087

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

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

Appellants,

vs.

LUIS GUERRERO, M.D.,

Appellee.

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

FILED
SID J. WHITE
NOV 20 1991
CLERK, SUPREME COURT
By
Chief Deputy Clerk

REPLY BRIEF OF APPELLANTS

Atlee W. Wampler, III, Esquire
Florida Bar No. 311227
James J. Breen, Esquire
Florida Bar No. 297178
Attorneys for Appellant
WAMPLER, BUCHANAN & BREEN, P.A.
900 Sun Bank Building
777 Brickell Avenue
Miami, Florida 33131
(305) 577-0044

TABLE OF CONTENTS

Wampler Buchanan & Breen

777 Brickell Avenue (305) 577-0044 Miami, Florida 33131

TABLE OF CITATIONS

STATUTES:

OTHER CITATIONS:

ARGUMENT

I. THE MANDATORY PEER REVIEW AND PRE-SUIT BOND REQUIREMENTS OF CHAPTER 85-175, LAWS OF FLORIDA, ARE CONSTITUTIONALLY VALID LEGISLATIVE RESPONSES TO THE HEALTH CARE CRISIS IN FLORIDA.

The Appellee's Brief inaccurately contends that the Appellants would have this Court ignore "...the fundamental principle that the paramount rule of law is the Constitution." The Appellants respectfully submit that the statutory pre-suit bond requirement at issue in the case sub judice is a constitutionally valid exercise of legislative authority in response to overriding public necessity. See eg., Carr v. Broward County, 541 So.2d 92 (Fla. 1989). It is fundamental that "...every reasonable doubt must be indulged in favor of the act..." and that the act must be sustained if "...it can be rationally interpreted to harmonize with the Constitution..." Holley v. Adams, 238 So.2d 401, 404 (Fla. 1970).

The statutory bond requirement at issue must be constitutionally reviewed in light of the severe crisis in the health care and tort systems it was designed to address. As this Court noted in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976);

> "Cases are legend which hold that the police power of the state is available in the area of public health and welfare, and we must, therefore, consider matters pursued under the law sub judice as being separate and distinct from those generally flowing from the market place." 335 So.2d at 805.

The Answer Brief of Appellee attempts to factually distinguish

this Court's earlier decisions, cited by the Appellant, however, does not contest the continued viability of the applicable standards for constitutional review of the legislation in question. This Court's well reasoned opinions in Carter v. Ssarkman, supra, Feldman v. Glucroft, 552 So.2d 798 (Fla. 1988); Holly v. Auld, 450 So.2d 217 (Fla. 1984), and Carr v. Broward County, supra, provide important precedent for evaluating the reasonableness of the pre-suit bond requirements in actions emanating from medical staff peer review proceedings.

Art. I, 521, Fla. Const. does not, per se, prohibit all restrictions to access of the Court's of this state. See, eg., North Port Bank v. State Dep't of Revenue, 313 So.2d 683 (Fla. 1975). Nevertheless, the Appellee appears to contend that any financial impediment, except for filing fees, must, without further analysis, be prohibited even if imposed by the Legislature in the exercise of its police power. The Appellee relies upon this Court's decision in Flood v. State ex rel. Homeland, 117 So. 385 (Fla. 1928), in support of its contention that only reasonable filing fees can be required as a condition to proceeding with litigation. There are, however, two critical distinctions between the instant case and Flood.

First, Flood entailed a review of the Legislature's exercise of its taxing authority and not an exercise of its police power in response to a public crisis as in the case sub judice. After

closely reviewing the facts, the Court in Flood rejected the argument that the fee required by the act was a court cost and found:

> "It is clear that to call this a fee is a misnomer. It is a tax levied and collected for a county purpose, if the establishment of a law library may be considered a county purpose."

The Flood Court went on to hold the act to be violative of the provision in the former Bill of Rights comparable to Art. 1, §21 of Florida's present Constitution;

> 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. 117 So. at 387.

Second, the Court in Flood found that the invalid tax in question equated to the selling of justice by the state. The Court concurred with the following opinion of the Supreme Court of North Dakota in the case of Mallin, et al. v. La Moure County, 145 N.W. 582:

> "We are quite satisfied, however, that prior to the adoption of the North Dakota Constitution the meaning had extended its original boundary, and that the provisions which are to be found in the Constitutions of all of the states were aimed, not merely against the selling of justice by the magistrates, but by the state itself..." 117 So.2d at 387.

The legislation at issue in the present case in no way involves the selling of justice by the state, but instead affects the respective rights and burdens of individual parties at the outset of litigation.

Finally, the Flood opinion acknowledges that the right to ace ss to the courts means the right to reasonable access:

> "...in other words, that a free 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." 117 So.2d at 387.

