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.

EDWARD A. SIEGEL, M.D.,

Appellee

CASE NUMBER 76,844

APPELLANTS' MAIN BRIEF

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SUMMARY OF ARGUMENT

The requirements of Sections 395.011, 395.0115, and 766.101, Florida Statutes (1989) that bond for attorney's fees be posted as condition precedent to bringing suit against physicians because of their participation in quality assurance and pees review do not violate the right of access to courts of Article I, Section 21, Florida Constitution. The statutes are a reasonable and limited restriction which is justified by the necessity to protect public health and welfare.

STATEMENT OF THE CASE AND OF THE FACTS

Appellants, Alvin Neumeyer, Eugene Valentine, and Frank Gill, are physicians who specialize in psychiatry in Okaloosa County. Psychiatric Associates is their professional service corporation. The three physicians were members of the medical staff of HSA Gulf Coast Hospital, a private psychiatric hospital in Okaloosa County. Doctor Neumeyer was president of the medical staff, the hospital medical director, and the chairman of the executive committee. Doctors Valentine and Gill were members of the executive committee. The executive committee was charged with the responsibilities of quality assurance, peer review, and the regulation of medical staff privileges,

The appellee, Edward A. Siegel, is a psychiatrist who entered into a written employment contract with HSA Gulf Coast Hospital in early 1986 to serve as a full time staff member. By June of 1986, the corporate owner of the hospital had become concerned because of reports of Dr. Siegel's behavior in the hospital that he might be an impaired physician. Reports had been

made by one of the Appellants, Dr. Valentine; by members of the non-physician staff of the hospital; and by the hospital administrator. Consequently, the corporate medical director instructed Dr. Valentine, who was serving as acting chairman of the executive committee and president of the medical staff in Doctor Neumeyer's absence, to summarily, but temporarily, suspend Dr. Siegel's medical staff privileges. Dr. Gill was designated to deliver the notice of summary suspension to Dr. Siegel, primarily out of concern that Dr. Gill might be best suited to be a non-threatening and possibly supportive messenger. Neither Neumeyer nor Gill had made any reports about Siegel. The corporate ownership subsequently required that Dr. Siegel undergo evaluation at an impaired physician's program. Upon receiving the report of the evaluation of Dr. Siegel by that program, Dr. Siegel's medical staff privileges were reinstated subject to the conditions that he consult weekly with the hospital medical director about his patient care and submit monthly reports of these consultations to the corporate

medical director. However several weeks later, Dr. Siegel left his duties at the hospital and has remained absent to this time.

The appellee filed this suit in the circuit court of Okaloosa County, and his initial complaint alleged two claims: (1) that the appellants wrongfully interfered with his contract of employment with the hospital; and (2) that the appellants intentionally inflicted emotional distress upon the appellee. Both of appellee's theories were based upon his perception of the appellants' roles in the events leading to his summary temporary suspension from the medical staff and his subsequent conditional reinstatement to the staff.

Because appellee's claim against them arose out of their executive committee responsibilities for quality assurance, peer review, and regulation of physician staff privileges, appellants asserted in their defenses that they were entitled to the statutory immunities provided by Sections 395.011, 395.0115, and 766.101, Florida Statutes (1989). They filed a motion to require the appellee to post a bond for attorney's fees

and costs, as required by identical provisions of all three statutes. The trial judge granted part of the relief sought by the motion and required the appellee to post a cost bond for $5,000.00. However, the trial judge held that the provisions of Section 395.011 (10)(b), 395.0115(5)(b), and 766.101(6)(b) for bond or other security for attorney's fees unconstitutionally violated the right of access to the courts provided by Article I, Section 21, Florida Constitution.

The appellants then sought certiorari review by the District Court of Appeal, First District. That appellate court denied appellants' petition for review and in its September 27, 1990, opinion, held that the provisions of three statutes, which require posting of bond or other security for attorney's fees unconstitutionally violated the right of access to the courts provided by Article I, Section 21, Florida Constitution.

The appellants now appeal the decision of the District Court of Appeal pursuant to Rule 9.030(a)(1)(A)(ii), Florida Rules of Appellate Procedure.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRONEOUSLY HELD THAT SECTIONS 395.011(10)(b), 395.0115(5)(b), AND 766.101 (6)(b), FLORIDA STATUTES (1989), WERE UNCONSTITUTIONAL BECAUSE THEY VIOLATED THE RIGHT OF ACCESS TO THE COURTS GUARANTEED BY ARTICLE I, SECTION 21, OF THE FLORIDA CONSTITUTION. THE STATUTES ARE A REASONABLE AND LIMITED RESTRICTION WHICH IS JUSTIFIED BY THE OVERPOWERING NECESSITY TO PROTECT PUBLIC HEALTH AND WELFARE.

