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Torts: Florida's Medical Peer Review Law Prohibits Discovery of Peer Review Committee Records - Feldman v. Glucroft

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TORTS: FLORIDA'S MEDICAL PEER REVIEW LAW PROHIBITS DISCOVERY OF PEER REVIEW COMMITTEE RECORDS*

Feldman v. Glucroft,
522 So. 2d 798 (Fla. 1988)

Appellant's complaint alleged that members of a medical peer review committee ("committee") had defamed him during peer review proceedings.[1] When the committee refused to produce records of its proceedings, appellant sought to compel production.[2] The trial court found that the committee's records were privileged under Florida's medical peer review law (the "statute") and refused to compel production.[3] Without the committee's records, appellant could not establish a prima facie case of defamation. Consequently, the trial court granted

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**Editor's Note:* This comment received the *Huber Hurst Award* for the outstanding Case Comment, Spring Semester, 1988.

1. 522 So. 2d 798 (Fla. 1988). Appellant, a podiatrist, alleged that respondents defamed him by asserting that he had subjected a child to an experimental surgical procedure. *Id.* Appellant further alleged that respondents' revocation of his hospital surgical privileges violated his due process and equal protection rights under the United States and Florida constitutions. *Id.*

2. *Id.* A majority of states allow discovery of peer review records and proceedings in actions by physicians who have been denied hospital staff privileges. Comment, *The Missouri Rule: Hospital Peer Review is Discoverable in Medical Malpractice Cases*, 50 MO. L. REV. 459, 477 (1985).

3. FLA. STAT. § 768.40 (1985) (renumbered at § 766.101); 522 So. 2d 798 (Fla. 1988). The relevant portion of § 768.40 provides:

> (2) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee . . . if the committee member or health care provider *acts without malice or fraud* . . . .
>
> (4) The proceedings and records of committees as described in the preceding subsections *shall not be subject to discovery or introduction into evidence* in any civil action against a provider of health services arising out of the matters which are the subject of evaluation and review by such committee . . . .

FLA. STAT. § 768.40 (1983) (emphasis added).

The 1983 version of the statute was modified by FLA. STAT. § 768.40 (1985). The 1985 version is substantially similar to the 1983 version with regard to the portions relevant to this comment. In the interest of clarity, subsections (2) and (4) of the 1983 version used by the instant court will be referred to throughout this comment as the "qualified immunity" and "discovery" provisions, respectively. The 1985 version has a few changes worth noting, including a change in the wording, "acts without malice or fraud," to "acts without intentional fraud." 522 So. 2d at 800. A modified version of § 768.40(2) of the 1983 statute appears in the 1985 version as § 768.40(3)(a):

summary judgment for appellees.[4] The Third District Court of Appeal affirmed, ruling that the discovery privilege contained in the statute operated to abolish defamation actions against committee members.[5] The district court certified two issues to the Florida Supreme Court.[6] On certification, the Florida Supreme Court vacated the summary

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> (3)(a) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a duly appointed medical review committee, or any health care provider furnishing any information, including information concerning the prescribing of substances listed in § 893.03(2), to such committee, or any person, including any person acting as a witness, incident reporter to, or investigator for, a medical review committee, for any act or proceeding undertaken or performed within the scope of the functions of any such committee if the committee member or health care provider *acts without intentional fraud.*

FLA. STAT. § 768.40(3)(a) (1985) (emphasis added).

Additionally, § 768.40(4) was modified and appears in the 1985 version as the following § 768.40(5):

> (5) The investigations, proceedings, and records of a committee as described in the preceding subsections shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

FLA. STAT. § 768.40(5) (1985).

4. 522 So. 2d at 798.

5. *Id.* The district court stated that the language of the medical peer review statute, read in the light of Holly v. Auld, 450 So. 2d 217 (Fla. 1984), created an absolute privilege which abolished all defamation actions against medical peer review members. 522 So. 2d at 798.

6. 522 So. 2d at 798. The district court certified the issue to the Florida Supreme Court as one of great public importance pursuant to art. V, § 3(b)(4) of the Florida Constitution. The questions certified were:

> 1. Does § 786.40(4) totally abolish a defamation claim arising in proceedings before medical review committees?
>
> 2. If so, is § 768.40(4) invalid as in conflict with article 1, section 21, Florida Constitution?

