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FILED
SID J. WHITE
JUL 10 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF FLORIDA

CASE NO. 77,293
4TH DCA CASE NO. 90-2077

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

Petitioner,

v.

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 HUMANA OF FLORIDA, INC. d/b/a HUMANA HOSPITAL - BENNETT

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Amicus Curiae HUMANA OF FLORIDA, INC., d/b/a HUMANA HOSPITAL - BENNETT ("Humana - Bennett") accepts the statement of the case and facts as set forth in the Petitioner ELOIS POSEY CRUGER as parent and guardian of the minor, ASHANTI POSEY's ("Cruger") initial brief.

SUMMARY OF ARGUMENT

The immunization of peer review materials from discovery is a crucial cornerstone of the health care delivery system and concomitant medical malpractice prevention policy of the State of Florida. The peer review privilege is one of the most broad and sacrosanct privileges recognized in the civil law both by the Florida Legislature and the common law. The peer review privilege clearly protects matters involving credentialing of hospital staff physicians, and thus subsumes the physician's application for hospital staff privileges. To hold otherwise would do violence to both the letter and spirit of the Florida peer review statutes, as well as to carve out an unwarranted and unnecessary exception to the broad scope of the common law privilege already afforded by this Court and the intermediate appellate courts of this State.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL'S RULING THAT A PHYSICIAN'S APPLICATION FOR HOSPITAL MEDICAL STAFF PRIVILEGES IS SUBJECT TO THE PEER REVIEW PRIVILEGE IS ENTITLED TO AFFIRMANCE BECAUSE IT IS IN ACCORD WITH THE PURPOSE AND INTENT OF THE PEER REVIEW STATUTE AS WELL AS COMMON LAW DOCTRINE.

A. THE GENERAL DUTY OF PEER REVIEW

The health of the citizens of this State is dependent upon the delivery of quality health care. Floridians have a right to expect, even to demand, quality health care. This fundamental principle has been explicitly recognized by the Florida legislature, which requires "all health care facilities, including hospitals..." to "assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review..." Section 766.101(1), Florida Statutes (1989). This duty has also been extensively recognized at the common law. A patient harmed by the negligent delivery of health care is entitled to recover an array of money damages ranging from the costs of medical care to damages for the emotional distress caused by the negligence. See, e.g., Borges v. Jacobs, 483 So.2d 773 (Fla. 3d DCA 1986).

The obligation to deliver quality health care of necessity carries with it the duty to review the care that is actually delivered. That duty to review the quality of health care had its statutory birth in Section 458.20, Florida Statutes (1972). That statute subsequently became Section 768.40, and is now Section 766.101. The so-called "peer review" statute states in

relevant part at Section 766.101(1)(a):

> The term "medical review committee" [is] a committee of a hospital...which committee is formed to evaluate and improve the quality of health care rendered by providers of health services or to determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care...

The Legislature also passed additional and more stringent "peer review" statutes. Section 395.0115, Florida Statutes (1989) provides in pertinent part:

> Each licensed facility, as a condition of licensure shall provide for peer review of physicians who deliver health care services at the facility.

In addition, the obligation of peer review has been addressed a substantial number of times by the Florida appellate courts, including this Court. See, e.g., Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988); Holly v. Auld, 450 So.2d 217 (Fla. 1984); Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990); Lake Hospital and Clinic, Inc. v. Silversmith, 551 So.2d 538 (Fla. 4th DCA 1989); Bay Medical Center v. Sapp, 535 So.2d 308 (Fla. 1st DCA 1988); Burton v. Becker, 516 So.2d 283 (Fla. 2d DCA 1987); Parkway General Hospital v. Allinson, 453 So.2d 123 (Fla. 3d DCA 1984); Segal v. Roberts, 380 So.2d 1049 (Fla. 4th DCA 1979); HCA of Florida, Inc. v. Cooper, 475 So.2d 719 (Fla. 1st DCA 1985).

Peer review had its common-law birth in the Illinois case of Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253 (Ill. 1965), which held for the first time that:

> The defendant also argues that it was error...to give any instruction which indicated it was the duty of the hospital to supervise the competence of its staff members. The trial court did not err in its ruling upon these matters.