Each of the three statutes involved in this appeal contains substantively similar provisions which require an aggrieved physician to post bond for attorney's fees and costs as a condition precedent to filing a civil suit against persons who participated in proceedings involving medical staff privileges, peer review, or quality assurance.

Section 395.011 requires that hospitals establish procedures for consideration of matters involving medical staff privileges. The pertinent portion of that statute, subsection 10(b), reads as follows:

> **(b)** As a condition of any applicant bringing any action against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the applicant 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.

Section 395.0115 requires hospitals to establish procedures for handling matters of physician peer review, and subsection 8(b) reads as follows:

> (b) As a condition of any staff member or physician bringing any action against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the staff member or physician 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.

Section 766.101 deals with medical review committees which deal with peer review or utilization review "...to evaluate and improve the quality of health care...", and subsection 6(a) reads:

> (b) As a condition of any health care provider bringing any action against any person that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the health care provider 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.

The trial judge and the District Court of Appeal erroneously held that these three statutory provisions are unconstitutional because they violate the right of access to the courts guaranteed by Article I, Section 21, Florida Constitution.

The three statutory provisions are integral parts of the effort by the Florida Legislature to prevent medical malpractice. The three provisions were parts of the Comprehensive Medical Malpractice Reform Act of 1985, Ch. 85-175, 1985 Fla. Laws 1180, which was a concerted effort to resolve the medical malpractice crisis which threatened both the availability and quality of health care in Florida. An apt description at the time was that Florida had become a "medical Beirut,"

This legislation had as its foundation the recommendation of the Governor's Task Force on Medical Malpractice which was created by Governor Bob Graham by Executive Order number 84-202. After six months of hearings and research, the Governor's Task Force issued its report, "Toward Prevention and Early Resolution."

On the subject of peer review, the Task Force reported:

> The hospital has an affirmative duty to ensure that only competent physicians are appointed to its medical staff, that those admitted are given clinical privileges according to their qualifications, and that staff physicians are evaluated periodically to ensure their continuing competence." (page 63).
>
> The state should encourage peer review and reduce the risks associated with it. Physicians currently feel vulnerable to suit if they candidly participate in peer review activities. This has acted as a deterrent to strong peer review among providers. (page 64).
>
> When a physician is removed from the hospital staff or is otherwise disciplined in a peer review situation, he will sometimes bring a suit against the physicians on the peer review committee. The suit is usually based on a myriad of complaints. They include restraint of trade, a lack of due process, defamation, violation of civil rights, and so forth. (page 64).
>
> When the individual physician sitting on a peer review panel is sued and personal assets are then threatened, it results in physicians being unwilling to participate further in these activities. Few mechanisms are in place to protect the physician who participates in peer review from these types of suits. (page 64).
>
> If incentives could be provided to encourage meaningful peer review participation, the inept provider could have his practice restrained to areas of competence. This

> should result in a reduction on the number of patient injuries caused by negligence. The overall quality of care would be improved and public confidence about the quality and competence of practitioners would be enhanced. (page 64)

As its Recommendation 8 the Task Force proposed:

> A person who files a civil action seeking damages against a peer review participant shall be required to post a bond sufficient to pay costs and attorney's fees in the event that the plaintiff is unsuccessful... .The requirement to post a bond is designed to act as a deterrent to filing a civil action only as a means to leverage or intimidate peer review participants. (page 75)

Based upon the report of the Governor's Task Force, the Florida Legislature enacted Chapter 85-175, Laws of Florida, which created the statutory bond requirement involved in this appeal. The preamble to the legislation clearly sets forth the overpowering state interest in the protection of the public health and welfare.

> **WHEREAS,** high-risk physicians in this state sometimes pay disproportionate amounts of their income for malpractice insurance, and
>
> **WHEREAS,** professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and

WHEREAS, the maximum rates for essential medical specialists such as obstetricians, cardiac-vascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists have become a matter of great public concern, and

WHEREAS, the premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine" as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and

WHEREAS, this situation threatens the quality of health care services in Florida as physicians become increasingly wary of high risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates, and

WHEREAS, this situation also poses a dire threat to the continuing availability of healthcare in our state as new young physicians decide to practice elsewhere because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates, and

WHEREAS, our present tort/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, unless fundamental reforms of said tort law/liability insurance system are undertaken, and

WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic

legislative action, and

WHEREAS, medical injuries can often be Prevented through comprehensive risk management programs and monitoring of physician quality, and (emphasis supplied)

WHEREAS, it is in the public interest to encourage health care providers to practice in Florida.

