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FILED
SID J. WHITE
OCT 2 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 78,017

COMMUNITY HOSPITAL OF THE PALM BEACHES, INC., etc., et al.,

Appellants,

-vs-

LUIS GUERRERO, M.D.,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY

STATUTES

PREFACE

This is a direct appeal from a Decision of the Fourth District Court of Appeal determining that certain Florida Statutes were unconstitutional. The parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(A) - Appellant's Appendix

STATEMENT OF THE CASE AND FACTS

Appellant's Statement of the Case and Facts is, for the most part accurate. However, certain statements in the Defendants' brief require comment. The Plaintiff does not agree that he abandoned his United States Constitutional claims by not raising them in his initial Petition for Writ of Certiorari, as claimed by the Defendants on page five of their brief. Those issues could be raised on plenary appeal, and were not abandoned simply because they were not included in the Petition for Writ of Certiorari.

Defendants claim that the Plaintiff changed his position on the eve of the hearing on his Motion to Clarify his Indigency Status (Appellant's Brief p.6). The Plaintiff did not change his position, rather the decisions in PSYCHIATRIC ASSOCIATES v. SIEGEL, 567 So.2d 52 (Fla. 1st DCA 1990) and SITTIG v. TALLAHASSEE MEMORIAL REGIONAL MEDICAL CENTER, 567 So.2d 486 (Fla. 1st DCA 1990), had issued and bound the trial court to rule that the statutes were unconstitutional. The Fourth District's

decision in GUERRERO I was a simple per curiam affirmance and, therefore, was not precedent binding the Circuit Court, while the First District's decisions did constitute binding precedents. As a result, the evidentiary hearing was moot.

Defendants claim that they petitioned for writ of certiorari from the trial court's order determining that the statutes at issue were unconstitutional because that order "directly contradicted the Fourth District's decision in Guerrero I" (Appellant's Brief p.7). However, the Fourth District's decision in GUERRERO I was a simple per curiam affirmance with no opinion (other than a dissenting opinion of Judge Anstead) and, therefore, it was not precedential authority which could engender any conflict.

On pages 7 through 8 of their brief, the Defendants address certain events in the trial court which occurred subsequent to the order determining the unconstitutionality of the statutes at issue. These matters were not of record in the Fourth District, nor were they argued there. Therefore, they are not properly raised in this Court.[1]

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[1]/A Motion to Strike the portions of the Appendix referred to regarding these matters is being filed contemporaneously with this brief.

POINTS ON APPEAL

POINT I

THE TRIAL COURT PROPERLY CONCLUDED THAT §§395.011(10)(B), 395.0115(5)(B), AND 766.101(6)(B), FLA. STAT. (1989), ARE UNCONSTITUTIONAL AS VIOLATING THE RIGHT OF ACCESS TO COURTS GUARANTEED BY ARTICLE I, §21 OF THE FLORIDA CONSTITUTION. [THIS POINT ADDRESSES POINTS I AND III OF APPELLANTS' BRIEF.]

POINT II

FLA. STAT. §57.081 DOES NOT APPLY TO BOND PREMIUMS OR ATTORNEY'S FEES AND, THEREFORE, IS IRRELEVANT TO THE ISSUES BEFORE THIS COURT. [THIS POINT ADDRESSES POINT IV OF APPELLANTS' BRIEF.]

SUMMARY OF ARGUMENT

The Fourth District, consistent with the First District, properly determined that Fla. Stat. §§395.011(10)(B), 395.0115(5)(B), and 766.101(6)(B) are unconstitutional as violating the right of access to courts guaranteed by Article I, §21 of the Florida Constitution. Florida courts have consistently held that financial impediments to judicial consideration of cases are unconstitutional unless they are limited to reasonable court costs. In the case sub judice, the Plaintiff was required, as a result of the statutes at issue, to post a bond of $150,000 as a prerequisite to any judicial consideration of his case. At a minimum, that would require the payment of a bond premium of approximately $15,000, with the requirement of securing the obligation with property worth $150,000. Such an impediment is unconstitutional as it does not act to eliminate meritorious suits, it simply prevents those without means from getting their cases resolved.

