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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 78,727

3RD DCA CASE NO. 90-01246

L.T. CASE NO. 89-23230

DOCTORS' HOSPITAL OF SOUTH MIAMI, LTD., d/b/a LARKIN GENERAL HOSPITAL,

Appellant,

vs.

JOSEPH OVADIA, M.D.,

Appellee.

_____/

APPELLANT'S INITIAL BRIEF ON THE MERITS

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PREFACE

Appellant, DOCTORS' HOSPITAL OF SOUTH MIAMI, LTD., d/b/a LARKIN GENERAL HOSPITAL, was the defendant in the trial court, the appellee in the district court of appeal, and will be referred to as LARKIN or appellant. Appellee, JOSEPH OVADIA, M.D., was the plaintiff in the trial court, the appellant in the district court of appeal, and will be referred to in this brief as OVADIA or appellee.

The following references will be used in this brief:

(R.) Record on Appeal

Attached to this brief is an appendix containing a copy of the transcript of the April 17, 1990 hearing before the trial court, as well as the Third District Court of Appeal's opinion. References to this appendix will be designated by (A.).

ISSUES ON APPEAL

I. WHETHER SECTION 395.0115(8)(b) IS FACIALLY CONSTITUTIONAL.

II. WHETHER SECTION 395.0115(8)(B) IS CONSTITUTIONAL *AS APPLIED* TO THE PARTICULAR FACTS OF THIS CASE.

STATEMENT OF THE CASE AND FACTS

OVADIA initiated litigation against LARKIN seeking the recovery of damages under allegations of breach of contract, defamation and equitable relief flowing from actions and conduct involved in suspending OVADIA from the staff of LARKIN. LARKIN served various motions responding to the complaint, including a motion to post bond or other security, pursuant to Section 395.0115(8)(b), Florida Statutes. That statute requires a plaintiff, suing a person or entity involved in the review of staff privileges under that statute, to post bond as set by the court in an amount sufficient to pay anticipated costs and attorneys' fees. Section 395.0115(8)(b)[1], Florida Statutes, provides as follows:

> As a condition of any staff member or physician bringing any action against any person or entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the staff member or physician shall post a bond or other security, as set by the court having jurisdiction of the action, in an amount sufficient to pay the costs and attorney's fees.

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[1] Section 766.101(6)(b) contains similar language but applies to health care providers as plaintiffs:

> As a condition of any health care provider bringing any action against any person that initiated, participated in, was a witness in, or conducted any review as authorized by this section and before any responsive pleading is due, the health care provider shall post a bond or other security, as set by the court having jurisdiction of the action, in an amount sufficient to pay the costs and attorney's fees,

A hearing was held on this motion on September 12, **1989**. In conjunction with its motion, the hospital filed affidavits and submitted testimony estimating the amount of costs and reasonable attorneys' fees to be expended by the hospital in defending this staff privileges case. The testimony and affidavits demonstrated that the defense of this case would cost at least $50,000 and could reach approximately $150,000 at the lower court level alone. (R. **111-113; 139)**

At this hearing, OVADIA ***never*** asserted, **by way of** affidavit, testimony or argument, that he was financially unable to post the bond. (R. **131-151)** **Nor** did he assert a financial inability to pay in his September 11 memorandum of law in response to LARKIN's motion to post bond. **(R. 114-116)** Rather, OVADIA simply argued that the statute was unconstitutional in that (1) it requires doctors to post a bond without a showing that the defendant would prevail, and **(2)** the statute awards only the hospital attorneys' fees it if prevails.[2] (R. **146-147)** Therefore, asserted plaintiff, the statute was arbitrary and unequal in its treatment of the parties. Plaintiff also made a blanket claim that the statute interfered with access to courts, but never explained to the court **how** it interfered with his access.

