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FILED
SID J. WHITE
JUN 24 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 77,293

ELOIS POSEY CRUGER, as
Parent and Guardian of
the Minor, ASHANTI POSEY,

Petitioner,

-vs.-

DOUGLAS J. LOVE, M.D.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FOURTH DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS

ROY D. WASSON
Attorney for Amicus Curiae
ACADEMY OF FLORIDA TRIAL LAWYERS
Suite 402 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

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ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

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ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

STATEMENT OF THE CASE AND OF THE FACTS

This is a proceeding to review the decision of the Fourth District Court of Appeal in Love v. Cruger, 570 So. 2d 362 (Fla. 4th DCA 1990), which conflicts with the holding of the First District that a physician's written application for hospital staff privileges--as opposed to the processes and products of the hospital's consideration thereof--is subject to ordinary rules of discovery and not within the ambit of peer review privilege under §§395.011(9) & 766.101(5), Fla. Stat. (1989). See Jacksonville Medical Center v. Akers, 560 So. 2d 1313 (Fla. 1st DCA 1990).

At the trial court level this action involves a suit for medical malpractice by the Plaintiff, who is Petitioner herein, against only a single Defendant: the Respondent, Dr. Love. (A-9)[1]. The present discovery dispute arose after Plaintiff served "Notices of Production from Non-Party," declaring her intent to obtain and serve subpoenas duces tecum upon three non-party hospitals, each of which would direct production of "[a] copy of the application for privileges and a copy of the delineation of privileges for Douglas J. Love, M.D." (A-1 through A-6).

DR. LOVE objected to issuance of the subpoenas, and the trial court overruled his objection. (A-8). As stated by the Fourth District in the decision under review, the trial court's "order effectively authorizes production of a copy Dr. Love's application

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[1]Appendix references are to the corresponding pages of the Petitioner's Appendix.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

for privileges at each of the hospitals and a copy of the document delineating the privileges granted Dr. Love at each of the hospitals." (A-9).

Upon entry of that order by the trial court, DR. LOVE timely filed a Petition for Certiorari in the Fourth District, in which he asserted that the documents sought through the subject discovery were privileged, pursuant to §§395.011(9) & 766.101(5), Fla. Stat. (1989). Plaintiff responded with arguments which included the following point:

> This civil action against Dr, Love did not arise out of the matters which are the subject of the records sought from the hospitals in question. . . [,in that t]here are no allegations in the complaint that any of the hospitals were negligent in granting privileges to Dr. Love, or were otherwise negligent in checking his credentials.

(Respondent's Response to Petition for Certiorari at 3).

Another argument in opposition to the requested writ was that the Defendant had prepared the applications himself, outside of the proceedings of the peer review committees which are subject to the statutory privilege, thereby rendering the statutes inapplicable thereto. (E.g., id. at 6).

By its two-to-one decision herein reviewed, the Fourth District held that "the items here sought to be produced are privileged from discovery." 570 So. 2d at 363. Perceiving the conflict between that holding and the First District's decision in Jacksonville Medical Center v. Akers, 560 So. 2d 1313 (Fla. 1st DCA 1990), Plaintiff petitioned this Court for discretionary review.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

SUMMARY OF THE ARGUMENT

The decision of the Fourth District should be disapproved under a variety of analyses. The present lawsuit was not one which should fall within the statutory privilege to begin with, because no claim exists against any party which can be said to "arise from" the peer review process. The hospitals are not parties, and no negligence on their part has been alleged, so the statutes are inapplicable.

Next, the application submitted by DR. LOVE was not a matter within the realm of privilege, as it was not "internal" to the peer review committee and its deliberative process. That application came from outside the protected proceedings, did not reflect any of the committee's thought processes or other reaction to the facts and information contained in the application, and simply is not the type of matter protected by the privilege.