211 N.E.2d at 261.

The courts have continued to expand this concept with little or no recognizable curtailment. See, e.g., Insinga v. LaBella, 543 So.2d 209 (Fla. 1989) (hospital has duty to select and retain competent staff physicians); Elam v. College Park Hospital, 183 Cal.Rptr. 156 (Ct. App. Cal. 1982) ("[A]s a general principal, a hospital's failure to insure the competence of its medical staff through careful selection and review creates an unreasonable risk of harm to its patients); Dade County Medical Ass'n v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979) (overwhelming public interest would require a peer review privilege even in absence of applicable statute); Oviatt v. Archbishop Bergan Mercy Hosp., 214 N.W.2d 490 (Ne. 1974); Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), adhered to, 51 F.R.D. 187 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973) (peer review essential to continued improvement in health care and confidentiality essential to peer review); Jonson v. Misericordia Comm. Hosp., 301 N.W.2d 156 (Wisc. 1981) (hospital has duty of care to see that only competent physicians practice at its facility).

The duty to review the quality of health care delivered to patients, as well as the competence of the physicians delivering such health care, whether statutory, common-law, contractual or

simply a requirement of responsible health-care management, has also been recognized by interested organizations. See, e.g., Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals 114-119, 215-221 (1991).

It is axiomatic that the actual review of the care provided by physicians must be undertaken by other physicians who are trained in the delivery of quality health care. These "peers" are the only qualified reviewers; they are the reviewers contemplated by the various statutes, cases and organizational statements that have already been cited. Indeed, the process itself is known and has been referred to in the case law as "peer review". See, Dade County Medical Ass'n v. Hlis, 372 So.2d at 120 ("The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques") (emphasis supplied).

In order to facilitate this peer review process, it has been made the beneficiary of one of the most jealously guarded and vigorously protected privileges in the civil law. Such privilege has been recognized repeatedly, both by the legislature of this State and the judiciary.

B. THE PEER REVIEW PRIVILEGE AND MEDICAL MALPRACTICE PREVENTION IN FLORIDA

In the face of a growing medical malpractice crisis, the Florida Legislature responded by promulgating statutory reforms aimed at risk management and prevention. See, Section 394.0115, et seq., Florida Statutes (1989). When it promulgated the Medical Malpractice Reform Act of 1985, the Florida Legislature was aware of the growing body of case law recognizing a health care facility's duty to protect its patients from substandard quality health care. See, Hawkes, The Second Reformation: Florida's Medical Malpractice Law, 13 Fla. St. U. L. Rev. 747, 749-750 (1985). Perhaps the most significant of these decisions was Elam v. College Park Hosp., 183 Cal. Rptr. 156 (Ct. App. Cal. 1982), in which the Court held that, "...as a general principal, a hospital's failure to insure the competence of its medical staff through careful selection and review creates an unreasonable risk of harm to its patients." Id. at 161. See also, Hawkes, The Second Reformation, supra, 13 Fla. St. U. L. Rev. at 750; Loveridge & Kimball, Hospital Corporate Negligence Comes to California: Questions in the Wake of Elam v. College Park Hospital, 14 Pac. L. J. 803 (1983).

The cornerstone, therefore, of risk management and prevention in the area of medical malpractice is the routine monitoring of the health care delivered to patients. It is with risk management and prevention in mind that the governing boards of health care institutions are afforded great latitude in

permitting or denying physicians the opportunity to practice medicine on their staffs, as well as in controlling both the continuity and the logistics of that practice. See, West Coast Hosp. Ass'n v. Hoare, 496 So.2d 222 (Fla. 4th DCA 1986).

The traditional, and clearly the most logical and effective, method of investigating and monitoring the quality of health care delivered at a particular institution is the peer review process. The original peer review statute, Ch. 768.40 et seq., and the new peer review statutes, Section 766.101, Florida Statutes (1989) and Section 395.0115 et seq., expressly provide for peer review in the context of Florida's health care delivery system. The peer review provided for by these statutes serves two distinct purposes.