The Defendants' reliance on general medical malpractice cases and the line of cases addressing whether causes of action can be abolished by the legislature is unpersuasive. Those cases do not address the issue in this case which is, quite simply, whether such a significant financial impediment to judicial consideration violates Article I, §21 of the Florida Constitution, The heavy reliance on the perceived medical malpractice crises is also unpersuasive since constitutional provisions are not to be disregarded because of expediency, nor because the legislature has passed statutes in response to an alleged crisis. One of the most basic principles of our jurisprudence is that the legislation which violates constitutional provisions must be declared invalid.

Additionally, the Fla. Stat. §57.081 is irrelevant to this case since that only permits indigent litigants from having to pay court costs. That statute does not apply to bond premiums or to attorney's fees. Therefore, that statute cannot be relied upon as providing an avenue for upholding the constitutionality of the statutes at issue.

For the reasons stated above, the Fourth District should be affirmed, and the statutes should be declared void as violating Article I, §21 of the Florida Constitution.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY CONCLUDED THAT §§395.011(10)(B), 395.0115(5)(B), AND 766.101(6)(B), FLA. STAT. (1989), ARE UNCONSTITUTIONAL AS VIOLATING THE RIGHT OF ACCESS TO COURTS GUARANTEED BY ARTICLE I, §21 OF THE FLORIDA CONSTITUTION. [THIS POINT ADDRESSES POINTS I AND III OF APPELLANTS' BRIEF.]

The statutes at issue in this case require that a physician challenging the denial, revocation, or limitation of his hospital privileges or other peer review action must file, as a prerequisite to court resolution, a bond for the full amount of the defendants' anticipated costs and attorney's fees. Absent the posting of such a bond, the defendants have no obligation to take any action to defend the lawsuit, and it simply remains dormant. These provisions clearly violate Article I, §21 of the Florida Constitution, as determined by the Fourth District in this case. The Fourth District adopted the reasoning of the dissenting opinion of **Judge** Anstead from GUERRERO I, which was also adopted by the First District in PSYCHIATRIC ASSOCIATES v. SIEGEL, 576 So.2d 52 (Fla. 1st DCA 1990).

Article I, §21 of the Florida Constitution provides:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The Fourth District characterized the right created by that provision as a fundamental right of access to the courts.[2] The

[2]/In GUERRERO 11, the Fourth District adopted the reasoning of the dissenting opinion of Judge Anstead in GUERRERO I. For ease of reference, the contents of that dissenting opinion will simply be referred to as the opinion of the Fourth District, although cites for quotations will be to Judge Anstead's dissenting opinion in GUERRERO I.

fundamental nature of that right is apparent from its historical background. A virtually identical provision was contained in Chapter 29 of the Magna Carta, which contained the clause, "To none will we sell, deny, or delay right or justice," T. PLUCKNETT, A Concise History of the Common Law, 24 (5th Edition 1956). That clause in the Magna Carta was paraphrased in the original constitution of the State of Florida, see 1838 Florida Constitution, Article I, §9. A similar provision has been retained in every subsequent version of the Florida Constitution.

The access to courts provision has been consistently applied to invalidate legislation or court rulings which impose financial burdens, other than reasonable court costs, as a prerequisite to judicial consideration. In FLOOD v. STATE EX REL HOMELAND, 117 So. 385 (Fla. 1928), the Court reviewed the propriety of legislation which imposed a supplementary docket fee of ten dollars to be paid by a plaintiff upon the institution of any civil action with more than $500 at issue (Chapter 12,004, Acts 1927). The funds generated by the docket fee were to be retained by the county and utilized for the establishment of a law library or for other general county purposes. The Court noted that despite its characterization as a "fee," the additional charge was in fact a tax levied and collected for a county purpose, since no part of it was appropriated for the payment of any services rendered by the clerk of the court. As a result, the legislation was repugnant to the access to courts provision of the Florida Constitution (117 *So.* at 387):

> The act is clearly an attempt to levy a tax on those who must bring their causes into court and to require the payment of such tax for the benefit of the public treasury, and is an abrogation of the administration of right and justice.