Most fundamentally, an analysis of the privilege statutes seems to protect against discovery of hospitals' awareness of facts made known by third parties in confidence as part of the peer review process, as opposed to protecting against discovery of the underlying facts themselves. While in the case at bar it is not important whether the hospitals knew the facts contained in the applications, this Court should hold that the policy reasons which otherwise would warrant hampering proof of a valid claim to protect the review process do not come into play where a hospital learns important information from the actively negligent physician.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

ARGUMENT

I.

THE DECISION OF THE FOURTH DISTRICT SHOULD BE DISAPPROVED, BECAUSE THE LAWSUIT BELOW WAS NOT A "CIVIL ACTION ARISING" OUT OF THE PRIVILEGES PROCESS, AND BECAUSE THE MATERIALS SOUGHT TO BE DISCOVERED WERE OUTSIDE THE SCOPE OF THE STATUTES

The ACADEMY heartily joins in Plaintiff/Petitioner's position that DR. LOVE's applications--and the delineation of his privileges granted thereunder--are not privileged, under a number of analyses. Two such analyses were presented by the Plaintiff/Petitioner in response to the Petition for Certiorari, both of which the ACADEMY agrees are compelling grounds to disapprove the decision of the Fourth District.

The first of those arguments was that the lawsuit below, against only DR. LOVE and not the hospitals, was not a "civil action against a provider of professional health services arising out of the matters which are the subject of evaluation and review by the committee[s]," which is the limitation of the scope of cases as to which the privilege pertains under the applicable statutes. See §766.101(5), Fla. Stat. (1989)(emphasis added). In no sense can the action below be said to "arise out of" DR. LOVE's application for privileges, and the hospitals' consideration thereof, because no claim has been made against those hospitals, much less a claim concerning the peer review process.

Second, Petitioner correctly detailed the differences between

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

materials (like DR. LOVE's applications) which are external to the peer review process and are generated outside the area of statutory protection described as the "four walls," and those kinds of materials which are generated from within the committee sanctum. As another court has held:

> 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.

Parkway Gen'l Hosp. v. Allinson, 453 So. 2d 123, 126 (Fla. 3d DCA 1984). DR. LOVE created his application outside of the subject proceedings, with information which existed external to and independent of those proceedings, so the applications themselves did not emanate from the "four walls."

The ACADEMY will not dwell on those areas and needlessly duplicate discussion thereof. Instead, the ACADEMY asks this Court's indulgence to consider another approach to the subject: one which might not even need to be reached, if the Court were to limit its decision herein to the particular facts of the case at bar. However, the issue which follows will eventually need to be decided, and the ACADEMY submits that it would be in the interest of the orderly administration of justice for this Court to deal with it now, to provide the lower courts and litigants with some needed guidance and to stem the flood of future cases which otherwise will result.

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

II.

THIS COURT SHOULD HOLD THAT APPLICATIONS THEMSELVES ARE NEVER PRIVILEGED BECAUSE THE POLICY REASONS FOR LIMITING DISCOVERY AND IMPAIRING VALID CLAIMS DO NOT COMPEL EXTENSION OF THE PROMISE OF CONFIDENTIALITY TO THE ACTIVELY-NEGLIGENT MEDICAL PRACTITIONER

At the outset of this discussion it must be reemphasized that, while it is not necessary to accept this argument to disapprove the decision under review, acceptance of the present argument will serve to address an important question which looms larger than the facts of the present case. In overview, the ACADEMY submits that the public policy justifications for limiting traditional discovery (and concomitantly impairing the prosecution of valid claims) do not compel courts to extend the statutory privilege to physicians' applications themselves; to the contrary, the public policy reasons behind the entire tort system compel the conclusion that relevant evidence in such applications should be discoverable and admissible at trial.

Before addressing the policy issues themselves, it is useful to examine more closely what the courts must have meant in the decisions where they have discussed what is and what is not within the ambit of the statutory privilege in question. At the risk of oversimplification, it is not the underlying basic facts within a peer review proceeding which the courts must mean to protect from discovery--such as what medical school an applicant attended, or whether she or he is a convicted felon, or what history of claims have been made--but it is the fact of the hospital's awareness of

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

those basic facts which is to be kept secret.

