IN THE SUPREME COURT OF FLORIDA

Case No. 68,920

MARK H. FELDMAN, Pro Se,

Appellant,

vs.

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

Appellees.

QUESTIONS CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

ANSWER BRIEF OF APPELLEES

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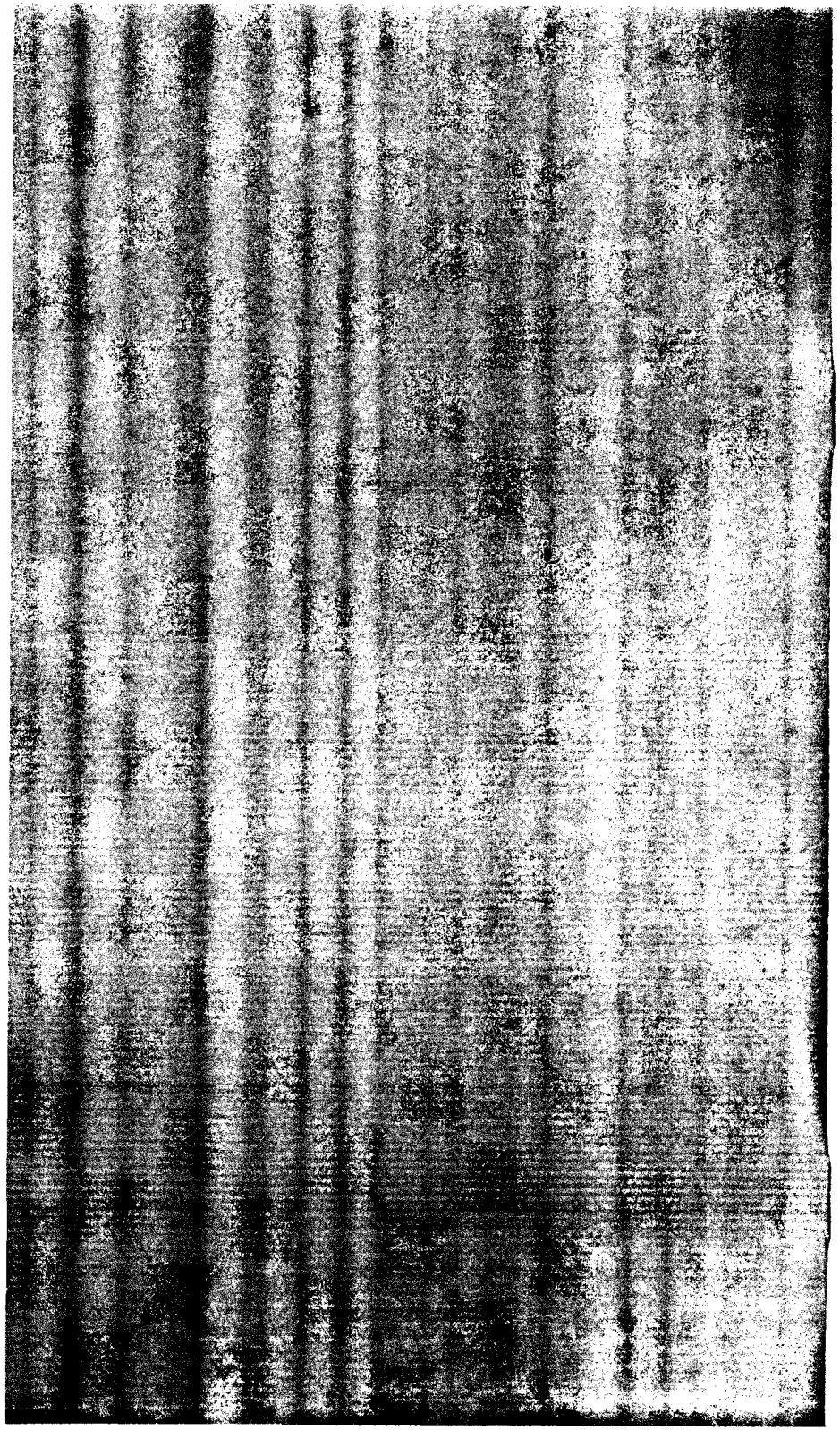

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INTRODUCTION

Appellant Dr. Mark Feldman, in his Statement of the Case, asserts that:

> . . . Defendants [as members of medical review committees] conspired to and were effective in having his privileges removed to perform this [surgical] procedure and in the process libeled, slandered [and] defamed . . . him . . ., conspire[d] to ruin his ability to obtain surgical privileges at the other hospitals under their control because of their hatred for the plaintiff and the Podiatry Profession as a whole . . . and the trial Court by its ruling in chambers would not allow any evidence gathered by defendant from hospital committees to be used at trial because of the

ruling in *Holly v. Auld,* 450 So.2d 217 (Fla. 1984) and of this Court (sic) in *Parkway General Hospital, Inc. v. Allinson,* 453 So.2d 123 (Fla. 3d DCA 1984) (Initial Brief, at v-vii).

Because Dr. Feldman failed to introduce extrinsic evidence of malice or fraud, outside the context of the medical review committee proceedings, the trial court properly, and constitutionally, pursuant to Section 768.40 (4), Florida Statutes (1983), precluded Dr. Feldman from introducing statements and records from the medical review proceeding to establish his cause of action for defamation.[1]

The questions certified to this Court concern the extent and constitutionality of the qualified defamation immunity and discovery privilege granted by the Legislature in Section 768.40, Florida Statutes (1983) in the context of medical peer review committee proceedings.

