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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 CASE NO: 90-2077

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent, DR. LOVE, accepts the statement of the case and facts as set forth in the initial brief of Petitioner ELOISE POSEY CRUGER as parent and guardian of the minor, ASHANTI POSEY. However, the respondent maintains that petitioner's reference to the trial court's willingness to review the documents in camera for confidential annotations is irrelevant as the documents are privileged in their entirety.

SUMMARY OF ARGUMENT

A physician's application to a hospital for staff privileges is a privileged communication protected from discovery by Florida Statutes Section 769.101(5) and Section 395.011(9). A physician prepares his application for staff privileges solely for the benefit of the hospital's medical review committee. Therefore, the application is part of the committee's records pursuant to the statutes, and not one "otherwise available from original sources."

Furthermore, the legislature drafted these sections with the intent of improving Florida's provision of health care. Medical review committees are given a very broad privilege so that the hospitals will have greater access to information. A physician's candor in applying for staff privileges is particularly necessary in helping the committees to make the correct decision regarding medical staff privileges. The Florida Supreme Court has a history of construing the malpractice statues broadly so as to further the

legislative intent.

Finally, the public policy reasons are so strong as to require that the privilege be recognized even if the statute did not exist.

ARGUMENT

I. A PHYSICIAN'S APPLICATION FOR STAFF PRIVILEGES IS A CONFIDENTIAL DOCUMENT PROTECTED BY THE FLORIDA STATUTES GOVERNING THE PEER REVIEW PROCESS.

In 1973, the Florida legislature, in its concern over the rising costs of health insurance, enacted Florida Statute Section 768.131.[1] The legislature was concerned with the rising costs of health insurance related to the costs of hospital and medical services and increasing problems in the area of medical malpractice insurance. Ch. 73-50 Laws of Florida, 1973, vol. I, at 97. At that time professional societies and associations were voluntarily reviewing standards of care. The legislature wished to encourage this voluntary reviewing process, and recognized that some form of immunity would be advisable in exploring acts of malpractice. Id.

Pursuant to a comprehensive medical malpractice reform, the legislature made the peer review process mandatory in 1985 by enacting what is now Subsection 2 of Section 766.101, Florida Statutes. Florida Statute Section 766.101(2) (1989) places an affirmative duty on a medical review committee of a hospital to

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[1]. Section 768.131 was later renumbered as Section 768.40, and is now Section 766.101.

screen, evaluate, and review the professional and medical competence of applicants to, and members of, medical staff. That statute further provides that as a condition of licensure, each health care provider shall cooperate with a review of professional competence performed by a medical review committee.

That same statutory provision, in subsection 1(a), defines "medical review committee" to include a committee of a hospital or of a medical staff of a licensed 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.

Subsection (5) of this same statutory provision provides a privilege for committee records:

> 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 used 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. (emphasis supplied).

The language of what is now Subsection (9) of Florida Statute Section 395.011, governing hospital licensing and regulation, is identical. Section 395.011 was also enacted in reaction to what the legislature saw as a threat to the provision of quality health care, and was premised on the notion that a comprehensive risk management program and monitoring of physician quality would prevent medical injuries. Ch. 85-174 Laws of Florida, 1985, vol. I at 1180.

This recent legislation placed an affirmative duty on hospitals to ensure that only competent physicians are appointed to its medical staff, and that those admitted are given clinical privileges according to their qualifications. See Sailors & New, "Toward Prevention and Early Resolution: Report and Recommendations of the Governor's Task Force on Medical Malpractice," April 1985 at 63.

The issue before this court is one of first impression. The extent of the privilege provided by the peer review statutes has been hotly debated throughout Florida as well as other jurisdictions. The debate in this particular case turns on whether the application for staff privileges and delineation of privileges are committee records or documents "otherwise available from original sources."

The Fourth District Court of Appeal found the application to be a privileged committee document "[i]n light of the policy that lies behind the confidentially (sic) of records and deliberations of medical review committees . . ." Love v. Cruger, 570 So.2d 362

(Fla. 4th DCA 1990), citing to Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979), as well as to the construction placed upon sections 766.101 and 395.011, Florida Statutes, in Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (Fla. 2d DCA 1990). In Tarpon, the Second District Court of Appeal declared that "[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.

The policy consideration upon which the Tarpon court relied was that espoused by this court in Holly v. Auld, 450 So.2d 217 (Fla. 1984) (privilege not limited to malpractice actions). In Holly, this court followed its policy of construing the statutes broadly so as to encourage candor during the review process. This court acknowledged the need for "the full, frank medical peer evaluation which the legislature sought to encourage," even where detrimental to the plaintiff's litigation. Id. at 220.

