IN THE SUPREME COURT OF FLORIDA

FROM THE THIRD DISTRICT COURT OF APPEAL, OF FLORIDA

DR. MARK H. FELDMAN, PRO SE

PETITIONER,

V.

CASE NO. 68,920

STEPHEN GLUCROFT,M.D.
ET AL.,

3DCA CASE NO. 85-1262

RESPONDENTS.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Dr. Mark Feldman is a Podiatrist licensed under Fla. Stat. Chapter 461, who practices his profession in Dade County, Fla.

In 1979 he filed a pro se complaint in Federal District Court in Miami against 17 hospitals and almost 100 doctors, most of whom are Orthopedic Surgeons,alleging violations of the Federal Anti-trust Laws, United States and Florida Constitutional violations and multiple Florida tort claims. During discovery proceedings in that case Dr. Feldman learned of proceedings the defendants in the case sub judice had instituted against him at Parkway General Hospital(Parkway). Parkway was not a defendant in the Federal case nor is it a defendant in the case now before this Court. Most of the defendants, appellees here,were defendants in the Federal case.

Dr. Feldman performed a procedure to repair a "flatfoot deformity" on a 9 year old child at Parkway. He had privileges to perform the procedure by virture of the privileges granted to him by Parkway some years before. Dr. Feldman had been trained in the procedure and it was part of the surgical armamentarium in which he was trained in dealing with severe deformities in children repairable by surgery. Such procedures, and others, were common where he was trained as well as in other parts of the United States.

Dr. Feldman alleged that in secret the defendants conspired to and were effective in having his privileges removed to perform this procedure and in the process libeled, slandered, defamed, and denied

him his Rights under the United States and Florida Constitutions. That further, the defendants transferred their egregious conduct to other hospitals where Dr. Feldman had applied for priviliges where these defendants controlled whether or not and if so to what extent privileges were to be granted. That the defendants had sought to so control his privileges at Parkway by total denial and having lost in that endeavor did in fact conspire 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. Their method, among others, was to base denial of privileges on the fact that Dr. Feldman had performed an "experimental procedure" on a 9 year old child.(R.1-12).

During preparation of the Federal case for trial, Dr. Feldman discovered documents from various review committees showing the activities of the Orthopedic Dept.at Parkway, headed by one of the defendants.(R.149-160). Discovery from North Miami General Hospital and testimony at the trial of the Federal case in 1983 showed the defendants had used the Parkway committee work as a basis to deny Dr. Feldman privileges at North Miami General(N.Miami) through defendants committee work at N.Miami. Further,the Parkway documents showed that Dr. Raskin, a Parkway committee Chairman, followed Parkway procedure and refered the case to a lower committee until the "doctor involved" was brought into the inquiry. This the defend-dants did not do thus depriving the plaintiff of his due process rights. Defendants knew of the Parkway bylaws which followed a course of procedure for cases such as this because of the testimony at trial of the Federal case.(R.241-255).

Appellant responded to discovery requests, (R.149-160) and the Circuit Court held hearings as the pre-trial process ensued. (R.38-39,83,142,167). Both sides submitted their Memoranda of Law in support of their positions. (R.118-125, 40-82, 84-91, 126-135,168-174, 241-255). As pre-trial hearings progressed, it became appearant that the trial Court by its rulings 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 in Parkway General Hospital., Inc. v. Allison, 453 So.2d 123 (3DCA 1984). The guidelines set out by the trial court as to what could be ascertained by production of documents or deposition as to the events and proof of allegations at trial made clear that the Holly decision barred all proof.

Plaintiff moved the Court to declare Fla. Stat.768.40(4) unconstitutional which the Court declined to do, by ruling it was constitutional. (R.138-141).

Defendants moved for summary judgment on all counts which was granted. Plaintiff appealed to the Third District Court of Appeal, (R. 257), which affirmed and certified questions (267-268). Appellant moved for clarification of Civil Rights and constitutional claims, which was denied, (R. 269). Petitioner invoked the jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

This case deals with fundamental rights of doctor's triggered during the process of applying to, being disciplined by, and reviewed in any capacity by one or more hospital committees. The decision by the Court will change the way medicine is practiced in Florida and perhaps the United States. At issue is whether the law as written and applied can withstand constitutional scrunity as it eliminates, through freezing the discoverability and use in judicial proceedings, all evidence in the hospital committee review process.

