IN THE SUPREME COURT OF FLORIDA

PSYCHIATRIC ASSOCIATES, a Professional Association; ALVIN NEUMEYER, M.D., EUGENE VALENTINE, M.D., and FRANK GILL, M.D.,

Appellants,

vs.

Case No. 76,844

EDWARD A. SIEGEL, M.D.,

Appellee.

ANSWER BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Amicus Curiae, Academy of Florida Trial Lawyers, accepts the Statement of Case and Facts as presented by the primary parties in their respective briefs, and submits no additional statement.

SUMMARY OF ARGUMENT

The district court properly held that the challenged statutes were invalid as violative of Article I, Section 21, Florida Constitution (Access to Courts).

By requiring that plaintiffs "buy" their access to court by purchase of pre-suit bond for defendant's potential attorney's fees (regardless of ultimate claim merit or outcome), the statutes directly contravene the command of Article I, Section 21, Florida Constitution, that access to court, redress of injury, and justice be administered "without sale." Such a financial pre-condition to access and redress was properly stricken as constitutionally proscribed.

The statutes were also properly stricken under traditional Article I, Section 21, judicial analysis. The legislative device significantly burdens and restricts access without any mutual or offsetting benefit for the burden imposed. Under the ploy of merely limiting access, it employs a financial pre-condition device which could be used, if not rejected by this Court, to effectively eliminate all right of access against a wide range of legislatively favored groups. See Smith v. Department of Insurance, 507 So.2d 1080, 1088-1089 (Fla. 1987). No overwhelming public necessity has been demonstrated for the attorney's fees bond burden on access as is required under Kluger v. White, 281 So.2d 1 (Fla. 1973), and ensuing decisions of this Court.

This Court should, therefore, affirm the district court and thereby uphold the fundamental rights of access to courts and redress of injury guaranteed by Article I, Section 21, of the Florida Constitution.

ARGUMENT

THE DISTRICT COURT PROPERLY HELD THAT THE CHALLENGED STATUTES VIOLATE ARTICLE I, SECTION 21, FLORIDA CONSTITUTION (ACCESS TO COURTS) BY REQUIRING POSTING OF BOND FOR DEFENDANT'S ATTORNEY'S PEES AS A CONDITION OF BRINGING PLAINTIFFS' CIVIL ACTION.

In proceedings below the district court denied certiorari, sought by appellants herein, and held in pertinent part:

> We approve the trial court's ruling that sections 395.011(10)(b) and 395.0115(5)(b), Florida Statutes (1987), and section 766.101(6)(b), Florida Statutes (Supp. 1988), which require the posting of a bond or other security for attorney's fees as a condition to bringing the action, violate article I, section 21, of the Florida Constitution and hold that it does not constitute a departure from the essential requirements of law. We agree with Judge Anstead's well-reasoned dissent in Guerrero v. *Humana, Inc.*, 548 So.2d 1187 (Fla. 4th DCA 1989), and adopt it as our opinion in this case.
>
> Psychiatric Associates, et al. v. Siegel, 567 So.2d 52, 53 (Fla. 1st DCA 1990).

Amicus Curiae, Academy of Florida Trial Lawyers, respectfully urges that the decision of the lower court is entirely correct and should be affirmed by this Court.

The Court, in assessing the propriety of the decision below, should consider first the "double" nature of the burden attempted to be imposed upon plaintiffs such as appellee.

In these proceedings Sections 395.011(10)(a), 395.0115(8)(a), and 766.101(6)(a), Florida Statutes, are not challenged or at issue. Each of these provisions is "one-way" in nature and provide, inter alia, that in any civil action against

a review proceeding participant, any prevailing defendant shall be awarded "reasonable attorney's fees."

Sections 395.011(10)(b), 395.0115(8)(b), and 766.101(6)(b), Florida Statutes, are challenged and at issue herein. Each of these provisions is also "one-way" in nature, applying only to plaintiffs in such civil actions, and require in pertinent part that such plaintiffs:

> As a condition of brinsing any action . . . shall post a bond or other security, as set by the court having jurisdiction of the action, in an amount sufficient to pay the costs and attorney's fees.

(Emphasis supplied.)