The opinion then quoted with approval from MALIN V. LA MOURE **COUNTY, 145** N.W. 582, 586 **(N.D. 1914), (117** ***So.*** at 387):

> [F]ree and reasonable access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to everyone.

Since FLOOD, Florida courts have consistently invalidated any financial conditions, other than reasonable court costs, imposed on the right to pursue judicial relief. In BELL V. STATE, 281 So.2d 361 (Fla. 2d DCA 1973), the trial court ordered the defendant to reimburse the State for **the** cost of **the** trial transcript and the prasecution **of** the **case** against him **as** a prerequisite to consideration of his request for a supersedeas bond. The Second District vacated that order, concluding that to require the defendant to pay those **costs** prior to having consideration of his bail request constituted a violation of the access to courts provision of the Florida Constitution. The court's decision underscores the fundamental nature of the right at issue. The order of the trial court did not impose the financial condition as a prerequisite to the defendant's right to pursue his appe1late remedies, but solely the issue **of** the supersedeas bond. The Second District, obviously considering the fundamental nature of the access to courts provision, determined that it precluded not only financial conditions which impeded resolution of the merits, but also those which interfered with

the resolution of other collateral issues such as release pending appeal.

In G.B.B. INVESTMENTS, INC. v. HINTERKOPF, 343 So.2d 899 (Fla. 3d DCA 1977), a mortgage foreclosure action, the trial court ordered that the defendant's counterclaim would be dismissed unless it deposited in the court registry the amount due on the mortgage, plus delinquent interest and taxes. The Third District reversed that order, concluding that such a financial precondition to suit was in "direct collision with G.B.B.'s constitutional right to free access to the courts." The court stated (343 So.2d at 901):

> It [Article I, Section 21] guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions. Any restrictions on such access to the courts must be liberally construed in favor of the constitutional right. LEHMANN v. CLONIGER, 294 So.2d 344 (Fla. 1st DCA 1974).
>
> The courts have generally disapproved financial pre-conditions to bringing claims or asserting defenses in court aside from court related filing fees.

Similarly, in TIRONE v. TIRONE, 327 So.2d 801 (Fla. 3d DCA 1976), the trial court entered an order dismissing the wife's motion for relief from final judgment, because she had not paid her prior attorney's fees as required by court order. The Third District reversed, stating (327 So.2d at 802):

> We hold that access to the courts may not be conditioned upon actual payment to one's attorney in a prior litigation.

Viewed in its historical perspective and in light of prior case law, the First District's decision properly applied Article

I, §21 of the Florida Constitution to invalidate the statutory bond requirements at issue. The opinion emphasizes the fundamental nature of the right of access to the courts and noted that it prohibits financial impediments to suit, other than those related to actual court costs (548 So.2d at 1187-88):

> The right to go to court to resolve our disputes, rather than resorting to self-help or settling them in the streets, is one of the most fundamental and necessary rights of a citizen in a society based on the rule of law....
>
> The courts have consistently held that Article I, §21 sharply restricts the imposition of monetary preconditions to asserting claims in court [citing G.B.B. INVESTMENTS, supra.]. 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.

The court noted that the bond requirements do not discriminate between meritorious and non-meritorious suits, and that their real effect is to prevent plaintiffs unable to afford the bond from bringing suit, Ibid. Based on those considerations and the arbitrary operation and effect of those statutory provisions, the First District held them to be unconstitutional.