The issues involved are of the utmost importance to the entire health care system in Florida. In its enactment of the Medical Malpractice Reform Act of 1985, the Florida Legislature created a new statutory tort for a health care facility's negligent supervision of its staff. Section 768.60(1), Florida Statutes (1985). Hospitals can not discharge their responsibilities under the Act without an effective peer review program and the ability to evaluate and discipline their medical staff and personnel. Unless the peer review process has some shelter from vexatious litigation, the Legislature's goal to encourage full, frank medical peer evaluation will be thwarted and meaningful peer review will be impossible.

1. The relevant parts of the statute and the lower court's final judgment appear at pages 1 through 11 of the Appendix.

STATEMENT OF THE CASE AND OF THE FACTS

The statement of the case of Appellant Dr. Mark Feldman ("Feldman") is incomplete and replete with facts outside the record. Appellees,[2] therefore, provide the following Statement of the Case and Facts:

A. The Federal Litigation.

In 1979, Feldman filed a civil action in the United States District Court for the Southern District of Florida, unrelated to the case at bar, asserting federal antitrust and federal constitutional and other claims against 85 defendants, including 64 individuals and 17 public and private hospitals. In *Feldman v. Jackson Memorial Hospital,* 509 F.Supp. 815 (S.D. Fla. 1981), *aff'd,* 752 F.2d 647 (11th Cir.), *cert. denied,* ..... U.S. ....., 105 S.Ct. 3504 (1985), Judge Kehoe dismissed Feldman's federal constitutional claims, allegedly based upon the denial to Dr. Feldman of staff privileges for the practice of podiatry at Jackson Memorial Hospital (a public institution) as well as at several private hospitals. *See* 509 F.Supp. at 822-23. Subsequently, after nearly five weeks of testimony, during which more than 80 witnesses testified, with Feldman acting *pro se,* Judge Kehoe directed a verdict against Feldman on his federal antitrust claim and other claims because: "It is the considered judgment of the Court that [Dr. Feldman] has failed to adduce sufficient evidence to permit the jury to consider these issues." *See Feldman v. Jackson Memorial Hospital,* 571 F.Supp. 1000, 1005 (S.D.

2. The Appellees are Stephen Glucroft, M.D., Joel B. Dennis, M.D., Lloyd A. Moriber, M.D., Melvyn Drucker, M.D., Kenneth Hodor, M.D., Robert S. Ennis, M.D., Hugh Unger, M.D., and a professional association of orthopedic surgeons known as Orthopedic Associates, P.A.

Fla. 1981), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, ... U.S. ....., 105 S.Ct. 3504 (1985).[3]

B. The Alleged Defamation.

During the course of the federal antitrust action, Feldman obtained discovery of an alleged defamation of him during the proceedings of a medical review committee,[4] in which Parkway General Hospital elected not to permit the performance of a particular surgical procedure[5] by podiatrists (R.2). Feldman has never been denied staff privileges at Parkway General except to the extent that podiatrists, in general, are denied the privilege of performing that particular surgical procedure; he is still a member of the staff at Parkway General. Feldman alleged that in the medical review committee meeting, Appellees "reported that [Feldman] had performed 'experimental surgery on an 11-year-old child' " (R.2).

In fact, one of the Appellees had been previously requested by the members of another medical review committee, at another hospital, to investigate the propriety of this surgical procedure (R.214). Feldman admitted (at page 1 of his Initial Brief in the Third District Court of Appeal) that he had, in fact, "perform[ed] a procedure to repair a 'flatfoot deformity' on a nine-year-old child at Parkway", which was the procedure in question. As set forth in the deposition of Dr. Lowell Weil, an eminent orthopedic surgeon in Chicago, Illinois, the arthroereisis procedure at issue was considered "experimental" in 1979 when the alleged defamation took place (R.232-3).

3. Feldman's federal antitrust action demonstrates that he is no stranger to vexatious litigation against other medical professionals. In addition, Feldman initially filed the present action in the United States District Court for the Southern District of Florida. The court dismissed the action for lack of subject matter jurisdiction. *See* Feldman v. Dennis, et al., United States District Court, Southern District of Florida, Case No. 83-534-CIV-JLK.

4. While Section 768.40, Florida Statutes, confers *"limited immunity* upon the actions of review committees . . . and bar[s] the use of committee records and proceedings in evidence in civil actions" in Florida courts, this Section "cannot, of course, operate to bar use of such evidence in the trial of a federal [antitrust] cause of action." Feminist Woman's Health Center, Inc. v. Mohammad, M.D., et al., 586 F.2d 530, 544 (5th Cir. 1978) (emphasis supplied).

5. The arthroereisis surgical procedure involves the implantation of either bone or artificial material into a joint (R.231).

C. Dr. Feldman's Pro Se Complaint And The Proceedings In Circuit Court.

Dr. Feldman's *pro se* Complaint (R.1-12), filed March 8, 1984, contained three counts. Counts I and II alleged that the surgeon Appellees slandered, libeled, defamed, and/or placed Feldman in a false light in 1976, 1977 and 1978 by statements to medical review committees that Dr. Feldman had "performed an experimental surgical procedure on a nine-year-old child" (R.5, 9). Count III alleged that Feldman's due process and equal protection rights under the United States Constitution (Amendment XIV) and the Florida Constitution (Article I, Sections 2 and 9) were violated when the surgeon Appellees allegedly denied Feldman privileges to perform this medical procedure at Parkway General Hospital (R.10, 11). Count III of the Complaint related solely to a decision by medical review committees at Parkway General Hospital not to permit the performance of this surgical procedure at Parkway General by podiatrists in general.

The trial court declined to permit discovery of "notes, minutes, records of conversations of every orthopedic, staff/committee meeting . . . at Parkway Hospital from January 1, 1977, which mentions [Feldman] and/or the surgical

procedure" because such matters were "privileged from discovery or introduction into evidence by [Feldman] by Section 768.40(4), Florida Statutes (1983)" (R.139). The court, however, did not "bar . . . all proof" as suggested by Feldman (Initial Brief, at vii). Feldman offered his own affidavit and deposition testimony concerning statements he asserts were made in the medical review proceedings (R.244-255), but he failed to offer evidence outside of the review proceedings to support the elements of his claims (R.261-3). The trial court also upheld the constitutionality of Section 768.40(4) (R.139-41), against several constitutional challenges (R.263-4).