For example, in the case of Bay Medical Center v. Sapp, 535 So. 2d 308 (Fla. 1st DCA 1988), in which the First District quashed orders permitting discovery concerning the defendant physician's alleged alcoholism, it was not the fact (if true) that the doctor was a drunkard which the statute rendered nondiscoverable, but the fact of the hospital knowing of his drinking problem. The ACADEMY submits that, where the statutory privilege attaches, it attaches only to the extent that is necessary to preclude proof that certain facts have been made known to the committee in question, not to the underlying fact itself.

The mere fact that an otherwise relevant fact is contained within a privileged document or proceeding does not render that underlying fact inadmissible. That is what must be meant by the provision that "information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use . . . ." See §766.101(5), Fla. Stat. (1989). Conversely, the ACADEMY concedes that independent discoverability of such basic facts "from original sources" does not ipso facto render admissible the hospital's knowledge of those facts, in the cases where such knowledge was instilled by third persons through the peer review process.

It is the need for confidence in those communications to credentials committees from third persons which underlies the privilege. This Court has recognized the "balancing act" which needed to be performed by the Florida Legislature to warrant such

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 • TELEPHONE (305) 374-8919

a narrowing of traditional discovery and evidentiary practices:

> A doctor questioned by a review committee would be just as reluctant to make statements [about an applicant for credentials], however truthful or justifiable, which might form the basis for a defamation action against him [or her] as he [or she] would be to proffer opinions which could be used against a colleague in a malpractice suit.
>
> * * *
>
> Inevitably, such a discovery privilege will impinge upon the rights of some civil litigants to discovery of information which might be helpful or even essential to their causes. We must assume that the legislature balanced this potential for health care cost containment offered by effective self-policing by the medical community and found the latter to be of greater weight.

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

On the other hand, there is no such threat to confidential third-party communications and frank review by committees when we consider disclosing in discovery the admissions of the applicant her-or-himself, and disclosing the fact of the hospital's knowledge thereof. The applicant for medical credentials will not be a potential defamation defendant for revealing the facts about his or her past.

The ACADEMY strongly urges this Court to examine the need for full discovery and the quest for truth in trials in the light of the fact that no third party confidence will be compromised by the rule of law proposed. Unlike the policy considerations which formed the basis for this Court's decision in Holly v. Auld, the public policy of verdicts based on truth should not permit health

ROY D. WASSON, ATTORNEY AT LAW
SUITE 402 COURTHOUSE TOWER, 44 WEST FLAGLER STREET, MIAMI, FLORIDA 33130 · TELEPHONE (305) 374-8919

care providers to secrete their awareness of facts made known by the actively negligent medical practitioner, as opposed to by strangers relying on a rule of privilege.

CONCLUSION

WHEREFORE, this Court should disapprove of the decision of the Fourth District in the case under review, and further establish a rule of law which permits discovery and introduction into evidence of relevant portions of applications for clinical privileges.

Respectfully submitted,

ROY D. WASSON
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies hereof were served by mail, upon Richard J. Roselli, Esq. and Kelley B. Gelb, Esq., KRUPNIK, CAMPBELL, MALONE and ROSELLI, P.A., 700 S.E. Third Ave., Courthouse Law Plaza, Suite 100, Fort Lauderdale, FL 33316; Sussan L. Dolin, Esq., CONRAD SCHERER & JAMES, P.O. Box 14723, Fort Lauderdale, FL 33302; and James C. Sawran, Esq., BILLING, COCHRAN, LYLES, HEATH & MAURO, P.A., 888 S.E. Third Avenue, Suite 301, Fort Lauderdale, FL 33316 on this, the 21st day of June, 1991.

ROY D. WASSON
Attorney for Amicus Curiae
Florida Bar No. 332070
Suite 402, Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
(305) 374-8919