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IN THE SUPREME COURT OF FLORIDA

COMMUNITY HOSPITAL OF THE PALM BEACHES, INC., d/b/a HUMANA HOSPITAL - PALM BEACHES; RICHARD A. BERJIAN, D.O.; and ERIC J. GOLDBERG, M.D.,

Appellants,

vs.

CASE NO.: 78,017
DCA-4, 90-3435

LUIS GUERRERO, M.D.,

Appellee.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND OF THE PACTS

The Appellee, Dr. Guerrero, is a general surgeon, whose privileges to perform surgery at the Appellant Hospital were limited by the Hospital to performing minor surgical procedures (70) as a result of medical review committee and disciplinary actions required by §395.0115(1), §768.40(2) and §768.60(1), Fla. Stat. (1985) [renumbered §395.0115(3), Fla. Stat. (1989) and §766.101(2) and §766.110(1), Fla. Stat. (Supp. 1990)]. (200).

The Appellant, Richard A. Berjian, D.O., was Chairman of the Tissue and Transfusion Committee, Department of Surgery, of the Medical Staff of the Appellant Hospital. (23).

The Appellant Eric J. Goldberg, M.D., was Chairman of the Surgical Evaluation Committee, Department of Surgery, of the Medical Staff of the Appellant Hospital, which committee initially reviewed those of Dr. Guerrero's surgical cases that met the criteria for automatic review. (15-18)

The Complaint contains three (3) counts, alleging claims against the Appellants for breach of contract (7-lo), violation of administrative and statutory rights (10-11), and tortious interference with advantageous business relationships. (11-12). The Parties agree that all three (3) counts of the Complaint arose solely out of the institution of medical review committee disciplinary proceedings, as mandated by §395.0115(1), §768.40(2), and 8768.60 (1) Fla. Stat. (1985) [currently renumbered as

§395.0115(3), Fla. Stat. (1989) and §766.101(2) and §766.110(1), Fla. Stat. (Supp. 1990)]. (3-6, 70-71). These statutes contain similar provisions requiring a physician who has filed suit against either the hospital or other physicians involved in medical review committee and disciplinary proceedings, based on such proceedings, to post a bond in an amount sufficient to pay the Defendants' reasonable costs and attorneys' fees prior to a responsive pleading being due. Section 395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985) [renumbered as §395.0115(8)(b), Fla. Stat. (1989) and §766.101(6)(b), Fla. Stat. (Supp. 1990)]. (70-72).

The Complaint does not allege that the Appellants directly interfered with the Appellee's doctor/patient or doctor/doctor relationships, but does allege that the restriction of the Appellee's clinical privileges and that the medical review committee and disciplinary process itself resulted in economic and non-economic damages. (6).

The Appellants raised the statutory bond requirements of §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985), (40-43), prior to filing responses to the Complaint, and filed affidavits showing that, due to extensive discovery required by the allegations set out in this complaint and in similar cases, the minimum reasonable attorneys' fees and costs required for services through the trial of this case to be One Hundred Fifty Thousand and 00/100 ($150,000.00) Dollars; a further Fifty Thousand and 00/100 ($50,000.00) Dollars for appeal to the Fourth District Court of

Appeal: and Fifty Thousand and 00/100 ($50,000.00) Dollars for an appeal to the Supreme Court of Florida. (60-65).

The Appellants evidence showed that, a minimum total of Two Hundred Fifty Thousand and 00/100 ($250,000.00) Dollars would be required to litigate the case through the Florida Supreme Court. Additionally, the Affidavit of Emil C. Marquardt, Jr., set out public policy arguments as to why the bond requirements are reasonable to further the operation of the medical review committee and disciplinary process. (60-62). The Appellee agreed before the trial court that Two Hundred Fifty Thousand and 00/100 ($250,000.00) Dollars in costs and attorneys' fees was reasonable to litigate the case through the Florida Supreme Court, and offered no evidence to the contrary. (71). The trial court refused to speculate on possible appellate action by the parties and, based upon the evidence presented, set the bond required by §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985) at One Hundred Fifty Thousand and 00/100 ($150,000.00) for the amount to be posted through the completion of the trial. (71).

The trial court then heard financial testimony by the Appellee regarding his ability to post such a bond. (71). The trial court held that it could not find that the Appellee either could or could not post the One Hundred Fifty Thousand and 00/100 ($150,000.00) Dollars bond, but did determine that the Appellee's Complaint had tolled the statute of limitations. (71). Thus, the trial court held that the Appellee had up to one year to post the required

bond, before any responsive pleading was due from the Appellants. (71).

The Appellee filed legal memoranda and moved the trial court to declare §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985), unconstitutional as violative of Art. I, § 21, Fla. Const., which guarantees access to the courts, and as a violation of federal constitutional rights of access to the courts. (44-48, 66-69). The designation of the lead defendant changed from "Humana, Inc., d/b/a Humana Hospital--Palm Beaches" to "Community Hospital of the Palm Beaches, Inc., d/b/a Humana Hospital--Palm Beaches" by stipulation of the Parties. (50).

Initially, the trial court in Guerrero v. Community Hospital of the Palm Beaches, et al., denied this motion, holding the medical review pre-suit bond statutes were not violative of Art. I, § 21, Fla. Const., nor of any federal constitutional rights. (72). In regard to Appellee's state constitutional claims, the trial court held that, while the bond requirements restrict Dr. Guerrero's access to the courts, they do not abolish his right to sue and are reasonably related to the purpose of the legislation, which is to insure the availability of physicians to serve on peer review committees and the ability of health care providers to conduct peer review. (72). In regard to Appellee's federal constitutional claims, the trial court found that the right restricted, which was to practice medicine at the Appellant Hospital with unrestricted privileges and free of medical review and disciplinary proceedings, was not a fundamental right, such as

those involved in criminal proceedings or in dissolutions of marriage, which merit strict scrutiny. (72).

The first time before the Fourth District Court of Appeal, in Guerrero v. Community Hospital of the Palm Beaches, et al., the Appellee abandoned his United States Constitutional claims. (85-94).

This is the same case that was before the Fourth District Court of Appeal in Guerrero v. Community Hospital of the Palm Beaches, et al., 548 So.2d 1187 (Fla. 4th DCA 1989) (hereinafter sometimes referred to as "Guerrero I") (157-159) except that the parties and the trial and appellate court's rulings on the constitutionality of the medical peer review pre-suit bond statutes are reversed. See November 20, 1990 Order of the trial court declaring §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985) [renumbered as §395.0115(8)(b), Fla. Stat. (1989) and §766.101(6)(b), Fla. Stat. (Supp. 1990)] unconstitutional as violative of Art. I, § 21, Fla. Const., (hereinafter sometimes referred to as "Guerrero II") (73), and the Fourth District's opinion of May 8, 1991, affirming trial court's determination of unconstitutionality of the statutes decision, Community Hospital of the Palm Beaches v. Guerrero, 579 So. 2d 304 (Fla. 4th DCA 1991). (268-269) as corrected as to the amount of the bond (272a).