The other authorities relied upon by the Appellee involve easily distinguishable actions by trial courts imposing financial impediments on a litigant's right to proceed that are in no way related to the Legislature's exercise of its police power. Bell v. State, 281 So.2d 361 (Fla. 2d DCA 1973), involved a trial court's order requiring a criminal defendant to reimburse the State for certain litigation expenses before being permitted to seek supersedeas. G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977), involved the requirement, imposed by the trial court, that a mortgage foreclosure defendant deposit in the Court's Registry all amounts due under the mortgage before proceeding with a counterclaim. Tirone v. Tirone, 327 So.2d 801 (Fla. 3d DCA 1976) overruled a trial judge's order dismissing the wife's motion for relief from judgment because she hadn't paid her own lawyer as ordered by the court.

The District Court in G.B.B. Investments v. Hinterkopf, supra, noted that the guarantee provided by Art. I, §21, prohibits only "unreasonable burdens and restrictions" on access to the Court's. 343 So.2d at 901. The courts in G.B.B. Investment, supra, Bell v. State, supra, and Tirone v. Tirone, supra, simply found that the

burden and restrictions imposed, unilaterally, by the trial courts' orders were unreasonable in light of the applicable facts and circumstances. None of those cases involved a review of legislative initiative in response to a public crisis such as that in the present case and they provide this Court with no assistance in its review of the reasonableness of the legislature's exercise of its power.

The Appellee asserts that this Court's decision in North Port Bank v. State Dep't of Revenue, supra, provides no support for the pre-suit bond requirement. The Appellants respectfully submit that the North Port Bank precedent supports the validity of the bond requirement in the present case for the reasons discussed below.

First, the North Port Bank Court applied the "...established maxim of statutory construction that courts have the judicial obligation to sustain legislative enactments when possible." 313 So.2d at 687. The pre-suit bond legislation at issue in the present case was enacted in response to a very real threat to the public health and welfare only after careful consideration and study by both the legislative and administrative branches of our state's government. The legislative initiative now before this Court entails an exercise of the state's police power that is entitled to even greater deference in an effort to sustain its validity than the revenue law presented in North Port Bank.

Second, it is clear from the North Port Bank decision that

even large financial burdens and restrictions on access may be legislatively imposed if they are otherwise reasonable under the circumstances. In North Port Bank the extent of the financial burden was affected by the amount of the tax, both contested and uncontested, and the statute was not determined to be invalid merely because the amount of the financial impediment could be very high. Similarly, in the present case, the amount of the bond is judicially determined on a case by case basis in light of the facts and circumstances relevant to attorneys' fees that are presented in an adversary proceeding. The trial court is free to consider all factors relevant to a determination of a reasonable fee including the likelihood that the plaintiff will prevail.

Third, the Court in North Port Bank recognized that litigants are not unconstitutionally deprived of access to the courts by a pre-suit bond requirement that is reasonably related to an important governmental interest. In North Port Bank, the public interest involved the government's need to effectively collect intangible taxes and the bond requirement was construed in a constitutionally valid manner. In the present case, the public interest in preserving its vital tort system of justice and health care delivery system is far more compelling and justifies upholding even stronger legislative action.

Fourth, North Port Bank dealt with disputes that arose after a statutorily provided administrative process and involved a

a

presumption that the State's assessment of the tax was correct. In the present case, the parties have conducted a statutorily mandated peer review hearing process which is presumed to have reached a correct result. In fact, the only claims that can be raised by the Appellee in court are those founded upon "intentional fraud". Section 395.0115(2), Fla. Stat., (1985). The Appellants have been immunized from liability for all other claims.

The Appellee contends that the subject of the bond requirement, in the present case, attorneys' fees and costs, is somehow an important difference from the subject of the bond in North Port Bank. This argument ignores the fact that both situations deal with a key objective of the litigation, the determination of the amount of tax owed in North Port Bank and the amount of fees and costs in the present case. Also, both cases involve legislation that establishes the relative positions of the parties entering litigation after statutorily mandated proceedings; those assessing taxes in one and those administrating hospital peer review in the other. Finally, both are directed at ensuring that the person commencing the litigation will satisfy the amounts that the litigant is required, by statute, to pay if the presumably correct action in question is upheld.

The Appellee argues that the statutory bond requirements for various pre-judgment writs are irrelevant to the issues before the Court because they involve constitutionally required conditions to

pre-judgment relief. See, Unique Caterers, Inc. v. Rudy's Farm Co., 338 So.2d 1067 (Fla. 1976). It is respectfully submitted that consideration of such bond requirements is instructive because they are imposed to protect certain litigants from damage that may arise from the granting of certain relief to their adversaries. The bond requirement in the case sub judice is similarly imposed to protect medical staff officers and health care facilities from damages, in the form of litigation expenses, resulting from their performance of statutorily mandated peer review duties. The fact that one type of bond is mandated by due process principles and the other by the dire need to resolve the health care crisis is a distinction without a significant difference. In both situations, the bond is a prerequisite to the pursuit of remedies in the courts.