After hearing argument, the trial court determined that the statute was constitutional, ordered **OVADIA** to **post** a **$35,000**

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[2] But note: **§768.40(6)(a),** Fla. Stat. **(1987)** (now §766.101) awards fees to a defendant who prevails in any action initiated by a hospital,

bond, and stayed proceedings until the bond was posted. (R. 125-126; 173-174)

OVADIA then filed a petition for writ of certiorari to the Third District Court of Appeal, seeking review of the trial court's order. The Third District dismissed the petition for lack of jurisdiction. (R. 182-184)

Upon remand to the trial court, LARKIN moved to require OVADIA to post a bond pursuant to the court's prior order. OVADIA *then* filed an affidavit stating for the *first* time that he was financially unable to post a bond. A hearing on LARKIN's motion was held on April 17, 1990, at which time OVADIA argued, consistent with his recently filed affidavit, that his income had decreased as a result of his suspension of his staff privileges, and consequently he was financially unable to post a bond. (A. 7)

The trial court did not accept OVADIA's argument. The court noted that OVADIA did not have to put up $35,000 to post a bond, but that he could get a bonding company to post it. As stated by the court:

> THE COURT: With all due respect to the doctor, I don't accept your argument. I am going to leave my order as it is and I am going to order him to post a bond or I am going to dismiss the matter, and I think the doctor can come up with a bond. Cash is not required.
>
> At this point in time the Court has no intention of increasing the bond and jeopardizing the plaintiff's rights in this case. The Court fixed a bond that it felt was fair to both the plaintiff and the defendant and I will say at this point I see na reason why it should go higher or lower and I am

> leaving the bond as the Court had indicated earlier.

(A. 7)

Further, **OVADIA's** attorney recognized that **OVADIA** would **not** have to put **up** $35,000 to post a bond. **As** stated by **OVADIA's** counsel at the hearing:

> MR. SUTTON: I understand that, but the requirements for a bonding company to post a $35,000 bond is not 10 percent, perhaps there is a premium, and **I** think it is one percent, and in a civil **case**, however, there is a requirement of Collateral.

(A. 6)

OVADIA failed to past a band pursuant to the court's order. **As** a result, LARKIN moved to dismiss plaintiff's complaint. Only after this motion to dismiss was filed did **OVADIA** place into the file an informal, unsworn "To Whom It May Concern" letter from an insurance agent. In this letter, the agent had indicated that he had reviewed a written statement signed by **OVADIA** in which **OVADIA** stated that he was "unable to post $35,000 in liquid assets in order to collateralize a bond." The agent stated in his letter that it was his opinion "that without full collateral DR. OVADIA will not be able to obtain the bond that has been requested of him." (R. 197-200) These documents were never introduced at the April 1990 hearing and defendant was never given an opportunity to challenge the authenticity or relevancy of these informal documents.

On May 10, 1990, the trial court entered its order granting LARKIN's motion to dismiss. (R. 214) A final judgment was subsequently entered an that order.

An appeal was then taken to the Third District Court of Appeal. Subsequently, this case was consolidated with Ovadia v. CRH Properties, d/b/a Coral Reef Hospital, et al., Case No. 90-1948 and Ovadia v. Jones, Case No. 91-833. In an opinion filed September 17, 1991, the Third District reversed the trial court's orders dismissing OVADIA's complaint for failure to post a bond pursuant to Sections 395.0115(8)(b), and 766.101(6)(b), Florida Statutes (1989), and held that these statutes infringe on the right of access to the courts, in violation of Article I, Section 21, of the Florida Constitution.

Appellant LARKIN then filed the present appeal, pursuant to Florida Rule of Appellate Procedure 9.030(a)(1)(A)(ii), which provides that the Florida Supreme Court has mandatory jurisdiction to entertain appeals from a district court of appeal invalidating a state statute.

SUMMARY OF ARGUMENT

It is well established that it is the duty of the courts to so construe legislation as to save it from constitutional infirmities, and to effect a constitutional result if it is at all possible to do so. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). Furthermore, while a statute may be invalid as applied to one set of facts, a statute can still be constitutionally valid as applied to another state of facts. In re Fuller, 255 So.2d 1 (Fla. 1971); Snedeker v. Vernmar, Ltd., 151 So.2d 439 (Fla. 1963). In such cases, the statute is not destroyed, but the duty is imposed upon the courts to enforce the statute in those cases where it may be legally applied. Ex parte Wise, 141 Fla. 222, 192 So. 872 (Fla. 1940).

Section 395.0115, Florida Statutes, represents an effort by the legislature to encourage enforcement of the peer review requirements by providing protection to those involved in the process. This legislation, including the bond requirement, was passed in response to a crisis situation and is reasonably related to the goal to be achieved, that is, to assure adequate and affordable health care to the people of this state. As such, the bond requirement of Section 395.0115(8)(b) is facially constitutional.

