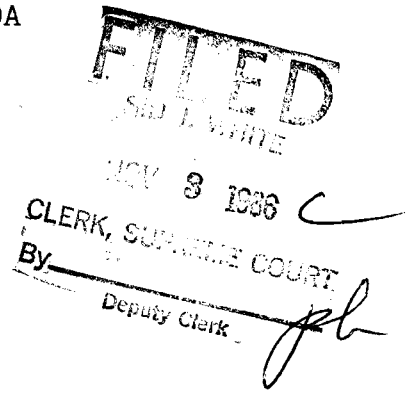
IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,920



MARK H. FELDMAN, D.P.M., PRO SE

PETITIONER

VS

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

RESPONDENTS

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER

INTRODUCTION

Defendants-appellees-respondents have made assertions in their briefs, supported by their amici which plaintiff-appellant-petitioner asserts are error and in some cases misleading. Petitioner will outline each instance and will reply serratum.

It is petitioner's understanding of the rules of appellate procedure and the Bar that if an appellate Court rules on a case on grounds other than those in which the case in the lower Court is brought, then it is the obligation of parties to bring this fact to the appellate Court. The signifiance here is that the citation of petitioner's case would have this Court understand that the Federal Appeals Courts considered the District Court's ruling granting a directed verdict against the petitioner here. Such is not the case and is and was known to respondents prior to briefing in the Third District Court of Appeal where respondents made the same error, to wit:

1. 509 F.Supp 815 was not appealed contrary to respondents assertion at p. 3, Answer brief of appellees.

2. 571 F. Supp 1000, was affirmed at 752 F.2d 647 (11th Cir. 1985), cert. den.____U.S.___,105 S.Ct. 3504 (1985).

THE 11th Cir. AND THE SUPREME COURT DEALT SOLELY WITH DR. FELDMAN'S MOTIONS UNDER FRCP 60(B) AS HE HAD MISSED THE APPEAL TIME DUE TO LOSS OF FINAL JUDGMENT AMONG 10,000 DOCUMENTS AND PETITIONED THE DISTRICT,APPEALS, AND SUPREME COURT TO SET ASIDE THE DIRECTED VERDICT DATE AND RE-ENTER IT SO THAT DR, FELDMAN WOULD BE ABLE TO FILE AN APPEAL. THUS,THE ANTITRUST CASE WAS NEVER HEARD BY ANY OTHER COURT OTHER THAN THE DISTRICT COURT, AFTER 6 YEARS OF LITIGATION, 5 WEEKS OF TRIAL AND OVER 80 WITNESSES. EMPHASIS MINE.

3. Appellees here were the same members of the hospital peer review committee at "another hospital", appellees brief at 5. (The hospital was N. MIAMI General).

4. Dr. Lowell Weil is a Podiatrist in Chicago, not "an eminent Orthopedic Surgeon in Chicago, App. Br.@ 5.

Dr. Weil doesn't do the procedure in question, did not train the petitioner and had no connection withthe case. He was contacted by defendants solely because he had been a fraternity brother of one of the defendants. He had not seen nor heard from the defendant in 19 years, prior to being contacted by defendant about the procedure.

Instructive is the fact that defendants-appellees made certain that only orthopedists not podiatrists, and the plaintiff could do the procedure. No more compelling statement can be shown after reading the defendants admittances at trial that "We didn't ask you anything about it" and defendants admission that if the individual involved were an orthopedist, he would have been asked about it.(the procedure).

5. Appellees assert that the issue of unconstitutionality of Article I, section 4, was never raised below, App. Br. @ 9 and 32

Petitioner did raise the Art. I,Sec.4 issue as well as Art. I,Sec.9. below.

Art. I, sec.4 raised at Circuit Court hearing on the Constitutionality issue and in Appellant's Initial Brief on Appeal at p.9. (R.).

Art. I sec.9,(due process), in plaintiff's motion for partial Summary Judgment, plaintiff's motion in opposition to defendant's motion for summary judgment, plaintiff's memorandum in support of complaint and in opposition to defendant's memorandum. Due process issue replete in appellant's briefs and oral argument to the Third District Court of Appeal.

6. Dr. Feldman's State Law claims of defamation, denial of both Florida and United States Constitutional Rights were dismissed by the Federal District Court prior to trial preserving them for State Court litigation. Only the Federal Antitrust issues were tried.