The Appellee notes that Fla. R. Civ. P. 1.610(b), providing for temporary injunction procedures, has a similar bond requirement. Necessary prerequisites to such relief are inadequacy of remedy at law and the threat of irreparable harm, injury or damage if the relief is not granted. See e.g. Wilson v. Sandstrom, 317 So.2d 732, 736 (Fla. 1975). Therefore, a litigant entitled to a temporary injunction, but unable to afford the bond, will presumably suffer irreparable harm or injury for which the litigant can never be fully compensated in the courts. Still, due process considerations control the determination of the reasonableness of restrictions on the litigant's right to access to the courts and

redress of injury.

Rule 1.420(d), Fla. R. Civ. P., governing voluntary dismissals, creates another reasonable financial impediment to access to the courts that, unlike Rule 1.610, does not flow from due process requirements. Litigants who voluntarily dismiss their case must pay all costs accessed in their prior dismissed action before being permitted to proceed if the case is refiled. Also, the rule provides for a stay of the action until the later trial court's order regarding payment is complied with. It is important to note that costs may include attorneys' fees incurred in the prior action where they are provided by contract or statute. See, McKelvey v. Kismet, Inc., 430 So.2d 919 (Fla. 3d DCA 1983). The cost payment requirement of Rule 1.420 reflects a reasonable balancing test of the judicial interest in discouraging multiple lawsuits against the litigant's interest in proceeding free of financial impediment.

The Appellee cites this Court's decisions in City of Tallahassee v. Pub. Emp. Rel. Comm'n, 410 So.2d 487 (Fla. 1982) and Austin v. State ex rel. Christian, 310 So.2d 289 (Fla. 1975), in support of the well established principle that the unconstitutionality of a statute may not be overlooked for convenience sake. The pre-suit bond requirement in question is not constitutionally infirm. The Appellants in no way contend that it should be upheld for mere convenience sale. The Appellants, do

respectfully submit, however, that questions of convenience, just as questions concerning the wisdom of the legislation, have no role in the determination of constitutional validity. Hollev v. Adams, 238 So.2d at 404.

The Appellee's Brief factually distinguishes the statutory bond requirement at issue in the present case from the pre-suit mediation requirement in Carter v. Sparkman, supra. A comparison of the relevant facts, however, supports the validity of the legislation at issue in the present case.

This Court recognized in Carter v. Ssarkman, that the statutory requirement at issue in that case placed a very heavy burden on litigants' rights to access to the courts, however, found the restriction to be reasonable because of the crisis facing the health care system in Florida in 1975. By 1985, the continuing threat to the availability of medical care to the citizens of this state had grown far graver and was met by the enactment of mandatory peer review legislation including essential built-in protections for those required to administer the process. Clearly, the terrible expansion of the crisis in our health care system necessitated decisive action by the Legislature in 1985.

Prior to 1985 the applicable statutes provided for permissive, but not mandatory, peer review in hospitals. In Hollv v. Auld, 450 So.2d 217 (Fla. 1984) this Court enforced the privilege and confidentiality requirements of the former permissive peer review

law, and noted that it was reasonable in light of the proper legislative purpose of fostering meaningful peer review. In Feldman v. Glucroft, supra, this Court again accepted the Legislature's determination that without the qualified immunity provisions of the 1975 statute, "...a viable health care peer review process would be difficult, if not impossible to maintain." 522 So.2d at 801.

The Legislature determined, in the 1985 act, that the compelling public interest necessitates mandatory peer review and that the pre-suit bond requirement is essential to meaningful peer review in hospitals because of the otherwise chilling effect imposed by the threat that hospitals, medical staff officers, and witnesses will incur legal expenses for discharging their required duties. It is respectfully submitted that these public policy determinations fall within the sound discretion of the Legislature. The limitation of the threat that participants in the peer review process will incur litigation expenses is a sound legislative purpose. The pre-suit bond requirement clearly provides participants with such protection and thus furthers the legislative purpose.

The pre-suit bond requirement is vital to meaningful mandatory peer review. Without it, the chilling effect of exposure to litigation expenses will cause prospective medical staff officers to avoid sewing, will cause witnesses to refrain from candidly

coming forward and will severely inhibit the ability of hospitals to implement and administer effective peer review.

