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IN THE SUPREME COURT OF FLORIDA

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JAN 23 1991
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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

APPELLEE'S ANSWER BRIEF

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SUMMARY OF ARGUMENT

The requirements of Sections 395.011(10)(b) and 395.0115(5)(b), Florida Statutes (1987), and Section 766.101(6)(b) (1988 Supp.) that bond for attorney's fees be posted as a precondition to bringing suit against peer review physicians violates the right of access to counts guaranteed by Article 1, Section 21, of the Florida Constitution. The bond provisions are beyond the outer limits declared permissible by this Court for reciprocal, merits-based bond requirements.

STATEMENT OF THE CASE AND THE FACTS

While teaching at the School of Medicine of the University of California at San Diego, appellee, EDWARD A. SIEGEL, M.D., was recruited by a hospital corporation to practice psychiatry on the staff at HSA Gulf Coast Hospital (GCH) in Fort Walton Beach, Florida. Unknown to Dr. Siegel, the appellants had a closed agreement to staff GCH with the physicians, psychologists and other support positions needed. Appellants actively recruited the appellee far their own corporation and Dr. Siegel was warned by appellants not to take the hospital corporation's offer, lest he enter into the "crossfire". He ultimately accepted the hospital corporation's offer by written contract executed in early 1986.

Within months of accepting the position at GCH, Dr. Siegel was suspended from exercising his staff privileges at GCH. The appellants, utilizing their control of the executive, quality assurance and other peer review committees of the hospital, as well as their medical directorship positions, convinced the hospital corporation that Dr. Siegel was an impaired physician. Even after the nationally renowned Impaired Physicians Program in Atlanta certified that there was no impairment, appellants continued to use their positions to restrict Dr. Siegel's ability to practice medicine at GCH.

Appellee filed suit against appellants on or about March 4, 1988, alleging that they intentionally and unjustifiably interfered with his contract of employment with HSA Gulf Coast Hospital and intentionally inflicted upon him severe emotional distress under the guise of quality assurance. Appellants answered the Complaint on April 7, 1988, denying the material allegations and asserting privileges and immunities under common law and Florida Statute §768.40(1985). Respondent replied to such defenses on April 19, 1988, denying the affirmative defenses and alleging waiver of privilege due to fraudulent and malicious intent.

Following a year of discovery, appellants moved for summary judgment based upon its affirmative defenses and lack of supportive facts, on June 22, 1989. Following a hearing, Circuit Judge Erwin Fleet denied the Motion for Summary Judgment on August 30, 1989.

Following several more months of discovery, appellants filed, for the first time, a Motion to Require Bond sufficient to pay their costs and attorney fees, on November 6th, 1989. Trial judge Erwin Fleet denied appellants' Motion for Bond for Attorneys Fees, holding that the provisions of Sections 395.011(10)(b) and 395.0115(5)(b), Florida Statutes (1987), and §766.101(6)(b), Florida Statutes (1988 Supp.), for

bond or other security for attorney's fees, violate the guarantee of access to the courts provided by Article I, Section 21 of the Florida Constitution. On certiorari review by the District Court of Appeal, First District, the ruling of the trial court was sustained. Appellants then invoked the jurisdiction of this Court pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure.

ARGUMENT

THE TRIAL COURT AND DISTRICT COURT OF APPEAL CORRECTLY HELD THAT SECTIONS 395.011(10)(b), 395.0115(5)(b), FLORIDA STATUTES (1987), AND SECTION 766.101(6)(B), FLORIDA STATUTES (1988 Supp.), WERE UNCONSTITUTIONAL BECAUSE THEY VIOLATED THE RIGHT OF ACCESS TO THE COURTS GUARANTEED BY ARTICLE 1, SECTION 21, OF THE FLORIDA CONSTITUTION

There are two reasons why this Court should affirm the decisions of the trial court and District Court of Appeal in this matter. First, appellants filed their motion to impose bond for attorney's fees in an untimely fashion, severely prejudicing appellee. Should the Court agree that the motion was untimely, the constitutional issue need not be addressed in order to affirm the decision. Second, assuming that the motion to impose a bond for attorney's fees was timely, it is clear that the two lower courts were correct in their finding that the statutory provisions denied appellee's constitutionally-protected access to court.