After the Fourth District's per curiam denial of the Appellee's Petition for Certiorari (157) in Guerrero I and his Request for Rehearing (168), the Appellee waited approximately ten (10) months before obtaining an Order for an evidentiary hearing

regarding the Appellee's indigency. (74-75). The Appellants, through service of Subpoena Duces Tecum to lending institutions and an automobile dealership, prepared evidentiary exhibits for the hearing regarding Appellee's financial condition, copies of which were provided to Appellee's counsel in advance of the hearing. (79-82). On the eve of the hearing, Appellee changed his position to, in essence, a renewal of his legal argument to declare the medical peer review pre-suit bond statutes unconstitutional. (76-78).

Before the evidentiary hearing began on November 16, 1990, the trial court announced that it had reconsidered its opinion in light of the reasoning in Judge Anstead's dissent in Guerrero I and the decisions of the panels in the First District Court of Appeal cases of Psychiatric Associates, et al. 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). (190-194).

The Appellants attempted to present evidence subpoenaed for the hearing into the record regarding the financial condition of the Appellee during the previous twelve months and the testimony of an expert bondsman and agent of an approved bond company. (190-191). The Appellee objected on the basis that the financial and bonding information was irrelevant since the trial court had declared the statutes facially unconstitutional and had not determined that the Appellee was indigent. (191-192). The trial court sustained the Appellee's objection. (192). The Appellants then proffered evidence of Dr. Guerrero's financial condition for

the record (79-84) and (190-191) that their evidence showed that a ten (10%) percent bond could be written for Dr. Guerrero to comply with the statutorily required bond in the amount set by the trial court of One Hundred Fifty Thousand and 00/100 ($150,000.00) Dollars upon Dr. Guerrero's payment of Fifteen Thousand and 00/100 ($15,000.00) Dollars. Additionally, the Appellants proffered that they were prepared to present extensive financial evidence that Appellee had been able to post the Fifteen Thousand and 00/100 ($15,000.00) Dollars cash for the ten (10%) percent bond during the twelve months subsequent to the Fourth District's mandate in Guerrero I. (79-84) and (190-191). Judge Cook denied the Appellants! motion to stay the proceedings pending an appellate review. (192-193). The Appellants applied for a writ of certiorari to the Fourth District Court of Appeal because the trial court's declaration of unconstitutionality of the statutes at issue directly contradicted the Fourth District's decision in Guerrero I. (197-234).

The Appellants then submitted motions to dismiss and to strike, pursuantto Judge Cook's previous Order allowing additional motions to be filed. Judge Brown, replacing Judge Cook as the trial judge, denied the motions on the procedural grounds that only one set of motions to dismiss would be considered (293), despite Judge Cook's earlier Order. (50). Judge Brown suggested that those motions be pled as affirmative defenses. Pursuant to these Orders, the Appellants filed a responsive Answer to the Appellee's Complaint, including Appellants' Affirmative Defenses. (273-292).

The case was noticed at issue, mediation required, and a trial date has been set. (294-295).

The Fourth District reversed its decision of Guerrero I, and affirmed the trial court's decision in Guerrero II that the medical peer review pre-suit bond statutes were an unconstitutional denial of access to the courts, as provided by Art. I, § 21, Fla. Const., on May 8, 1991, (268-269). Community Hospital of the Palm Beaches v. Guerrero, 579 So.2d 304 (Fla. 4th DCA 1991) as corrected. (272a).

The Appellants appeal this decision, under Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii) and Art. V, § 3(b)(1), Fla. Const. (1980), which authorize this Court to hear appeals of decisions of the district courts of appeal declaring invalid state statutes.

SUMMARY OF ARGUMENT

The requirements of Sections 395.011(10)(b), Fla. Stat. (1989), 395.0115(8)(b), Fla. Stat. (1989), and 766.101(6)(b), Fla. Stat. (Supp. 1990), and those statutes' historical numerical designations, that a bond for reasonable attorney's fees and costs be posted as a condition precedent to proceeding with a suit against physicians and hospitals arising from their participation in medical review and disciplinary proceedings are a valid exercise of the police power of the Legislature to remedy an identified crisis in public health and welfare. The "access to courts" provision of Art. I, 521, Fla. Const., does not apply as the

presuit bond statutes does not abolish a cause of action. The Complaint does not allege any claims to which Art. I, 521, Fla. Const., applies. Even assuming, arguendo, that the "access to courts" provision was applicable, the legislative determination of an overpowering public necessity requires the Court to uphold this reasonably related remedy.

ARGUMENT

ISSUE I

Whether the health care crisis in the State of Florida constitutes sufficient public need justifying the statutory attorneys' fees and cost bond requirements of §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985). [Renumbered as §395.0115(8)(b), Fla. Stat. (1989) and §766.101(6)(b), Fla. Stat. (Supp. 1990)].

The Legislature of the State of Florida has recognized that a dire health care crisis exists in this state which will soon cause the breakdown of both the capacity of the health care industry to provide medical care and the ability of our legal system to effectively resolve medical-legal issues. Ch. 85-175, Preamble, Laws of Fla., at 1182-1183. Because of this very real threat, our Legislature has determined that:

> "...the magnitude of this compelling social problem demands immediate and dramatic legislative action."

Ch. 85-175, Preamble, Laws of Fla., Page 1183. The bond requirements complained of by the Appellee are justifiable legislative restrictions upon access to the courts and are not precluded by Art. I, § 21, Fla. Const. See, Carr v. Broward County, 541 So.2d 92, at 95 (Fla. 1989); Feldman V, Glucroft, 522

So.2d 798, 801 (Fla. 1988); Holly V. Auld, 450 So.2d 217, 220 (Fla. 1984); Carter V. Sparkman, 335 So.2d 802, at 805-808 (Fla. 1976). The cases cited by the Appellee in Guerrero I and 11, as will be demonstrated below, are entirely inapplicable to the constitutionally permitted legislative exercise of the police power of the state in the face of dire need in the area of public health and welfare at issue in the present case.

A review of the relevant health care statutes since 1972, in conjunction with the Florida Supreme Court cases reviewing the constitutionality of those statutes, highlights the extraordinary public policy issues with which our Legislature has been grappling. Ch. 72-62, Laws of Fla., constituted the first move by the Legislature to immunize persons involved in the medical review process for monetary liability. In 1973 the Legislature first imposed a restriction on discovery and use in court of proceedings and records of medical review committees. Ch. 73-50, Laws of Fla. The basis for this legislation was:

> ''WHEREAS, the Legislature is deeply concerned over the rising costs of health insurance which are directly related to the costs of hospital and medical services and increasing problems in the area of medical malpractice insurance:
>
> WHEREAS, the various health services, professional societies, and associations in the State of Florida are promulgating programs and establishing committees for the purpose of reviewing standards of care, utilization and expense in the rendering of health services in an effort deter or eliminate some of the causes of increased claims and costs of providing health services and to provide a statistical base for further analysis, study and recommendations; and
>
> WHEREAS, the legislature recognizes the advisability of immunity for peer review committees so that the medical

> profession can explore over utilization of medical services, improper charging for medical services, and acts of malpractice in order that it can have better control over its members and experience rate its physicians for malpractice coverage;" (Ch. 73-50, Preamble, Law of Fla.).