The fundamental rights implicated are access to the courts, First Amendment guarantees, and due process and equal protection guarantess under the 14th Amendment of the U.S. Constitution and Article I sections 4,5 and 21.

As applied the offending statutes grant absolute immunity to all participants in the medical review committee proceedings. The victim is without power to clear his name, and to add insult to injury, plaintiffs must post bond or pay all defendants attorney's fees prior to being heard by a Court. The cause of action for defamation against a doctor is now eliminated by legislative fiat and this Court in it's Holly decision.

The courts of this State and those of the United States have long held that the lesislatures and the Congress are without power to eliminate such fundamental rights as are implicated here, without providing an alternative or passing strict judicial scrunity in explaining the reasons for such elimination.

The case before the Court cannot pass muster for upholding the statutes, eliminating a doctor's cause of action for defamation, and granting absolute immunity to all participants in the defamatory process.

Upholding these constitutional infirmaties would precipitate multiple injuries to thousands of health care professionals around the United States. Hospital privileges would be granted to a select few who "knew the right people", and would eliminate dissent in the health care industry.The Constitutional guarantees of this country cannot be for sale for each group capable of lobbying the legislatures for absolute immunity. The statutes, it is respecfully submitted, must fall.

The Constitution of the State of Florida , 1968 revision,provides in pertinent part:

> "Section 4 Freedom of Speech and Press- Every person may speak, write and publish his sentiments on all subjects but shall be responsibile for the abuse of that right. No law(emphasis supplied) shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence....."
>
> " Section 21 Access to Courts- The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

These Rights are of equal force. Annenberg v. Coleman, 163 So. 405 (Fla.1935).

> " Section 4 of the Declaration of Rights...so that every person for any injury done him in his reputation (empasis by the Court) shall have remedy by due course of law..." "The normal forum for the trial of conflicting claims of right asserted under the foregoing respective constitutional sections is in the nisi prius courts, in direct proceedings, not in collateral proceedings in habeas corpus."

Annenberg, supra, has not been overruled. Holding Florida Stat. 768.131(4), now 768.40(4),(hereinafter stats.), constitutional would grant absolute immunity to all persons on the hospital committees and elevate all committee proceedings to be in effect, a nisi prius court where the accused is impotent as he could not present evidence to defend himself.Nothing in the legislative history of either statute intends that result of the law.

Petitioner recognizes that an appellate court is generally required to apply the law in effect at the time of its decision. Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla.1978), City of Lakeland v. Catinella, 129 So.2d 133 (Fla.1961).

The statutes have been amended as of July 1, 1986 with the standard for a civil action to be eliminated absent " intentional fraud." In addition, prior to bringing such an action the plaintiff must post financial security sufficient to cover the costs and legal fees of defendants. Clearly, these costs would be tens, indeeds hundreds of thousands of dollars, if not more than a million when multiple doctors and hospitals are involved and would be a total bar to the courts in effect. Certainly this financial barrier cannot be constitutional.

Fla. Statute 768.40(3)(a) allows liability to attach only in cases of intentional fraud. 768.40(5) eliminates any ability of the accused to obtain the records or evidence to clear his name. 768.40(6)(b) mandates that a plaintiff post costs and attorney's fees of the defendant in ad vance of his case. 768.40(6)(a) allows only the defendant to recoup his costs and attorney's fees. If these sections don't violate the Equal Protection clause Petitioner could not imagine what does.

Certainly it must now be appearant the doctors who are denied hospital privileges are singled out for unequal treatment before the law. After denial the state mandates that the hospital report the doctor's failure to obtain hospital privileges to the applicable licensing board, Fla. Stat. 395.011(7), for which he cannot obtain evidence necessary to prosecuts the cause of action allowed in 395.011(8). In the event he wishes to try absent the needed evidence, the defendants costs and legal fees are paid in advance, 395.011(10)(a)&(b).