522 So. 2d at 798. Article 1, § 21, gives litigants the right of access to the courts: "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. 1, § 21.

judgment, remanded the action to allow appellant to file an amended complaint, and HELD, the statute does not abolish defamation claims since litigants may proceed with such actions if they can establish malice or fraud without the committee records.[7]

The medical malpractice crisis in Florida began in the early 1970s when malpractice insurance rates sharply increased, and many insurance carriers pulled out of the state.[8] Although some called it an illusory crisis,[9] the Florida Medical Association and malpractice insurance carriers mounted intense advertising and lobbying campaigns to convince the public and the legislature of the need for reform.[10] The legislature responded in 1972 by enacting the first of a continuing series of medical malpractice statutes designed to curb rising malpractice insurance rates and thereby contain health care costs.[11]

To further reduce health care costs, the legislature sought to encourage self-regulation by the medical community through peer review.[12] The legislature recognized that meaningful peer review would be impossible without confidentiality.[13] Consequently, the legislature included two provisions in the statute to provide for the confidentiality of committee proceedings.[14]

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7. 522 So. 2d at 798. The court's finding that § 768.40 did not totally abolish defamation claims rendered the second question moot. *Id. See infra* note 48 for a discussion of the right-of-court-access issue.

8. *See* Comment, *Medical Malpractice in Florida: Prescription for Change*, 10 FLA. ST. U.L. REV. 593 (1983). Premium rates charged by Employers Fire Insurance Company in 1974 ranged from a low of $438 to a high of $4,974; the Florida Medical Malpractice Joint Underwriting Association rates in 1975 ranged from a low of $2,947 to a high of $29,590. The Florida Medical Association, *Report and Recommendations to the 1983 Legislature, The Judiciary, and Citizens of Florida* (1982). The 1975 higher rates are, of course, low in comparison with current rates. *See* Hawkes, *The Second Reformation: Florida's Medical Malpractice Law*, 13 FLA. ST. U.L. REV. 747 (1985).

9. Some commentators assert the "crisis" was not fueled by excessive malpractice claims but by the insurance companies' losses in the financial markets. *See* Cunningham & Lane, *Malpractice — The Illusory Crisis*, 54 FLA. B.J. 114, 116 (1980).

10. *Id.* at 114.

11. *See Prescription For Change*, *supra* note 8; *see also* Hawkes, *supra* note 8. At least 48 states have enacted some form of remedial medical malpractice legislation. Comment, *Illinois' Medical Malpractice Review Panel Provision: A Constitutional Analysis*, 17 LOY. U. CHI. L.J. 275, 276 (1986). As of 1985, only Minnesota and West Virginia had not passed medical malpractice laws. *Id.* at 276 n.6.

12. Holly v. Auld, 450 So. 2d 217, 220 (Fla. 1984). For an overview of peer review regulation at national and state levels, see Comment, *The Missouri Rule: Hospital Peer Review is Discoverable in Medical Malpractice Cases*, 50 MO. L. REV. 459, 462-64 (1985). For a discussion of the mechanics of the peer review process, see Cuneo, *Disclosure v. Confidentiality of Hospital Peer Review Committee Records*, 31 MED. TECH. Q. 172, 173 (1984).

13. Holly v. Auld, 450 So. 2d 217, 220 (Fla. 1984).

14. *Id.*

First, the statute's qualified immunity provision shields medical review members from claims for damages resulting from their actions during committee proceedings if those acts are made without malice or fraud.[15] Second, the statute's discovery privilege clause bars discovery of committee proceeding records.[16] The interaction of these two provisions has caused inconsistency among Florida courts.[17]

In *Holly v. Auld*,[18] the Florida Supreme Court attempted to rectify the uncertainty caused by the two statute provisions.[19] A hospital credentials committee in *Holly* denied plaintiff staff privileges based on negative reports obtained from other doctors.[20] Plaintiff brought a defamation claim against a member of the credentials committee and sought discovery of the committee's records.[21] The district court found that the statute's discovery privilege provision applied to medical malpractice actions but not to defamation actions.[22] The district court interpreted the statute's qualified immunity provision to allow the discovery of committee records to determine if the committee members acted with malice or fraud.[23] Reversing the district court, a sharply divided supreme court[24] held that the statute's discovery prohibition applied to defamation actions as well as malpractice actions.[25]

The *Holly* court determined that the legislature, in enacting the statute, had balanced the plaintiff's need for discovery against the

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15. FLA. STAT. § 768.40(2) (1983).