It is important to note that the Legislature's scheme for the medical peer review process, as of 1973, was permissive. Nevertheless, the Supreme Court of Florida, in Holly v. Auld, supra., quoted verbatim the above quoted basis for the discovery and evidentiary restrictions and found:

> "It is apparent that the need for confidentiality is as great when a credentials committee attempts to elicit doctors' honest opinions about one of their colleagues for purposes of determining fitness for staff privileges as when attempting to determine whether the practice of a doctor on the staff meets the standards of the medical community. A doctor questioned by a review committee would reasonably be just as reluctant to make statements, however truthful or justifiable, which might form the basis of a defamation action against him as he would be to proffer opinions which could be used against a colleague in a malpractice suit." 450 So.2d at 220.

The Court in Holly v. Auld then held:

> "Inevitably, such a discovery privilege will impinge upon the rights of some 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 cost containment offered by effective self-policing by the medical community and found 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." 450 So.2d at 220.

The Appellee argues Holly is inapplicable to the present case, because there the Court did not consider constitutional issues. (135) (246-247). However, Holly dealt with eliminating access to essential information, in effect, eliminating or severely limiting

access to the courts. Id. The Court then stressed that balancing competing policy interests is precisely within the legislative function and outside of the judicial function. Id. See also, the discussion of the access to courts issue in the dissenting opinion of Judge Ehrich, Holly, at 222.

In Ch. 77-461 and 79-400, Laws of Fla., the Legislature clarified and somewhat expanded its immunity provisions in the area of medical peer review; however, the Legislature's scheme for the medical review and disciplinary process remained permissive. This was the status of the 1983 version of §768.40(4), Fla. Stat. (1983), which was viewed by the Florida Supreme Court in Feldman v. Glucroft, supra. As will be discussed more fully under Issue 11, the Court in Feldman found no total abolishment of a cause of action and thus determined that an analysis of the applicability of Art. I, § 21, Fla. Const., would be unnecessary, 522 So.2d at 798. The Court quoted its Holly v. Auld opinion extensively and again upheld the impediments to litigants resulting from the immunity and discovery limitations of 5768.40, Fla. Stat., as reasonable in light of the legislative determination of necessity. 522 So.2d at 801.

Prior to 1985, the Legislature authorized, but did not require, the medical review and disciplinary process at issue in the present case. The Legislature's scheme of permissive peer review was first promulgated at Ch. 72-62, Laws of Fla., which also provided immunity from monetary liability. It was the statutory permissive peer review process, and its discovery and immunity

provisions, which were upheld in Holly v. Auld, supra, and peldman v. Glucroft, supra, by the Florida Supreme Court, on the basis of extreme public need in public health and welfare.

Governor Bob Graham, in Executive Order No. 84-202, created the Governor's Task Force on Medical Malpractice, to examine the continuing medical malpractice crisis in the State of Florida. After six (6) months of hearing and research, the Governor's Task Force issued its report, "Toward Prevention and Early Resolution." Among its findings, the Task Force reported:

> "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 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).

Recommendation VIII of 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 attorneys' 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).

The Legislature of the State of Florida reached substantially the same conclusions. The Legislature determined, enacting Ch. 85-175, Laws of Fla., made the following determinations:

> WHEREAS, high-risk physicians in the 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, cardio-vascular surgeons, neurosurgeons, orthopedic surgeons, and anesthesiologists, have become a matter of great public concern, and
>
> WHEREAS, these 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 down grade their specialties to obtain relief from oppressive insurance rates, and
>
> WHEREAS, this situation also poses a dire threat to the continuing availability of health care 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 law/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

WHEREAS, it is in the public interest to encourage health care providers to practice in Florida." Ch. 85-175, Preamble, Laws of Fla.

In 1985, the Legislature urgently addressed the increasing crisis in health care and found imminent the breakdown of our tort Laws/liability insurance system for medical malpractice unless fundamental reforms were undertaken. Id. Only in the face of such dire public need did the Legislature mandate medical staff peer review disciplinary process at issue in the present case. See, Ch. 85-175, §395.0115(1), Laws of Fla., at page 1184. Concurrently, the Legislature enacted the pre-litigation bond requirements contested by the Appellee and held unconstitutional by the courts in Guerrero 11, Ch. 85-175, §395.0115(5)(b), Laws of Fla., at page 1185. It is respectfully submitted that the Supreme Court of the State of Florida has already pronounced that significant pre-litigation burdens may be imposed in the health care area. Holly v. Auld, supra, Feldman v. Glucroft, supra. By 1985, the Legislature found itself faced with an even greater crisis and than previously dealt with by the Supreme Court, and was thus forced to mandate the peer review process in hospitals. Ch. 85-179, Preamble, Laws of Fla. Only with the increased protection afforded by the bond requirement will the medical staff peer review disciplinary process work. The judgment of the Legislature must be supported and the bond requirement enforced.

The Legislature's recognition, that simply immunizing participants in the disciplinary medical review process would not effect the desired result of the self-regulation of the medical profession, was discussed by the Third District Court of Appeal in Parkway General Hospital v. Allison, M.D., 453 So.2d 123 at 125 (Fla. 3rd DCA 1984), while construing the Supreme Court's decision in Holly v. Auld, supra. The Florida Supreme Court approved and agreed with the Parkway court's analysis of Holly v. Auld, in Feldman v. Glucroft, supra, 522 So.2d at 801. The Parkway court found that:

> "It [the legislature] realized that simply immunizing health care professionals for providing information to a medical review committee would not effect the desired result--the self regulation of the profession. That is, it was not enough to provide immunity from liability in a defamation suit because 1) that still allowed defamation lawsuits against health care professionals and 2) the mere threat of involvement as a defendant in such a lawsuit was enough to deter those people from participating in or even giving information to a medical review committee. Moreover, the fact that an announced privilege existed did not stop the filing of defamation suits because it was only a 'qualified' privilege; a privilege dependent upon the participants acting 'without malice or fraud.' Thus, in order to insure a valid peer review, the legislature had to protect the participants therein, even though by doing so it was necessary to encroach upon certain rights held by others." 453 So.2d at 125.

The court in Parkway found that the Legislature had a rational basis in protecting the peer medical review participants, even though by doing so it was necessary to encroach on rights held by those physicians who were the subject of the peer medical review evaluations.

In the case before this Court, the 1985 Legislature addressed the continuing and escalating medical malpractice crisis in Florida by requiring hospitals, through the physicians on their medical staffs, to police the doctors on their medical staffs by enacting the mandatory peer medical review requirements of §395.0115(1), §768.40(2), and §768.60(1), Fla. Stat. (1985). In exchange for this onerous and necessary task, the Legislature enacted restrictions in the bond requirements of §395.0115(5)(b) and §768.40(6)(b) [renumbered §395.0115(8)(b), Fla. Stat. and §766.101(6)(b), Fla. Stat. (Supp. 1990)], [The Legislature also enacted §395.011(10)(b), Fla. Stat. (1985) requiring a similar bond before lawsuits can proceed in matters involving the denial of applicant's request for medical staff membership or clinical privileges.] to protect hospitals and doctors participating in the medical review disciplinary process from the chilling effect caused by the threat of the filing of non-meritorious, retaliatory suits by disciplined doctors.

