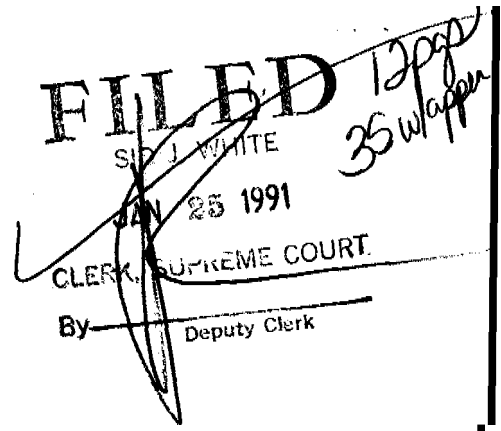
IN THE SUPREME COURT OF FLORIDA



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' REPLY BRIEF

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ATTORNEYS FOR APPELLANTS

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RESPONSE TO APPELLEE'S STATEMENT OF THE FACTS

In his statement of the facts, appellee suggests that appellants acted with sinister motives and that they were solely responsible for the temporary summary suspension of the appellee from the hospital staff. While appellee's contention is not germane to the constitutional issue presented by this appeal, it requires response.

Doctor Robert V. Norris was the corporate medical director of Healthcare Services of America, Inc., the Owner of the psychiatric hospital, and his deposition testimony clearly illuminates the true reason for appellant's suspension:

> Q. At that point would it be a fair summary that based upon the reports you have been receiving from Mr. Plasbesg [the hospital administrator] for the past several weeks and the conversations you had had with Dr. Neumeyer, the written quality assurance report, and then the call from Dr. Valentine, that you, as corporate medical director, based upon your experience, felt that there was then reason for genuine concern for patient safety because of these reports of Doctor Siegel's conduct?
>
> A. Yeah, the reports that they had been giving me, as I said, for me had gotten to the point where when Doctor Valentine's call

came, the issue as to whether Doctor Siegel was impaired or not was a code [sic] in question and how that question got answered would depend on how they should deal with it. (Norris deposition at 55; Appendix to Reply Brief at page 11)

Q. Doctor Norris, given the nature of the reports and the several sources of reports about Doctor Siegel's behavior, based on your experience and then your responsibilities at the time as a corporate medical director, was it the prudent and good faith action to take to temporarily suspend Doctor Siegel at that time until there could be an evaluation of him?

A. I believe so.

Q. Are you satisfied that the participants at the time, Mr. Plasberg [the hospital administrator], Doctor Neumeyer, Doctor Valentine, and any of the people at the hospital who were giving them the reports, because they were obviously coming from other people to Plasberg, that they acted in good faith in voicing these concerns to you and discussing the action which should be taken.

. . . .

A. I have no reason to doubt anyones good faith.

Q. You understood, did you not, that all of the people with whom you were discussing these problems were generally concerned about the possible harm to patients if the situation was allowed to continue without some action being taken?

A. Yes.

(Norris deposition at 67-68; Appendix to Reply Brief pages 12, 13)

RESPONSE TO APPELLEE'S CLAIM OF WAIVER

Appellee contends that appellants waived the statutory requirements for appellee to post a bond for attorneys fees because appellants did not file a motion to require the bond until later in the litigation. Appellee's reading of the three statutes is incorrect. The three statutes do not place any obligation upon the defending party to move or initiate any action to require the posting of the bond. All three statutes make it mandatory that the aggrieved physician post the bond or other security. It is not a requirement that can be waived by the defending party.

Appellee contends that unless the defending party files a motion to require the bond before his responsive pleading is due, the defending party has waived the statutory requirements for the bond. However, a fair reading of the three statutes must conclude that it is not a time limit upon the defending party. To the contrary, it is a limitation upon the aggrieved physician who is attempting to bring the

suit; he must post the bond before the defending party or parties are required to file any responsive pleading. However, even under the appellee's interpretation, the appellants are still entitled to ask that the statutory requirement be enforced. The appellants filed their motion to require the bond on November 6th, 2989. Subsequently, the appellee served an amended complaint on July 18th, 1990, which added three additional counts alleging violations of federal and state restraint of trade statutes. (Appendix to Reply Brief at pages 14 - 32) Appellants' motion to require the bond had been served November 6, 1989, well in advance of their required response to the amended complaint.

Appellee claims he has been prejudiced because the appellants did not file **their** motion to require the bond until later in the litigation. Appellee contends that had he been confronted with a bond at the outset of the litigation, he would then have had "...the opportunity to weigh the pros and cons of proceeding with his claim..." and "...to evaluate the potential

loss of significant sums in paying appellants' attorneys fees." (Appellee's answer brief at page 6). This argument by appellee proves with startling clarity the necessity to require the posting of a bond far costs and attorneys fees in lawsuits by physicians aggrieved with peer review or quality assurance action. There should be an incentive for sober reflection before embarking upon a lawsuit with possible motives of mischief and retaliation. By his argument, appellee appears to acknowledge that he did not otherwise weigh the merits of his claim before proceeding with his lawsuit. Presumably, appellee and his counsel were aware that he was subject to the statutory requirements for bond and chose to disregard them. Appellee's claim that he was deprived of the opportunity to evaluate his exposure to attorneys fees is not worthy of serious consideration. All three statutes make it abundantly clear, notwithstanding the bond requirements, that appellee would be subject to a mandatory award of attorneys fees in the event he was unable to prove the requisite bad faith or intentional fraud:

395.011 Staff Membership and Professional Clinical Privileges. -

. . . .

(10)(a) In **the** event that the defendant **prevails** in an action brought by an applicant against any person or entity that initiated, participated in, **was a** witness in, or conducted any review **as** authorized by this section, the court shall award reasonable attorneys fees and costs to the defendant.

395.0115 **License** Facilities; **peer** Review; Disciplinary **Powers.** -

. . . .

(a)(a) In the event that the defendant prevails in an action brought by **a** staff member or a physician who delivers health **care** services at the facility against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized **by** this section, the court **shall** award reasonable attorneys fees and ***costs*** to the defendant.

766.101 Medical Review Committee, Immunity from Liability. -

. . . .

(6)(a) In the event that the defendant prevails in an action brought by a health care provider against any person that initiated, participated in, was a witness in, or conducted any review as authorized by this section the court shall award reasonable attorneys fees and costs to defend it.

Yet, appellee now tells this Court that he did not adequately evaluate the merits of his claims and his potential liability for attorneys fees and costs because there was not an earlier effort to require him to post a bond. There could be no more compelling example of the need for the bond. Enough said.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of Appellants' Reply 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 January 24, 1991.

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APPENDIX

TO

APPELLANTS'

REPLY BRIEF