The trial court in proceedings below required posting of bond for costs pursuant to the above statutes, but held that the statutory requirement of bond for attorney's fees was unconstitutional as violative of Article I, Section 21, Florida Constitution (Appellants' Appendix, Item 2, p. 3). The district court affirmed (Appellants' Appendix, Item 1, pp. 1-2).

The statutes at issue are wholly unlike others approved or upheld by this Court. They do not merely restrict certain favored information from discovery [see Hollv v. Auld, 450 So.2d 217 (Fla. 1984)] or limit entitlement to recovery to instances where a legislatively required proof or showing is made by plaintiff [see Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988)]. They do not merely require pre-suit merits-related screening or mediation [see Carter v. Sparkman, 335 So.2d 802 (Fla. 1976); but see Aldana v. Holub, 381 So.2d 231 (Fla. 1980)].

To the contrary, the statutes at issue attempt to place an additional one-way burden, or preliminary "price tag," on plaintiff's very right of access to court. Plaintiff's right of access and redress is directly abolished, irrespective of merit, unless plaintiff first bears the burden and expense of pasting bond or security for defendant's attorney's fees.

Article I, Section 21, of the Florida Constitution (1968) is clear in its terms. It provides and commands:

> § 21. *Access* to courts
>
> The courts shall be open to every person far redress of any injury, and justice shall be administered without sale, denial or delay.

This Court has addressedthe protected, fundamental right of access to courts numerous times since 1968. Before turning to those decisions, however, Amicus Curiae respectfully submits that compelling a plaintiff to "buy" his way into court by providing advance bond or security for defendant's future attorney's fees (irrespective of claim merit or ultimate outcome) constitutes a direct, prohibited violation of the above-quoted constitutional command that "justice shall be administered without sale."

Amicus Curiae respectfully submits that separate and apart from this Court's pronouncements in Kluser v. White, 281 So.2d 1 (Fla. 1973), and its progeny respecting abolition of a cause of action, Article I, Section 21, of the Florida Constitution by its own and express terms proscribes legislation which makes the administration of justice unavailable unless "purchased and sold"

by the advance provision of bond or security for the adversary defendant-ligitant's attorney's fees.

This Court's prior "access to courts" decisions have, admittedly, not **focused** on the "sale" prohibition of Article I, Section 21, no doubt because the legislative attempts and efforts previously brought to this Court's attention have employed other devices restricting or abolishing access. In Carter v. Sparkman, 335 So.2d **802** (Fla. 1976), this Court observed in passing at page **805** that payment of reasonable "cost deposits" was a typical example of a burden which traditionally could be placed on entry or access to the courts, but that greater burdens are generally opposed or disapproved by the courts.

In G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d ***899*** (Fla. 3d DCA 1977), under **analogous** circumstances, the district court held that a defendant-mortgagor could not be required to post in the registry of the ***court*** or otherwise provide security for **the** amount due on the mortgage as a precondition for a counterclaim against the mortgagee. In holding such a financial pre-condition violative of Article I, Section 21, of **the** Florida Constitution, the district court noted at page 901:

> The courts have generally disapproved financial **pre-**conditions to bringing claims or asserting defenses in court aside from court related filing ***fees.***

Carter v. Sparkman, supra, and GBB Investments, Inc. v. Hinterkopf, supra, do recognize that charges such as filing fees **and** "cost" deposits are permissible, but there can be no serious debate that an adversary's attorney's fees are separate and apart,

and of a different nature, than costs. It is well established that the term "costs" generally does not extend to or include attorney's fees. Wiggens v. Wiggens, 446 So.2d 1078, 1079 (Fla. 1984); State ex rel Royal Ins. Co. v. Barrs, 87 Fla. 168, 99 So. 668 (1924).

Thus, Amicus Curiae respectfully urges that separate and apart from the restraints upon "abolishment" of a cause of action as proscribed by Kluger v. White, supra, and its progeny, the financial pre-condition of the subject statutes violates the command of Article I, Section 21, Florida Constitution, that the courts shall be open for redress of any injury and justice shall be administered "without sale."

In this respect, it is appropriate to tauch upon Sittig v. Tallahassee Memorial Reaional Medical Center, 567 So.2d 486 (Fla. 1st DCA 1990), wherein the district court held Section 395.0115(8)(b), Florida Statutes, violative of Article I, Section 21, as applied to a plaintiff who is financially unable to post the required bond. Having so held, the court properly declined in that case to unnecessarily address the facial invalidity of the statute.