I. The Motion To Impose Bond Was Untimely

All three statutes at issue in this appeal require the imposition of bond sufficient to pay the defendants' costs and attorney's fees before any responsive pleading is due. Florida

Statutes §§ 395.011(10)(b), 395.0115(5)(b), 766.101(6)(b). The appellants failed to raise the bond issue until appellee expended significant time and expense over nineteen (19) months in prosecuting his common law claims for intentional interference with contract and intentional infliction of emotional distress. These claims have survived appellants' motion for summary judgment, showing that there are genuine issues of material fact as to appellants' motivation in suspending Dr. Siegel's hospital privileges.

The failure of appellants to seek imposition of the bond requirement has a severe prejudicial effect on the appellee. Had the motion to impose bond been made in timely fashion as required, Dr. Siegel would have had the opportunity to weigh the pros and cons of proceeding with his claims prior to expending time and significant amounts of money in prosecuting those claims. The appellants waited more than a year and a half before seeking any bond, thus depriving Dr. Siegel of his opportunity to evaluate the potential loss of significant sums in paying appellants' attorney fees. No excuse has been offered by appellants for the untimely motion, neither in the lower tribunal, the District Court, nor in this Court. It can only be assumed that they were aware of the bond requirement and voluntarily chase not to seek imposition of bond

until respondent spent most of his resources prosecuting his claims.

The decision of appellants to wait for the action to get close to trial before seeking bond has obviously worked to the extreme prejudice of Dr. Siegel. He is no longer able to evaluate his claims against the potential of losing large sums of money in attorney's fees payable to appellants prior to expending his resources.

Based upon the untimeliness of appellants' motion in the Court below, together with the extreme prejudice to appellee in being deprived of his opportunity to fairly evaluate his claims against potential significant losses and his expenditure of large sums without such opportunity for such evaluation, the decisions of the trial and district courts should be affirmed on these grounds.

11. The Statutory Requirement Of Bond For Defendants' Attorney's Fees Is Unconstitutional

Article I, Section 21 of the Florida Constitution (1968), expressly provides as follows:

> "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."

The statutory bond requirement for attorney's fees directly conflicts with the right of access to courts. Where a person is unable to meet the bond requirement, there is no provision to retain a plaintiff's common law causes of action. That person's access to court is denied.

In Kluger v. White, 281 So.2d 1, 4 (Fla. 1973), this Court provided a clear expression of the strength and priority inherent in the access to court provision. The Kluger case held unconstitutional certain legislation which abolished a person's right of action in tort to recover property damage arising from an automobile accident, stating as follows:

> We hold, therefore, that where 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. Section 2.-01 F.S.A., the Legislature is without power to abolish such 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. See also Jetton **v.** Jacksonville Electric Authority, 399 So.2d **396** (Fla. 1st DCA, 1981), review denied, 411 So.2d 381 (Fla. 1981).

Rather than attempt to justify the abolition of Dr. Siegel's right of access to courts under Kluger, appellants

argue that the statutes at issue merely make it "more difficult" to maintain these common law actions (Appellants' Brief, pp. 14-15). This assertion is only correct if the Court assumes that all physicians, including those fraudulently suspended from practice and without income, are financially capable of affording bonds for attorney's fees potentially amounting to hundreds of thousands of dollars. While it may be tempting to agree that all physicians in Florida are wealthy, it must be assumed, for purposes of this appeal, that some doctors might find it more than "difficult" to post such a bond. For those physicians, their access to court is clearly abolished under the present statutory scheme, appellants assertions to the contrary notwithstanding.

Florida courts have generally disapproved of financial pre-conditions restricting a person's access to courts. For instance, in GBB Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977), the trial court restricted a mortgage foreclosure defendant from asserting a counterclaim unless he posted bond or cash covering the alleged mortgage debt, interest and taxes. In reversing, the District Court stated as follows:

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

> clerk to be used in constructing a county law library as a condition for bringing a lawsuit has been declared an undue burden on the right of free access to the courts. Flood v. State, ex rel. Homeland Co., 95 Fla. 1003, 117 So. 385 (1928). Requiring a defendant in a criminal case to pay court-appointed counsel fees and certain appellate costs as a condition for being heard on a motion for supersedeas bail following conviction has been struck down on the same ground. Bell v. State, 281 So.2d 361 (Fla. 2d DCA 1973). And requiring payment of a sum of money into the registry of the court unrelated to filing fees as a condition for defending a lawsuit has long been declared constitutionally impermissible. Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897).
> (343 So.2d at 901)