REPLY TO ARGUMENTS OF RESPONDENTS:

THIS REPLY BRIEF WILL ENCOMPASS THE ARGUMENTS OF RESPONDENTS AND THEIR AMICI

Petitioner has asserted that the statute does abolish any and all causes of action resulting from the hospital-medical peer review process because all proof necessary for survival of causes of action allowable in Florida must come from the actions of defendants. The cornerstone of any proof lies in the actions within the walls of the review process and is concealed from the Courts by this Court's ruling in Holly. Proof is totally impossible.

Defendants cite Johnson, Alterman Transport Lines and Newton, (appellees brief at 13), all of which are Workman's Compensation cases which modified recovery by statute but in no way prevented access to evidence necessary for a litigant to support and prove his claim.

Brandwein v. Gustman, 367 So.2d 725 (Fla. 3DCA 1979) cited by respondents at 14, is support for petitioner. Brandwein was granted a hearing, whereas petitioner here was not by respondents admission. Brandwein refused to amend his complaint to allege the facts which would show "malice or fraud". Although now not possible, the Third District applied the privilege only because the allegations in the complaint were deficient. Certainly not the situation in the case at Bar.

Good Samararitan Hospital v. Simon, 370 So.2d 1174 (Fla. 4DCA 1979) is clear in point for petitioner. The allegations supported a defamation action and discovery, not now possible because of Holly, was allowed. The Simon Court clearly recognized the constitutional infirmities resulting from barring discovery. Simon, at 1176.

Carter v. Sparkman, 335 So.2d 802 saw a statute struck because it became unworkable. Taxation of costs and attorney's fees after litigation is far different from such taxation as a pre-condition to litigation. Here a total bar to access results.

The offending statute even protects "all records made as the direct result thereof." (All medical review committees), Parkway General Hospital v. Allison, 453 So.2d 123 (Fla. 3DCA 1984). It is therefore axiomatic that each hospital in any State where an applicant would apply throughout his lifetime would be sending and receiving copies of libelous records. The victim once ruined would be powerless to clear his name because the records and testimony instigating, planning, propagating and disseminating any conspiracy, fraud, libel, slander, interference with advantageous business relationships, antitrust, intentional infliction of emotional distress, etc., etc., etc. would all be protected from discovery and introduction into evidence.

While defendants assert that plaintiff must demonstrate malice and or fraud by defendants outside the medical review process, the statute itself says nothing of the sort. Fla. Stat. 768.40(2) and (4). While it is proper to prove malice or fraud by extrensic circumstances, Nodar, at 810, it"MAY ", be proven thusly. Nowhere does it say it MUST be proven by extrensic circumstances. Certainly Nodar, does not stand for such a proposition.

Defendants assert that " If a plaintiff asserting such an action could demonstrate malice or fraud by extrensic evidence, section 768.40 would allow discovery and introduction of evidence from the medical review proceeding to support an action under section 395.0115." (Answer Br. of Appellees at 18 fn.11.) Where does 768.40 say that? Where does 395 et.seq. say that? Where does Holly say that? Section 768.40(4) and Holly eliminate 395.0115. Defendants may not realize it but, in a Complaint, allegations and discovery from all sources come before introduction into evidence.

Fla. Stat. 395.011(1) outlines the duty of a hospital in acting on a doctor's privileges, as does sec.(5). Upon request available in sec. (7), any reason given which the doctor deems error is protected because he will be unable to obtain the records of the decision making body to ascertain how they arrived at an erroneous decision as well as have an opportunity to clear his name. In effect, any and all remedies afforded under 395.011 (8) are barred by Holly and 768.40 and 395.0115(9). In addition, 395.011(10)(b) carves out a segment of individuals, doctors whose hospital privileges have been denied, modified, or terminated, and arbitrarily mandates that these persons must pay an entrance fee in the form of defendants legal fees and costs prior to entering the courtroom. Surely this Court will have no trouble declaring this section unconstitutional. Georgia Southern & Florida Railway Co. v. Seven Up Bottling Co., 175 So.2d 39 (Fla. 1965). Costs savings as the basis for justification for a classification has long been rejected. Rinaldi v. Yeager, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966), Shapiro v. Thompson, 394 U.S. 618, 633, 89 S.Ct. 1322, 1330, 22 L.Ed.2d 600 (1969), invoking the strict scrutiny test because the issues involved fundamental rights.