Defendants contend that the bond requirement imposed by Fla. Stat. §395.0115(5)(b) and §768.40(6)(b) does not violate the access to courts provision of the Florida Constitution because the legislature enacted it in response to a perceived need in the area of public health and welfare. Defendants rely on three cases, CARTER v. SPARKMAN, 335 So.2d 802 (Fla. 1976); HOLLY v. AULD, 450 So.2d 217 (Fla. 1984); and FELDMAN v. GLUCROFT, 522

So.2d **798** (Fla. 1988), in support of this conclusion. However, none of those cases addressed the bond requirement at issue the case sub judice. Furthermore, those **cases** do not support the proposition that the bond requirement at issue here is constitutional.

In CARTER v. SPARKMAN, supra, the Court addressed the constitutionality of the legislation creating medical liability mediation panels and requiring resort to them as a prerequisite to seeking relief in the courts. After noting that the courts are generally opposed to any burden being placed on the rights of aggrieved persons to pursue their claims in court, the majority opinion noted that certain reasonable restrictions had been permitted, such **as** (335 So.2d **at 805):**

> [Tlhe 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.

While the Court concluded that the pre-litigation burden of mediation (335 So.2d at 806), "reaches the outer limits of constitutional tolerance," it did uphold the procedure. In upholding the mediation procedure against the constitutional challenge, the court simply held that the legislature can create administrative prerequisites to suit even though there may be additional expenses imposed thereby. Requiring the posting of a bond in the amount of the opponent's anticipated attorney's fees is not the equivalent of requiring administrative review prior to suit.

Justice England noted in his concurring opinion in CARTER that the mediation procedure was designed to remove from the court system cases which were patently frivolous or clearly meritorious, 335 So.2d at 807. Defendants attempt to justify the bond requirement at issue here under a similar rationale, arguing that the legislature enacted the bond requirement "to protect hospitals and doctors participating in the medical review disciplinary process from the chilling effect of the threat of the filing of non-meritorious retaliatory suits by disciplined doctors," (Petition p. 14). However, the bond requirement does not operate as a screening device based on the merits of the claim, but simply eliminates those cases in which a plaintiff cannot afford to obtain the bond.

CARTER is inapposite because, as noted by the Fourth District, unlike the mediation procedures, the bond requirement contains no component relevant to the merits of a plaintiff's action. The Fourth District quoted from ALDANA v. HOLUB, 381 So.2d 231, 236 (Fla. 1980), where the Court stated (548 So.2d at 1189):

> It simply offends due process to countenance a law which confers a valuable legal right, but then permits that right to be capriciously swept away on the wings of luck and happenstance.

It is also significant that in ALDANA, the Florida Supreme Court determined that the same mediation procedures that were upheld in CARTER were unconstitutional. The Court based its decision on the fact that the procedures operated arbitrarily to eliminate many claims irrespective of their merits.

In HOLLY v. AULD, supra, the Court addressed the statutory discovery privilege provided in Fla. Stat. §768.40(4) and determined that it applied in all civil actions and not simply to medical malpractice actions. There was no constitutional issue involved in that case and, thus, it is of minimal importance with regard to this Petition. The Court simply determined that the legislature perceived a need for confidentiality in the medical review proceedings and created a discovery privilege to protect that confidentiality. No issue of access to courts was presented.

In FELDMAN V. GLUCROFT, supra, the Court was presented two certified questions (522 So.2d at 798):

> (1) Does Section 768.40(4) totally abolish a defamation claim arising in proceedings before medical review committees?
>
> (2) If so, is Section 768.40(4) invalid as in conflict with Article I, Section 21, Florida Constitution?

The Court determined that the statute did not totally abolish a defamation claim, but simply created a qualified immunity for members of medical review committees as it had done for other licensing and administrative proceedings, 522 So.2d at 801. Based on that answer to the first question, the court determined that the second question was moot and did not address it. Nothing in the FELDMAN v. GLUCROFT case supports Defendants' position in the case sub judice, since there was no issue regarding the constitutional right to access to the courts.