Final Summary Judgment in favor of the surgeon Appellees and against Feldman was rendered on all three counts of his Complaint. The bases for the Final Judgment were:

(a) With respect to Counts I and II for defamation and invasion of privacy, Feldman failed to produce any evidence not barred from use by Section 768.40(4), that any of the surgeon Appellees had published defamatory statements about Feldman.

(b) Section 768.40(4), Florida Statutes (1983), is constitutional.

(c) With respect to Count III, as a matter of law, Feldman had no right to engage in surgical privileges of his choice in hospitals of his choice. In any event, none of the surgeon Appellees was engaged in the "state action" required to invoke the federal and state due process and equal protection guarantees relied upon by Feldman to recover damages for the Parkway General review committees' decision not to permit podiatrists to perform a particular surgical procedure at the hospital (R.259-266).

D. Review By The Third District Court Of Appeal.

The Third District Court of Appeal affirmed the Final Summary Judgment in favor of Defendants below, expansively holding that Section 768.40 "creates an absolute privilege and means that any existing defamation action has been totally abolished." *Feldman v. Glucroft*, 488 So.2d 574, 757 (Fla. 3d DCA 1986). The court further held that "the public policy consideration expounded in *Holly* [*v. Auld*, 450 So.2d 217 (Fla. 1984)] and the statute itself . . . provide ample basis upon which the legislature could validly have eliminated the action." *Feldman, supra*, at 757. The court then certified 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?

As Appellees demonstrate in this Brief, Section 768.40 is a grant of only "limited immunity" and, therefore, does not "totally abolish" an action for defamation arising out of statements made in medical review committee proceedings. Moreover, even if Section 768.40 did totally abolish such defamation actions, this abolition would not violate Article I, Section 21 of the Florida Constitution.

SUMMARY OF THE ARGUMENT

Section 768.40(4), Florida Statutes (1983), does not totally abolish Appellant's defamation action for statements made in medical review committee proceedings. Rather, Section 768.40 grants a qualified immunity from liability for defamation in the absence of malice or fraud. Because Dr. Feldman failed to introduce extrinsic evidence of malice, outside the review proceedings, the trial court properly excluded evidence from the proceedings, pursuant to Section 768.40(4), and granted summary judgment in favor of the surgeon Appellees.

Even if Section 768.40(4) did totally abolish certain defamation actions, such an abolition would be constitutional. The Legislature, in enacting Section 768.40(4), clearly articulated its deep concern over rising health care costs and related medical malpractice problems in Florida. The overpowering public necessity for adequate health care outweighs a defamation plaintiff's right of access to courts and no alternative method of meeting that necessity could be shown.

This Court should decline to revisit its holding in *Kluger v. White,* 281 So.2d 1 (Fla. 1973). The principles set forth in *Kluger* do not apply in this cause and, in any event, the *Kluger* decision properly analyzes the roles of the Legislature and the courts in protecting the rights of the citizens of Florida.

The additional constitutional arguments raised by *Amici* are without merit. The issue of conflict between Section 768.40(4) and Article I, Section 4 of the Florida Constitution, was never raised by Feldman in the proceedings below and, in any event, should properly be rejected. Furthermore, Feldman has not sought this Court's review of his due process and equal protection claims and the Third District properly rejected those

ARGUMENT

I. SECTION 768.40 DOES NOT TOTALLY ABOLISH A CAUSE OF ACTION

Section 768.40(4), Florida Statutes (1983), does not totally abolish a defamation action. The section simply makes certain defamation actions more difficult to litigate; it requires a plaintiff, in an action involving a medical peer review proceeding, to show extrinsic evidence of malice or fraud, outside the review proceeding, as a condition to introducing evidence from the review proceeding itself to establish the claim. Thus, the statute does not implicate the guarantee of access to courts in Article I, Section 21 of the Florida Constitution.

A. The Reach Of Article I, Section 21, Florida Constitution.

The polestar decision in any discussion of Article I, Section 21 of the Florida Constitution is *Kluger v. White,* 281 So.2d 1 (Fla. 1973).[6]

> [W]here 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

6. Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572, 573 (Fla. 1979).

right, and no alternative method of meeting such public necessity can be shown.

Id. at 4.

As explained in *Jetton v. Jacksonville Electric Authority,* 399 So.2d 396 (Fla. 1st DCA), *review denied,* 411 So.2d 383 (Fla. 1981):

> In *Kluger,* the Supreme Court held only that the complete abolition of a prior common law right to recover for automobile accident property damages violates the right to redress provision, absent either a substitute remedy "to protect the rights of the people of the State to redress for injuries" or a legislative demonstration of "overpowering public necessity." 281 So.2d at 4.
>
> Guided by case law subsequent to *Kluger,* we narrowly construe the instances in which constitutional violations will arise. The Constitution does not require a substitute remedy unless legislative action has abolished or totally eliminated a previously recognized cause of action.
>
> As discussed in *Kluger* and borne out in later decisions, no substitute remedy need be supplied by legislation which reduces but does not destroy a cause of action. The Court pointed out that legislative changes in the standard of care required, making recovery for negligence more difficult, impede but do not bar recovery, and so are not constitutionally suspect.