Certainly it could not be denied that once privileges have been granted in a public or private hospital, the doctor has both a liberty and property interest in those privileges. The hospital must follow its bylaws in the protection of those interests. In the case sub judice, the hospital did attempt to follow them but all were thwarted in their effort by the actions of defendants.

Holly and Sec. 768.40 thereby eviscerate Fla. Stat. 395.0115(2) as no proof of intentional fraud could be obtained under 395.0115 (4) with the blockade to the courtroom outlined in 395.0115(5)(b) equal to 395.011(10)(b).

Yet 395.0115(1) and 395.011(6) require the procedures of hearings consistent with The Joint Commission On Hospital Accrediation be instututed. If hospitals must institute the Joint Commission Standards, which mandate appeal mechanisms with access to records for the protection of the accused, on the one hand, and another statute prohibits & protects disclosure, how can either statute be enforced?

Defendants rely on McNayr, Robertson,Lloyd, Bell, Farish, Seidel, Greene, Litman, & Rosenberg,(Answer Brief of Appellees @ 26), for the proposition that absolute immunity in this case comports with other absolute immunity privileges in Florida. They neglect to point out that those cases involue judicial and or quasi-judicial proceedings. It seems clear that defendants would have this Court elevate all hospital review committees to judicial and or quasi-judicial proceedings. Granting absolute immunity would do precisely that. Certainly no such result would be tolerated by this Court.

The exception is Litman v. Massachusetts Mut. Life Ins. Co., 739 F.2d 1549(11th Cir. 1984). Defendants reliance on this case is misplaced as the Court allowed no privilege to defame the plaintiff in upholding a substantial Jury award for plaintiff.

Defendants liken the case at bar to the governmental investagation case of Winfield v. Div. of Pari-Mutual Wagering, 477 So.2d 544 (Fla. 1985), (Answer brief at 29). Concealment of criminal conduct from governmental investigation is a far cry from hospital peer review proceedings. The differences come closer however, if extrapolation occurs and reports of doing "experimental surgery on children" reach State Licensing Boards who pass on the information and decisions to a State Attorney. Certainly, it is possible that an accused doctor could be convicted without ever having the opportunity to clear his name now mandated by statute, all because no access to the review records, committees, and testimony could be obtained.

Finding the statute constitutional would subject doctors to the egregious conduct by defendants seen in Hudall v. Sellner, 800 F.2d 377 (4th Cir. 1986).[1] McDonald v. Smith, 105 S. Ct. 2787, 86 L.Ed.2d 384 (1985) and Herbert v. Landro, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed2d 115 (1979) did not permit exceptions for liability for defamation or access to evidence needed at trial gained through discovery. This Court should not now carve out special protection for doctors, hospitals and peer review participants.

1/ Petitioner was affected at Parkway General Hospital, North Miami General Hospital and Mount Siani Hospital as has been noted. Hospital applications to other hospitals have been on "hold" since the federal trial in 1982 because of the defendants actions here,e.g. Humana Biscayne in North Miami. Defamation victims are thus labeled no matter where they go in an effort to repair their lives.

Defendants would have this Court grant absolute immunity to all participants in any medical reivew proceeding because of an alleged malpractice crisis. Such legislative pronouncements cannot be the basis for abrogating fundamental rights under the Florida and United States Constitutions. If that were the case, any fundamental right could be eliminated by a sufficient number of "WHEREAS" 'ES, in the Preamble of any legislative Act. The power of the legislature does not stretch so far. Aldana v. Holub,381 So.2d 231 (Fla. 1980), Champion v. Gray, 478 So.2d 17 (Fla. 1985), Steuart v. State Dolcimascolo, 161 So. 378(1935), Atlantic Coastline v. State, 143 So. 255 (1932), Jones, Varnum & Co. v. Townsend's Administratrix 21 Fla. 431 (1885), and State v. Chase, 114 So. 856 (Fla. 1927). See especially,Boynton v. State, 64 So.2d 536 (Fla. 1953), Liberman v. Marshall, 236 So.2d 120 (Fla. 1970).

It may be that the ertire method of "peer review" will have to be changed. For example, indpendent evaluating consultants will be hired to Credential a hospital applicant and follow his performance in his hospital career. Evaluators of the same specality with identities blind,as in testing by number rather than name, may be the norm to comply with the constitution. Even so done, no absolute privilege or denial of discovery should be tolerated. As malpractice insurance covers the practitioner, such evaluating companies with an appeals process in place, would be covered by insurance. Hospitals would be held harmless by such coverage as they would contract with these companies for the credentialing process. Protection of individual constitutional rights demands a change in the system.

