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IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 76,844

PSYCHIATRIC ASSOCIATES, a
Professional Association;
ALVIN NEUMEYER, M.D.,
EUGENE VALENTINE, M.D., and
FRANK GILL, M.D.,

Appellants,

-vs-

EDWARD A. SIEGEL, M.D.,

Appellee.

AMENDED BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF FLORIDA, INC., IN SUPPORT OF RESPONDENT

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SUMMARY OF ARGUMENT

This Court should hold that the statutory bond requirements at issue are unconstitutional as violating Article I, §21 of the Florida Constitution, the access to courts provision. Florida courts have consistently invalidated financial preconditions to suit other than reasonable court costs based on the fundamental concept that everyone should have access to the courts for resolution of disputes. The bond requirements at issue imposed a significant impediment to judicial resolution of causes of action specifically authorized by the legislature. To permit these bond requirements to stand is, in essence, justifying a situation in which the rich have greater access to justice than the middle class or the poor. Such a result is antithetical to long-standing principles of Anglo American jurisprudence. This Court should rule consistent with the prior decisions implementing Article I, §21 and invalidate the statutory provisions at issue.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT §§395.011(10)(B), 395.0115(5)(B), AND 766.101(6)(B), FLA. STAT. (1989), ARE UNCONSTITUTIONAL AS VIOLATING THE RIGHT OF ACCESS TO COURTS GUARANTEED BY ARTICLE I, §21 OF THE FLORIDA CONSTITUTION.

The statutes at issue in this case require that a physician challenging the denial, revocation, or limitation of his hospital privileges or other peer review action must file, as a prerequisite to court resolution, a bond for the full amount of the defendant's anticipated costs and attorney's fees. Absent the posting of such a bond, the defendants have no obligation to take any action to defend the lawsuit, and it simply remains dormant. These provisions clearly violate Article I, §21 of the Florida Constitution, and suffer other constitutional infirmities as well.

Article I, §21 of the Florida Constitution provides:

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

The First District characterized the right created by that provision as a fundamental right of access to the courts.[1] The fundamental nature of that right is apparent from its historical background. A virtually identical provision was contained in

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[1]/The First District adopted the dissenting opinion of Judge Anstead in GUERRERO v. HUMANA, INC., 548 So.2d 1187 (Fla. 4th DCA 1989), as its opinion in this case. For ease of reference, the contents of that opinion will simply be referred to as the opinion of the First District, although cites for quotations will have to be to Judge Anstead's dissenting opinion.

Chapter 29 of the Magna Carta, which contained the clause, "To none will we sell, deny, or delay right or justice," T. PLUCKNETT, A Concise History of the Common Law, 24 (5th Edition 1956). That clause in the Magna Carta was paraphrased in the original constitution of the State of Florida, see 1838 Florida Constitution, Article I, §9. A similar provision has been retained in every subsequent version of the Florida Constitution.[2]

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

[2]/1861 Florida Constitution, Article I, §9; 1865 Florida Constitution, Article I, §9; 1885 Florida Constitution, Declaration of Rights, 54.

legislation was repugnant to the access to courts provision of the Florida Constitution (117 So. at 387):[3]

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

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

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

Since FLOOD, Florida courts have consistently invalidated any financial conditions, other than reasonable court costs, imposed on the right to pursue judicial relief. In BELL v. **STATE, 281 So.2d 361** (Fla. **2d DCA 1973),** the trial court ordered **the defendant to reimburse the state for the cost of the trial** transcript and the prosecution of the case against him as a prerequisite to consideration of his request for a supersedeas

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[3]/At the time of the FLOOD decision, the access to courts provision in the Florida Constitution was contained in §4 of the Bill of Rights, and provided:

> All courts in this state shall be open, **so** that every person for any injury done him in his lands, **goods**, person or reputation shall have remedy, by **due** course of law, and right and justice shall be administered without sell, denial or delay.

That provision of the 1885 Constitution was modified in the 1968 revision, although the modification was not intended to alter the scope or effect of that provision, see Commentary to Article I, §21, Florida Constitution 25A West's Florida Statutes Annotated, **p.** 480.

bond. The Second District vacated that order, concluding that to require the defendant to pay those casts prior to having consideration of his bail request constituted a violation of the access to courts provision of the Florida Constitution. The court's decision underscores the fundamental nature of the right at issue. The order of the trial court did not impose the financial condition as a prerequisite to the defendant's right to pursue his appellate remedies, but solely the issue of the supersedeas bond. The Second District, obviously considering the fundamental nature of the access to courts provision, determined that it precluded not only financial conditions which impeded resolution of the merits, but also those which interfered with the resolution of other collateral issues such as release pending appeal.

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

> It [Article I, Section 21] guarantees to every person the right to free access to the courts on claims of redress of injury free of unreasonable burdens and restrictions. Any restrictions on such access to the courts must be liberally construed in favor of the

constitutional right. LEHMANN v. CLONIGER, 294 So.2d 344 (Fla. 1st DCA 1974).