An analysis of the three cases discussed above reveals that they are inapposite, The Florida Supreme Court has simply upheld

certain aspects of the Medical Malpractice Act Fla. Stat §768 et. seq., none of which are at issue here. The only case relating to pre-litigation impediments is **CARTER** v. **SPARKMAN**, supra, which is easily distinguishable since, in that case, the legislature required an administrative proceeding prior to permitting access to the courts, a requirement that does not conflict with Article I, §21 of the Florida Constitution.

NORTH POINT BANK v. STATE DEPARTMENT OF REVENUE, 313 So.2d 693 (Fla. 1975), does not support Defendants' position. In that case, the Court determined that a statutory requirement that a taxpayer deposit or post a bond far the disputed amount of assessed intangible taxes did not violate the access to courts provision of the Florida Constitution. The Court determined that if construed literally, the statute would violate that constitutional provision, 313 So.2d at 683. However, the Court concluded that, as construed by the trial court, the statute was not constitutionally infirm. The trial court had concluded that, 313 So.2d at 687:

> The statute does not require the taxpayer to post a bond in the amount of the contested assessment, but only requires that it post a **bond** upon the satisfaction of the court's judgement as to the proper tax. [Emphasis in original.]

The Court also noted that prior to bringing suit, the taxpayer was required to participate in an administrative proceeding which reviewed the assessment. That administrative assessment was considered presumptively correct. Based on the trial court's

interpretation, the taxpayer also had an opportunity to overcome the presumption created by the administrative determination prior to the setting of the bond. Thus, the taxpayer was provided an additional opportunity to reduce or eliminate the bond requirement based on the merits of the case. In the case sub judice, Dr. Guerrero has no means of presenting the merits of his claim prior to being required to post the $150,000 bond. Defendants' contention that Dr. Guerrero's situation is analogous because the amount of the bond is judicially determined makes no sense. The only determination to be made by the trial judge under the statutes at issue here is the amount of the anticipated attorney's fees, not whether there should be any bond required.

Additionally, the bond requirement at issue in NORTH PORT BANK was reasonably related to the legislative purpose, i.e., providing a means of collection of intangible taxes. The only legislative purpose argued by the Defendants for the bond requirement in the case sub judice is that it operates to protect potential defendants from non-meritorious claims, which, as discussed supra, it does not, in fact, do. Additionally, in NORTH PORT BANK, there was a presumption that the assessment was correct based on the prior administrative proceedings. In this case, as noted by the First District, the statute in essence creates a presumption that Dr. Guerrero's claim is without merit, 548 So.2d at 1188.

Defendants' reliance on the statutory bond requirements regarding prejudgment attachment (Fla. Stat. §76.12); prejudgment

garnishment (Fla. Stat. §77.24); and prejudgment replevin (Fla. Stat. §78.068), is without merit because the bonds required in those cases are not a prerequisite to bringing a claim in court. The bonds required in those cases are a prerequisite to obtaining relief prior to a resolution of the underlying cause of action. A creditor is entitled to pursue his claim in court without having to post the bond required by any of those statutes. The creditor must only post a bond if it desires to attach the debtor's property prior to a resolution of the underlying claim. The situation is identical for the bond required by Fla.R.Civ.P. 1.610(b) in cases where temporary injunctions are issued. Such bonds were not enacted by the legislature as an impediment to seeking judicial resolution of claims, but rather are required to ensure the constitutionality of prejudgment seizures, see UNIQUE CATERERS, INC. v. RUDY'S FARM CO., 338 So.2d 1067 (Fla. 1976). Those bond requirements have no relationship to the one at issue here which acts as an impediment to a plaintiff's access to the court for any relief.