Appellants seek comfort in Sittig, supra, or in the failure of appellee to establish financial inability in the case sub iudice, so as to come directly within the holding of Sittig. Amicus Curiae respectfully submits that if appellee has failed to demonstrate financial inability, that merely serves to establish that the facial unconstitutionality of the statutes in issue was squarely before the lower court and properly addressed below.

Furthermore, Amicus Curiae respectfully urges that the command of Article I, Section 21, Florida Constitution, that justice be administered "without sale" does not permit the legislature to impose proscribed "sale" on persons or plaintiffs who are able to "pay the price." It commands "without sale," pure and simple.

Turning to traditional analysis of access to courts as protected under Article I, Section 21, appellants have cited Kluger v. White, 281 So.2d 1 (Fla. 1973), and Jetton v. Jacksonville Electric Authority, 399 So.2d 396 (Fla. 1st DCA 1981); rev. den. 411 So.2d 383 (Fla. 1981).

This Court has spoken to Article I, Section 21, Florida Constitution, since Kluger, supra, and Jetton, supra. In Smith v. Department of Insurance, 507 So.2d 1080, 1087-1090 (Fla. 1987), in considering and holding invalid a statutory cap on "noneconomic" damages, this Court specifically rejected the argument that legislative action is immune from the prohibitions of Article I, Section 21, unless it "totally" abolishes right of access.

Furthermore, in Smith v. Department of Insurance, supra, this Court at page 1089, specifically rejected the "total abolition or elimination" reasoning of Jetton v. Jacksonville Electric Authority, supra, holding that Jetton's viability was based upon separate principles respecting waiver of sovereign immunity. See also Caulev v. City of Jacksonville, 403 So.2d 379, 385 (Fla. 1981), respecting limitation upon scope or interpretation of Jetton, supra.

In Smith v. Department of Insurance, supra, in rejecting the argument that since the cause of action was not totally abolished, but damages only "capped," protected **access** was not denied, this Court observed at page 1089 in pertinent part:

> Further, if the legislature may constitutionally cap recovery at **$450,000**, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1. None of these caps, under the reasoning of appellees, would 'totally' abolish the right of access to the courts.

By like measure in the case **sub** judice, if the legislature **may** condition access to court on securing bond for attorney's fees of a defendant-adversary, there is no discernable reason why it might not impose unlimited additional financial pre-conditions an **access.**

In the instant case it is clear that the statutes do not pass constitutional muster. They neither provide a reasonable alternative, or quid pro **quo,** for the burden imposed nor rest upon a foundation of overpowering public necessity.

The challenged statutes, being wholly one-way in nature, lack the mutuality of benefit which provided statutory validity in Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). In Smith v. Department of Insurance, **507** So.2d 1080 **(Fla.** 987), this Court explained its Lasky decision as follows:

> In *Lasky,* we upheld a statutory provision which denied recovery for pain and suffering and similar intangible items of damages unless the plaintiff was able to meet a $1,000 medical expense threshold. We did so, however, because the legislature had provided such plaintiffs with an alternative remedy and a commensurate benefit. First, the vehicular no-fault insurance statute required that all motor vehicle owners obtain insurance or other security to provide injured persons with minimum benefits. . . . Second, under the no-fault insurance statute, any given vehicle owner was **as** likely to be sued

> as to sue and giving up the right to sue was compensated for by obtaining the right not to be sued. Thus, unlike here, the legislation we upheld in *Lasky* provided a reasonable trade off of the right to sue for the right to recover uncontested benefits under the statutory no-fault insurance scheme *and* the right not to be sued. Here, the benefits of a $450,000 cap on noneconomic damages run in only one direction because the potential plaintiffs and defendants stand on different footing.

In the case sub judice, the Lasky test is not met. First, only plaintiff is required to bond or provide security for attorney's fees. Second, plaintiff receives no statutory benefit whatsoever for the burden imposed upon right of access. In the words of Smith v. Department of Insurance, supra, here there is no "trade off" of benefits, and the benefits of the burden or restriction on access "run in only one direction."