> "We do not overlook the proposition that some legitimate purposes may be served by denying inmates (sic)(doctors) access to the courts, such as restricting the filing of frivilous lawsuits and preventing the disruption and administrative inconviece necessitated by court appearances...The State of Florida, of course is not a party to this appeal to set forth and argue these considerations. Nevertheless, we find that they have been ably argued in other courts and rejected as insufficient to override the constitutional right of access to the courts. Delorme, 353 F.Supp. at 259-60 See Holman, 712 F.2d at 859-60, Thompson, 421 F.Supp. at 884-85." Lloyd v. Farkash, 476 So.2d 305 (Fla.1DCA 1985)

The statutes create favoritism twords the defendants and as such they cannot stand.

Petitioner was accused of performing experimental surgery on a child, by defendants, and who without his knowledge had his privileges to perform the procedure removed and then asserted to multiple hospitals and persons that Dr. Feldman performed experimental surgery on children.(Complaint.). Petitioner asserts the procedure was not in 1977 nor is it today, experimental, but rather a normal procedure for the repair of flatfoot deformities in children and adults. Petitioner may only clear his name and be awarded appropriate damages from defendants for their malicious acts in a court of law. He is precluded from using gathered evidence by a Fla. Statute and a ruling of this Court which bars access to the courts and grants absolute immunity to defendants. Dr. Feldman was denied procedural and substantive due process by defendants actions, despite attempts by Parkway hospital to see the bylaws were followed, wherein defendants made sure thet were not. Petitioner now seeks relief from this Court.

Holly v. Auld, 450 So.2d 217(Fla.1984), should be overruled. The decision eliminates a doctor's ability to clear his name, when as here outlined in petitioner's complaint, vindication may be had no other way. Dr. Feldman has now been before the courts for over 7 years involving actions by defendants which took place in 1977. Even doctors are entitled under the Bill of Rights to be ensured that "For every wrong there is a remedy", Slavin v. Kay, 108 So.2d 462 (Fla.1958), Wilson v. O'Neal, 118 So.2d 101 (Fla.1960). Holland v. Mayes, 19 So.2d 709(Fla.1944).

While giving credence to legislative intent, it cannot be asserted that their power is to eliminate judicial review. Marbury v. Madison, 1 Cranch 137, 163, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). As Chief Justice Marshall insisted,

> "(t)he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

And 32 years later the Chief Justice reinforced the concept in United States v. Nourse, 9 Pet. 8, 28-29, 34 U.S. 8, 28-29, 9 L.Ed. 31 (1835),:

> "It would excite some suprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process.. leaving to the debtor no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust.But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States."

Kluger v. White, 281 So.2d 1(Fla.1973) controls. The legislature has not shown an "overpowering public necessity for the abolishment of such right and no alternative method of meeting such public

necessity." Kluger, at 4. The District Court noted that an action was abolished and upheld in Rotwein v. Gersten, 36 So.2d 419 (Fla.1948), Kluger, at 4, Feldman v. Glucroft, 488 So.2d 574(3DCA 1986).Rotwein supra, did not deal with a fundamental Right. Furthermore the legislature specifically stated that the abolition of the cause of action was because,

> "the actions have been subject to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damages to many persons wholly innocent and free from wrongdoing, that hey have been exercised by the unscrupulous for their own enrichment.."Rotwein, supra, at 420.

No such showing was made regarding the statutes here and as we will see infra, allowing the statutes and Holly to stand will have the result so abhoared by the legislature and noted by the Court in Rotwein, supra,and this Court in Aldana v. Holub, 381 So.2d 231 (Fla.1980), when unconstitutionality was found after the egregious assault of the constitutional rights of so many was permitted. We need not let such a heinous result visit upon the doctors of this State who apply for hospital privileges and are put upon as the petitioner was in this case.

Absent a heartbeat, breathing, being on the staff of a hospital, and or holding an administrative position in a hospital there are no requirements prior to serving on the committees covered by the "peer review" statutes covered in the Holly holding.The committees are in the hospital application, credential,medical executive, hospital executive, joint conference, tissue, hospital Board, subspecality(e.g. Orthopedics involved here) and joint review. They may have 3-15 members each depending on the size of the hospital. If upheld, the statutes and Hollygrant absolute immunity to thousands of individuals in Florida,

who may remain in power for many years at any one hospital. With no judicial forum to answer to, individuals and groups in power would be free to grant or deny privileges at their whim knowing there is no accountability owing. Any procedural hearings on a rejection becomes meaningless because the information obtained to render a decision is witheld from the applicant by the statutes and Holly. This result conflicts directly with Fla. Stat. 395.01let. seq., and in particular section (8). This statute was the sequal to Fla. Stat. 395.0653 which was enacted to enable a fairer application process which is now not possible because of Holly.