The trial court in Guerrero I found that:

> "...the bond... is reasonably related to the purpose of the legislation, that is to insure the availability of physicians to serve on peer review committees and the ability of health care providers to provide peer review." (72).

The Supreme Court of Florida in Carter v. Sparkman, supra, recognized that the Legislature acted within its discretion in finding the existence of a crisis involving health care costs and medical malpractice justifying the imposition of substantial financial pre-litigation burdens on litigants, 335 So.2d at 805-

806. The Supreme Court thus affirmed the requirement that medical malpractice plaintiffs first submit their cases to mediation in accordance with 5768.133 and 5768.134, Fla. Stat. (1975). These statutes were later held to be unconstitutional on other grounds in the case of Aldana v. Holub, 381 So.2d 231, 235-237 (Fla. 1980). Carter v. Ssarkman, supra, still stands for the proposition that the Legislature may act to impose pre-litigation financial burdens on claimants in an effort to resolve the health care crisis and the court may not supplant the judgment of the Legislature in this area.

The Appellee, relying on Judge Anstead's dissent in Guerrero I, tries to distinguish Carter on the ground the mediation requirement operated as a screening device on the merits, unlike the bond requirements of the instant case. (245-246). This argument misconstrues the screening requirement analyzed in Carter. Under 8768.133 and 5768.134, all claimants were required to undertake the expense of a mediation hearing prior to filing suit. This requirement did not screen cases on the merits, because it did not prohibit unmeritorious claims from going forward after the mediation. Rather, it required the parties to attempt a settlement prior to instigating the suit. The Carter court upheld the Legislature's determination that the prelitigation financial burden placed on the claimant was necessary in order to help decrease the cost of malpractice insurance and, therefore, health care costs, Carter at 806: similarly, the Legislature determined that the bond requirement was also necessary to reduce malpractice insurance

costs and to encourage physicians to participate in medical peer review committees. Ch. 85-175, Preamble, Laws of Fla., pages 1182-1183.

The mediation requirements were deemed unconstitutional in Aldana v. Holub, supra, because they were determined to be effectively inoperable. The court emphasized that its decision was based upon the practical operation of those statutes and not upon a re-evaluation of the original decision of the statutes' facial constitutionality. Aldana, at 237. Carter v. Sparkman still stands for the proposition that the appropriate standard of judicial review for constitutional attack under Art. I, § 21, Fla. Const., when the act reviewed in response to the Legislature's finding of a public health crisis, is that the legislative solution to the perceived public health problem must be sustained if it is reasonably related to its legislative purpose, 335 So.2d at 805-808.

The Appellee claimed in Guerrero I and II that any imposition of restrictive financial conditions for institution of a civil action, not being related to payment for services rendered by the court or a clerk of the court, is violative of Art. I, § 21, Fla. Const., and that the Florida courts have consistently so held since the year 1928. (45-46) (242-244). The Appellee was and is wrong in this contention.

In Carter v. Sparkman, supra, the Supreme Court of Florida reviewed the validity of the medical liability mediation panel statute as an alleged violation of Art. I, § 21, Fla. Const., as

well as other constitutional grounds. The medical liability mediation panel statute required a plaintiff to go through the extraordinary expense of a full administrative trial on its claim before the plaintiff could file a lawsuit in the state courts. §768.137 and 5768.134, Fla. Stat. (1975). See, Justice England's concurring opinion in Carter v. Saarkman, 335 So.2d at 807-809.

The Court began with the general constitutional principle of judicial review of acts of the Legislature as follows:

> "It is incumbent on this Court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity and if possible a statute should be construed in such a manner as would be consistent with the constitution, that is in such a way as to remove it farthest from constitutional infirmity." Carter V. Sparkman, supra at 805.

The Supreme Court reviewed the general principles of Art. I, § 21, law regarding other legal matters generally flowing from commerce and concluded that, although courts are generally opposed to any burden being placed on the rights of aggrieved persons to have access to courts, there may be reasonable restrictions to access to the courts imposed by the Legislature. Carter at 805. The Supreme Court pointed out typical examples as follows:

> "Typical examples are the fixing of 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 liable may be filed." Id. at 805.

The Supreme Court then held that, when the Legislature determines that a crisis exists in the area of availability of

medical care services and that there is a necessity for legislation for the benefit of public health and welfare, the Legislature's exercise of the police power of the state to address that crisis is a separate and distinct area of the law from all other legal matters generally flowing from commerce. Id. at 805.

The Supreme Court found that, even though the financial burden placed by the Legislature on a potential claimant before he could file a lawsuit reached the outer limits of constitutional tolerance, the Supreme Court did not deem that burden sufficient to void the law. Id. at 806. The Supreme Court found that those prelitigation expenses reasonably incurred would naturally become part of the costs of the judicial proceedings, taxable against the loosing party. Id. at 805.

Justice England, in a concurring opinion, then went on to explain the constitutional analysis of Art. I, § 21, Fla. Const. Justice England began with the proposition that judicial review of a legislative solution to a perceived public health care crisis requires that the statute must be sustained if it is reasonably related to the purpose sought to be achieved. Id. at 807.

Justice England then pointed out that:

> "The act specifically tolls the statute of limitation upon filing a claim with the mediation panel, so there can be no loss of substantive rights to plaintiff by reason of being required to go before a mediation panel before filing a complaint in court." Id. at 807. (footnote omitted).

The trial court, in Guerrero I, pointed out that the statute of limitations was tolled upon filing the complaint, even though

a responsive pleading was not due until the bond was posted for reasonable attorneys' fees and costs as determined by the trial court. (71-72).

In Carter v. Ssarkman, supra, Justice England emphasized the seriousness of the statutory imposition of restrictive financial conditions before filing a medical malpractice claim by requiring the aggrieved person to bear the burdensome expense of two full trials on the claim, but declined to invalidate the statute. Id. at 807.

Justice England noted that the legislative act favored medical defendants over a certain category of claimants who had limited financial resources. Id at 808. Justice England found that the act created a harsh procedure that was inequitable to a large and undefined class of poor potential litigants, but even though the Legislature's procedure widened existing disparities in financial resources of the litigants, he could not conclude that the Legislature's act was unreasonable. Id. at 808.

Justice England pointed out that the pre-litigation financial burden of that statute was lessened by the determination that pre-litigation financial expenses required by the statute were deemed to be taxable costs if the plaintiff prevailed in a later trial. Id. at 808, note 5. All of the Appellee's reasonable costs in obtaining a bond in the amount determined by the trial court should be taxable costs if the Appellee prevails in a trial subsequent to posting the bond.

The Appellee, relying on Judge Anstead's dissent in Guerrero I, contends that the bond requirement is not reasonably related to the legislative purpose. (249). The Legislature, however, found that the bond requirement was not only reasonable, but necessary, to achieve its purposes of encouraging doctors to serve on medical peer review committees and to reduce medical malpractice insurance and, therefore, health care costs. Pages 16-18, herein. Both the Legislature and the Governor's Task Force on Medical Malpractice determined the existence of a chilling effect, and determined the bond requirement was reasonable and necessary to counteract the chilling effect. Pages 15-18, herein.