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

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

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

Viewed in its historical perspective and in light of prior case law, the First District's decision properly applied Article I, §21 of the Florida Constitution to invalidate the statutory bond requirements at issue. The opinion emphasizes the fundamental nature of the right of access to the courts and noted that it prohibits financial impediments to suit, other than those related to actual court costs (548 So.2d at 1187-88):

> The right to go to court to resolve our disputes, rather than resorting to self-help or settling them in the streets, is one of the mast fundamental and necessary rights of a citizen in a society based on the rule of law....
>
> The courts have consistently held that Article I, §21 sharply restricts the imposition of monetary preconditions to asserting claims in court [citing G.B.B. INVESTMENTS, supra.]. While reasonable measures, like filing fees, have been upheld, monetary conditions that constitute a substantial burden on a litigant's right to have his case heard in court have been disfavored.

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

The Appellants contend that based on this Court's reasoning in FELDMAN v. GLUCROFT, 522 So.2d 798 (Fla. 1988), there must be a complete abolition of an existing cause of action in order for a violation of Article I, §21, to occur. However, FELDMAN v. GLUCROFT is inapposite to the issue before this Court. The constitutional challenge made in that case arises from a line of cases including KLUGER v. WHITE, 281 So.2d 1 (Fla. 1973), which address situations in which the legislature abolishes a cause of action. Those cases focus on the phrase "redress of any injury" in Article I, §21, as noted in KLUGER, supra (281 So.2d at 3):

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

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

This case involves the legislature's creation of financial preconditions to suit which are unrelated to the actual expenses incurred by the court in administering the case. The reliance is on the phrases "the courts shall be open to every person" and

"justice shall be administered without sale, denial or delay." This constitutional argument does not focus on the phrase "redress of any injury," for as noted by the First District (548 So.2d at 1188):

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

Here, the Plaintiff has a recognized cause of action, **Fla.** Stat. 8768.40. Thus, the issue is not whether that potential claim has been abolished, but rather whether the legislature can constitutionally impose a significant financial precondition to obtaining judicial resolution of the claim.

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

Moreover, it is clear that the legislature did not choose to abolish a cause of action against peer review participants or entities, because it specifically authorized such causes of

action in three separate statutes, see Fla. Stat. §§395.011(8), 395.0115(5), and 766.101(3)(a). The bond requirements at issue do not abolish any cause of action, but simply eliminate the claim for those who are not affluent enough to satisfy that financial precondition.[4]

The Appellants refer to Recommendation 8 the Task Force Report to the effect that the bond requirement was necessary to deter the filing of civil actions as a means of leveraging or intimidating peer review participants (Appellants' Brief, p. 10). However, as noted in the First District's opinion, the bond requirement contains no component relevant to the merits of the plaintiff's action. It simply acts as a bar to all suits, meritorious or otherwise, unless the plaintiff has the means to post the substantial bond. The First District quoted from ALDANA v. HOLUB, 381 So.2d 231, 236 (Fla. 1980), where this Court stated (548 So.2d at 1189):

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

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[4]/The statute may effectively eliminate the statutory cause of action for a large class of potential plaintiffs since the amount contemplated by the bond requirement are quite significant. In GUERRERO v. HUMANA, INC., supra, the trial court ordered the plaintiff to post a bond of $150,000 to satisfy the prospective attorney's fees and costs of the defendants. The Fourth District denied, without opinion, the plaintiff's Petition for Writ of Certiorari, which challenged that ruling.

Here, the legislature clearly did not intend to abolish a cause of action against peer review participants or organizations, but specifically authorized such a right. However, that right is then capriciously swept away through the arbitrary application of the bond requirements. Thus, in addition to the access to courts provision, the statutory provisions at issue raise serious due process and equal protection concerns as well.

It is not melodramatic to state that the decision before this Court will have extremely broad ramifications. If this Court upholds the bond requirements at issue, it is laying the groundwork for a society where the rich have greater access to justice than the middle class or the poor. It is obvious that if this Court upholds these provisions, many interest groups will seek similar statutes in an effort to protect themselves from potential liability. While we can hope that the legislature would not enact such statutes without compelling circumstances, to the extent any would be promulgated, justice would be available to the rich but not to the middle class or the poor. An injured party's claim would be resolved, not on the merits, but on the financial status of the victim. No alleged crisis justifies that result. Such a result is repugnant to basic concepts of justice as exemplified by the Magna Carta and the Florida Constitution. This Court should render a decision consistent with that noble jurisprudence and fundamental fairness.

CONCLUSION

For the reasons stated above, this Court should affirm the First District's decision, and hold that Fla. Stat. §§395.011(10)(b), 395.0115(5)(b), and 766.101(6)(b), are unconstitutional as violating Article I, §21 of the Florida Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIEY that a true copy of the foregoing was furnished to RICHARD SMOAK, ESQ., 304 Magnolia Ave., Panama City, FL 32402; and DANIEL M. SOLOWAY, ESQ., 127 S. Alcaniz St., Pensacola, FL 32513, by mail, this 24th day of January, 1991.

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