Although the Feldman Court saw the issue as one of public policy and relied on Dade County Medical Ass'n v. Hlis, 372 So.2d 117, (3DCA 1979), this case is clearly distinguishable solely because the Hlis did not need the requested documents to prove their case, whereas Dr. Feldman can only prove his case with the requested and therefore needed documents. Hlis supra at 120 n.3

> "It simply offends due process to countenance a law which confers a valuable legal right, but the permits that right to be capriciously swept away on the wings of luck and happenstance." Aldana, supra @ 236, n.9

We need only look to the circumstances in Zambrano v. Devanesan, 484 So.2d 603 (4DCA 1986), for an example of what doctors are capable of doing to each other. Arguably, the medical staff meeting where the vote was taken in the case was a "medical review committee" for the statutes purposes, but the issue was never raised by either party. If it was raised, under Holly, Dr. Zambrano would have been without recourse to remedy the wrong done to him. THE MEDICAL STAFF PRIVILEGES PROBLEM IN FLORIDA,

12 Fla. St. U.L.R.339 (1984), is replete with such examples. Only in Cardia v. Holy Cross Hospital, Inc., 427 So.2d 803 (4DCA 1983) does there appear to be a ray of hope for the aggrieved doctor. The statutes conflict with Fla. Administrative Rule 10D-28.58(2)(d) which provides for due process, but is now impotent due to Holly. Certainly the case before this Court is different than Cardia or Holly, but the net effect is the same. Petitioner had the privilege to perform the procedure at one hospital, (Parkway). The defendants controlled the orthopedic department at Parkway, and North Miami General to WHICH PETITIONER WAS APPLYING. Defendants controlled the orthopedic staffs at other hospitals as well; North Shore and Biscayne, where petitioner would have applied after success at North Miami. Defendants had opposed petitioner at Parkway and lost because of petitioners credentials. Unknown to petitioner, defendants had petitioners privileges reduced at Parkway through the "experimental procedure lie" as alleged in the complaint, and then used the same lie in meetings at North Miami General, where petitioner was applying,all unknown to petitioner. Contrary to Fla. Law, petitioner was not told why his application was rejected at North Miami General. If these allegations are true, Dr. Feldman was the victim of multiple defamatory acts by defendants circulated to hundreds of persons over several years. The forum for presentation of the truth is a Court of Law, not intra hospital hearings which permit the abolition of a doctors career without recourse. We deal here with Fundamental Rights, Fla. Const. Art. I, sec. 4, 21, U.S. Const., Amend. 14, Due Process, Equal Protection.

This case involves"judicial enforcement of a discriminating legislative enactment, and therefore state action is implicated." Sasso v. Ram Property Management, 431 So.2d 204 (1DCA 1983),at 211, n.(8). The statute must be analyzed under the "strict scrutiny" standard because a fundamental right is involved. Examining Board v. Flores De Otero, 426 U.S. 572, 96 S.Ct. 2264, 49 L.ed.2d 65 (1976). First amendment rights are included, Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968), as is the right of access to the courts, e.g. NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963). Such rights include those"implicit or explicit" in the Constitution. San Antanio Independent School District v. Rodriguez, 411 U.S. 1,33-34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973).

The Statutes as applied allow for the arbitrary and capricious treatment of doctors who apply to hospitals for privileges. Some are given procedural and substantive due process and some, as petitioner here, are not. The Conflicting statutory provisions and the Holly decision of this Court prevent any evidence sufficient for the accused to defend and clear his name. A fair hearing before an unbiased tribunal is essential to due process. Duffield v. Charleston Area Medical Center, 503 F.2d 512, 517, (4th Cir.1974). "An impartial decision maker is the basic constituent of minium due process." Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). As the Drucker testimony shows, (R.241-256), the treatment afforded Dr. Feldman was far different from that he would have received had he been an Orthopedist. Further, this disparate treatment

failed to conform to the essential requirements of law. Cardia, supra n.3 at 805, through the statutory acceptance of the Rules and Regulations of the Joint Commission on Hospital Accrediation. Defendants actions violated the statute as a matter of law, Cardia, supra, at 806, n. 4, Fla. Adm. Code Rule 10D-28.58(2)(d). (See also n.5 and 6, p.806).