The first purpose is to satisfy a public policy requiring the review of a physician's competence to insure the delivery of quality health care. Report of the Medical Malpractice Insurance Advisory Counsel (January 1983) at 18 (created pursuant to Ch. 82-391, Section 3, Laws of Florida). See also, Dade County Medical Ass'n v. Hlis, 372 So.2d at 117.

The second purpose is to reduce the risk of medical malpractice incidents and resulting litigation by requiring health care facilities to police themselves and the physicians on their staffs. In fact, as noted in Hawkes, The Second Reformation, supra, under the Medical Malpractice Reform Act, a hospital may be directly liable both for the failure to screen new physicians and for the failure to continually monitor

physicians already on staff. Thus, if a hospital knows or should have known that a member of its staff is practicing medicine below a reasonably acceptable standard, the hospital must act to remedy the situation or risk exposure for the negligent failure to monitor. This Court endorsed that legislative policy in Insinga v. LaBella, 543 So.2d 209 (Fla. 1989). Furthermore, since periodic review of the quality of health care delivered and the medical staff is required, the failure to diligently conduct the review and attempt to discover a problem could also expose the hospital to liability. Hawkes, The Second Reformation, supra, 13 Fla. St. U. L. Rev. at 751-752 [Footnotes omitted].

The peer review process can, however, only function if it operates in an atmosphere free from coercion and fear of reprisal of the "peer" physicians who serve it. The Third District Court of Appeal noted in Dade County Medical Ass'n v. Hlis, supra, that, "Confidentiality is essential to the functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a sine quo non of adequate hospital care....There is an overwhelming public interest in having these staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." 372 So.2d at 120, quoting Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973). See also, Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988) (Without broad privilege, viable health

care peer review process would be difficult, if not impossible, to maintain).

The courts have clearly recognized the value of protecting the communications that occur during a peer review meeting. See e.g., Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990); Lake Hospital and Clinic, Inc. v. Silversmith, 551 So.2d 538 (Fla. 4th DCA 1989); Bay Medical Center v. Sapp, 535 So.2d 308 (Fla. 1st DCA 1988). The Florida Legislature has also recognized this overwhelming need. The original peer review statute states in relevant part that:

> The investigations, proceedings and records of a [peer review] committee... 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.

Section 766.101(5)(1989).

This privilege is intended to be the broadest possible within due process limitations. Hawkes, The Second Reformation, supra, at 753. It prevents any litigants from having access to materials reviewed by a peer review committee, the information presented to it or its deliberations, including the impressions and mental processes of the participants, unless the materials

are independently available. See, Segal v. Roberts, 380 So.2d at 1049 (Fla. 4th DCA 1979); Parkway General Hosp., Inc. v. Allinson, 453 So.2d at 123, 126 (Fla. 3d DCA 1984) ("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."). This immunity protects the information and the resulting documentation even if they are material to the litigant's cause of action. See, Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988); Holly v. Auld, 450 So.2d 217 (Fla. 1984); Burton v. Becker, 516 So.2d 183 (Fla. 2d DCA 1982).

The Florida Legislature has made a knowing decision in favor of a public policy which protects the delivery of health care in general as opposed to the rights of individual litigants alleged to be aggrieved by the subject matter considered by some peer review committee. The courts, including this Court, have paid considerable deference to the legislature's consistent position regarding this issue. In Holly v. Auld, 450 So.2d 217 (Fla. 1984), the Florida Supreme Court held that:

> 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 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 court.

The policy choice is obvious and the Legislature made it

in 1973 and again in 1985. The courts have made it each and every time the issue has been presented to an appellate court in the State of Florida. See, e.g., cases cited supra, and Suwanee Hospital Corp. v. Meeks, 472 So.2d 1305 (Fla. 1st DCA 1985). The policy considerations underlying the peer review privilege are so strong and so consistently upheld that the Third and First District Courts of Appeal have held that even if there were no statutory peer review privilege, the common law would have to provide one. See, Dade County Medical Ass'n v. Hlis, 372 So.2d at 119; HCA of Florida, Inc. v. Cooper, 475 So.2d at 720.