> 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 courts.

Id.

This court's policy of construing the statutes broadly was affirmed again in Feldman v. Glucroft, 522 So.2d 798 (Fla.1988) (affirming the denial of discovery in a defamation case). The

court justified the immunity provided by the legislature in finding that the information necessary to the review process would otherwise be unobtainable. Id. at 801.

On the other hand, the First District Court of Appeals has arrived at a different conclusion. Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990). In Akers, the plaintiff had requested the physician's applications and renewal applications from both the physician and the hospital, JMC. The physician objected pursuant to Section 395.011(9) and Section 766.101(5); however, he did comply with the request and produced the application. Id. at 1315. JMC objected and subsequently denied the request. The appellate court found that JMC could not in good faith claim that the applications were immune from discovery once they had already been produced. Id. at 1316.

In attempting to define a committee record, the First District Court of Appeal made a distinction between those records created by the internal hospital entity, and those produced by outside entities and considered by the hospital. The court relied on Willing v. St. Joseph Hospital, 176 Ill. App. 3d 737, 531 N.E.2d 824 (App. Ct. 1988) (applications are not part of the peer review process, but are voluntarily submitted prior to such proceedings). Id. at 1315. The court placed all documents which were not created directly by the review committee in the "otherwise available from original sources" category.

The dissent questioned the majority's interpretation of the language. Taking the majority's interpretation to its logical

conclusion, virtually all information would be excluded from the privilege. Id. at 1316 (Allen, J., dissent). The dissent read the language to 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 a committee." Id. (emphasis in the original).

Very few jurisdictions have considered the narrow issue before the court: whether a physician's application to a hospital for staff privileges and the hospital's delineation of those privileges are committee records clothed in the privilege of the peer review statutes. However, other jurisdictions have had a chance to define the scope of the privileged committee records, and have arrived at a conclusion similar to that espoused by the dissent in Tarpon.

The Supreme Court of Texas has stated:

> In general, this privilege extends to documents that have been prepared by or at the direction of the committee for committee purposes. Documents which are gratuitously submitted to a committee or which have been created without committee impetus and purpose are not protected. (emphasis supplied).

Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 648 (Tex. 1985) (interpreting Tex. Rev. Civ. Stat. Ann. art. 4447d § 3 (Vernon Supp. 1988)). This definition was once again affirmed in Barnes v. Whittington, 751 S.W.2d 493 (Tex. 1988). In Barnes, the court emphasized the statutory purpose of the privilege for records. The court supported the legislature's intent of encouraging uninhibited discussion of events that are the subject of committee action or

review. Id. at 496 (citing to Jordan, 701 S.W.2d at 647).

Delaware has also defined its statute in a similar manner:

> Records include any paperwork, reports or compilation of data which are used exclusively by the committee . . . . The discoverer, in order to effect discovery, must show the records were used by or published to persons outside the specific review organization . . . . (emphasis supplied).

Dworkin v. St. Francis Hospital, Inc., 517 A.2d 302, 307 (Del. Super. Ct. 1986), appeal refused, 521 A.2d 649 (Del. 1987) (citation omitted). In Dworkin, when the court defined the records and proceedings to include any information used exclusively by the committee, it too was furthering the legislative purpose of the statute to: "prevent the chilling effect caused by the prospect of public disclosure of statements made to, or information prepared for and used by, medical review committees in the accomplishment of their assigned tasks." 517 A.2d at 307.

Although the courts in Texas and Delaware have defined the scope of committee records and proceedings, they have not had the opportunity to apply these definitions to a physician's application for staff privileges. However, it appears that under the definitions espoused by these two courts, Dr. Love's application for staff privileges is a committee record protected by the Texas and Delaware statutes. A physician's application is not submitted gratuitously to a review committee. Jordan, 701 S.W.2d at 648. Instead the application and the pertinent information are requirements placed on the physician who is to be investigated by the reviewing committee. The paperwork submitted is used

exclusively by the committee. Dworkin, 517 A.2d at 307. A doctor might be less than candid if faced with the prospect of public disclosure of his statements. Id.

Other jurisdictions have held that a physician's application for staff privileges is a confidential communication protected by their respective peer review statutes. Parker v. Saint Clare's Hospital, 159 A.D.2d 919, 553 N.Y.S.2d 533 (App. Div. 1990); John C. Lincoln Hospital and Health Center v. Superior Court, 159 Ariz. 456, 768 P.2d 188 (Ct. App. 1989); Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987).