This aberant procedure which provides a review mechanism where orthopedists are evaluated by orthopedists, as well as other specialists evaluating members of the same specality, but only in the case of podiatrists not allowing podiatrists to evaluate podiatrists denies both due process and equal protection to petitioner. Dr. Feldman's liberty and property interests were removed from him contraveining the dictates in Board of Regents v. Roth,408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

As the allegations in petitioner's complaint assert, (R.1-12), make clear, defendants actions took place without his knowledge. This state of affairs yields the unsettling discovery that in such situations as the review process, the victim's cause of action is barred before it ever existed in that it cannot be discovered except by happenstance, which may be after the statute of limitations. Under this Court's decisions in Diamond v. E.R. Squibb and Sons, Inc., 397 So.2d 671 (Fla. 1981),Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979), the law fails.

The practical operation and effect of the statutes has rendered them unconstitutional. This Court may determine that such

operation and effect are true in the cause now before the court. Jacksonville Port Authority v. State, 161 So.2d 825 (Fla. 1964). Aldana, supra, at 237.

The effect of Holly, is to grant absolute immunity to the review committees. Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.ED.2d 115 (1979), Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985), do not permit such a result.

> "Spreading false information in and of itself carries no First Amendment credentials." 441 U.S. at 171, "It is worth noting here that the privilege as asserted by respondents would also immunize from inquiry the internal communications occurring during the editorial process and thus place beyond reach what the defendants participants learned or knew as the result of such collegiate conversations or exchanges. If damaging admissions to colleagues are to be barred from evidence, would a reporter's admissions made to third parties not participating in the editorial process also be immune from inquiry?", Id.
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> "Evidentary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding. United States v. Nixon, 418 U.S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "(w)hatever their origins, these exceptions to the demand for every man's evidence are not created lightly nor expansively construed, for they are in derogation of the search for truth." Nixon at 710.
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> "Only complete immunity from liability for defamation would effect this result, and the Court has regularly found this to be an untenable construction of the First Amendment." Herbert, at 441 U.S. 153 @176-177.

This Court has allowed the legislature to grant immunity which contraveins the dictates of the First Amendment. Respectfully, it cannot stand. Our Constitution was here long before those

who petitioned the legislature to carve out absolute immunity for them to defame others and escape the Bar, Other than "judicial" absolute immunity does not exist for anyone. The Constitution will be with us long after they are dead, and niches in the Document cannot be permitted for medical conspirators. Even the Medical Profession must adapt to the Constitution and obey its dictates, Not the Reverse.

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the States...", Dun, supra, at 2947 quoting Rosenblatt v. Baer, 383 U.S. 75, 92.

The legislature of Florida is without power to eliminate a cause of action which abrogates petitioner's fundamental rights in this case. Kluger, supra., Holly, supra, dissent of Judge Shaw and Judge Adkins, 221-223.

Hospital officials and all review committees now must be considered "state actors" because their activities are guided by and must be reported to the State. The state has erected an impenetrable barrier around the "state committees" triggering the protection of Paul v. Davis, 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155. As the Cardia court has noted, at 806, this is impermissible. The statutes are facially unconstitutional.

CONCLUSION

For the reasons expressed herein, petitioner asks this Court to overrule Holly, and find that Fla. Stat. 768.40(4) unconstitutional as being violative of Art. I, sec. 21, access to the courts and that the statutes have in operation violated petitioner's due process and equal protection rights under the United States and Florida Constitutions. Further, that the statute violates petitioners rights under Article I, sec. 4, Fla. Const. Or in the alternative, this Court certify to the United States Supreme Court the question of whether a State may grant absolute immunity to peer review committees in the hospital doctor privilege process.

CERTIFICATE OF SERVICE

I hereby certify that the petitioner's Initial Brief, Appendix, and Motion for Oral Argument were mail to the Supreme Court of Florida, the Supreme Court Bldg., Tallahassee, Fla., 32301 and Dan Paul, Esq. 100 S. Biscayne Blvd., 13th Fl., Miami, Fla., 33131, on this Aug. 12, 1986.

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