16. *Id.* § 768.40(4).

17. *E.g.*, *compare* Parkway General Hospital, Inc. v. Allinson, 453 So. 2d 123 (Fla. 3d D.C.A. 1984) (construing §§ 768.40(2) and (4) as allowing defamation actions against medical peer review committees if the litigant can obtain extrinsic evidence of malice or fraud) *with* Feldman v. Glucroft, 488 So. 2d 574 (Fla. 3d D.C.A. 1986) (lower court decision of the instant case and same district court that decided *Parkway General Hospital*, holding that §§ 768.40(2) and (4) abolished defamation actions against medical peer review members).

18. 450 So. 2d 217, 220 (Fla. 1984).

19. *Id.*

20. *Id.* at 218.

21. *Id.* The plaintiff alleged that he was defamed when the defendants reported negative information about the plaintiff to the credentials committee. *Id.*

22. *Id.* The district court noted that most of the provisions of § 768.40 are ambiguous. Holly v. Auld, 418 So. 2d 1020, 1023 (Fla. 4th D.C.A. 1982). In particular, the district court found the discovery privilege in § 768.40(4) to be "fairly susceptible to different construction." *Id.* at 1025. Although the district court held that the discovery privilege in § 768.40(4) applies only to medical malpractice cases, it certified the discovery issue as one of great public importance. *Id.* at 1028.

23. 450 So. 2d at 218.

24. *Id.* at 217 (three justices dissenting).

25. *Id.* at 221. The supreme court specifically concluded that the discovery privilege in § 768.40(4) is not limited to medical malpractice cases and, in fact, includes defamation actions arising from evaluation by hospital credentials committees. *Id.*

competing need to contain health care costs.[26] The court decided that the legislature intended the statute to promote self-regulation and to contain costs, even at the expense of a plaintiff's need for discovery. Thus, the *Holly* court concluded that the statute's discovery provision was absolute.[27] The court reasoned that prohibiting the discovery of committee records would advance the legislative policy of reducing health care costs.[28]

Justice Shaw disagreed with the majority's interpretation of the statute.[29] Justice Shaw found that the statute's qualified immunity provision codified the common law rule that a qualified privilege is lost when malice or fraud is present.[30] According to Justice Shaw, the statute revealed "clearly expressed legislative intent" to give plaintiffs redress from peer review members for damages resulting from malice or fraud.[31] Justice Shaw asserted that the majority's interpretation created the "illogical result" of allowing a plaintiff to bring an action but denying him "any discovery of the evidence essential to his cause of action."[32] Justice Shaw concluded that the court's holding effectively abolished defamation actions against committee members.[33]

The Third District Court of Appeal in *Parkway General Hospital v. Allinson*[34] followed the holding in *Holly* and refused to compel

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26. *Id.* at 220.

27. *Id.*

28. *Id.* The court deemed this policy judgment to be within the exclusive province of the legislature. *Id. See* Butler, *Hospital Peer Review Committees: Privileges of Confidentiality and Immunity*, 23 S. TEX. L.J. 45, 69 (1982) (peer review confidentiality provides the "greatest benefits to the greatest number at a social cost which the courts are willing to pay").

29. 450 So. 2d 217, 221 (Fla. 1984) (Shaw, J., dissenting) (§ 768.40(4) grants only a qualified privilege and is, therefore, inapplicable if the parties act with malice or fraud).

