussed in this appeal (F.S. 768.40) makes it impossible for any claimant, whether a victim of malpractice or a victim of abuse of the peer review process, to discover or use at trial any material evidence which would substantiate his claim. It is very important to note that Amici adamantly argue for continuation of this absolute privilege so that they cannot in fact be liable for negligent failure to conduct such peer review or for abuse of the process.

The FHA and FMA weakly argue, at Page 15, that hospitals have little control or ability to require physicians to serve on peer review committees. This is not the case since under F.S. 395.0115 and F.S. 395.011 hospitals have authority to establish procedures and requirements of staff membership including the authority to require service on peer review committees. The allegation that hospital staff membership is not essential in todays medical environment is untrue. With few exceptions, hospital facilities are essential to the practice of medicine. As a result, peer review committees wield tremendous power over the entire health profession.

Florida law is moving in the direction of requiring the medical professions and hosptials to conduct a review of their members in the process of granting and continuing medical staff privileges. (F.S. 768.60) At the same time, responsibility is being imposed (within limits) to refrain from abuse of the review process (F.S. 395.0115 and F.S. 395.011). There remains no logical reason to frustrate these goals by prohibiting discovery and use at trial of facts necessary to prove responsibility for dereliction of these important social goals. Furthermore, the state has failed to show a compelling need to abrogate constitutionally protected rights to redress in Court including the right to sue for injury to reputation to protect some presumed or imagined improvement of the quality of medical care.

II.

The Article I, Section (4) was raised by the Appellant, Feldman, below

At Page 28 of its Answer brief, the Appellees argue that the Article I, Section (4), argument was raised for the first time by the Amici briefs filed before this Court in support of the Appellant, Feldman. In fact, the point that the Statute violates Article I, Section (4) of the Florida Constitution was raised by Appellant, Feldman, in his brief before the Third District Court of Appeal at Page 9. Amici who have filed briefs in support of Feldman's position did not appear before the Third District Court of Appeal and therefore were not first to raise the issue.

This Amicus is unable to determine whether the point was raised by Feldman at the Circuit Court level since the hearing on the Motion for Summary Judgment was apparently not reported.

The remaining argument of the Appellee in its answer brief that the protection accorded to free speech under Article I, Section(4) of the Florida Constitution is the same as that required under The First Amendment of the United States Constitution is without merit. The Federal Constitution contains no express protection for the right of redress for damage to reputation as does the State Constitution. The Appellee's answer brief essentially argues that this additional language is simply a nullity. Clearly, the additional language protecting the remedy for injury to reputation is included in the Florida Constitution for a reason and it should be accorded the same weight as the grant of freedom of speech Annenberg v. Coleman, 121 Fla. 133, 163 So. 405 (1935). The meaning of the Section 4 protection for injury to reputation is obvious on its face and has been already briefed in the Initial Brief of Appellant and the Amici Briefs supporting that position.

III.

Section 768.40 does totally abolish a cause of action

In its Answer Brief, Appellees argue at Page 9 that Section 768.40 does not totally abolish a cause of action. The Appellees rely largely on Good Samaritan Hospital Association, Inc. v. Simon, 370 So.2d 1174 (4th DCA 1979). That case does clearly

hold that Section (4) of 768.40 does provide an exception to the bar on discovery in those cases referred to in Section (4). The Good Samaritan case however, is at odds with the more recent decision of this Court in Holly v. Auld, 450 So.2d 217 (Fla 1984) and the decision herein from the Third District Court of Appeal.

Amicus agrees with the decision in Good Samaritan and agrees that if the interpretation in that case were adopted by this Court the Statute would thereby be constitutionally permissible under the Kluger analysis. However, this Court has rejected the Good Samaritan logic in its Holly decision and adoption now of the former analysis would appear to require the Court to receed from the latter. Amicus also agrees with the statement of the Court in Good Samaritan at Page 1176 when it stated:

> "Our decision today is consistent with the expressed intent of the Legislature to provide meaningful access to the Courts for those asserting a cause of action outside of this limited immunity. To do otherwise would raise serious constitutional issues."

Amicus, however, cannot completely agree with the interpretation of the application of the Good Samaritan decision given to it by Appellees at pages 16 to 18 of their brief. Appellees essentially argue there should be a preliminary evidentiary finding by the Court as to whether there is extrinsic evidence of malice and, if so, then the discovery should be allowed.

There is no support for this two-step analysis advocated by the Appellant in any of the cases, including most particularly the Good Samaritan case upon which Appellees rely. In that case, there is no reference as to whether there was proof of malice or

even to the specifics of the statements upon which the Plaintiff Simon relied. The Court in the Good Samaritan case simply affirmed the Lower Court Order allowing discovery by the Plaintiff of proceedings of the medical review committee.

The Appellees have attempted to argue that the Lower Court's interpretation of 768.40 herein was in accord with the Good Samaritan case. Appellees argued that the Court below found no extrinsic evidence of malice of fraud which would have allowed Dr. Feldman's discovery or introduction into evidence of the facts which occurred at the peer review committee.