Id. at 398. As further explained in *Abdin v. Fischer,* 374 So.2d 1379 (Fla. 1979), there is a "distinction between abolishing a cause of action and merely changing a standard of care." *Id.* at 1381. *See also Johnson v. R.H. Donnelly Company,* 402 So.2d 518 (Fla. 1st DCA 1981), *review denied,* 415 So.2d 1360 (Fla. 1982). Any statute which "leaves intact [the litigant's] common law remedies in tort" and only "reduces but does not destroy a cause of action" has no "constitutional infirmity". *Alterman Transport Lines, Inc. v. State,* 405 So.2d 456, 459 (Fla. 1st DCA 1981). *See generally Newton v. McCotter Motors, Inc.,* 475 So.2d 230 (Fla. 1985), *cert. denied,* ..... U.S. ....., 106 S.Ct. 1210 (1986), for cases upholding legislation merely modifying the relevant causes of action and, therefore, not subject to constitutional challenge.

B. Section 768.40 Grants Only A Limited Immunity For Defamation.

Notwithstanding Feldman's draconian pronouncement that "the cause of action for defamation against a doctor is now eliminated," it is well settled that the limited immunity granted in Section 768.40 does no such thing. The language of the statute itself clearly limits immunity from liability to situations in which the "committee member or health care provider acts without malice or fraud." Section 768.40(2), Florida Statutes (1983).[7] *Amicus* concedes this point, noting that the statute "extends . . . a qualified immunity (*e.g.,* absent fraud or malice)" and even acknowledges that the statute "on its face suggests an or-

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7. As Feldman correctly notes, a 1985 amendment to the statute limits immunity in the case of "intentional fraud". Section 768.40(3)(a), Florida Statutes (1985) (Initial Brief, at 2). As explained in Part I A above and herein, *infra,* at 17, the 1983 statute and the 1985 amendment make recovery in tort more difficult, but they still do not grant absolute immunity from defamation actions. Furthermore, the new provision requiring the posting of a cost bond as a condition to suit, Section 768.40(6)(b), Florida Statutes (1985), provides no basis to invalidate the statute. *See* Carter v. Sparkman, 335 So.2d 802, 808 (Justice England, concurring).

derly approach to protecting medical committees against vexatious law suits" (Brief of Joseph W. Little, at 3).

In *Brandwein v. Gustman,* 367 So.2d 725 (Fla. 3d DCA 1979), the Third District first construed the Section 768.40 evidentiary privilege and held that it was limited by "malice or fraud". *Id.* 726. The First District shortly thereafter, while perceiving the "perplexing question" later identified by the Third District in *Parkway General Hospital, Inc. v. Allinson,* 453 So.2d 123 (Fla. 3d DCA 1984),[8] adopted a proper statutory construction of Sections 768.40(2) and (4) in its opinion in *Good Samaritan Hospital Ass'n v. Simon,* 370 So.2d 1174 (Fla. 4th DCA 1979):

> Enactments of the legislature should not be construed in such a fashion that a totally irrational result is reached. *Austin v. State ex rel. Christian,* 310 So.2d 289 (Fla. 1975); *State Farm Mutual Auto Ins. Co. v. O'Kelley,* 349 So.2d 717 (Fla. 1st DCA 1977). Here, the legislature clearly intended to allow actions such as that filed by respondent. The gist of this action is that the petitioners maliciously defamed the respondent during the course of the committee proceedings. But, if we accept petitioners' construction of Section 768.40(4), no one would be allowed to ever disclose what took place during the course of the committee proceedings. In other words, the legislature would have authorized the action by one subsection, 768.40(2), and, in effect, barred the same action by not allowing disclosure of the defamation, by another subsection, 768.40(4). We do not believe the legislature intended such an irrational result. Rather, we

8. "Subsection 2 seemingly carves out a defamation exception to the statute [*i.e.,* malice or fraud] which Subsection 4 then makes impossible to prove." *Id.* at 125.

> conclude that this is an appropriate case for construing the provisions of Sections 768.40(2) and 768.40(4) together in order to arrive at a proper interpretation.

Id. at 1176.

The court then construed the statutory sections together as a limited immunity, permitting defamation actions for comments in medical review proceedings if malice or fraud could be demonstrated.

> The legislature has . . . apparently recognized that committee members may be inhibited from action by the threat of a lawsuit by a physician whose conduct is the subject of committee proceedings. But here, certain policy considerations influenced the legislature to grant a limited immunity, not including actions involving malice or fraud. 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 this limited immunity. To do otherwise would raise serious constitutional issues.

Id. at 1176.

The Third District also recognized the limited nature of the immunity in *Parkway*:

> Again, however, the legislature has enacted a limited privilege. To say that certain records shall not be subject to discovery or be admitted as evidence presupposes a lawsuit for which this information is desired. In addition, the statute is quite explicit in stating that documents or records otherwise available from original sources are not immune from discovery or use nor should anyone who participates in a review committee be prevented from testifying as to matters

within his knowledge. The shield of confidentiality protects only those words spoken within the four walls of the commitee meeting itself and the records made as a direct result thereof. Anything else is discoverable and may be used as evidence at trial.

Id. at 126.

Only later, in the opinion below, did the Third District conclude that "the statute creates an absolute privilege and means that any existing defamation action has been totally abolished." *Feldman v. Glucroft, supra,* at 575. This conclusion was unnecessary to affirm the Final Judgment below, because Feldman had simply failed to demonstrate malice or fraud outside the medical review proceedings, which would have defeated the privilege.

The constructional difficulties which perplexed the Third District in *Parkway* (see footnote 8, *supra*),[9] and any concern regarding the constitutionality of Section 768.40, may be avoided by examining how malice or fraud may be demonstrated in a defamation action. Malice is defined as "ill will, hostility, evil intention to defame and injure." *Nodar v. Galbreath,* 462 So.2d 803, 811 (Fla. 1984). To overcome a defamation privilege, "there must be a showing that the speaker used his privileged position 'to gratify his malevolence' ". *Id.* at 811. This Court has explained that "malice may be inferred from the language itself, *or may be proven by extrinsic circumstances.*" *Nodar* at 810, quoting *Coogler v. Rhodes,* 38 Fla. 249, 21 So. 109 (1897) (emphasis supplied).[10] In fact, as a leading commentator has explained, "a plaintiff typically attempts to show that a defamatory statement was made with 'malice' by extrinsic evidence of the defendant's hostile feelings." Sack, *Libel, Slander and Related Problems,* Practicing Law Institute (1980), at 330.