The legislature determined that the prevention of injury by medical malpractice would be instrumental in resolving the long-running debate about medical malpractice in Florida, The legislature recognized that most medical malpractice occurs in hospitals. Consequently, **the** legislative remedy imposes responsibility upon **hospitals** to insure that incompetent medical care is not provided by hospital staff physicians. ***See,*** C. **Hawkes,** The Second Reformation: Florida's Medical Malpractice Law, **13** Fla. St. U. L. Rev. 747 (1985).

As a foundation of the legislative remedy, Section 766.110 imposes upon hospitals a duty "...to assure comprehensive risk management and the competence of their medical **staff.,."** That statute provides for

liability of the hospital when the hospital's failure to comply with the statute's duty results in injury to a patient. The three statutes involved in this petition, 395.011, 395.0115, and 766.101 then provide for review of physician privileges, peer review, quality assurance, and risk management to accomplish the duty imposed on hospitals. Other physicians are probably best qualified and are in the best position to identify substandard care by other physicians; the physicians' participation in the processes is essential. To encourage the physicians' full and willing participation, all three statutes confer upon physicians immunity for their actions. Physicians are immune from retaliatory law suits by physicians disgruntled with the review processes unless the participating physicians act with intentional fraud. In the event a disgruntled physician is not successful in proving that a participating physician acted with intentional fraud, the statutes provide that the physician who was the target of the suit may recover attorney's fees and costs. The legislature apparently

recognized that the right to recover attorney's fees and costs should not be illusory and that the physician who answered the statutory call to participate in good faith in quality assurance and peer review should not suffer the financial injury which is inevitable even in a successful defense against a suit by a physician disgruntled with the result of the review processes. In short, the legislature has imposed a reasonable requirement of the payment of a premium for a bond for costs and attorney's fees to encourage the essential physician participation to accomplish the legislative goals.

The bond requirement of the three statutes are reasonable efforts by the legislature to achieve a proper legislative exercise of the police power in the area of public health and welfare. The statutes do not abolish a disgruntled physician's right to sue participants for intentional fraud in the peer review and quality assurance process. while the statutes may make it more difficult for an aggrieved physician to sue his peers and hopefully cause sober reflection of

the potential costs, the statutes do not abolish the right to sue. This Court recognized in its key decision of Kluger v. white, 281 So.2d 1 (Fla. 1973), that it is abolition without reasonable alternative or an overpowering public necessity which violates the constitutional right of access to the courts:

> We hope, 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, OK 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. 1982)

The earlier statutory requirement for presuit mediation of medical malpractice claims was also subject to challenge as violating the guarantee of access to the courts. However, this Court held in

Carter v. Sparkman, 335 So.2d 801 (Fla. 1976):

> Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law. Typical examples are the fixing of a time within which suit must be brought, payment of reasonable cost deposits, pursuit of certain administrative relief such as zoning matters or workmen's compensation claims, or the requirement that newspapers be given the right of retraction before an action for libel may be filed.
>
> Cases are legend which hold that the police power of the state is available in the area of public health and welfare, and we must, therefore, consider matters pursued under the law sub judice as being separate and distinct from the marketplace. At the time of the enactment of the legislation in question, sub judice, there was an imminent danger that a drastic curtailment in the availability of healthcare services would occur in this state. Id. at 805. (Emphasis supplied).

Only after several years' experience with the mediation statutes did this Court ultimately determine in Aldana v. Holub, 381 So.2d 231 (Fla. 1980), that the operation and effect of the mediation statutes violated the guarantee of access to the courts. At the time, the Court conducted "a painstaking examination" of over seventy cases and took judicial notice that the

mediation statutes simply had failed in operation to achieve the intended purposes. Id. at 236. The Court emphasized that its decision was based upon the proven practical operation of those statutes and was not a reevaluation of its original decision that the statutes were facially constitutional. Id. at 237.

In Holly v. Auld, 450 So.2d 217 (Fla. 1984), this Court considered another statutory effort to encourage physician participation in peer review and quality assurance. At issue was Section 768.40, Florida Statutes, which prohibited discovery of information developed during peer review proceedings. The Court upheld the application of that statute to all civil actions and quashed the effort of the district court of appeal to limit the application of the statute. The Court's analysis of the legislative intent behind that statute is particularly pertinent to the three statutes in question in this case:

> The preamble and language of that enactment readily reveal the legislature's intent and its policy reasons. In an effort to control the escalating costs of health care in the state, the legislature deemed it wise to encourage a degree of self-regulation by the

> medical profession through peer review and evaluation. The legislature also recognized that meaningful peer review could not be possible without a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues
>
> Inevitably, such a discovery privilege would hinge upon the rights of same 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 costs containment offered by effective self-policing by the medical community and found that 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.