It is equally clear that the statutes in question do not rest upon any foundation of "overpowering public necessity" as to the requirement of bonding for defendant's attorney's fees.

If an emergency or public necessity was demonstrated legislatively, that necessity was addressed by legislative restriction of actions against such defendants to instances wherein malice or fraud is present [Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988)]; by restriction af discovery of information or testimony from medical review proceedings [Hollv v. Auld, 450 So.2d 217 (Fla. 1984)]; and by creation of a one-way statutory entitlement of prevailing defendants to award of attorney's fees [§§395.011(10)(a); 395.0115(8)(a); 766.101(6)(a), Fla. Stat.].

There is no showing whatsoever of public necessity to go beyond the foregoing, ample remedial measures and impose an

additional burden upon access to court in the form of a financial precondition of bonding or securing defendant's potential attorney's fees regardless of claim merit.

In the case sub iudice the district court not only affirmed, but also stated that:

> We agree with Judge Ansted's well-reasoned dissent in Guerro v. Humana. Inc., 548 So.2d 1187 (Fla. 4th DCA 1989), and adopt it as our opinion in this case.

In Guerro v. Humana, Inc., supra, Judge Ansted noted in pertinent part at page 1188:

> The courts have consistently held that Article I, section 21 sharply restricts the imposition of monetary preconditions to asserting claims in court. G.B.B. Investments Inc. v. *Hinterkopf*, 343 So.2d 899 (Fla. 3d DCA 1977). While reasonable measures, like filing fees, have been upheld, monetary conditions that constitute a substantial burden on a litigant's right to have his case heard in court have been disfavored. In my view, the bond requirement violates that constitutional guarantee of access to the courts.

In that case Judge Ansted also considered this Court's prior pronouncements in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), and as to the guidance of same reasoned at page 1188:

> In effect, the statute creates a presumption that the claim is without merit and requires the claimant to provide for the defendant's fees and costs, up front. Of course, the actual entitlement to fees and costs cannot be determined until the merits of the case are decided. In addition, unlike the provisions in *Sparkman*, the bond requirement is not reciprocal, there being no provision for insuring the payment of claimant's fees and costs in the event that claimant's action proves to be meritorious. Even in Sparkman, the supreme court noted that the pre-litigation mediation requirement reached 'the outer limits of constitutional tolerance.' Id. at 806. If the merits-focused procedure involved in Sparkman was at the outer limits, surely the bond requirements involved herein have exceeded those limits.

Amicus Curiae respectfully submits that the decision below is entirely correct and must be affirmed. The district court properly held that the challenged statutes violated Article I, Section 21, Florida Constitution, in imposing on the fundamental right of access to court and redress of injury the financial pre-condition of bond or other security for defendant's potential attorney's fees, regardless of the ultimate merit of plaintiff's claim.

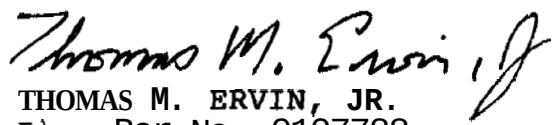
CONCLUSION

The decision of the district court should be affirmed. The statutes at issue impose an unreasonable and prohibited financial precondition on the right of access to court. The statutes are one-way in nature without reciprocity or mutuality of benefit as a saving feature. No overpowering public necessity is demonstrated.

If Article I, Section 21, Florida Constitution, may be legislatively circumvented in this fashion, then **every** group in Florida with powerful legislative influence may seek to burden the access to court of citizen-plaintiffs with correspanding, or greater, financial pre-conditions to suit. The fundamental guarantee of access to courts and redress of injury of Article I, Section 21, will be reduced to constitutional insignificance.

The decision of the district court properly upholds the Constitution of Florida and the right of access to court. This Court should affirm.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. mail to Philip Burlington, Esq., Suite 4-B, Barrister Bldg., 1615 Forum Place, West Palm Beach, FL 33401; Richard Smoak, Esq., Sale, Smoak, Harrison, Sale, McCloy & Thompson, Post Office Drawer 1579, Panama City, FL 32402; and Daniel M. Soloway, McKenzie & Millsap, P.A., 127 S. Alcaniz Street, Pensacola, FL 32513, this 23rd day of January, 1991.

Thomas M. Irvin, Jr.
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