The extrinsic circumstances examined by this Court in *Nodar* were "months of personal conversations, telephone calls, and letters . . ." preceding the alleged defamation. In the present case, Feldman (in his Statement of the Case) asserts that the surgeon Appellees

> conspire[d] to and were effective in having his privileges removed to perform this [surgical] procedure and in the process libeled, slandered [and] defamed . . . him" and that they "conspire[d] to ruin his ability to obtain surgical privileges at the other hospitals under their control *because of their hatred for the plaintiff and the Poditary Profession as a whole*" (Initial Brief, at v-vi) (emphasis supplied).

See also Brief of The Florida Academy of Trial Lawyers, at 10. If such malice had in fact existed, Feldman could have made a showing similar to that in *Nodar,* of alleged "ill will, hostility, evil intention to defame and injure," *Nodar* at 811, through evidence outside the medical review proceedings. Feldman simply failed to make this showing and, therefore, the Section 768.40 privilege applied.[11]

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9. As this Court admonished in Holly v. Auld, 450 So.2d 217 (Fla. 1984):

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Id. at 219.

10. Here, as in *Nodar,* even if not privileged, the alleged defamatory "words do not inherently demonstrate express malice." *Id.* at 812.

11. The assertions of Feldman (Initial Brief, at 7) and *Amicus* (Brief of The Florida Academy of Trial Lawyers, at 12, 20) that Section 768.40 eliminates the statutory cause of action

(Continued on following page)

Other jurisdictions construing medical review discovery statutes have similarly concluded that immunity from discovery does not amount to abolition of a cause of action. In *Samuelson v. Susen,* 576 F.2d 546 (3d Cir. 1978), the court upheld the validity of an Ohio privilege statute virtually identical to Section 768.40(4), barring discovery or introduction of proceedings and records of medical review committees. The court found that the defamation plaintiff was not precluded from introducing evidence falling outside the purview of the statute. *Id.* at 553.

> Plaintiff is not precluded from establishing the necessary causal connection between the defamatory matter and his injury by circumstantial evidence or by evidence from deponents which falls outside the purview of the O.R.C. §2305.251. *Id.*

See also Eubanks v. Ferrier, 267 S.E.2d 230, 233 (Ga. 1980) (Georgia statute barring discovery of medical review proceedings merely withheld from wrongful death plaintiff a certain type of evidence which would otherwise be available to her; it did not deprive plaintiff of right to access to courts).

Likewise, by enacting the Section 768.40 privilege, the Florida Legislature qualifiedly precluded only one method of proving malice (the words themselves in the

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Footnote continued—

for malicious denial or termination of staff privileges provided by Section 395.0115 (1985) and recognized in Cardia v. Holy Cross Hospital, Inc., 427 So.2d 803 (Fla. 4th DCA 1981), are equally unavailing. If a plaintiff asserting such an action could demonstrate malice or fraud by extrinsic evidence, Section 768.40 would allow discovery and introduction of evidence from the medical review proceeding to support an action under Section 395.0115.

medical review proceedings) and not the other (extrinsic circumstances). Furthermore, if extrinsic circumstances demonstrate malice, even the words themselves are not privileged. Had Feldman introduced evidence of malice outside the review proceedings, the allegedly defamatory words and documents could have been discovered and introduced into evidence. *See Good Samaritan Hospital Ass'n, supra,* at 1176.

As demonstrated in Part I A above, legislative changes, making recovery in tort more difficult, "impede but do not bar recovery, and so are not constitutionally suspect." *Jetton, supra,* at 398. Section 768.40 merely requires a defamation plaintiff to initially demonstrate malice by extrinsic evidence and, if he does, the immunity privilege does not apply. Such "elimination of one possible ground for relief," *Jetton* at 398, or alteration of a standard of care, *Abdin, supra,* at 1381, does not implicate Article I, Section 21 of the Florida Constitution. As this Court long ago held in *Slatcoff v. Dezen,* 76 So.2d 792 (Fla. 1954), construing a statute exempting certain life insurance policies from claims of creditors, "proof of fraud [or malice] operates as a permanent brake upon misuse of the exemption . . ." *Id.* at 794.

Section 768.40 is, therefore, not a total abolition of a defamation action for statements occurring in medical review committee proceedings. Article I, Section 21 of the Florida Constitution is, therefore, not implicated in construing the statute.

II. EVEN IF SECTION 768.40 DID TOTALLY ABOLISH DEFAMATION IN MEDICAL REVIEW COMMITTEE PROCEEDINGS, SUCH AN ABOLITION WOULD NOT VIOLATE ARTICLE I, SECTION 21, FLORIDA CONSTITUTION

The analysis of Article I, Section 21 of the Florida Constitution and of Section 768.40, in Part I above, demonstrates that the statute did not abolish Feldman's defamation action. However, even if Section 768.40 did abolish a cause of action for defamation, the preamble and the language of the statute itself clearly reveal the Legislature's intent and policy in its enactment. These legislative findings demonstrate the "overpowering public necessity" and the "lack of an alternative method" required for the constitutional abolition of a cause of action in Florida. *Kluger v. White*, 281 So.2d 1 (Fla. 1973).

A. The Medical Malpractice Crisis.

In its 1973 enactment of the discovery exemption contained in Section 768.40(4) (formerly numbered as Section 768.131(4)), the Legislature plainly expressed its concern over the availability of adequate health care and the related medical malpractice problems existing in Florida at that time.

