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SID J. WHITE

FEB 3 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. ✓ 78,727; 78,861; 78,862
(CONSOLIDATED)

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

Appellant,

vs.

JOSEPH OVADIA, M.D.,

Appellee.

APPELLANT'S REPLY BRIEF

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REBUTTAL TO APPELLEE'S STATEMENT OF FACTS

At page 4 of his statement of the facts, OVADIA states that the quotation set forth at page 3 of LARKIN's initial brief "has absolutely no factual predicate in any Record and no predicate in fact whatsoever." However, this quote of the trial judge's statements is taken directly from the transcript of the April 17, 1990 hearing on the Defendant's Motion to Request Plaintiff to Post a Bond. A copy of this transcript is included in the Appendix attached to Appellant's Initial Brief. (A. 3-9) This transcript was originally listed in the initial Designation to **Reporter**. See attached. However, this transcript was never listed in the index to the record on appeal. Apparently, the transcript was never physically transmitted by the trial court to the Third District Court of Appeal. Counsel for LARKIN contacted the clerk's office regarding this matter, and was informed that the clerk's office was unable to find this particular transcript. Consequently, in an attempt to remedy this situation, LARKIN provided a copy of the April 17, 1990 transcript to the Third District Court of Appeal in an appendix to its brief. There was never any objection to the submission of this transcript to the appellate court. Accordingly, this transcript was officially designated by appellant to be part of the **record** on appeal, was properly before the Third District Court of Appeal, and is now properly before this court.

OVADIA also argues in his statement of facts that the statement cited by LARKIN at page 4 of its initial brief, attributable to OVADIA's trial counsel, is "absolutely incorrect

and is a total misrepresentation and misstatement." (Appellee's Brief, p.5) The statement cited by LARKIN at page 4 of its brief is a *direct quote* from the April 17, 1990 hearing and can be found at page 6 of appellant's appendix.

REBUTTAL TO A ARGUMENT

Contrary to appellee's assertions, the cases cited by the Third District Court of Appeal in its opinion concerned **only** the unconstitutional **application** of the statutory provisions at issue. OVADIA states at page 26 of his brief that there is "no word" in Community Hospital of the Palm Beaches, Inc. v. Guerrero, 579 So.2d 304 (Fla. 4th DCA 1991), and Psychiatric Associates v. Siesel, 567 So.2d 52 (Fla. 1st DCA 1990), "that states a holding that the provisions are unconstitutional only as applied."

However, in both of these decisions, the court specifically relied upon Judge Anstead's dissent in Guerrero v. Humana, Inc., 548 So.2d 1187 (Fla. 4th DCA 1989). As stated by the court in Comunitv Hospital, supra, 579 So.2d at 305:

The reasoning supporting the trial court decision is fully expressed by Judge Anstead's **dissenting** opinion in Guerrero v. Humana, Inc., 548 So.2d 1187 (Fla. 4th DCA 1989), adopted by the **First** District in Siegel. Nothing is to be gained by repeating it here.

579 So.2d at 305.

Further, as stated by the court in Siesel, supra:

We agree with **Judge** Anstead's well-reasoned dissent in Guerrero v. Humana, Inc., 548 So.2d 1187 (Fla. 4th DCA 1989), [footnote omitted] and adopt it as our opinion in this case.

567 So.2d at 53.

As previously explained in LARKIN's initial brief, the main concern expressed in Judge Anstead's dissent in Guerrero v. Humana, Inc., 548 So.2d 1187 (Fla. 1st DCA 1989), relied upon by the courts in Siegel and Comunitv Hospital, supra, was the

unconstitutional application of the statute. As stated at page 1188 of Judge Anstead's 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.

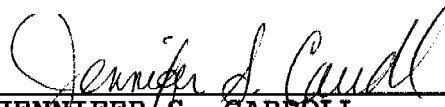
(e.g.) Guerrero, 548 So.2d at 1188.

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 this case is constitutional. The trial court in our case clearly make a *factual* determination that OVADIA was in fact financially able to post a 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 the bond statute is unconstitutional.

CONCLUSION

On the basis of the foregoing reasons, and the reasons expressed in Appellant's Initial Brief, 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.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing reply 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, and to RONALD J. MARLOWE, ESQUIRE, FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., Attorneys for Appellees, CRH PROPERTIES and DR. JONES, Courthouse Center, 11th Floor, 175 N.W. First Avenue, Miami, Florida 33128-1817, by mail, this 31st day of January, 1992.



JENNIFER S. CARROLL

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

JOSEPH OVADIA, M.D.,

GENERAL JURISDICTION DIVISION

Plaintiff/Appellant,

-vs-

CASE NO. 89-23230

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

Defendant/Appellee.

Judge Robert H. Newman

DESIGNATION TO REPORTER
AND
REPORTER'S ACKNOWLEDGMENT

I. Designation

Plaintiff/Appellant, JOSEPH OVADIA, M.D., files this Designation to Reporter and directs Mudrick, Witt, Levy & Consor to transcribe an original and 2 copies of the following portions of the proceedings to be used in this appeal:

1. The entire hearing proceedings recorded by the Reporter on or about: (1) May 24, 1990; (2) April 17, 1990; (3) April 10, 1990; and (4) January 1, 1990, before the Honorable Judge Robert H. Newman in the above styled cause.

2. The court reporter is directed to file the original with the clerk of the lower tribunal and to serve one copy on the following:

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Law Offices
Magill & Lewis, P.A.

I, Counsel for Appellants, certify that satisfactory financial arrangements have been made with the court reporter for preparation of the transcript.

MAGILL & LEWIS, P.A.

By: _____

R. Fred Lewis

11. Reporter's Acknowledgment

1. The foregoing designation was served on the day of _____, 1990, and received on the day of _____, 1990.

2. Satisfactory arrangements have () have not () been made for payment of the transcript cost. These financial arrangements were completed on the _____ day of _____, 1990.

3. Number of trial or hearing days _____.

4. Estimated number of transcript pages _____.

5. Transcript will be completed on the _____ day of _____, 1990, or an extension of time is needed until _____.

MUDRICK, WITT, LEVY & CONSOR

DATE: _____

By: _____

Official Court Reporter

cc MUDRICK, WITT, LEVY & CONSOR
100 S.E. Second Street
Miami, FL 33131

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 18th day of June, '1990, to: Joseph P. Metzger, Esq., METZGER, SONNEBORN & RUTTER, P.A., Attorneys for Defendant, P.O. Box 024486, West Palm Beach, FL 33402-4486;

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