30. *Id.*

31. *Id.*

32. *Id.* Justice Shaw also argued that the majority approach violated a cardinal rule of statutory interpretation: statutes should be read *in pari materia*, giving effect to all provisions if possible. *Id.* at 222. According to Justice Shaw, "under the majority's literal interpretation of subsection 768.40(4), we are faced not merely with an ambiguity but with a direct contradiction between subsections (2) and (4) of section 768.40." *Id.*

33. *Id.* at 222 (Shaw, J., dissenting) (this abolition "bars access to the courts for redress of injury in violation of article I, section 21, Florida Constitution."); *see also infra* note 48.

34. 453 So. 2d 123 (Fla. 3d D.C.A. 1984). Plaintiff, a young physician, had been associated for two years with Dr. Figuero, an older, more established physician. *Id.* at 124. After a personality conflict developed between the two doctors, plaintiff left the practice. *Id.* In his defamation complaint, plaintiff alleged a series of "vexatious acts, false medication and nursing reports, and malicious statements by Dr. Figuero . . . which started as soon as he left Dr. Figuero's practice and culminated in the recommendation by the executive committee of the medical staff that disciplinary action be taken against [plaintiff]." *Id.*

production of a committee's records in a defamation action.[35] The *Parkway* court expressed consternation over the difficulty of reconciling the qualified immunity provision with the discovery privilege provision.[36] Citing Justice Shaw's dissent in *Holly*, the court reasoned that the qualified immunity provision creates a defamation exception to the statute which the discovery privilege provision makes "impossible to prove."[37] The *Parkway* court acknowledged that its holding seemed harsh in light of the malice allegations in the case.[38] Nonetheless, the court adopted the *Holly* court's interpretation of the legislative intent.[39] While the court held that committee records were not discoverable, it allowed defamation actions against committee members if litigants could establish malice or fraud without the committee records.[40]

In the instant case, a sharply divided Florida Supreme Court reaffirmed *Holly* and *Parkway*.[41] Like the *Parkway* court, the instant court construed the qualified immunity provision and the discovery prohibition provision to permit litigants to bring defamation actions against committee members if they can establish malice or fraud without committee records.[42] Thus, litigants can discover evidence of malice or fraud only from sources "not immune from discovery."[43]

The instant court recognized that its holding would severely restrict defamation actions against committee members.[44] Attempting to justify this restriction, the court referred to the legislative intent analysis in

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35. *Id.* at 126. *See* Comment, *The Medical Staff Privileges Problem in Florida*, 12 FLA. ST. U.L. REV. 339 (1984).

36. 453 So. 2d at 125.

37. *Id.*

38. *Id.* The court stated:

> [This] result seems harsh, especially when confronted with the facts of a case such as this; where the allegations are that the respondent successfully practiced at petitioner hospital for over two years; that the suspension of staff privileges is a direct result of his problems with a better established, and economically more powerful doctor.

Id.

39. *Id.* at 125, 126. The court stated that the legislature, in order to insure "valid peer review," created § 768.40(4) to protect peer review participants. *Id.* The legislature, in providing this protection, deemed it "necessary to encroach upon certain rights held by others." *Id.*

40. *Id.* at 126. "The shield of confidentiality protects only those words spoken within the four walls of the committee meeting itself and the records made as a direct result thereof. Anything else is discoverable and may be used as evidence at trial." *Id.*

41. 522 So. 2d at 798 (three justices dissenting).

42. *Id.* at 801.

43. *Id.*

44. *Id.* The instant court stated that this discovery privilege will inevitably encroach upon the rights of defamation plaintiffs to discover helpful, or even essential, information. *Id.*

the *Holly* case.[45] The instant court concluded that the need for containing health care costs through effective self-policing by health care providers outweighed a plaintiff's need for redress.[46]

Justice Shaw's brief dissenting opinion reiterated the reasoning of his *Holly* dissent.[47] Justice Shaw argued that despite the majority's claims to the contrary, the court's holdings in the instant case and in *Holly* created an absolute bar to defamation actions based on proceedings before committees.[48] According to Justice Shaw's *Holly* dissent, litigants can bring an action for defamatory comments made during committee proceedings only if discovery of the committee's records are allowed.[49] Justice Shaw proposed to construe the discovery privilege provision to permit discovery in cases of malice or fraud.[50] Justice Shaw reasoned that this solution gives effect to the legislative intent to provide committee members only a qualified immunity from discovery.[51]