The preamble to Chapters 73-50, Laws of Florida, reads, in pertinent part, as follows:

> 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 proceedings of medical review committees 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 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; . . .[12]

The Florida courts, in construing Section 768.40, have consistently recognized the Legislature's concern over the serious health care problems in Florida and the Legislature's recognition of the lack of an alternative solution to the medical peer review system and the attendant qualified privilege granted proceedings of medical review committees. In *Holly v. Auld*, 450 So.2d 217 (Fla. 1984), this Court stated,

> In an effort to control the escalating costs of health care in the state, the legislature deemed it wise to

12. In fact, the medical malpractice insurance problem reached crisis proportions nationwide by 1975, at which time insurers refused to renew existing policies or offered renewals at astronomical rates and physicians considered major curtailment of services to minimize their potential liability. The Florida Legislature, at that time, enacted the far-reaching Medical Malpractice Reform Act of 1975, providing for mandatory pooling of insurance, measures for identifying and disciplining incompetent and negligent physicians and establishing a medical mediation procedure for malpractice claims. *See* French, Florida Departs from Tradition: The Legislative Response to the Medical Malpractice Crisis, 6 Fla.L.R. 423 (1978); Probert, Nibbling at the Problems of Medical Malpractice, 28 Univ.Fla.L.R. 56 (1975).

encourage a degree of self-regulation by the medical profession through peer review and evaluation. The legislature also recognized that meaningful peer review would not be possible without a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.

It is apparent that the need for confidentiality is as great when a credentials committee attempts to elicit doctors' honest opinions about one of their colleagues for purposes of determining fitness for staff privileges as when attempting to determine whether the practice of a doctor on the staff meets the standards of the medical community. A doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit . . .

Inevitably, such a discovery privilege will impinge upon 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 cost 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.

Id. at 219-220. *See also Parkway General Hospital v. Allinson*, 453 So.2d 123, 125 (Fla. 3d DCA 1984) ("[T]he

legislature, recognizing that the continued headlong rise in health care costs would have a disastrous effect on the state's residents, made a choice. . . . Thus, [i]n order to insure valid peer review, the legislature had to protect the participants therein, even though by doing so it was necessary to encroach upon certain rights held by others"); *Dade County Medical Ass'n v. Hlis*, 372 So.2d 117, 120 (Fla. 3d DCA 1979) ("Candid and conscientious evaluation of clinical practices is a *sine quo non* of adequate hospital care . . . There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded").[13]

In fact, in its enactment of the Medical Malpractice Reform Act of 1985, the Legislature created a new statutory tort for a health care facility's negligent supervision of its staff. Section 768.60(1), Florida Statutes (1985). Hospitals can not discharge their responsibilities under the Act without an effective peer review system, which necessarily entails a certain immunity to encourage full, frank medical peer evaluation.

In *Rotwein v. Gersten*, 36 So.2d 419 (Fla. 1948), this Court upheld the validity of Section 771.01, *et seq.*, Florida Statutes (1945), abolishing causes of action for alienation of affections, criminal conversation, seduction and breach of promise. There, the Legislature prefaced the act by stating that such actions have been "subject to great abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages for many persons wholly

13. Feldman asserts that upholding the validity of Section 768.40 would "eliminate dissent in the health care industry" (Initial Brief, at ix). However, the courts in *Holly, Parkway* and *Hlis* recognize that the statute has just the opposite effect.

innocent . . ." *Id.* at 420. If this Court should find that Section 768.40 abolishes a cause of action for defamation, the policy expressed by the Legislature in doing so is at least as compelling as that recognized by the Court in *Rotwein*. Here, the Legislature determined that the overpowering public necessity in maintaining health care cost containment and, thus, the availability of adequate health care for the citizens of Florida, outweighed the interest of a defamation plaintiff in the context of medical review committee proceedings.

B. The Privilege Granted In Section 768.40(4) Is No Different From Other Absolute Privileges Recognized In Florida.

Feldman and *Amici* assert that the Florida Constitution deprives the Legislature of the power to enact absolute privileges to defamation actions (Initial Brief, at 11; Brief of Joseph W. Little, at 16; Brief of The Florida Academy of Trial Lawyers, at 22). However, absolute privileges from defamation actions are recognized under Florida law in a variety of contexts. *See, e.g., McNayr v. Kelly,* 184 So.2d 428, 431 (Fla. 1966) (statements of public officials in their official capacity); *Robertson v. Industrial Insurance Co.,* 75 So.2d 198 (Fla. 1954) (statements made in license revocation proceedings before the Insurance Commissioner); *Lloyd v. Hines,* 474 So.2d 376 (Fla. 1st DCA 1985) (statements of state law enforcement agent as witness in criminal trial); *Bell v. Gellert,* 469 So.2d 141 (Fla. 3d DCA 1985) (statements made in labor grievance complaint which were relevant to that complaint); *Farish v. Wakeman,* 385 So.2d 2 (Fla. 4th DCA 1980) (compelled testimony before a legislative committee); *Seidel v. Hill,* 264 So.2d 81 (Fla. 1st DCA 1972) (statements introduced in quasi-judicial proceedings, such as worker's compensation proceedings); *Greene v. Hoiriis,* 103 So.2d 226 (Fla. 3d DCA 1958) (statements made in connection with unemployment compensation proceedings); *Litman v. Massachusetts Mutual Life Insurance Co.,* 739 F.2d 1549 (11th Cir. 1984) (publication consented to or invited by the plaintiff); *Rosenberg v. American Bowling Congress,* 589 F.Supp. 547 (N.D. Fla. 1984) (statements made as a result of a contractual agreement to be bound by a private organization rule).