It cannot be seriously questioned that DR. LOVE's application for staff privileges constitutes protected peer review material within the meaning of Section 766.101, Florida Statutes.[1] It is at this juncture axiomatic that credentialing committees are peer review committees within the meaning of the statute. Holly v. Auld, 450 So.2d 217 (Fla. 1984), affirming Auld v. Holly, 418 So.2d 1020, 1023 (Fla. 4th DCA 1982); Lake Hospital and Clinic, Inc. v. Silversmith, 551 So.2d 538, 541 (Fla. 4th DCA 1989). As the Fourth District held in Auld v. Holly, 418 So.2d at 1023:

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[1] Petitioner appears to have abandoned its claim with respect to discoverability of the "copy of the delineation of privileges" for DR. LOVE, since she has failed to raise this aspect of the Fourth District's decision in her brief. It is well settled that issues and contentions neither raised nor addressed in an appellant's brief are deemed to have been abandoned and will not be considered by an appellate court. City of Miami v. Steckloff, 111 So.2d 446 (Fla. 1959). Even so, the identical policy considerations obtain with respect to the discoverability of the delineation of privileges.

> At the outset, we must decide whether a hospital's credentials committee is a "medical review committee" as defined by the statute. A credentials committee is a medical review committee so long as the purpose of the committee is one of those listed in the statute. It is apparent that at least one of the purposes of the credentials committee in the present case is to improve the quality of health care at the hospital by limiting staff privileges to doctors of a certain caliber of competence. Therefore, we conclude that the credentials committee is a medical review committee.

It is also clear that DR. LOVE's application for staff privileges with HUMANA-BENNETT constitutes "records of a committee" as provided in Section 766.101(5), Florida Statutes. As the Second District Court of Appeal recognized in Tarpon Springs General Hospital v. Hudak, 556 So.2d 831, 832 (Fla. 2nd DCA 1990):

> Such an application must necessarily be part of the records and certainly falls within the policy considerations reflected in the statutes.

The Second District, applying the foregoing policy considerations, held that the peer review privilege cloaked the physician's application for privileges.

Other jurisdictions which have considered the question have likewise held that the physician's application for staff privileges is privileged under the rubric of peer review. See, e.g., Parker v. Saint Clare's Hospital, 159 A.D.2d 919, 553 N.Y.S.2nd 533 (App. Div. 1990); John C. Lincoln Hospital and Health Center v. Superior Court, 159 Ariz. 456, 768 P.2d 188 (Ct. App. Ariz. 1989); Humana Hospital Dessert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (Ct. App. Ariz. 1987). While

the Petitioner accurately points out that the intermediate appellate courts of Illinois have held contra,[2] the position of the California courts, relied upon Petitioner in support of its position, is less clear. In Henson v. Clairemont Community Hospital, 218 Cal. App. 3d 1110, 267 Cal.Rptr. 503 (Ct. App. Cal. 1990), relied upon by the Petitioner here, the court stated:

> Nor do we believe the plain facts (as opposed to the underlying facts of the investigation and evaluation) of denial, suspension or termination of staff privileges is automatically immune from discovery under evidence code Section 1157. It seems probable that the actual decision to deny, suspend or terminate a particular physician's privileges is an act of the hospital administration rather than that of a medical staff committee [citation omitted]. Indeed, the record here shows the Clairemont Community Hospital Board of Governors approved, disapproved or conditioned its staff appointments and reappointments.

Id. at 514. The record in the instant case admits of no such thing, and furthermore as has already been demonstrated, the Florida courts recognize that the credentialing process is in fact protected by the peer review privilege. See supra at 11. Compare Mt. Diablo Hospital District v. Superior Court, 183 Cal. App. 3d 30, 227 Cal. Rptr. 790 (1986) (minutes of committee which considers whether prospectively to allow certain drug or chemical therapy to be administered in hospital privileged as peer review).

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[2] Willing v. Saint Joseph's Hospital, 176 Ill. App. 3d 737, 531 N.E.2d 824 (Ill. Ct. App. 1988), appeal denied, 125 Ill.2d 575, 537 N.E.2d 819 (1989).