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45. *Id.*

46. *Id.* The court justified its conclusion by referring to eight cases in which courts applied a qualified immunity privilege for defamation actions: MacNayr v. Kelly, 184 So. 2d 428, 431 (Fla. 1966) (statements of public officials in their official capacity); Robertson v. Industrial Ins. Co., 75 So. 2d 198 (Fla. 1954) (statements made in license revocation proceedings before the insurance commissioner); Lloyd v. Hines, 474 So. 2d 376 (Fla. 1st D.C.A. 1985) (statements of state law enforcement agent as witness in criminal trial); Bell v. Gellert, 469 So. 2d 141 (Fla. 3d D.C.A. 1985) (statements made in labor grievance complaint which were relevant to that complaint); Farish v. Wakeman, 385 So. 2d 2 (Fla. 4th D.C.A. 1980) (compelled testimony before a legislative committee); Stone v. Rosen, 348 So. 2d 387 (Fla. 3d D.C.A. 1977) (absolute privilege of citizen to make complaint against Florida Bar member); Seidel v. Hill, 264 So. 2d 81 (Fla. 1st D.C.A. 1972) (statements introduced in quasi-judicial proceedings such as worker's compensation proceedings); Greene v. Hoiriis, 103 So. 2d 226 (Fla. 3d D.C.A. 1958) (statements made in connection with unemployment compensation proceedings).

47. 522 So. 2d at 802.

48. *Id.* Since the instant court held that defamation actions against medical peer review committees were not abolished, it rendered moot the second question certified to it by the Third District Court of Appeal. *Id.* at 75. This second question concerned a litigant's constitutional right of access to the courts under art. I, § 21, of the Florida Constitution. *See supra* note 6. Justice Shaw maintained in his *Holly* dissent that the majority's holding violated plaintiff's constitutional right of access to the courts. The seminal case on the right of court access is Kluger v. White, 281 So. 2d 1 (Fla. 1973). Comment, *Insurance: Does Florida's No-Fault Law Comply with the Constitutional Right of Access to the Courts?*, 35 U. FLA. L. REV. 194, 196 (1982). The *Kluger* court held unconstitutional a property damage provision in Florida's original no-fault law because the provision abolished plaintiff's right to court access without providing a reasonable alternative or showing public necessity. 281 So. 2d at 196. For a recent application of the *Kluger* court's reasonable alternative and public necessity tests, see Smith v. Department of Ins., 507 So. 2d 1080, 1087-89 (Fla. 1987) (holding unconstitutional the 1986 Tort Reform Act's $450,000 noneconomic damages cap provision since it violated plaintiff's right of access to the courts).

49. *See* 450 So. 2d at 223 (Shaw, J., dissenting).

50. *Id.* at 222; *see supra* notes 30-31 and accompanying text.

51. *Id.*; *see supra* note 32 and accompanying text.

In an era of spiraling health care costs, cost containment is an important policy objective.[52] The instant case emphasizes the Florida Supreme Court's preoccupation with carrying out the legislative intent to reduce health care costs by fostering self-regulation within the medical community.[53] However, the court's analysis fails to adequately address other important legislative policies underlying the statute.[54]

The *Holly*, *Parkway*, and instant courts interpreted the statute to address only the legislative policy of reducing health care costs.[55] All three cases place the need for cost containment above the plaintiffs' need to redress defamation claims against committee members.[56] This interpretation, however, inadequately expresses the qualified immunity provision which expressly states that medical peer review members are immune from suit unless they act with malice or fraud.[57] Searching inquiry into legislative intent is not necessary to understand that the statute's "malice or fraud" exception grants committee members only qualified immunity from liability.[58] According to Justice Shaw, however, the instant court's holding has the practical effect of granting committee members absolute immunity from liability.[59]

A grant of absolute immunity to committee members abolishes their risk of exposure to defamation actions.[60] As Justice Shaw asserted, abolishing defamation actions against committee members gives committee members an "unchecked license to commit acts of malice or fraud."[61] It is unlikely that a legislature would create such a broad exemption from liability for acts of malice or fraud.[62]

Justice Shaw's interpretation imputes a less radical motive to the legislature. Under Justice Shaw's interpretation, the statute provides confidentiality for peer review proceedings unless a committee member acts with malice or fraud.[63] A qualified discovery privilege would per-

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52. *See* 450 So. 2d at 219-20; 453 So. 2d at 125; 522 So. 2d at 800.