Accordingly, absolute privileges from defamation actions are recognized in Florida. If Section 768.40(4) did abolish a cause of action for defamation for statements made in medical review proceedings, it is merely one further instance of the many absolute privileges for defamation recognized by the Florida courts.

C. This Court Should Decline To Revisit Kluger v. White.

Feldman and *Amici* acknowledge, as they must, that the principles set forth by the Court in *Kluger v. White,* 281 So.2d 1 (Fla. 1973), govern the determination whether the Legislature's purported abolition of certain defamation actions, by enacting Section 768.40, is constitutional (Initial Brief, at viii, 4; Brief of The Florida Academy of Trial Lawyers, at 15; Brief of Joseph W. Little, at 17, 21, 22). Nevertheless, *Amicus* asserts that the Article I, Section 21 guarantee of access to courts is absolute and does not allow for the exceptions enunciated in *Kluger* (Brief of The Florida Academy of Trial Lawyers, at 21). *Amicus,* in effect, invites the Court to overrule its decision in *Kluger,* as well as a substantial body of authority following *Kluger,* and find that the Legislature may not alter a cause of action, in any way, except by means of constitutional amendment. *Amicus'* request for such further review of *Kluger* is unwarranted in this cause and, in any

event, the *Kluger* decision property analyzes the roles of the Legislature and the courts in protecting the rights of the citizens of Florida.

As demonstrated in Part I B above, Section 768.40 does not abolish a cause of action for defamation in medical review proceedings, but merely requires that a plaintiff show extrinsic evidence of malice or fraud, outside the review proceeding, in order to discover and introduce evidence from the review proceeding itself, to establish a defamation claim. Therefore, as explained by the authority set forth in Part I A above, construction of the statute does not implicate Article I, Section 21 of the Florida Constitution and the Court need not further address the issues raised in *Kluger v. White.*

Furthermore, to the extent that the statute limits certain defamation actions, the Legislature arguably has created a statutory cause of action as a reasonable alternative to a common law defamation action and, thus, the statute would pass constitutional muster under the "substitute remedy" test enunciated in *Kluger.*

However, even if the Court were to find that Section 768.40 did totally abolish certain defamation actions, the analysis set forth in *Kluger* properly determines the constitutionality of such an abolition.

In *Kluger,* this Court reviewed the constitutionality of a statute which abolished certain traditional rights of action in tort for property damage arising from an automobile accident. The Court struck down the statute because it violated the right of access to courts guaranteed by Article I, Section 21 of the Florida Constitution, without providing an alternative protection to the injured party. *Id.* at 5. In reaching its determination, the Court held that

> [W]here 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.*

Id. at 4 (emphasis supplied).

The "overpowering public necessity" or "compelling state interest" test is a well established principle of constitutional law used to determine the constitutionality of governmental regulation which attempts to restrict an individual's fundamental rights. In *Winfield v. Div. of Pari-Mutuel Wagering,* 477 So.2d 544 (Fla. 1985), the Court found that the right of privacy guaranteed by Article I, Section 23 of the Florida Constitution is just such a right. Accordingly, the Court set forth the standard governing the constitutionality of the government's intrusion on that right.

> [The compelling state interest] test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means. *See Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re Estate of Greenberg,* 390 So.2d 40 (Fla. 1980).

Id. at 547. Although the Court used the "strong standard" in reviewing the claim under Article I, Section 23, the Court recognized that "this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual," *Id.*, and held that the statute at issue was a proper governmental intrusion upon the claimant's fundamental right to privacy.

Similarly, in *Lieberman v. Marshall,* 236 So.2d 120 (Fla. 1970), the Court considered the constitutionality of state regulation which restricted the claimant's right to free speech guaranteed by Article I, Section 4 of the Florida Constitution and, again, recognized that the right, while a basic one, is not absolute. Thus, in a proper case, it may be restricted out of public necessity.

> Liberty of speech must be respected by public agents, even if the speech is angry, critical, adverse, or threatens to bring about economic harm, as in union activity. Unreasonable or improper infringements of this liberty cannot stand. . . . The exercise of liberty of speech in specific situations may be required to yield to valid state or local interest springing from public necessity. . . .

Id. at 127 (citations omitted).

The Court in *Kluger* recognized that, under compelling circumstances, an individual's right to access to the courts, however basic, must yield to the good of the public as a whole.

> Upon careful consideration of the requirements of society, and the ever-evolving character of the law, we cannot adopt a complete prohibition against such legislative change.

Id. at 4.

In considering such societal needs, the Court has upheld a statute abolishing a cause of action which, though long a part of the common law and of the law of Florida, had become a destructive element in society. *Rotwein v. Gersten,* 36 So.2d 419 (Fla. 1948). Similarly, as demonstrated in Part II A above, the Florida Legislature, as well as the Florida courts, recognize that confidentiality in medical peer review proceedings is essential to ensure adequate health care to the citizens of Florida.

Amicus suggests that, in purportedly abolishing defamation actions in medical review proceedings, the Legislature simply weighed valid rights and protections of one class of individuals (defamation plaintiffs) against the rights of another (members of medical review committees) and abolished the rights of one group in the name of a greater good (Brief of The Florida Academy of Trial Lawyers, at 16). This is simply not the case. If the Legislature were found to have abolished certain defamation actions by its enactment of Section 768.40, it would have done so by weighing the rights of certain defamation plaintiffs against the need to ensure adequate health care to the public at large; that overpowering public necessity required the abolition of certain defamation plaintiffs' rights to access to the courts and no alternative method of meeting such public necessity could be shown. *See Kluger* at 4.

Because Section 768.40 did not totally abolish Feldman's defamation action, the Court need not address the issues raised in *Kluger v. White.* However, even if the Court were to find that Section 768.40 did abolish such an action, the Court need only look to the proper analysis set forth in *Kluger* to determine that such an abolition would be constitutional.

