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JUL 15 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

vs.

DOUGLAS J. LOVE, M.D.,

Respondent

CASE NO. 77,293

4TH DCA NO. 90-2077

BRIEF OF AMICUS CURIAE OF FLORIDA MEDICAL ASSOCIATION, INC. AND FLORIDA HOSPITAL ASSOCIATION, INC.

FLORIDA MEDICAL ASSOCIATION, INC.

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PRELIMINARY STATEMENT

References to Petitioner's Brief are indicated by "PB."

STATEMENT OF THE CASE AND FACTS

The Florida Medical Association, Inc. ("FMA") and the Florida Hospital Association, Inc. ("FHA") agree with and adopt the Statement of the Case and Facts set forth in Respondent's Reply Brief.

SUMMARY OF ARGUMENT

The Fourth District's decision to grant Respondent's Petition for Writ of Certiorari reflects an accurate interpretation of §§395.011(9) and 766.101(5), Florida Statutes (1989). The statutes are clear that an application for privileges is absolutely protected, and Petitioner's attempt to create an exception for such application is without support.

ARGUMENT

THE FOURTH DISTRICT ACTED CORRECTED IN DECIDING THAT DR. LOVE'S APPLICATION FOR STAFF PRIVILEGES IS PROTECTED FROM DISCOVER BY SECTIONS 395.011 AND 766.101, FLORIDA STATUTES (1989).

Florida law clearly protects from discovery records of disciplinary boards, medical review committees and other committees mentioned in §766.101, Fla. Stat. (1989). The extent of the privilege, however, has been hotly debated, and district courts may have differing points of view. See, e.g., Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (Fla 2d DCA 1980) and Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla 1st DCA 1990). Never before, however, has it been argued to this court that an application for privileges is not immune from discovery. The most probable explanation is found in the clarity of §766.101, Fla. Stat. (1989) on this point.

Section 766.101(5), Fla. Stat. (1989) protects from discovery "investigations, proceedings, and records of a committee as described in the preceding subsections" where such records would be used against a health services provider when such records were "the subject of evaluation and review by such committee." §766.101(5), Fla. Stat. (1989). Section 766.101 refers, in pertinent part, to a "medical review committee" of a hospital which screens, evaluates, and reviews "the professional and medical competence of applications to and members of, medical staff." §766.101(2). The statute also refers to a committee of an insurer, self-insurer or joint

underwriting association. Moreover, subsection (1)(a) alone mentions nine distinct committees, none of which has it ever been argued do not fall within subsection five's protection. Section 395.011 is similar, section (9) being the discovery immunity subsection.

Subsection (5) of §766.101 clearly applies to all medical review committees described and pertains specifically to matters subject to each committee's "evaluation and review." It is only logical, therefore, to conclude that the protection applies to an application for privileges, since that begins the medical review committee's review process. This legislative clarity perhaps accounts for Petitioner's absence of legal support for its argument to the contrary.

The narrow issue before this Court is one of first impression. The Second District has, however, addressed the issue in Hudak, 556 So.2d 831. There, the petitioner hospital sought a Writ of Certiorari to review the trial court's order directing it to produce a physician's application for privileges. Both the hospital and the physician were defendants in a medical malpractice action. The petitioner invoked both §395.011(9) and §766.101(5), Fla. Stat., in its petition, and the Court granted the petition, stating "[s]uch an application must necessarily be part of the records and certainly falls within the policy consideration reflected in the Statutes." Id. at 832.

One other Court, the First District, appears to have reached a controversial and opposite conclusion. In Akers, 560 So.2d 1313 (Fla 1st DCA 1990), the petitioner hospital, as in Hudak, sought a Writ of

Certiorari to review the trial court's order directing it to produce the medical malpractice defendant physician's applications and renewal applications. Significantly, however, the Akers physician produced the actual documents sought. Hence, the case dealt primarily with the Statute's "otherwise available" clause, and produced a strongly worded dissent. In fact, it is arguable whether Akers and Hudak are inopposite given their extremely different factual scenarios. Akers was accepted by this Court for review, but was dismissed after settlement.

Petitioner urges this Court to find that the clear immunity of §§766.101 and 395.011 does not apply to a physician's application for privileges. "It is hard," Petitioner writes, "to see how such statutory intent and purpose is furthered by protecting a physician's application for privileges." PB-5. It is precisely this and related records which the Legislature found to constitute such a benefit to the public health and welfare as to outweigh the civil litigant's right to discovery. The protection is clear, however, on the face of both statutes. Moreover, the Hudak court correctly interpreted the statutes. Who can argue that the full and frank disclosure sought through the statutes' immunity and recognized by this Court in Holly v. Auld, 450 So.2d 217 (Fla. 1984), does not apply to an application for staff privileges?