The Florida Supreme Court recently upheld a statute of repose which terminated all claims for medical malpractice after four (4) years from the date of the incident, or seven (7) years if the malpractice was fraudulently concealed from the plaintiff. Carr v. Broward County, 541 So.2d 92 (Fla. 1989). The Court relied on its decision in Kluser v. White, 281 So.2d 1 (Fla. 1973), and its subsequent affirmation of the Kluger test in Overland Construction Company v. Sirmons, 369 So.2d 572 (Fla. 1979). These cases stand for the proposition that the Legislature has the power to restrict or abolish access to courts where the Legislature can show an over-powering public necessity and no alternative method of meeting such necessity can be shown. Kluser at 4, Overland at 573, Carr at 95.

The Supreme Court found such an overpowering public necessity in Carr based on the Preamble to the Medical Malpractice Reform Act of 1975 (Ch. 75-9, 57, Laws of Fla.):

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida; and
>
> WHEREAS, the problem has reached crisis proportion in Florida,..." Carr at 94.

These are substantially the same legislative purposes as expressed in the statutes presently at issue, set out on Pages 16-18, herein.

The Appellee tries to distinguish the Kluger test by claiming that it only applies to the abolition of causes of action, not the creation of financial requirements. (250-252). Of course, as we have discussed above the Kluger test was used by the Court in Carter v. Sparkman, which specifically dealt with the imposition of prelitigation financial burdens imposed on a plaintiff. Moreover, the Court in Kluger cited with approval Rotwein V. Gersten, 160 Fla. 736, 36 So.2d 419 (Fla. 1948), quoting and emphasizing:

> "The causes of action prescribed by the act under review were a part of the common law and have long been a part of the law of the country. They have no doubt served a good purpose, but when they become an instrument of extortion and blackmail, the Legislature has the Dower to, and may, limit or abolish them." Kluser at 4 (emphasis supplied by Supreme Court).

This is precisely what the Legislature has done in enacting 5395.011, §395.0115 and 5768.40; the Legislature limited a cause of action to prevent its improper or abusive use, as well as to

encourage doctors to perform a vital regulatory function that is statutorily mandated.

Carr reaffirmed not only the holding of Kluser and its decedents, but the principles behind Kluger, which stand for the Legislature's power to control access to the courts for reasons of overpowering public necessity. In Carr, the Court recognized the Legislature's findings of the same public interest involved in the present case as overpowering, Carr at 94, affirming the Fourth District's decision upholding the constitutionality of a medical malpractice statute of repose under Art. I, § 21, Fla. Const. In Carr the Supreme Court gave Kluser the broad interpretation that it intended Kluger represent in holding "We find the Fourth District Court recognized the principals of Kluser and properly applied them in determining that the Legislature had found an overriding public necessity in its enactment of §95.11(4)(b)." Carr at 95.

The Florida Supreme Court's emphasis lies on the legislative finding of an overriding public necessity, not on any distinctions between abolishment and limitation. It is hard to conceive that the Legislature may abolish causes of action without also being able to limit such causes of action for the same overpowering public need, particularly under the Court's holding in Rotwein, supra.

The Appellee's claims against the Appellants each relate to and arise from the Appellant's performance of statutorily mandated peer review duties. (70-71). Under such circumstances, the

requirement that a litigant post a bond to cover costs and attorneys' fees resembles the similar requirements for attachment, §76.12 Fla. Stat. (1989); pre-judgment garnishment, 577.24 Fla. Stat. (1989); pre-judgment replevin §78.068 Fla. Stat. (1989); and temporary injunctions, Rule 1.610(b), Fla.R.Civ. P. In each of these areas, bonds are required to protect parties who may be injured by the enforcement of legal rights by another party. Each begins with the determination that a certain status quo exists, and the bond requirement is imposed to protect a class of litigants from potentially irreparable harm resulting from an unsuccessful effort to change the status quo. Similarly, the bond requirement at issue in the present case protects hospitals, medical staff officers, and others involved in peer review from sustaining losses in the form of attorneys' fees and litigation costs incurred in defending actions arising from their performance of statutorily mandated duties. Whereas the medical peer review presuit bond statute requires a bond in the amount of reasonable attorneys' fees, the above statutes require a bond for twice the amount at issue, conditioned on attorneys' fees and costs.

The Legislature is aware of the common knowledge that doctors "go bare" without medical malpractice insurance, transferring all their assets into others' names to thwart lawsuits that would provide vacuous judgments. Such doctors without assets may get an attorney to sue a medical review committee and a disciplining hospital on a contingency basis; however, such a doctor would have

to think twice about the merits of bringing a vexatious retaliatory suit if the doctor had to first put up a fees and costs bond if he lost.

The Legislature has made a determination that litigants such as the Appellee may not be permitted to proceed with the enforcement of their rights until and unless they post a bond which will insure that the Appellants are left in the status quo should the Appellee not prevail, §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985) [renumbered as §395.0115(8)(b), Fla. Stat. (1989) and §766.101(6)(b) Fla. Stat. (Supp. 1990)]. In view of the existing health care crisis, such action on the part of the Legislature is clearly reasonable and must be upheld.

ISSUE II

Whether Art. I, § 21, Fla. Const., is applicable to the statutory bond requirements of §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985) [renumbered as §395.0115(8)(b), Fla. Stat. (1989) and §766.101(6)(b) Fla. Stat. (Supp. 1990)].

Art. I, § 21, Fla. Const. is inapplicable to those causes of action which did not exist by statute prior to the adoption of the Constitution of the State of Florida, or were not recognized at English common law and adopted pursuant to §2.01, Fla. Stat. (1989). Carr v. Broward County, 544 So.2d 92, 95 (Fla. 1989); Kluger v. White, 281 So.2d 104 (Fla. 1973); Sunspan Engineering and Construction Company v. Spring-Lock Scaffoldins Company, 310 So.2d 4 (Fla. 1975); Harrell v. State Department of Health and Rehabilitative Services, 361 So.2d 715 (Fla. 4th DCA 1978). The

three counts pled by the Appellee in the Complaint each seek redress of alleged injuries arising from the statutorily mandated activities of the hospital and its medical staff as required by 5395.0115, 5768.40, and 5768.60, Fla. Stat. (1985) [§768.40 is renumbered as 8766.101 Fla. Stat. (Supp. 1990) and 5768.60 is renumbered as 5766.110 Fla. Stat. (Supp. 1990)3. The bond statutes at issue do not abolish a cause of action for redress of the alleged injuries, therefore, the "access to courts" provision Art. I, § 21, Fla. Const., is inapplicable.

A review of the Supreme Court's opinion in Kluser v. White, supra, reveals that the "access to courts" issue raised by the Appellees in Guerrero I and II must be broken down into three questions. Id. at 4. First, a determination must be made as to whether a cause of action has been abolished without a legislative provision of alternative protection. If the first question is answered in the affirmative, a determination must be made as to whether the cause of action abolished was established by statute prior to the adoption of Florida's Constitution or known to the English common law as adopted pursuant to 52.01, Fla. Stat., as the law of the State of Florida. Only if both the first and second questions are answered in the affirmative, must the court determine whether the Legislature's impediment to access to courts is reasonable under the circumstances of the unique public need at issue, as was the case in Feldman V. Glucroft, supra, Holly v. Auld, supra, and Carter v. Sparkman, supra.