II. INDIGENT LITIGANTB DESIRING TO PURSUE MERITORIOUS CLAIMS ARISING FROM HOSPITAL PEER REVIEW PROCEEDINGS SHOULD BE AFFORDED RELIEF FROM THE PRE-SUIT COST SECURITY REQUIREMENT BY §57.081, Fla. Stat.

The Appellee contends that the financial impediment resulting from the pre-suit bond requirement may prevent some litigants from pursuing meritorious claims in the courts. The cost associated with litigation is always a factor that must be considered by a prospective litigant in choosing to go forward. Indeed, many kinds of litigation often prove financially infeasible and our courts would be flooded with otherwise meritorious claims were cost not a factor. The initial cost of the pre-suit bond to litigants such as the Appellant is a necessary by-product of the Legislature's approach to solving the health care crisis. Should the Appellant ultimately prevail, that cost will be taxable as was the cost of the pre-suit mediation procedure reviewed in Carter v. Sparkman, §57.071(1), Fla. Stat. The fact that some litigants may decline to incur the expense of a pre-suit bond should not result in a determination that the Legislature's response to the health care crisis is invalid.

In the case sub judice, the Appellants attempted to establish that the Appellee was capable of complying with the pre-suit bond requirement, however, a full evidentiary hearing, on this point, was never conducted. The Appellee now criticizes the weight of the

Appellants' evidentiary proffers. The Appellants submit that every reasonable doubt should be resolved in favor of the legislation in question. Therefore, it should be presumed that the Appellee is capable of posting the bond absent proof to the contrary.

The Appellee asserts that enforcement of the statute will effectively eliminate cases where the plaintiff cannot afford the bond. A distinction should be drawn between cases where the plaintiff chooses not to incur the expense, as discussed above, and where the plaintiff is indigent or insolvent. Contrary to the Appellee's assertions, the latter situation is resolved by 557.081, Fla. Stat.

The Appellee supports his contention that §57.081(1), Fla. Stat., is inapplicable to the pre-suit attorneys fee bond requirement by citing cases where the statute has been deemed inapplicable to obligations for litigation expenses owed to third parties. 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 Ins. Co., 347 So.2d 439 (Fla. 3d DCA 1977) (statute does not eliminate obligation to pay cost of transcript); Smith v. Dep't of Health and Rehab. Serv., 504 So.2d 801 (Fla. 2d DCA 1987) (same).

The Appellee's argument entirely ignores the critical fact

that the statute being reviewed requires the posting of "...a bond or other security..." with the court. The question presented is analogous to the case of an indigent litigant who has once voluntarily dismissed his case and is required to pay costs taxed in the earlier proceeding before recommencing his suit. Fla. R. Civ. P. 1.420(d). Under such facts, the litigant is entitled to the relief afforded by §57.081, Fla. Stat., as noted by the court in Suria v. Ruggles Const. Co., 552 So.2d 1129 (Fla. 3d DCA 1989). The result would presumably be no different if the costs taxed in the earlier proceeding included attorneys' fees. See, McKelvey v. Kismet, supra.

Clearly, the statute at issue in the case sub judice involves the pre-payment of costs into the registry of the court. In a proper case, a litigant should be relieved of his or her duty to prepay such costs to the clerk pursuant to 557.081, Fla. Stat.

CONCLUSION

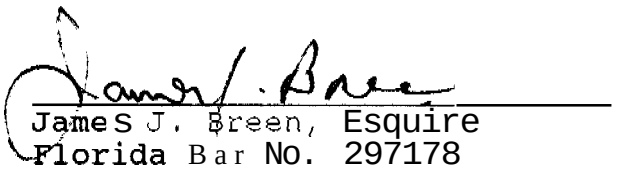
The statutory provisions which require the plaintiff to post a bond or other security for attorneys! fees and court costs as a condition precedent to bringing suit for actions arising out of mandatory medical peer review committee actions are a reasonable legislative response to a an overpowering public 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 valid under the access to courts provision

of the Constitution, due to the Legislature's finding of an overpowering public need. Furthermore, the Legislature has provided relief 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 or other security 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellants has been sent via U.S. mail to: Mr. Jack Scarola, Esquire, SEARCY DENNEY SCAROLA BARNHART & SHTPLEY, P.A., P. O. Drawer 3626, West Palm Beach, Florida 33402 and Mr. Philip M. Burlington, Esquire, EDNA L. CARUSO, P.A., Suite 4-B, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401 on this the 18th day of November, 1991.

Respectfully submitted,



James J. Breen, Esquire
Florida Bar No. 297178
Atlee W. Wampler, 111, Esquire
Florida Bar No. 311227
Attorneys for Appellants
WAMPLER, BUCHANAN & BREEN, P.A.
900 Sun Bank Building
777 Brickell Avenue
Miami, Florida 33131
(305) 577-0044

1015\ANSBRF.MJG