Moreover, because the trial court made a determination that OVADIA was in fact financially able to post a bond, the statute, as appliedto the present case, is constitutional. It is this fact which distinguishes the present case from those cases

ARGUMENTS ON APPEAL

I. SECTION 395.0115(8)(b) IS FACIALLY CONSTITUTIONAL.

A. Standard of Review

In testing a statute's constitutionality, consideration should be given to the entire act, and the court may consider its history, the evil to be corrected, the intention of the legislature, the subject regulated, and the abject to be obtained. Legislation which is being challenged may also be compared with cognate laws in order to determine its purpose, meaning and effect. Scarboroush v. Newsome, 150 Fla. 220, 7 So.2d 321 (Fla. 1942); 10 Fla.Jur.2d Constitutional Law 570.

Moreover, a statute is *presumed* constitutional and the party challenging it has the burden to establish its invalidity. Peoples Bank of Indian River County v. State, Dept. of Banking & Finance, 395 So.2d 521 (Fla. 1981). The statute will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. State v. Kinner, 398 So.2d 1360 (Fla. 1981).

The rule is well established that in determining the constitutionality of legislation, the courts must give the statute a construction which will uphold it rather than invalidate it, if there is any reasonable basis for doing so. Miami Dolphins, Ltd. v. Metropolitan Dade Countv, 394 So.2d 981 (Fla. 1981); Sarasota Countv v. Barq, 302 So.2d 737 (Fla. 1974); Emhart Corp. v. Brantlev, 257 So.2d 273 (Fla. 3d DCA 1972); State v. Keaton, 371 So.2d 86 (Fla. 1979). Thus, it is the duty of the courts to so

construe legislation as to save it from constitutional infirmities, and to effect a constitutional result if it is at all possible to do so. See Chatlos v. Ovesstreet, 124 So.2d 1 (Fla. 1960); 10 Fla.Jur.2d *Constitutional Law* §80.

B. Analysis

In 1985, the legislature passed 85-175 setting forth restrictions on a physician's right to sue facilities for restrictions or denials of the right to practice medicine at those facilities. The same act also expanded the immunity available to medical review committees responsible for restricting or denying staff privileges. As justification for these restrictions, the legislature stated as follows:

> WHEREAS, high-risk physicians in this state sometimes pay disproportionate amounts of their income for malpractice insurance, and
>
> WHEREAS, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> WHEREAS, the maximum rates for essential medical specialists such as obstetricians, cardiovascular 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 downgrade 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 systems 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 physicians quality, and

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

Chapter **85-175**, 1985 Regular Session.

Section 395.011, Florida Statutes, was amended in this legislation by the addition of various sections including section 8(a) and (b) which provide **as** follows:

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

(b) As a condition of any applicant bringing any action against any person or

> entity that initiated, participated in, was a witness in, or conducted any review as authorized by this section, and before any responsive pleading is due, the applicant shall post a bond or other security, in an amount sufficient to pay the costs and attorney's fees.

The corresponding section of statutes, Section 395.0115, providing for disciplinary powers of licensed facilities, was amended with the same provision for attorneys' fees and a bond requirement. This section was later amended in 1988 to define further the requirements for peer review within a licensed facility. In the 1988 modification, the legislature included section 1 stating its intent to protect good faith participants in the peer review process from retaliatory tart suits and federal anti-trust suits. The legislature stated: "Such intent is within the public policy of the state to secure the provision of quality medical services to its citizens." §395.0115(1), Fla. Stat.

The 1985 and 1988 legislation was passed in response to a critical need for reform in the system of providing quality medical services to Florida's citizens. Upon determining that a crisis existed in this area, the legislature mandated peer review within licensed facilities as a step toward ensuring the availability of quality medical care. The peer review process as established requires licensed facilities to provide by written, binding procedures peer review to investigate and discipline if necessary staff members or physicians found to require such action. To safeguard those participating in this peer review process, the legislature provided by statute qualified immunity from monetary

liability and protection against the admission into evidence of information generated during the peer review process. §§395.0115 and 768.40, Fla. Stat. The legislature also required physicians attacking those involved in the peer review process to post bond for anticipated fees and costs in Section 395.0115(5)(b).

Addressing the restrictions of Section 768.40, Florida Statutes, as they were created by the 1973 legislative amendments, the Florida Supreme Court noted that this legislation was passed in an effort to control the escalating costs of health care by encouraging self regulation by the medical profession through its own peer review and evaluation. Such meaningful peer review would not be possible without guarantees of confidentiality for physicians participating in the process. According to the court in Holly v. Auld, 450 So.2d 217 (Fla. 1984), the protections against discovery were designed to provide confidentiality necessary for the full, frankmedical peer review evaluation. This discovery privilege was upheld despite the fact that it would impinge upon the rights of civil litigants to discover information which might be helpful or even essential to their causes. Holly, 450 So.2d at 220. The court stated:

> 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.