> It is apparent that the need for confidentiality is as great when a credentials committee attempts to elicit doctors' honest opinions about one of their colleagues for purposes of determining fitness for staff privileges as when attempting to determine whether the practice of a doctor on the staff meets the standards of the medical community. . . . The discovery privilege of subsection (4) was clearly designed to provide that degree of

> confidentiality necessary for the full, frank medical peer evaluation which the legislature sought to encourage. Id. at 220.

While the foregoing speaks specifically to a physician testifying to a credentials committee, the same logic applies to a physician's own application. The protection ensures full disclosure by the practitioner of things which may embarrass or endanger the practitioner

Petitioner is correct that the Hudak opinion is deficient in not explicating the policy preserved by its decision. PB-6. More likely, however, the Hudak court saw the clarity of this Court on the issue, both in Holly and four years later with Feldman v. Glucroft, 522 So.2d 798,801 (Fla. 1988):

> The justification for the immunity in these circumstances is that the necessary information could not otherwise be obtained without this protection. We accept the legislative determination that, without this type of qualified immunity, a viable health care peer review process would be difficult, if not impossible, to maintain.

Petitioner also urges that the application sought is not protected since it was produced outside the four walls of a medical peer review committee. PB-7. To be sure, the Akers majority draws a distinction between medical review records generated "internally" by the committee and those generated outside the committee. Akers at 1315. Nevertheless, in this respect, the Akers distinction should either be viewed as spurious and irrelevant or as relevant only when applied to the case's factual scenario. Nearly all such records are produced outside the four walls. To follow the distinction would lead to absurd results. For example, would not the committee's

documents prepared by its administrative personnel become subject to discovery? Clearly this is not what the Legislature intended.

Judge Allen has wisely pointed out in his Akers dissent that the First District's decision necessarily voids the immunity of all information possessed by a board or committee since "[v]irtually all information upon which boards and committees rely comes from external sources." Akers at 1316. As such the First District majority completely undermines the express legislative purpose for granting immunity in the first place, and its decision can surely be expected to cripple such review activity since physician applicants involved in the medical review process are aware of and depend on the immunity. In this age of increased regulation of health care professionals, the immunity trade-off/inducement has become ever more essential. The reality is that, without uncompromised immunity for medical review activity, including all records received and generated by such activity, there will be few participants in the process, and the full and frank disclosure sought to be protected by the Legislature and previously recognized by this Court stands threatened.

Congress was aware of this reality when it created the National Practitioner Data Bank (NPDB) law, a far-reaching piece of legislation requiring reports from various entities about the conduct of health care providers. The law extends immunity to all documents and participants in the peer review process. 42 C.F.R. §11101 et seq. One of Congress' express findings in enacting the law reads: "There is an overriding national need to provide incentive and

protection for physicians engaging in effective professional peer review." 42 C.F.R. §11101(5).

Petitioner also contends that immunity does not attach to the application since the lawsuit did not "arise out of" matters that are the subject of the medical review committee's evaluation and review. The suggestion is that only a claim of negligent credentialing against the hospital would trigger the statutes' immunity provisions in this case. Petitioner offers no legal support for the interpretation, and no court has undertaken such an analysis.

If the Legislature intended the immunity provisions to have such limited application, it would have so specified. In the case of §766.101(5), the statute refers to "civil action against a provider of professional health services." "Health care providers" is defined by §766.101(1)(a)(2) to include various professionals and hospitals and ambulatory surgical centers. Petitioner's interpretation would only protect disclosure of the privileges application only where (1) a hospital was a party to the suit, and (2) the suit plead negligent credentialing or some similar theory.

Petitioner also claims only suits actually arising from a committee's evaluation and review are protected, thus limiting the privilege further. The net result of such interpretations would be to merely encourage artful pleading while completely undermining the public health protection these statutes seek to ensure. While no court has interpreted the "arising out of" language, Petitioner's interpretation simply goes too far.

It is the supply of sensitive information which must go

unimpeded. When a physician or other health care professional supplies such information, it is apparently the Legislature's hope that the professional will do so fully with the peace of mind that no harm will result from compliance. Petitioner's interpretation would be consistent with Legislative intent only if it could be said that the professional supplying the sensitive information could predict the nature of litigation which might result or which might involve him or her. It would create a sort of shell game that is both unworkable and inconsistent with express Legislative intent.

CONCLUSION

A physician's application to a hospital for staff membership or for staff privileges falls squarely within the immunity created by statute. Any breach of such immunity poses the same unacceptable threat to public health, and safety guarded against by Florida law, previously recognized by this Honorable Court and guarded against by federal law. For the foregoing reasons, the Fourth District's decision should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to RICHARD ROSELLI, ESQUIRE, 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, Florida 33316; JAMES C. SAWRAN, ESQUIRE, 888 Southeast Third Avenue, Suite 100, Fort Lauderdale, Florida 33316; ROY D. WASSON, ESQUIRE, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; and SUSAN L. DOLIN, ESQUIRE, Conrad, Scherer & James, Post Office Box 14723, Fort Lauderdale, Florida 33302, this 10th day of July, 1991.

JEFFREY L. COHEN, ESQ.