Defendants assert that absolute immunity is needed for all members of all peer review committees in order to protect candid conversations in the professional review process. Such a legislative and judicial grant of immunity would do no more than allow access to hospitals delegated by members of the cartel.

> "Indeed, it is a basic tenet of democracy that all power, public as well as private, must be subject to effective limitation lest the power be abused. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part." The Federalist No.51 (J. Madison) 227 (Beard ed. 1964). "Man's capacity for justice makes democracy possible; but man's inclination to injustice makes democracy necessary." R. Niebuhr, The Children of Light and the Children of Darkness xiii(2d ed. 1960).

Under the standards of proof required by the Courts involving defmation actions brought by private individuals against nonmedia defendants, involving nonpublic issues, no plaintiff could ever survive summary judgment without access to the records and intra-committee evidence. Dun & Bradstreet, Inc. v. Greenmoss Builders, 105 S.Ct. 2939 (1985), Miami Herald Publishing Co. v. Ane, 458 So.2d 243 (Fla. 1984), and 423 So.2d 376 (Fla, 3DCA 1983), Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984) and 429 So.2d 715 (Fla. 4DCA 11983), and Della-Donna v. Gore Newspapers Co.489 So.2d 72 (Fla. 4DCA 1976). By barring all evidence intrinsic to the case and proof thereof, the cause of action is barred.

Constitutional deprivations promulgated to defend and enforce constitutional infirmities cannot stand. The statute must be ruled unconstitutional.

Amicus, Florida Medical Association and the Florida Hospital Association urge absolute immunity and elimination of all actions against hospitals and members of all committees by all aggrieved individuals. If done, such institutions and individuals would be free and unfettered in or out of such institutions and committees to reak havoc upon any victim they chose, knowing their actions are free of accountability. Such an effect is intellectual lunacy. Fraudulent evidence is not permitted in a courtroom. Where is the justification for permitting such evidence in a hospital peer review committee? Doctors and hospitals would have this Court declare them sacrosanct. What CHUTZPAH![2] Our Constitutions are our only protection from such groups as these whose capacity to raise sufficient sums to see such statutes as 768.40(4) and 395.0115 (5)(b) and 395.011(6) passed are unlimited. This Court is the final refuge of protection from such statutes. The health care industry, including doctors, must obey the Constitution, not the reverse.

2/ The Jewish word meaning NERVE; defined as the man who has murdered his mother and father and who, now before the Bar of Justice, is pleading for mercy because he's an orphan!

Even the Bredice Court, so relied on by respondents and all their Amici, conceded that discovery of records and discussions within the review process could be had upon a showing of exceptional circumstances. Bredice v. Doctors Hospital, 50 F.R.D. 249 (D.C. Cir. 1970), Thus even a case decided 26 years ago and used as a cornerstone by respondents must fail them. Medical malpractice is a far different case than the one at Bar. Those cases are always provable by extrensic evidence of intra-committee actions. Here plaintiffs cannot prove their allegations without the intra and inter review documents and testimony.

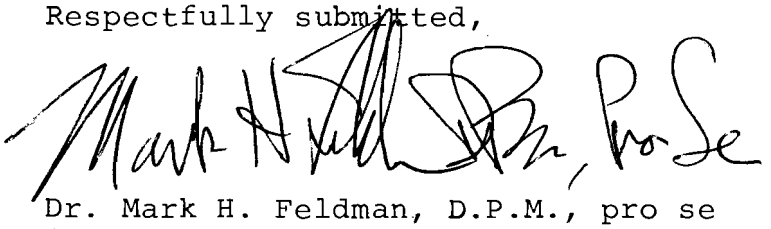
For amici of FHA and FMA at p.8 to assert petitioner has not been affected by the Holly decision barring his requested discovery and introduction into evidence of now protected material is untenable.

This case does not deal with self critical analysis as urged by amicus FHA and FMA. Petitioner did not criticaly analyze himself. He was criticaly analyzed by others in kangaroo fashion and not invited to the"Court". Such actions go unprotected and the perpetrator does so at his peril. Young v. King, 244 A.2d 792 (1975), Shibilski v. St. Joseph's Hosp., 266 N.W.2d 264 (1978).

CONCLUSION

For the reasons herein expressed, petitioner urges this Court to accept the Certified Questions and grant the relief requested in Petitioner's Initial Brief on the Merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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