Holly, 450 So.2d at 220.

Answering certified questions regarding Section 768.40(4), Florida Statutes, and whether it unconstitutionally abolished a defamation claim, the Florida Supreme Court in Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988), held that this statute simply added a restrictive element to the cause of action rather than abolishing it completely thus saving it from constitutional attack. Feldman, 522 So.2d at 799. Citing Holly's explanation of the legislation's intent and purpose, the court noted that without the type of qualified immunity set up in the statute, a viable health care peer review process would be difficult, if not impossible, to maintain.

The bond provisions of Section 395.0115, Florida Statutes, which appellee claims are unconstitutional, were simply another method established by the legislature to encourage physicians to participate in the critically needed peer review process in the medical field, similar to the immunity extended in Section 768.40, Florida Statutes. The legislature has established as the public policy of this state that there will be meaningful peer review in the medical field to assure Florida's citizens; the availability of quality and affordable medical care. Sections 395.0115 and 768.40 are the means the legislature has chosen to implement this public policy.

In Parkway General Hospital v. Allinson, 453 So.2d 123 (Fla. 3d DCA 1984), this court examined Holly v. Auld in response to a request for a writ of common law certiorari quashing an order denying protection from discovery of medical staff review

committee minutes. The court noted that the legislature had made a decision to ensure valid peer review even if encroachment upon rights held by others was necessary to do so. The court noted that the legislature "chose to promote the protection of those giving information over the 'rights' of those who were the subject of evaluation... ." Parkway, 453 So.2d at 126. In the same way, the legislature chose to protect those involved in the peer review process by requiring the disgruntled physician to post a bond for costs and fees. The cause of action was not abolished but a reasonable restriction was created.

Kluger v. White, 281 So.2d 1 (Fla. 1973), is the first case specifically discussing a challenge to a statute as unconstitutionally depriving a litigant to access to the courts without a reasonable alternative. The Florida Supreme Court addressed a challenge to a statute preventing recovery for uninsured property damage below a set amount. The court held that where a right of access to the courts had been provided by statutory or common law, the legislature cannot abolish such a right without providing a reasonable alternative unless the legislature can show an overpowering public necessity. Kluger, 281 So.2d at 4.

In contrast to the statute challenged in Kluger, which prevented recovery of damages for the destruction af an uninsured automobile, the statute in the instant case does not impermissibly restrict access to the court. It merely sets up a condition precedent with which plaintiffs must comply.

The Florida Supreme Court previously addressed similar conditions precedent established by the legislature in medical malpractice cases in Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), cert. *denied,* 429 U.S. 1041 (1977). The issue in that case was the legislative enactment requiring prelitigation submission to mediation by plaintiffs with medical malpractice claims. Determining the mediation statute to be facially constitutional in the face of numerous challenges including one on the denial of access to the courts, the court stated: "Although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guaranty of access, there may be reasonable restrictions prescribed by law." Carter, 335 So.2d at **805.**

Noting the "imminent danger that a drastic curtailment in the availability of health care services would occur," the court determined that the mediation statute was a reasonable restriction. The statute was the legislature's attempt to resolve the health care crisis. In his concurring opinion, Justice England noted specifically that the mediation statute put plaintiffs to the expense of two full trials on their claim, thus favoring the defendants over plaintiffs who might have limited resources. Justice England maintained that the statute was still valid and stated: "A disparity of resources has always been an imbalance in

litigation which the courts are relatively powerless to adjust." Carter, 335 So.2d at 808.[3]

There are similar requirements for presuit financial or other conditions which have survived judicial scrutiny. Examples as cited in Carter include payment of reasonable cost deposits, pursuit of administrative remedies, and extension of the right of retraction prior to a libel suit. Carter, 335 So.2d at 805. Further, Sections 77.031(3) and 76.12, Florida Statutes, require posting of a bond prior to actions far garnishment and attachment. A plaintiff must file a bond in the amount of two times the debt demanded before being allowed to seize collateral of the debtor defendant prior to judgment.