Defendants argue that an access to courts analysis must be based on the rationale utilized in KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973), which first requires a determination whether the legislature has abolished a cause of action without providing an alternative means of protection. However, KLUGER is not dispositive in the case sub judice because the issue in KLUGER was not the creation of a financial impediment to judicial resolution of a valid cause of action, but rather the

constitutional limitations upon the legislature's abolition of a cause **of** action.

The KLUGER opinion focused on the phrase "redress of any injury" in Article I, §21, (281 So.2d at 3):

> This Court has never before specifically spoken to the issue of whether or not the constitutional guarantee of a "redress of any injury" (Fla.Const., art. I, §21, F.S. A.) bars the statutory abolition of an existing remedy without providing an alternative protection to the injured party.

That is not the issue here, and the line of cases discussed above including, inter alia, FLOOD, supra, and G.B.B. INVESTMENTS, supra, do not rely on that rationale.

This case involves the legislature's creation of financial preconditions to suit which are unrelated to the actual expenses incurred by the court in administering the case. The reliance is on different phrases in Article I, §21, i.e., "the courts shall be open to every person" and "justice shall be administered without sale, denial or delay." This constitutional argument does not focus on the phrase "redress of any injury," for as noted by the Fourth District (548 So.2d at 1188):

> While the provision [Article 1, §21] may not guarantee a litigant a particular remedy when the litigant is allegedly wronged, it does guarantee a litigant who has a recognized cause of action a forum in which to be heard.

Here, Dr. Guerrero has a recognized cause of action for breach of contract and tortious interference with an advantageous business relationship, see also, Fla. Stat. §768.40. Thus, the issue is

not whether that potential claim has been abolished, but rather whether the legislature can constitutionally impose a significant financial precondition to obtaining judicial resolution of the claim.

Defendants' argument that the legislature is entitled to impose the bond requirement in response to the alleged medical malpractice crisis ignores the fundamental principle that the paramount rule of law is the Constitution, see HOLLEY v. ADAMS, 238 So.2d 401, 405 (Fla. 1970). The legislature cannot, through legislation, constrict a right granted by the Constitution, AUSTIN v. STATE EX REL CHRISTIAN, 310 So.2d 289, 293 (Fla. 1975). Additionally, the unconstitutionality of a statute cannot be overlooked for reasons of convenience, CITY OF TALLAHASSEE v. PUBLIC EMPLOYEE RELATIONS COMMISSION, 410 So.2d 487, 490 (Fla. 1987).

Moreover, it is clear that the legislature did not choose to abolish a cause of action against peer review participants or entities, because it specifically authorized such causes of action in three separate statutes, see Fla. Stat. §§395.011(8), 395.0115(5), and 766.101(3)(a). The bond requirements at issue do not abolish any cause of action, but simply eliminate the claim for those who are not affluent enough to satisfy that financial precondition.

Defendants also argue that under KLUGER, the access to courts provision only applies to statutory actions pre-dating the adoption of that constitutional provision and claims that were part of the English common law prior to 1776, see Fla. Stat.

§2.01. However, the cases relied upon for that proposition do not support it. CARR v. BROWARD COUNTY, 541 So.2d 92 (Fla. 1989), construed the constitutional guarantee of "redress of any injury" contained in Article I, §21 and concluded that that provision did not require the continuation of any specific statutory remedy. It did not address the other provisions of Article I, §21, and it did not hold that that section, as a whole, only applied to common law actions. The same is true for KLUGER v. WBITE, supra. There is no logical basis for concluding that the guarantee that "justice shall be administered without sale, denial, or delay" only applies to common law claims. None of the cases addressing financial impediments to judicial consideration support such a limitation.

Assuming arquendo that there is such a limitation, it does not affect the Fourth District's decision.