An examination of the actual Summary Judgment entered in this case shows that the Appellees' argument is incorrect. The Court below stated in its Final Judgment:

> "3. When confronted with sworn affidavits showing no publication, Plaintiff in order to avoid Summary Judgment is required to submit counter-affidavits demonstrating the existence of a genuine factual issue as to whether any of the Defendants published the alleged defammatory matter concerning Plaintiff outside the medical review proceeding. This the Plaintiff failed to do, because everything he has produced on the issue of publication is barred from introduction into evidence by the privilege for medical review committee proceeding contained in Section 768.40 (4), Florida Statutes." (Appellees' Answer Brief, A5)

The ruling of the Lower Court as cited above and at other points in the Final Summary Judgment make clear that the Lower Court granted the Summary Judgment because there was no evidence of publication of any defammatory statements outside the peer review committee, not because there was no extrinsic evidence of malice or fraud.

The analysis now argued by the Appellees that the privilege is not absolute was clearly not argued to the Lower Court. It would be unjust for the Appellees to argue to the Lower Court in this matter that the privilege is absolute and then on appeal to argue that it is only a qualified privilege. Since Appellees now claim the privilege is not absolute and a cause of action can be maintained by a physician, under the Good Samaritan ruling, Dr. Feldman is entitled to remand with directions to vacate the Judgment.

IV.

None of the alleged absolute privileges cited by Appellees as precedent for the subject Statute are, in fact, absolute, or in derogation of the common law

The Appellees attempt to refute the argument that 768.40(4) is an unconstitutional abolition of a cause of action for slander or libel by citing various examples of allegedly similar privileges. All of these fall into two categories. The first are judicial and other governmental privileges.

Privilege for various participants in judicial proceedings of the state is a concept of common law which predates the Florida Constitution. The cited judicial proceedings created by statutes after the effective date of the Constitutional guarantees of redress to which a privilege has been applied all fall within the same general category of judicial proceedings which the common law already recognized a privileged. It is also important to note that in all such proceedings, due process of law applies; the proceedings are public; there is a bona fide

right of appeal through the judicial process; the privilege does not apply to statements which are not relevant to the proceeding; and certain civil torts such as abuse of process and malicious prosecution are available to redress abuse. All of these safeguards are completely absent in the medical review committee setting.

Similarly, the immunity of public officials cited by Appellees is a common law privilege which predates the Constitution guaranteeing redress for injury to reputation and therefore is not in derogation of Article I, Section (4) or Section (21). Also, public officials are accountable under our system at least to the public. To whom are peer review members accountable?

The second category of privileges cited by Appellees as authority for absolute privileges in derogation of the constitution are generally those that arise out of the voluntary consent of the party to waive right to redress for one reason or another.

Accordingly, F.S. 768.40(4) as applied does not have precedent in Florida law and is in derogation of Article I Section (4) and Section (21).

CONCLUSION

In summary, no compelling necessity or reasonable relationship to the stated purposes of 768.40 has been demonstrated to justify abrogation of important constitional rights.

In any event, Appellees now appear to admit the privilege is

not absolute but only creates a qualified privilege as described in Good Samaritan, supra., which would save the statute from unconstitutionality.

There is no other absolute privilege in the law which would be precedent for the sweeping absolute effect of the 768.40 as it has been interpreted in Holly and the Court below and the Statute is therefore unconstitutional as applied to this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief by Amicus Curiae The Florida Academy of Florida Trial Lawyers has been mailed this 19th day of February, 1986 to: DR. MARK H. FELDMAN, Pro Se, 1550 NE Miami Gardens Drive, Suite #201, North Miami Beach, Florida 33179; MR. DAN PAUL, ESQUIRE, Finley, Kumble, etc., 777 Brickell Avenue, Suite 1000, Sun Bank Center, Miami, Florida 33131, Attorney for Appellees; EMIL C. MARGUARDT, Jr., Esquire, 400 Cleveland Street, Suite 800, Clearwater, Florida 33517, Attorney for Florida Hospital Association and Florida Medical Association; JOSEPH LITTLE, ESQUIRE, 3731 N.W. 13 Place, Gainesville, Florida 32605, Attorney for Amicus Curiae Joseph Little; EDWARD O'DONNELL, ESQUIRE, Mershon, Sawyer, 4500 S.E. Financial Center, 200 South Biscayne Boulevard, Miami, Florida, 33131-2387, Attorney for Amicus Curiae South Florida Hospital Association.

CHARLES C. POWERS, ESQUIRE
CHARLES C. POWERS, P.A.
1801 Australian Avenue South
Suite 201
Post Office Box 15021
West Palm Beach, Florida 33416
Telephone: (305) 478-5400
Attorney for Amicus Curiae
The Academy of Florida Trial
Lawyers