In the district court below, OVADIA relied upon G.B.B. Investments, Inc. v. Hinterkopf, 343 So.2d 899 (Fla. 3d DCA 1977), in support of the proposition that the courts will strike down legislation which defeats access to the judicial system. Such

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[3] While the Supreme Court originally upheld the facial validity of the medical mediation act in Carter, it later determined that the subsequent practical operation and effect of that particular statute had rendered it unconstitutional on arbitrary and capricious grounds. See Aldana v. Holub, 381 So.2d 231, 237 (Fla. 1980). The court emphasized in Aldana that its decision was not premised on a re-evaluation of the wisdom of the Carter decision, 381 So.2d at 237. The Aldana court specifically commented that the Carter court had specifically upheld the legislation based on the health care crisis. Rather, it was based an the unfortunate fact that the medical mediation statute had proven unworkable and inequitable in practical operation. The statute in the instant case has not been proven unworkable and inequitable. When applied to a situation as in the present case, where there has in fact been a determination that a plaintiff is financially able to post a bond, the statute is constitutional in its operation and the purpose of the legislation can be implemented without the imposition of any constitutional infirmities. See argument under Section 11.

legislation was not involved in G.B.B. Instead, the trial court upon motion of one of the parties had required a deposit of an overdue mortgage payment prior to allowing a counterclaim in a mortgage foreclosure suit. This court noted initially that there was no Florida statute, case or constitutional provision either authorizing, sanctioning or mandating the trial court's actions. Because of this lack of authority, the trial court's actions came into direct collision with G.B.B.'s constitutional right to free access to the courts. G.B.B., 343 So.2d at 900. The court then cited Carter v. Sparkman as an explanation of the restrictions which can constitutionally be placed on plaintiff's rights to access to the courts. Distinguishing the restrictions recognized as acceptable in Carter and other restrictions which are acceptable, the court indicated no valid or reasonable basis for the financial condition imposed by the trial court in G.B.B. The court in G.B.B. did not strike down legislation that operates to defeat access to the judicial system. The court also did not address legislation which has been passed in response to a crisis situation and which is reasonably related to the purpose intended to be achieved.

The other cases relied upon by OVADIA below to support his argument regarding other decisions striking legislation for impermissible imposition on the access to the courts are also inapplicable. None of those cases involved legislation similar to that at issue here, that is, imposition of a financial requirement prior to suit in response to a crisis situation and the legis-

lature's declaration of public policy. None of those cases involved legislation which has a reasonable relation to its intended purpose of averting a crisis in health care availability.

The legislature in this **case** determined that public policy required protection of the consuming public in the area of health care services. The most efficient way to protect the public was to require self-policing among the medical profession. Such self-policing, to be efficient, required protection for those participating. To that end, the legislature passed the statutes extending limited immunity, protecting information from discovery and requiring a bond before suing those involved in the peer review process.

The Florida legislature established the peer review process to allow licensed facilities to police those practicing medicine within their institution. The process requires physicians to review the medical practice of other physicians practicing within the hospital and, if the medical practice of the physician subject to review is questionable, to discipline or suspend staff privileges in order to protect the health, safety and welfare of the public. The paramount purpose of this legislation is to allow institutions to discipline or remove from the practice of medicine physicians the peer review committees determine are not qualified. Physicians who are removed or disciplined in this fashion retain their right to sue the institution for wrongful removal of privileges or disciplinary action. Because of the incredible expense which attend these cases, the legislature required the

deposit of a bond to protect the institution and the peer review committee members from the burden of defending a frivolous lawsuit by a physician they have determined is not fit to practice within their institution.

OVADIA attempts to set forth the picture of an innocent victim whose rights are being "trampled by the whims of small groups of economic power." What OVADIA has lost sight of, however, is that the legislation in question was promulgated by the legislature to protect the public, He has also mistakenly assumed that he has a property right in his ability to practice medicine within a particular institution. OVADIA retains his right to practice medicine but his practice is affected at the hospital. In Hull v. Board of Commissioners of the Halifax Hospital Medical Center, 453 So.2d 519 (Fla. 5th DCA 1984), the court indicated that: "There is no constitutional right recognized in Florida for a physician to practice in a particular hospital." Hull, 453 So.2d at 524.

Section 395.0115(5)(b), Florida Statutes, represents an effort by the legislature to encourage enforcement of the peer review requirements by providing protection to those involved, willingly or unwillingly, in the process. This legislation, including the bond requirement, is reasonably related to the goal to be achieved, that is, to assure adequate and affordable health care to the people of this state. The bond requirement does not deprive appellee of his access to the courts in violation of Article I, Section 21 of the Florida Constitution; it simply creates a reasonable condition precedent.