The Florida Supreme Court recently, in Feldman v. Glucroft, supra, addressed the issue of whether §768.40(4), Fla. Stat. (1983), totally abolished a defamation action arising from information furnished to a medical review committee. The Court held that the immunity and discovery provisions of §768.40, Fla. Stat., did not abolish a cause of action, and, therefore, the Court did not reach the access to courts issue of Art. I, § 21, Fla. Const. Justice Grimes, concurring, noted that the access to courts provision also may be inapplicable because no cause of action had been abolished. Id. at 802. The bond requirements of §768.40(6)(b) and §395.0115(5)(b), Fla. Stat. (1985), [renumbered at §766.101(6)(b), Fla. Stat. (Supp. 1990) and §395.0115(8)(b), Fla. Stat. (1989)] must, therefore, also be analyzed to ascertain if they abolish a cause of action.

The requirement that a physician post bond in an amount sufficient to pay the costs and attorneys fees of the defendants, prior to a responsive pleading being filed, in no way abolishes a cause of action. The right of the plaintiff to pursue a cause of action based upon intentionally fraudulent conduct is left intact by the amendment to 5395.0115 and 5768.40, Fla. Stat (1985). Therefore, the Supreme Court's decision in Feldman V. Glucroft, supra, is equally applicable to the present case. It is also important to note that the Supreme Court in Feldman recognized that the 1985 amendment to §768.40(4), Fla. Stat., permits actions based upon intentional fraud, while the 1983 version permitted actions based upon malice or fraud. The Court's opinion was that neither

version of the statute totally abolished a cause of action. Id. at 801. Although the bond requirement of the 1985 statute was not at issue in Feldman, the Supreme Court has affirmatively stated that the 1985 version of the act, which incorporates the bond requirement, does not abolish the cause of action.

The legislatively mandated requirement that the Appellee post a bond for costs and attorneys' fees prior to defendants having to file a responsive pleading clearly imposes a burden that is greater than that placed upon most other civil litigants. The Supreme Court in Feldman dealt with such additional burdens when considering the discovery privilege of §768.40(4), quoting Hollv v. Auld:

> "Inevitably, such a discovery privilege will impinge upon the rights of some 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 cost containment offered by effective self-policing by the medical committee and found the latter to be of greater weight." Feldman at 800-801. (emphasis supplied).

The Supreme Court thus has:

> "...concluded that the Legislature had a clear public need and justifiable basis for creating this limited restriction in the area of health care." Id. at 800.

The Supreme Court has also specifically considered the fact that the legislatively imposed burdens on litigation in the area of medical staff review might make it impossible for a litigant to prosecute a cause of action, and upheld the burden. Id. The will of the Legislature must, therefore, be upheld in enforcing the bond

requirements of §395.0115(5)(b) and §768.40(6)(b), Fla. Stat. (1985), in the present case.

Judge Anstead opinion's in Guerrero I, upon which the lower court relied on in this case, attempted to distinguish Feldman on the grounds that it is one thing to increase the difficulty of proving the case by limiting discovery, but quite another to limit access to the courts. (159). This argument ignores the Florida Supreme Court holdings in Rotwein, supra, Kluger, supra, Carter, supra, and Carr, supra, which uphold the Legislature's power to limit or abolish access to the courts for overwhelming public necessity.

Even if the application of the bond requirements of §768.40(6)(b) and §395.0115(5)(b), Fla. Stat. (1985), resulted in the total abolishment of a physician's right to seek redress of injuries sustained in medical review activities, and the Legislature had not determined an overpowering public need, the access to courts provision of Art. I, 521, of the Fla. Const. would still be inapplicable to the present case. A review of the three counts of the Complaint reveals that each count is based upon allegations that the Appellee's rights under the peer review procedure mandated by statute have been violated. For example, Count I alleges breach of contract, in the form of the medical staff bylaws procedures required by 5395.0115(1) Fla. Stat. (1985). (7). Count II specifically alleges that the Appellee's rights granted by the medical peer review statutes have been violated. (10-11). Count III alleges damages in the form of injury to his

doctor and patient relationships arising from actions occurring within the statutorily mandated medical review process. (12).

The statutory medical peer review process based on hospital bylaws was first implemented in 1972 by Ch. 72-62, Laws of Fla., and made mandatory in 1985 by Ch. 85-175, Laws of Fla. This clearly occurred after the adoption of the Florida Constitution and deals with an area that was unknown to the English common law. Therefore, Art. I, § 21, of the Fla. Const. is inapplicable. Kluger v. White, supra; Carr v. Broward County, supra.

The Appellee contends that the case of Sunspan Engineering and Construction Company V. Spring-Lock Scaffoldins Company, 310 So.2d 4, (Fla. 1975), stands for the proposition that Art. I, § 21, Fla. Const. is applicable in all contract and tort actions (92), and that the case of Lasky v. State Farm Insurance, 296 So.2d 9 (Fla. 1974) provides that the access to courts provision is applicable in all tort actions. (93). A review of those cases, however, reveals that the analysis made by the Supreme Court in determining whether an action was contemplated under common law goes beyond the mere question of whether a tort or contract claim is at issue.

Sunspan Engineering and Construction Company V. Springlock Scaffoldins Company, susra, dealt with an action in common law negligence and common law contract, (Id. at 7), by third party plaintiff, who was an alleged tortfeasor of an injured employee, against an employer, for injuries sustained by the employee during the course of employment. Sunspan clearly dealt with a third party's common law negligence and common law contract actions

brought against an employer in a workmen's compensation case that were totally barred by the Workmen's Compensation Insurance Act of the Legislature. The statute allowed the employee and the employer to sue the third party tortfeasor but barred the third party tortfeasor from suing the employer. The Court found that common law negligence and contract actions existed before Art. I, §21, Fla. Const., and that the Legislature could abolish such rights if it could show an overpowering public necessity to abolish such rights and if no alternative method of meeting the public necessity could be shown. The Court found the Legislature showed no overpowering or compelling necessity for the abolishment of the third party's reciprocal right to sue an employer in a proper case. Id. at 7. The Court found the Legislature's act to be arbitrary, capricious and without any rational basis to further any overpowering public necessity. Id. at 8. Lasky, supra, dealt with automobile tort liability, which had been determined to be within the purview of Art. I, 521, Fla. Const. in Kluser v. White, supra. Neither of those cases dealt with the situation presented in the instant case where the Legislature has required the hospitals and their medical staffs to conduct peer review and disciplinary proceedings according to written medical staff bylaws (which have been determined by the courts to be a contract between the hospital and the disciplined medical staff member) with respect to members of the medical staff and concurrently provided specific protections, in the form of immunity from civil liability, protection from discovery, and a requirement that litigants who

contest such peer review decisions in court must post a bond for attorneys' fees and court costs as set by the court. This is an area entirely foreign to the common law of England, as of July 4, 1776, as incorporated into Florida law by §2.01, Fla. Stat.