Count I of Dr. Guerrero's Complaint alleged a breach of contract and Count III alleged tortious interference with an advantageous business relationship (A7-10, 11-12). Clearly, contract actions were recognized as part of the English common law prior to 1776. Apparently conceding that, the Defendants argue that since Dr. Guerrero's contract claim arises out of the medical staff peer review procedures which were not recognized in common law that claim is not protected by Article I, S21 of the Florida Constitution. No authority is cited for that proposition and it is not supported by any logic. It would be equally logical to argue that contracts arising out of the purchase of computer equipment are to be excluded from the protection of

Article I, §21 of the Florida Constitution because computers were not known to the English at common law in 1776. There is no authority for such a distinction. The mere fact that some terms of the contract were not known to the common law does not mean that the claim should be treated differently.

Defendants also contend that Count III relating to the tortious interference with advantageous business relationships involves a claim not recognized at English common law. However, no authority is cited for that proposition. Defendants contend that because the Florida Supreme Court in CHIPLEY **v.** ATKINSON, 1 So. 934 (Fla. **1887),** addressed such **a** tort and relied on English cases decided in **1881** and **1853,** the cause **of** action was not recognized prior thereto. **A** reading of the Court's opinion does not support that assessment. The narrow issue in CHIPLEY was whether a cause of action existed against a third party for procuring the discharge of an employee. The Court relied on two English cases, but did not state that those cases were the genesis of the claim for tortious interference with an advantageous business relationship. The Court simply noted their factual similarity and persuasive reasoning. In fact, the implication of the Court's reliance on the English cases is that the tort was recognized at common law and, therefore, the English cases were relevant in determining the scope of the tort. The mere fact that the Florida Supreme Court relied on CHIPLEY **v.** ATKINSON in a subsequent case (DADE ENTERPRISES, INC. v. WOMEKO **THEATERS,** INC., **160** So. 209, **210** (Fla. **1935)),** as being the seminal case in Florida regarding interference with a contract

does not alter that conclusion. Therefore, Defendants have provided no authority on which this Court could conclude that the tort of interference with an advantageous business relationship was not recognized at common law.

Defendants contend that the assertion that Florida courts have consistently invalidated any financial conditions (other than reasonable court costs) imposed on the right to pursue judicial relief is erroneous. Defendants apparently take issue with G.B.B. INVESTMENTS, INC. v. HINTERKOPF, 343 So.2d 899 (Fla. 3d DCA 1977), where the court stated (343 So.2d at 901):

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

Defendants attempt to distinguish **BELL** v. STATE, supra; TIRONE v. TIRONE, supra, and **G.B.B.** INVESTMENTS v. **HINTERKOPF,** supra, on the grounds that the financial impediments in those cases were the result on judicial orders and not legislation. However, none of those cases suggests that the analysis is any different when the impediment is created by the legislature. Only payment of reasonable cost deposits is considered constitutionally permissible, see CARTER v. SPARKMAN, supra. Payment of attorney's fees does not fall within that category, see TIRONE, supra.

A final contention of the Defendants requires comment. The Defendants overstate their proffer at the trial court by claiming that they had a representative of a national bonding

company present who was going to testify that for $15,000 the company would post the $150,000 bond for Dr. Guerrero. That is inaccurate as noted previously. Moreover, it is inaccurate to say that all one needs to obtain a $150,000 bond is a $15,000 payment. The $15,000 constitutes a premium for the bond; however, no company will ever issue a bond unless the party has liquid assets of at least the face amount of the bond which can be encumbered. This is simply common sense. A surety does not simply accept a payment of $15,000 to assume an obligation of $150,000 unless there is certainty that the party has the $150,000 in the event payment is necessary. It is simply inaccurate and misleading to suggest that the only financial burden placed on Dr. Guerrero by the bond requirement is the obligation to pay a $15,000 premium.[3]

In summary, the bond requirement imposed by Fla. Stat. §§768.40(6)(b) and 395.0115(5)(b) violates Article I, §21 of the Florida Constitution, since it constitutes an impermissible burden on a plaintiff's right to access to the courts. That financial precondition is not reasonably related to any expenses of the court and cannot be construed as a valid "screening" procedure such as the medical mediation procedure was in CARTER v. SPARKMAN, supra. Therefore, this Court should hold that the statutory provisions at issue are unconstitutional and uphold the Order of the Circuit Court.