II. SECTION 395.0115(8)(b) IS CONSTITUTIONAL *AS APPLIED* TO THE PARTICULAR FACTS OF THIS CASE.

A. Standard of Review

A statute or ordinance may be valid as applied to one state of facts, although under another state of facts an application of the statute may violate rights secured by the organic law. In re Apportionment Law Senate Joint Resolution No. 1305, 1972 Regular Session, 263 So.2d 797 (Fla. 1972); In re Fuller, 255 So.2d 1 (Fla. 1971); Snedeker v. Vernmar, Ltd., 151 So.2d 439 (Fla. 1963); Grava V. Baran, 134 So.2d 25 (Fla. 3d DCA 1961) (constitutionally valid legislation may be unconstitutionally exercised); Westwood Lake, Inc. v. Dade County, 264 So.2d 7 (Fla. 1972), conformed to 262 So.2d 705 (Fla. 3d DCA) (there can be an unconstitutional application of valid legislation). In such cases, the statute is not destroyed, but the duty is imposed upon the courts to enforce the regulation in those cases where it may legally be applied. Ex parte Wise, 141 Fla. 222, 192 So. 872 (Fla. 1940). See generally 10 Fla.Jur.2d Constitutional Law §74.

B. Analysis.

The cases relied upon by the Third District in its opinion concern only the unconstitutional application of Sections 395.0115(8)(b) or 766.101(6)(b) to a particular set of facts. For example, Sittig v. Tallahassee Memorial Regional Medical Center, Inc., 567 So.2d 486 (Fla. 1st DCA 1990), which is currently being reviewed by this court, Tallahassee Memorial Regional Medical Center, Inc. v. Sittig, Case No. 76,917, involved an appeal from

a dismissal of plaintiff's complaint for failure to prosecute. In Sittig, plaintiff's staff privileges were suspended by the hospital pursuant to the peer review process prescribed by Section 395.0115(1), Florida Statutes (1985). Appellant filed suit against appellee, alleging, among other things, breach of contract, violation of medical staff requirements under Section 395.0115, and libel. Appellee moved for an order requiring posting of the bond as required by Section 395.0115(5) [now subsection (8)]. Appellant asserted that she was without income and therefore unable to post a bond in any significant amount. She submitted evidence regarding her financial circumstances, and argued that the bond requirement could not constitutionally be applied to bar suit by a plaintiff who is unable to post the bond, The trial court rejected appellant's constitutional arguments and, after an evidentiary hearing, set the bond at $30,000. The court then issued an order staying appellant's action until she posted the bond.

No bond was posted and no record activity occurred until over a year later, when appellee moved to dismiss for failure to prosecute pursuant to Flarida Rule of Civil Procedure 1.420(e). A hearing was held, after which the trial court issued an order dismissing the action for failure to prosecute. The court found that appellant was still financially unable to post the bond.

Appellant asserted that the bond requirement, both on its face and as applied to the case, was unconstitutional and that it denied her constitutional right of access to the courts. The First District Court of Appeal held as follows:

> We do not reach the claim of facial unconstitutionality of Section 395.0115(5)(b) because of our conclusion that the subject statute is unconstitutional as ***applied*** in the instant case. The bond requirement clearly cannot withstand constitutional scrutiny where it effectively operated to preclude the appellant from exercising her constitutional right of access solely because of her financial inability to post the requisite bond. (e.s.)

Sittig, **567** So.2d at **487.**

The court qualified its holding with the following footnote:

> The genuineness of a claim of inability to meet the bond requirement is of course **a** factual matter for determination by the trial court.

Sittig, **567** So.2d at **487, fn.2.**

Likewise, Judge Anstead's main concern in his dissent in Guerrero **v.** Humana, Inc., **548** So.2d 1187 (Fla. 4th DCA 1989), which was relied upon in Psychiatric Associates v. Seigel, M.D., 567 **So.2d 52** (Fla. 1st DCA 1990), and Community Hospital of the Palm Beaches, Inc. v. Guerrero, **579** So.2d 304 (Fla. 4th DCA 1991), was the unconstitutional ***application*** of the statute. As stated at page 1188 of his dissent:

> The real effect of the [statute's] requirement is that plaintiffs ***unable*** to ***afford*** the bond are precluded from bringing suit. Thus, the economically ***disadvantaged*** will be deprived of access to the courts. (e.s.)