53. 522 So. 2d at 798-99.

54. *See* 450 So. 2d at 221-23 (Shaw, J., dissenting); *supra* notes 30-31 and accompanying text.

55. *See supra* notes 28, 40, 46 and accompanying text.

56. *See supra* notes 28, 40, 46 and accompanying text; *see also* Comment, *Medical Malpractice in Florida: Prescription for Change*, 10 FLA. ST. U.L. REV. 593, 594 (1983).

57. *See supra* note 3.

58. 450 So. 2d at 221 (Shaw, J., dissenting).

59. 522 So. 2d at 802 (Shaw, J., dissenting); *see also* 450 So. 2d at 223 (Shaw, J., dissenting).

60. *See* 522 So. 2d at 802 (Shaw, J., dissenting); *see also* 450 So. 2d at 223 (Shaw, J., dissenting). *See supra* notes 48-49 and accompanying text.

61. 450 So. 2d at 222 (Shaw, J., dissenting).

62. *See id.* at 221-22. "'[I]t should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation' and '[n]o literal interpretation should be given which leads to an unreasonable or ridiculous conclusion . . . .'" *Id.* (quoting Sharer v. Hotel Corp. of America, 144 So. 2d 813, 817 (Fla. 1962)).

63. *Id.* at 222.

mit litigants to discover committee proceedings upon allegations of malice or fraud.[64]

A potential problem with Justice Shaw's solution is that litigants bringing defamation actions against peer review members may routinely allege malice or fraud to circumvent the qualified discovery privilege.[65] Justice Shaw responded that the remedy for this abuse is a motion for a protective order.[66] A protective order would provide committee members the protection the *Holly*, *Parkway*, and instant courts sought to provide through their statutory interpretation.[67] While a qualified discovery privilege would continue to permit the prosecution of legitimate defamation actions, the instant court's statutory interpretation will, on a practical level, preclude all defamation actions against committee members regardless of the actions' merit.[68]

The legislature's policy of containing health care costs deserves serious judicial consideration.[69] When confronted with the confusing statute in the instant case, the court looked to the policy of cost containment to resolve the statute's ambiguity.[70] Consequently, the court set forth a theoretical compromise between the defamation litigant's right to redress injury and the committee members' need for confidentiality.[71] What seems like a compromise, however, in practice results in a complete denial of redress for a defamation plaintiff.[72] This result conflicts with the litigant's statutory right to bring defamation claims against committee members who act with malice or fraud.[73] Ironically, this right to redress injury resulting from malice or fraud is set forth in the very statute the court interprets as abolishing the right.[74]

Justice Shaw's proposal to provide a qualified discovery privilege for committee records and proceedings offers a more logical interpretation of the statute.[75] By giving effect to both of the statute's competing provisions, Justice Shaw's interpretation offers a true com-

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64. *Id.* This interpretation would provide both redress for defamation plaintiffs when malice or fraud is present and a qualified discovery privilege for committee proceedings and records. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id. See supra* notes 48-49, 62 and accompanying text.

69. *See supra* note 52 and accompanying text.

70. 522 So. 2d at 800-01 (citing 450 So. 2d at 219-20).

71. *See supra* notes 28, 46 and accompanying text.

72. *See supra* notes 59-60 and accompanying text.

73. 450 So. 2d at 222 (Shaw, J., dissenting).

74. *See* FLA. STAT. § 768.40(2), (4) (1983).

75. *See supra* notes 65-68 and accompanying text.

promise.[76] A qualified discovery privilege would provide protection for committee records and also permit prosecution of legitimate defamation actions against committees.[77]

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76. *Id.*
77. *See* 450 So. 2d at 222 (Shaw, J., dissenting).