The only Florida court to permit discovery of a physician's application for staff privileges has been the First District in Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990). In that case, however, the First District took great pains to point out that the physician in question had already provided his application for staff privileges to the party requesting the same discovery from the hospital. As the First District pointed out:

> Here, the original source, Dr. Brown, has willingly complied with the discovery requests; therefore [the hospital] cannot in good faith claim that the same applications are simultaneously immune from discovery under the statutes. Clearly, in this case, production of the originals will not compromise the confidentiality of any proceedings conducted by [the hospital] regarding Dr. Brown's application. In the event, however, that members of the hospital committee may have made notations upon those documents during their review or investigation, we direct the trial court to conduct an in-camera inspection of the materials requested in order to determine whether any such entries fall within the statutory proscription and should therefore be deleted prior to production.

Even with this narrowly carved exception confined to the particular facts of the case, the First District's decision was not unanimous. Judge Allen dissented, noting that the majority's decision appeared "to run afoul of the expansive interpretation placed upon the subject statutes' forerunners by our Supreme Court" citing Feldman and Holly. 560 So.2d at 1316. Judge Allen further observed:

> The rationale for the majority's decision

> seems to be that the "otherwise available from original sources" language in Sections 395.011(9) and 766.101(5), Florida Statutes, means that the only "documents" protected from discovery by these statutes are documents which have been created by the licensing board or medical review committee. I respectfully disagree. I read the language to merely mean that a document which a party secures from the original source is not inadmissible as evidence merely because the document, or a duplicate thereof, has been presented during proceedings of a board or committee. If the Legislature had intended to limit "document" to mean only documents created by a board or committee, then surely the Legislature would have said so, rather than engage in the extended language quoted in the majority of opinion.

Id. at 1316 [emphasis in original].

To permit the Plaintiff to discover the information which it seeks would be to wholly contravene the legislative intent of the peer review statutes and the judicial imprimatur which has been placed upon those statutes by virtually every court in Florida which has considered the issue. Although the Plaintiff might demonstrate a need for the information in the establishment of her cause of action, this need has been overridden time and time again, by the Legislature and the courts, and the policy choice has been made in favor of the confidentiality which has been determined to be absolutely essential in the self-policing of the health care provided by Florida's hospitals, including this Amicus.

The amicus Academy of Florida Trial Lawyers asserts that the Fourth District's decision is erroneous because the

Petitioner's underlying claim does not "arise from" the peer review process. This assertion is wide of the mark. First, the very fact that the underlying suit alleges malpractice by a HUMANA-BENNETT staff physician (albeit not at HUMANA-BENNETT) calls that physician's competence into question, and it was that very issue which HUMANA-BENNETT's credentials committee addressed when it considered whether to grant him staff privileges. Second, the common law doctrine of peer review would protect the requested materials, even if the statute did not, unless Petitioner could show "exceptional necessity" or "extraordinary circumstances" to justify their production. Bay Medical Center v. Sapp, 535 So.2d 308, 311 (Fla. 1st DCA 1988); HCA of Florida, Inc. v. Cooper, 475 So.2d 719 (Fla. 1st DCA 1985); Dade County Medical Ass'n v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979).

The overall position urged by the amicus Academy of Florida Trial Lawyers not only addresses a broad policy question not before the Court, but also urges an abrogation of the statute in complete conflict with this Court's prior pronouncements in Holly and Feldman. Such an interpretation would do violence to the spirit and letter of the peer review statutes to such an extent that virtually no privilege at all would remain. This is not only contrary to the intent of the Florida Legislature, but also to the common law doctrines embraced by the Florida judiciary over many years.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourth District Court of Appeal in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of July, 1991 to: **JAMES C. SAWRAN, ESQ.**, Billing, Cochran, Heath, Lyles & Mauro, P.A., 888 Southeast Third Avenue, Suite 301, Fort Lauderdale, FL 33316; **RICHARD J. ROSELLI, ESQ.**, Krupnick, Campbell, Malone and Roselli, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, FL 33316.

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