Guerrero, **548** So.2d at 1188.

Unlike the situation in the cases relied upon by OVADIA and the Third District Court of Appeal, the statute as applied to the particular facts in the case currently before this court is

constitutional. The trial court in our case clearly made a factual determination that OVADIA was in fact financially able to post a bond. This is unlike the situation in Sittig, where the trial court had determined that the plaintiff could not afford to post a bond, but nevertheless dismissed plaintiff's complaint because she failed to post the bond. It is this fact which distinguishes the present case from those cases relied upon by OVADIA and the Third District to support the claim that Section 395.0115(8)(b) is unconstitutional.

The trial court's factual determination, that OVADIA's delayed claim of financial inability to meet the bond requirement was not genuine, is supported by the record. When the issue of the bond requirement was first heard by the trial court in September 1989, OVADIA *never* asserted that he was financially unable to post a bond. It was only until after an appeal had been disposed of and the case had been remanded back to the trial court that OVADIA first raised an issue as to his financial ability to meet the bond requirement.

Further, although testimony established that attorneys' fees could range anywhere from $50,000 to $150,000, the trial court only required a $35,000 bond. Also, as recognized by the court and OVADIA's attorney at the April 1990 hearing, OVADIA would not have to put up $35,000 to post a bond. Rather, he could get a bonding company to post it (A. *6*) Further, OVADIA's attorney stated that OVADIA would only need to put up one percent of the $35,000 and some collateral to post the bond. (A. 6)

Moreover, it is clear from the trial judge's comments at the April 1990 hearing that the court did in fact make a factual determination as to OVADIA's *actual financial* ability to post a bond. As stated by the court:

> THE COURT: With all due respect to the doctor, I don't accept your argument. I am going to leave my order as it is and I am going to order him to post a bond or I am going to dismiss the matter, and I think the doctor can come up with a bond. Cash is not required.
>
> At this point in time the Court has no intention of increasing the bond and jeopardizing the plaintiff's rights in this case. The Court fixed a bond that it felt was fair to both the plaintiff and the defendant and I will say at this point I see no reason why it should go higher or lower and I am leaving the bond as the Court had indicated earlier.

(A. 7)

Because the trial court made a determination that OVADIA was in fact financially able to post a bond, the statute as applied to the present case is constitutional.

CONCLUSION

It is well established that it is the duty of the courts to so construe legislation as to save it from constitutional infirmities, and to effect a constitutional result if it is at all possible to do so. Chatlos v. Overstreet, 124 So.2d 1 (Fla. 1960). Furthermore, while a statute may be invalid as applied to one set of facts, a statute can still be constitutionally valid as applied to another state of facts. In re Fuller, 255 So.2d 1 (Fla. 1971); Snedeker v. Vernmar, Ltd., 151 So.2d 439 (Fla. 1963). In such cases, the statute is not destroyed, but the duty is imposed upon the courts to enforce the statute in those cases where it may be legally applied. Ex parte Wise, 141 Fla. 222, 192 So. 872 (Fla. 1940).

Section 395.0115, Florida Statutes, represents an effort by the legislature to encourage enforcement of the peer review requirements by providing protection to those involved in the process. This legislation, including the bond requirement, was passed in response to a crisis situation and is reasonably related to the goal to be achieved, that is, to assure adequate and affordable health care to the people of this state. As such, the bond requirement of Section 395.0115(8)(b) is facially constitutional.

Moreover, because the trial court made a determination that OVADIA was in fact financially able to post a bond, the statute, as applied to the present case, is constitutional. It is this fact which distinguishes the present case from those cases

relied upon by **OVADIA** to support his claim that Section 395.0115(8)(b) is unconstitutional.

On the basis of the foregoing reasons, appellant respectfully asserts that the decision of the Third District Court of appeal **should** be reversed, and the trial court's order requiring **OVADIA** to post **a** bond pursuant to the terms of Section **395.0115(8)(b),** Florida Statutes, **be** affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing initial brief has been furnished to R. FRED LEWIS, ESQUIRE, MAGILL & LEWIS, P.A., Attorneys for Appellee, Suite 200, 7211 S.W. 62nd Avenue, Miami, Florida 33143, by mail, this 21st day of October, 1991.

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