Moreover, court-related filing fees and costs bonds are not the same as bonds for attorney's fees. See, generally, Wiggins V. Wiggins, 446 So.2d 1078 (Fla. 1984). Assuming, arquendo, that filing fees and costs bonds can be analogized to the attorney fee bonds at issue here, it is extremely important to note that statutes requiring this financial precondition to access to court generally contain provisions for waiver of the financial requirements. For instance, nonresident plaintiffs are required to post bond for costs and their causes of action are subject to dismissal if they fail to do so. Florida Statutes, §57.011 (1967). The same plaintiffs are not denied access to courts, however, because that same chapter of law provides for the right to proceed in forma

pauperis without prepayment of costs. Florida Statutes, §57.081(1)(1980). The Florida Attorney General has opined that this waiver provision is applicable to appellate proceedings in the District Courts of Appeal and this Honorable Court as well. Op. Att'y Gen. Fla. 80-86 (November 4, 1980).

Additionally, statutes which require persons who seek to adopt children in Florida to pay publication costs for notice have been held by this Court to be unconstitutional without waiver provisions for indigents. Grissom v. Dade County, 293 So.2d 59 (Fla. 1974). This reasoning tracks the due process concerns under the United States Constitution as expressed in Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 113 (1971). In Boddie, the Supreme Court held unconstitutional Connecticut statutes requiring all plaintiffs seeking marriage dissolution to post court fees and costs for service of process as a condition precedent to access to the courts. Due process prohibited the state from denying access to courts far persons who were unable to pay, where no waiver provision existed to allow them to resort to the judicial process. Id. at 374, 383, 91 S.Ct. at 784, 788.

The lack of a waiver provision therefore reduces the subject legislation to statutes which deny access to court and impermissibly restrict constitutional rights of due process.

Appellants cite to this Court's decision in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) in an attempt to show that Florida's acceptance of reasonable cost bonds justifies acceptance of the bond requirements here. As noted above, however, cost bonds are not the same as bonds for attorney's fees. Wiggins v. Wiggins, supra. Moreover, these same cost bonds alluded to in Sparkman include waiver provisions which restore any lost due process or access to courts.

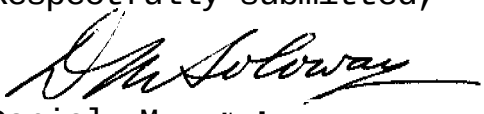
The thrust of appellants' argument is that the attorney fees bond at issue is a reasonable legislative action imposing reasonable restrictions as a pre-condition to prosecuting this type of claim, similar to the pre-suit mediation requirement in medical malpractice cases. These circumstances are not analogous to the pre-suit mediation requirements of the Comprehensive Medical Malpractice Act of 1985 which were upheld in Carter v. Sparkman, supra. The instant bond requirements do not contain any provision for addressing the merits of Dr. Siegel's claims before bond must be posted. Unlike the provisions in Sparkman, Dr. Siegel has no reciprocal right for payment of his costs and fees when the jury returns a verdict in his favor. In specifically citing to these major distinctions, Judge Anstead of the Fourth District Court of Appeal dissented from the decision in Guersero v. Humana, Inc., 548

So.2d 1187 (Fla. 4th DCA 1989). In Guerrero, the trial court ordered Dr. Guerrero to post a bond of $150,000 for the defendant's attorneys fees before he could proceed with his action. A Petition for Certiorari was denied, per curiam by the District Court. Judge Anstead's dissent sets out much of Dr. Siegel's argument and in order to avoid repetition herein, the Court is urged to review this opinion. The First District Court of Appeal did so, and adopted this well-reasoned dissent as its opinion in this case.

CONCLUSION

The stat tory provisions which require bond for attorney's fees as a precondition for bringing a suit against physicians who use peer review powers to fraudulently restrict another physician's practice are unconstitutional. The statutes are not based upon the merits of the claim, nor are they applied to both parties. There is no waiver provision far physicians who are not wealthy and lose their action entirely. These provisions exceed the outer limits of the merits-focused procedure in Carter v. Sparkman and violate appellant's constitutional right of access to courts and due process guaranteed in Florida.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to the fallowing-named counsel for the appellants at the address shown by regular U. S. Postal Service on this 18th day of January, 1991:

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