Count II of the Appellees complaint is based entirely upon the modern statutory scheme for medical staff peer review. (10-11). count I attempts to allege an action in contract: however, it is founded upon medical staff bylaws which are the creature of the medical staff peer review statutes. (7). Section 395.0115(1) provides, in part, that the procedures for medical staff peer review actions:

> "...shall comply with the standards outlined by the Joint Commission on Accreditation of Hospitals, the American Osteopathic Association, the Accreditation Association for Ambulatory Health Care, and the 'Medicare/Medicaid Conditions of Participation', as such procedures existed on January 1, 1985. The procedures shall be adopted pursuant to hospital bylaws." (emphasis supplied).

Count III of the Appellee's complaint attempts to allege a cause of action sounding in the tort of interference with advantageous business relationships.

Tortious interference with business relationships developed as a cause of action in the State of Florida after the incorporation of English common law. The cause of action was accepted in Dade Enterprises, Inc. v. Wometco Theaters, Inc., 160 So. 209 (Fla. 1935), where the Supreme Court of Florida held:

> "The weight of modern authority holds that interference with any contract amount to a tort. That rule has been consistently adhered to in this State since the decision of this Court in Chipley v, Atkinson, 23 Fla. 206, 1 So. 934." 160 So. at 210.

Although the Dade Enterprises opinion dealt with tortious interference with a contract, Chipley v. Atkinson, which was relied on by the Dade Enterprises Court, acknowledged for the first time in Florida that tortious interference with valuable business relationships could exist even without an enforceable contract. A review of Chipley v. Atkinson, 1 So. 934 through 941, discloses the legal analysis conducted by the Supreme Court of Florida in determining that a cause of action existed for tortious interference with valuable business relationships. The English cases relied upon were Bowen v. Hall, 6 Queens Bench Division 333 (decided in 1881) and Lumley V. Gye, 2 EL.BL. 216 (decided by the Queens Bench in 1853). These cases are cited at 1 So. 396. In Wackenhut Corp. v. Maimone, 389 So.2d 656 at 657 (Fla. 4th DCA 1980), the Fourth District also recognized Lumley as the first appearance of the modern tort of intentional interference with a contractual or business relationship. Section 2.01, Fla. Stat., provides that the common law adopted in Florida is the common law of England as it existed on July 4, 1776. Therefore, the cause of action for tortious interference with valuable business relationships is a legal development that post-dates the common law applicable to Art. I, § 21 of the Fla. Const.

The Appellee has, therefore, attempted to equate his statutorily based causes of action contained in Counts I, II and III of his complaint with the classic common law negligence and contract claims raised in Sunspan Engineering, supra; Lasky, supra. Each count, however, is based upon the medical staff peer review

disciplinary procedures in written hospital bylaws required by legislative enactment after the adoption of Florida's Constitution. Only the tortious interference with business relationship allegations of Count III are even arguably separate and independent from the medical staff review statutes. Even assuming, arguendo, that Count III is not dependent upon the statutory provisions, it still alleges a cause of action which did not exist under the English common law prior to July 4, 1776, or pursuant to Florida statutes prior to the Constitution's adoption.

The Appellee's assertion that the court's reliance on English cases in Chipley implies that the tort of interference with advantageous business relationships was recognized at common law (254) is without merit. The court's reliance on English case law suggests that there was no such cause of action at common law, at least until the decision in these two late nineteenth century cases. The Appellee's assertion that the Appellant has not proven the tort of interference with advantageous business relationships did not exist at common law (254) is merely a form of the disingenuous argument that Appellant has not proven a negative; under the evidence of Chipley, supra, Dade Enterprises, supra, and Wackenhut Corp., supra, Appellant has at least created a presumption that this tort did not exist at common law as of July 4, 1776, which the Appellee should be forced to rebut.

The court in the case of Harrell v. State of Department of Health and Rehabilitative Services, supra, followed the Supreme Court's decision in Kluger v. White, supra, in holding that a cause

of action based upon an adverse administrative determination was not affected by Art. I, § 21, Fla. Const. In holding that a financial impediment to access to the courts, in the form of transcript preparation expenses, was not prohibited by Art. I, § 21, Fla. Const., the court held:

> "Up until that time [1961] former Ch. 120 entitled 'General Provisions Relating to Boards, Commissions, Etc.' made no provision for judicial review of administrative proceedings upon application of a party adversely affected by final agency action. The time sequence therefore demonstrates that the 'Access to Courts' provision in the Florida Constitution (which dates back to 1885) does not apply to a cause of action seeking judicial review of an unfavorable administrative agency decision affecting welfare assistance under A.F.D.C. or the Food Stamps program." 361 So.2d at 718.

The court's decision in Harrell, supra, has been followed by other District Courts of Appeal. See Harris v. Department of Corrections, 486 So.2d 27 (Fla. 1st DCA 1986); Smith v. Department of Health and Rehabilitative Services, 504 So.2d 801 (Fla. 2nd DCA 1987); Roberts v. Unemployment Appeals Commission, 512 So.2d 212 (Fla. 3rd DCA 1987). The statutory bond requirements at issue in the present case cannot be declared invalid on the basis of the constitutional provision relied upon by the Appellee (and now by the Fourth District in Guerrero 11) because, like the provision for judicial review of administrative orders, the statutory medical peer review process in compliance with written hospital bylaws is a modern legislative creation not known to English common law or provided by statute before the enactment of Florida's Constitution.

Finally, even if Art. I, 521, Fla. Const., were applicable to the causes of action alleged in the instant case, the bond

requirements must be enforced as a reasonable exercise of legislative discretion as demonstrated in Issue I.

ISSUE III

Whether the authorities cited by the Appellee in Guerrero I and II prohibit the Legislature from imposing the bond requirement in addressing the health care crisis.

The cases cited in the Petition for Certiorari in Guerrero I, (85-94, 132-141), with the exception of Carter v. Sparkman, do not control the issues presented to this Court. None of them deal with the extraordinary public health and welfare exception applied by the Supreme Court of Florida in Feldman v. Glucroft, supra; Holly v. Auld, supra; Carr v. Broward County, supra; and Carter v. Sparkman, supra. Moreover, unlike the present case, the authorities cited by the Appellee in Guerrero I all dealt with causes of action known to English common law or provided by statute before the enactment of Florida's Constitution.

In Guerrero I, the Appellee first cited the cases of Shav v. First Federal of Miami, Inc., 429 So.2d 64 (Fla. 3rd DCA 1983); Lehmann v. Cloniger, 294 So.2d 344 (Fla. 1st DCA 1974); and Carter v. Sparkman, supra, for the proposition that courts must closely scrutinize legislative restrictions on access to the courts. (89). None of those cases held that such restrictions are per se impermissible. Only Carter v. Sparkman dealt with the dire public need exception present here and, as discussed above, the Court in that case upheld an act imposing a substantial financial impediment

to access to the courts due to public health and welfare needs as found by the Legislature.

The Appellee cited Flood v, State *ex* rel. Home Land Company, 117 So. 385 (Fla. 1928), and Bower V, Bower, 55 So.2d 797 (Fla. 1951) for the contention that "...Florida courts have consistently invalidated any financial conditions (other than reasonable court costs) imposed on the right to pursue judicial relief." (89-90) The Appellee ignores controlling recent authority in making this contention.