This Court considered a later challenge to Section 760.40, Florida Statutes, in Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988). At issue were the statutory immunity granted to participants in peer review and the prohibition against discovery of peer review information. The district court of appeal had held that the statute totally abolished a **cause** of action for defamation arising out of peer review proceedings. The district court of appeal certified its decision and the question whether its interpretation of the statute

caused the statute to violate the constitutional right of access to the courts. This Court held that Section 768.40 did not totally abolish a cause of action for defamation because the statute specifically limited to the immunity to peer review activities which were without malice or fraud. The Court also found that the prohibition against discovery of peer review information did not effectively abolish a cause of action for defamation because the same information could properly be developed from sources other than the record of the peer review proceedings. Consequently, the Court determined it was unnecessary to consider the constitutional issue of right of access to the courts. However, appellants contend here that the Court's reasoning in Glucroft confirms that there must be a complete abolition of an existing cause of action before a limitation runs afoul Article I, Section 21, Florida Constitution.

By its Rule of Civil Procedure 1.420(d), this Court has recognized that it may indeed be proper to make it more difficult for a litigant to proceed with a

claim if there has been reason to question the sincerity of the litigant's intentions:

> **(d)** Costs. ...If a party who has once dismissed a claim in any court of this State commences an action based upon or including the same claim against the same adverse party, the Court shall make such order for the payment of costs for the claim previously dismissed as it may deem proper and shall stay the proceedings in the action until the party seeking affirmative relief in the action has complied with the order.

The first appellate court in Florida to consider the statutory requirement for posting a bond as a condition precedent to bringing a lawsuit against a participant in peer review was the District Court of Appeal, Fourth District, in Guerrero v. Humana, Inc., 548 So.2d 1187 (Fla. 4th DCA 1989). The dissenting opinion contains the facts of that case. The trial judge ordered the plaintiff to post a bond of $150,000.00 to cover the defendant's costs and attorney's fees. The trial judge specifically stated in his order that the statutory requirement did not abolish the physician's right to sue. Judge Anstead's dissent argued that the statutory requirement of the bond did violate Article I, Section 21, Florida

Constitution. In the present appeal, the First District took Judge Anstead's position:

> We approve the trial court's ruling that Section 395.011 (10)(b) and 395.0115 (5)(b), Florida Statutes (1987), and Section 766.101 (6)(b), Florida Statutes (Supp. **1988),** which required the posting of 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 own opinion in this **case.** Index at 1.

Shortly before **its decision** in the present case, the First District considered **the** statutory requirement for bond in Sittig v. Tallahassee Memorial Regional Medical Center, Inc., 15 FLW **2338** (1st DCA September 13, **1990).** In Sittig, **a** different panel of the First District found that the application of the **statute in** that particular case was unconstitutional. The plaintiff had offered evidence that she lacked the financial ability to post the bond. The court expressly avoided the issue of facial unconstitutionality. In the **present** case, Dr. Siegel

offered no evidence of financial inability to post a bond, and the different panel in this appeal based its decision upon a determination of facial unconstitutionality of the statutes.

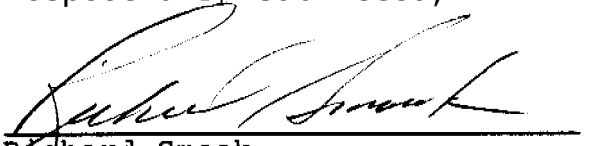
The Florida Legislature recognized that the active and willing participation of physicians in the peer review process was indispensible to reduce the incidence of medical malpractice and to improve the quality of patient care in Florida. To secure the physician's participation, the Legislature adopted three very important provisions. First, it granted immunity, absent fraud or malice, to participating physicians. Second, it provided that information produced during peer review proceedings would remain confidential. Third, a disgruntled physician would first have to post a bond for costs and attorney's fees before he could sue the participants in the peer review process. The participating physicians would be assured that even a successful defense of a retaliatory lawsuit would not result in a Pyrrhic victory of financial ruin. Unless all of the triad are upheld and given a

thorough opportunity to prove, or disprove, the soundness of the Legislature's decision, Florida will continue to be known as a "medical Beirut," and even the most conscientious and selfless physicians will avoid participation in peer review and exposure to the hostile fire which is sure to follow.

CONCLUSION

The statutory provisions which require bond for attorney's fees as a condition precedent for bringing a suit which arises out of responsibilities of peer review, quality assurance, and risk management are a reasonable imposition upon the constitutional right of access to the courts. These statutes have a reasonable relationship to the accomplishment of a valid legislative purpose: the prevention of injuries by incompetent medical care. The appellants request that this Court declare that the statutes are constitutionally valid and direct that the appellee be required to post a bond for a reasonable attorney's fee as condition precedent to prosecuting his suit against the appellants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of Appellants' Main Brief has been furnished to Mr. Daniel M. Soloway, McKenzie & Millsap, P.A., 127 S. Alcaniz Street, Pensacola, Florida 32513 by regular U. S. Mail on December 31, 1990.

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