III. THE ADDITIONAL CONSTITUTIONAL ARGUMENTS RAISED BY AMICI ARE WITHOUT MERIT

A. The Article I, Section 4 Issue Was Not Raised Below And, In Any Event, Should Properly Be Rejected.

Feldman's Complaint alleged that the surgeon Appellees defamed him by statements made in medical review proceedings and violated his due process and equal protection rights under the United States Constitution (Amendment XIV) and the Florida Constitution (Article I, Sections 2 and 9) (Statement of the Case and of the Facts above, at 5). On appeal to the Third District Court of Appeal, Feldman asserted only that Section 768.40(4) violated his federal and state due process and equal protection rights and the guaranteed access to courts provided by the Florida Constitution. Nowhere in the proceedings below did Feldman raise a claim that Section 768.40(4) conflicts with Article I, Section 4 of the Florida Constitution. Nevertheless, *Amici,* for the first time, raise the issue before this Court (Brief of The Academy of Florida Trial Lawyers, at 23-26; Brief of Joseph W. Little, at 8-12).[14]

This Court has determined that, in reviewing questions certified by a district court of appeal to be of great public importance, the Court may properly review the entire *decision* that passes upon such a question. *Zirin v. Charles Pfizer & Co., Inc.,* 128 So.2d 594, 596 (Fla. 1961). However, because the Article I, Section 4 issue was never raised in the proceedings below and is not a

14. *Amicus* concedes, as it must, that the issue was not addressed by the Third District in its opinion and, of course, the issue was not certified by the Third District to this Court (Brief of The Academy of Florida Trial Lawyers, at 23).

part of the decision rendered by the Third District, the Court need not review the question.

Even if the Court were to consider the question whether Section 768.40(4) conflicts with Article I, Section 4, Appellees respectfully submit that the question must be answered in the negative.

Article I, Section 4 of the Florida Constitution grants to the citizens of Florida the constitutional right of free speech, limited only by an abuse of that right. It provides that *"no law* shall be passed to restrain or abridge the liberty of speech . . ." (emphasis applied). *Amicus,* by asserting that Feldman had a constitutional right, under Article I, Section 4, to bring a defamation action against the surgeon Appellees, impermissibly attempts to extend the protection of Article I, Section 4 to private, rather than state action.

It is well settled that the scope of 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. *Department of Education v. Lewis,* 416 So.2d 455, 461 (Fla. 1982); *Florida Canners Ass'n v. State Dept. of Citrus,* 371 So.2d 503 (Fla. 2d DCA 1979). The Court must apply the limitations on free speech as announced in the decisions of the United States Supreme Court. *Lewis* at 461.

The United States Supreme Court has held that the First and Fourteenth Amendments safeguard the rights of free speech by limitations on *state* action, not private action. *Lloyd Corp., Ltd. v. Tanner,* 407 U.S. 551, 567 (1972). Because the scope of Article I, Section 4 of the Florida Constitution is identical to that of the First Amendment of the United States Constitution, Feldman has no constitutional right under Article I, Section 4 to bring a

defamation action against the surgeon Appellees for alleged defamatory statements made in connection with private medical review committee proceedings.

Furthermore, to the extent that the Legislature, by enacting Section 768.40, may have created a statutory cause of action as an alternative to a common law defamation action (*see* Part I B above), such enactment does not imply that the Legislature intended to extend the protection afforded by Article I, Section 4. *Compare, Schreiner v. MacKenzie Tank Lines, Inc.*, 432 So.2d 567, 570 (Fla. 1983) (statute creating a right of action for employment discrimination against private persons employing fifteen or more persons did not impliedly broaden the application of Article I, Section 2 to private acts).

Because the issue of conflict between Section 768.40 (4) and Article I, Section 4 was not raised below and is not part of the decision rendered by the Third District, the Court need not address the issue. In any event, Article I, Section 4 does not protect the right of free speech in the context of private action and Section 768.40 (4) does not conflict with Article I, Section 4.

B. The Third District Properly Rejected Feldman's Due Process And Equal Protection Claim In A Summary Fashion.

In its opinion affirming the Final Summary Judgment in favor of Defendants below, the Third District summarily rejected Feldman's equal protection claim as "totally unconvincing." *Feldman v. Glucroft*, 488 So.2d 574, 575 at fn.2 (Fla. 3d DCA 1986).[15]

15. Although the Third District did not specifically refer to Feldman's due process claim, that issue was presented by Feldman on appeal and, therefore, the Court presumably rejected that argument in a similar fashion.

Feldman's due process and equal protection claims were fully addressed by the trial court and briefed by the parties, both in the trial court and on appeal. *Amicus'* treatment of the issues (Brief of The Florida Academy of Trial Lawyers, at 26-27), merely reiterates the assertions of the parties in the proceedings below and provides no basis for reversal of the Third District's decision.

CONCLUSION

For the foregoing reasons, the questions of great public importance certified to this Court by the Third District Court of Appeal should be answered in the negative and the decision affirming Final Summary Judgment should, in all other respects, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief of Appellees were caused to be mailed this 8th day of October, 1986 to: Mark H. Feldman, 1550 N.E. Miami Gardens Drive, Suite 201, North Miami Beach, Florida 33179; to 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, Post Office Box 15021, West Palm Beach, Florida 33416; and to Joseph W. Little, Esq., *Amicus Curiae,* 3731 N.W. 13 Place, Gainesville, Florida 32605.

/s/ FRANKLIN G. BURT

SECTION 768.40, FLORIDA STATUTES (1983)

Section 768.40 *Medical review committee, immunity from liability.*

* * *

(2) 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 review committee, or any health care provider furnishing any information, including information concerning the prescribing of substances listed in s. 893.03 (02), 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.

* * *

(4) 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