Neither Flood nor Bower dealt with a legislative determination of public health and welfare necessity as a basis for the financial impediment to access to the courts. Flood involved the use of docket fees to fund law libraries, any where the excess monies collected were to be used for general county purposes. The charge was determined to be a tax of litigants for the benefit of the public treasury, not a fee reasonably related to the cost of litigation, and was unreasonable under the circumstances. Bower dealt with the requirement that the "original plaintiffs" satisfy court costs that had been taxed against them, before pursuing an appeal. Contrary to the Appellee's assertion that Bower precluded financial conditions on the right to appeal (91), the Supreme Court in Bower held this financial impediment to be reasonable and authorized under the "access to courts" provision of Florida's Constitution as it had in the past. See Walker v. City of Jacksonville, 19 So.2d 372 (Fla. 1944), cited by the court in Bower. The Bower court reversed the trial court only because it

Contrary to the contention of the Appellee, therefore, Bower v. Bower, supra, is another example of the Supreme Court of this State acknowledging valid financial impediments to litigation that are imposed by the Legislature in appropriate circumstances.

Bell v. State, 281 So.2d 361 (Fla. 2d DCA 1973), Tirone v. Tirone 327 So.2d 801 (Fla. 3rd DCA 1976), and G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3rd DCA 1977), each deal with financial impediments to access to the courts that were based solely on a judicial order, and not imposed by the Legislature due to a determination of public need. In reviewing the trial court orders, the appellate courts found them to be unreasonable impediments to access to courts. The Third District Court of Appeal emphasized this distinction in G.B.B. Investments, Xnc. v. Hinterkopf, in quoting the Supreme Court's opinion in Carter v. Sparkman, supra:

> "Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law. Typical examples of are the fixing of a time within which suits must be brought, payment of reasonable costs 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 if where an action for liable may be filed." 343 So.2d at 901.

Additionally, the court in G.B.B. Investments, Inc., pointed out that there was no reasonable relationship between the payment and any valid public purpose. That is not the case regarding the constitutionality of the statutes before this Court.

The Appellee's assertion that the courts in Bell, Tirone, and G.B.B. Investments, Inc., did not suggest that their analysis would be any different for legislatively imposed impediments (92, 138) ignores the basic doctrine of separation of powers, wherein the judiciary must give deference to the Legislature's determinations of policy. Additionally, while the courts have struck down such impediments generally, the courts have not done so where the impediments were enacted by the Legislature upon a determination of overpowering public necessity.

ISSUE IV

Whether the Legislature's provision for relief for indigent plaintiffs in §57.081(1) and §57.071(1) Fla. Stat. (1989), must be read in conjunction with the medical peer review presuit bond statutes.

Judge Anstead dissent in Guerrero I, adopted by the trial court in Guerrero 11, is an appealing argument to passions regarding the primacy of the adversary system and the necessity for resort to it by aggrieved indigents. However, not before Judge Anstead in Guerrero I was the issue of the Legislature's provision for relief of indigent plaintiffs, §57.081(1), Fla. Stat. By filing an appropriate affidavit, an indigent plaintiff in a medical peer review case has the right to proceed without pre-payment of costs. Costs are defined in §57.071(1), Fla. Stat. (1989), as reasonable premiums or expenses paid on all bonds or other security furnished by such party.

The needs of the indigent plaintiff have been provided for by the Legislature in §57.081 and 557.071, Fla. State., which statutes should be harmonized and read to compliment the medical peer review presuit bond statutes struck down by the lower courts.

If a disciplined physician claims that he is indigent, and can sustain his position in a fair hearing pursuant to 557.081 and 557.071, he will have the relief provided by the Legislature.

Additionally, this Court may take notice that posting a statutory bond is a common occurrence in the Florida courts. The entire One Hundred Fifty Thousand and 00/100 ($150,000.00) Dollars statutory bond need not have been posted by the Appellee in this case. There is an industry known as the bonding business that commonly writes statutory surety bonds in the full amount for ten (10%) percent cash deposit or a one (1%) percent cash deposit along with an encumbrance on existing assets and a pledge to repay the full amount if called upon by order of the court. Additionally, the Appellants proffered that they were prepared to present evidence that the Appellee had had the Fifteen Thousand and 00/100 ($15,000.00) Dollars cash to post the ten (10%) percent bond during the course of the previous twelve (12) months since the mandate issued from the court in Guerrero I, as the Appellee has spent similar amounts for other purposes (See 190-191 and Appellants' list of proposed hearing exhibits [79-84]). However, the trial court, upon objection by the Appellee as to relevancy, barred the admission of the proffered evidence. (192).

The Appellants believe that the vice perceived by Judge Anstead in the medical peer review presuit bond statutes is the inability of the aggrieved truly indigent physician to pursue his claims. The Legislature has provided an appropriate remedy for such plaintiffs. The Appellants request this Court to harmonize the Legislature's acts and uphold the constitutionality of the medical peer review pre-suit bond statutes.

The Appellee's reliance on Grissom V. Dade County, 279 So.2d 899 (Fla. 3rd DCA 1973); Dade County v. Womack, 285 So.2d 441 (Fla. 3rd DCA 1973); Bower V. Connecticut General Life Insurance Company, 347 So.2d 439 (Fla. 3rd DCA 1977); and Smith V. Department of Health and Rehabilitative Services, supra, (256), are distinguishable in that they require the indigent to pay for services not provided by the court; either the county or the newspaper publishing the notice would have to pay for the services, rather than the court. Here, as no services are at issue, no one would be required to pay in the indigent's stead. The Legislature created both the bond requirement and the indigent plaintiff's relief statutes after weighing policy considerations. The Court must conclude that the Legislature determined the policy considerations behind the indigent's relief statute outweighed the consideration behind the medical peer review pre-suit bond statute, in order to harmonize and uphold the statutes.

CONCLUSION

The statutory provisions which require the plaintiff to post a bond for attorneys' fees and court costs as a condition precedent for bringing suit for actions arising out of medical peer review committee actions as required by statute, are a reasonable legislative response to a an overpowering public necessity. Although the Appellee's Complaint does not implicate Art. I, § 21, Fla. Const., since no cause of action was abolished, the bond requirement at issue is a valid imposition on the access to courts provision of the Constitution, due to the Legislature's finding of an overpowering public need. Furthermore, the Legislature has provided for access to the courts for truly indigent plaintiffs through other statutes. Therefore, the Appellants respectfully request that this Court declare the statutes constitutionally valid and direct that the Appellee be required to post a bond for reasonable attorneys' fees and costs, as determined by the trial court in Guerrero I, as a condition precedent to prosecuting his suit against the Appellants.

Respectfully submitted,

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CERTIFICATE OF BERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellants' Initial Brief was mailed by U.S. Mail to: Jack Scarola, Esquire, SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A., P.O. Drawer 3626, West Palm Beach, Florida 33402; Phillip M. Burlington, Esquire, EDNA L. CARUSO, P.A., Suite 4-B/Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; and Clerk of the Court, Supreme Court of Florida this 14th day of August, 1991.

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