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[3]/Additionally, the Defendants have not stated the time period that the $15,000 payment would cover. If it is an annual premium, the burden on Dr. Guerrero is obviously very significant since lawsuits can take years to resolve.

POINT II

FLA. STAT. §57.081 DOES NOT APPLY TO BOND PREMIUMS OR ATTORNEY'S FEES AND, THEREFORE, IS IRRELEVANT TO THE ISSUES BEFORE THIS COURT. [THIS POINT ADDRESSES POINT IV OF APPELLANTS' BRIEF.]

Defendants claim that Fla. Stat. 557.081 must be considered in determining the constitutionality of the statutes at issue. This argument is based on a clearly erroneous analysis of that statute and Fla. Stat. §57.071, and simply has no merit. Fla. Stat. §57.081(1) provides in pertinent part:

> Any indigent person who is a party or intervenor in any judicial or administrative agency proceeding or who initiates such proceeding shall receive the services of the courts, sheriffs, and clerks, with respect to such proceedings, without charge. **No** prepayment of costs to any judge, clerk, or sheriff is required in any action when the party has obtained from the clerk in each proceeding a certification of indigency, based on an affidavit filed with him that the applicant is indigent and unable to pay the charges otherwise payable by law to any of such officers. [Emphasis supplied.]

That statute only addresses the services of the courts, sheriffs, and **clerks** and the exemption from costs is limited to those payable to the courts, clerks and sheriffs. It does not address any obligation to post bonds or pay attorney's fees. Moreover, it is clear that the statute is limited to the payment of costs to court officials and not to third parties such as bonding companies, et cetera, and has been so construed, see **GRISSOM** v. DADE COUNTY, 279 So.2d 899 (Fla. 3d DCA 1973) (statute does not eliminate a party's obligation to pay costs of publishing notice

necessary to obtain jurisdiction over defendants); DADE COUNTY v. WOMACK, 285 So.2d 441 (Fla. 3d DCA 1973) (same); BOWER v. CONNECTICUT GENERAL LIFE INSURANCE CO., 347 So.2d 439 (Fla. 3d DCA 1977) (statute does not eliminate obligation to pay cost of transcript); SMITH v. DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 504 So.2d 801 (Fla. 2d DCA 1987) (same).

Defendants claim that Fla. Stat. §57.081 refers also to costs of premiums or bonds because Fla. Stat. §57.071 includes such expenses as taxable costs. However, Fla. Stat. §57.071 simply specifies certain costs which should be allowed if costs are awarded to a party. The fact that bond premiums are included in that statute as a taxable cost does not mean that they are to be considered as eliminated for indigents under Fla. Stat. 557.081. The latter statute is limited to costs paid to the courts, sheriffs, and clerks; and they are not parties who are paid premiums for bonds or other security.

It is rather startling that Defendants even make this argument since it undercuts the premise of the legislation they are seeking to uphold. The Defendants have argued that the bond requirement is justified because the legislature was entitled to conclude that people who participate in peer review processes are entitled to protection, including security for the possible award of attorney's fees if a non-meritorious suit is brought against them. Nonetheless, Defendants argue that if a plaintiff is indigent there is no requirement to post such a bond. That would appear to deny peer review participants the protection of the security in cases where it is most needed. However, that

conundrum need not be resolved since Fla. Stat. 857.081 clearly does not apply to bond premiums or attorney's fees.

CONCLUSION

For the reasons stated above, this Court should affirm the Fourth District's decision.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to ATLEE W. WAMPLER, 111, ESQ., 602 Sun Bank Bldg., 777 Brickell Ave., Miami, FL 33131, by mail, this 3rd day of October, 1991.

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