In Humana, the court recognized that the confidentiality of peer review proceedings was essential to a complete investigation and review of medical care. 742 P.2d at 1386.

> Doctors are motivated to engage in strict peer review by the desire to maintain the patient's well-being and to establish a highly respected name for both the hospital and the practitioner within the public and professional communities. However doctors seem to be reluctant to engage in strict peer review due to a number of apprehensions: loss of referrals, respect and friends, possible retaliations, vulnerability to torts, and fear of malpractice actions in which the records of the peer review proceedings might be used. (emphasis supplied).

Id. (quoting Comment, Medical Peer Review Protection in the Health Care Industry, 52 Temple L.Q. 552, 558 (1979). In deciding the constitutionality of the statute, the court further stated that the Act does not protect otherwise discoverable factual information obtained from alternative sources.

The Arizona court then defined the scope of the otherwise discoverable information: "Such original sources include court records about previous malpractice claims and administrative records or testimony about a physician's education and training." Id. The court also indicated other original sources to which a plaintiff might have recourse including medical records available pursuant to a patient's consent, and expert opinions as to all these matters. Id.

This would appear to be the logical interpretation of the statutory language. Indeed this court has declared: "The shield of confidentiality protects what is presented or spoken to the committee at its meetings." Feldman v. Glucroft, 522 So.2d 798, 801 (Fla.1988) (emphasis supplied).

A physician's application for staff privileges is a committee record which should be protected from discovery pursuant to Section 766.101(9). The application is prepared for and presented solely to the medical review committee. The committee uses the information furnished in the application during its decision-making process. The application is not a document created prior to the review process, Willing, supra p. 6. In fact, a physician's application for staff privileges is actually the commencement of review proceedings.

To hold otherwise would contravene the legislature's intent. Section 766.101(9) was enacted so that the review process could proceed with the utmost candor. Holly, supra p. 5. Opening up a physician's application to discovery in malpractice actions, would

place a chilling effect on the doctor's candor. The court would be limiting what would be the review committee's best source of information. Laws v. Georgetown University Hospital, 656 F.Supp. 824 (D.D.C. 1987) (extending qualified privilege to private communication, which was ultimately reviewed at hospital staff meeting, prepared by doctor accused of malpractice to chairman of department of his specialty).

II. EVEN IF THE STATUTE DID NOT PROTECT THE PHYSICIAN'S APPLICATION FROM DISCOVERY, PUBLIC POLICY WOULD REQUIRE THAT THIS COURT EXTEND THE PRIVILEGE TO THE APPLICATION.

Florida courts have held that even where a statutory privilege does not arise, public policy would mandate nondisclosure of certain documents absent exceptional necessity or extraordinary circumstances. Bay Medical Center v. Sapp, 535 So.2d 308, 311 (Fla. 1st DCA 1988); HCA of Florida, Inc. v. Cooper, 474 So.2d 719, 720 (Fla. 1st DCA 1985); Mercy Hospital v. Dept. of Professional Regulation, 467 So.2d 1048 (Fla. 3d DCA 1985); Dade County Medical Association v. Hlis, 372 So.2d 117, 119 (Fla. 3d DCA 1979). See also Insinga v. Labella, 543 So.2d 209 (Fla.1989) (public policy required that his court adopt the theory of corporate negligence, holding hospitals liable to patients for actions of physicians with staff privileges).

These courts applied a balancing test, weighing the interest in medical staff candor against the plaintiff's interest in discovering the information. When faced with the decision of

whether to extend a statutory privilege to information, or to even create a privilege, courts in other jurisdiction have generally applied the same balancing test, or the traditional common law criteria outlined by Wigmore. 8 Wigmore, Wigmore on Evidence § 2285 (McNaughton rev. 1961). See Sweasy v. King's Daughters Memorial Hospital, 771 S.W.2d 812 (Ky. 1989); Laws v. Georgetown University Hospital, 656 F.Supp. 824 (D.D.C. 1987); Hutchinson v. Smith Laboratories, Inc., 392 N.W.2d 139 (Iowa 1986); State ex rel. Chandra v. Sprinkle, 678 S.W.2d 804 (Mo. 1984); Bredice v. Doctors Hospital, 50 F.R.D. 249 (1970), aff'd, 479 F.2d 920 (D.C.Cir. 1973).

The four factors in Wigmore's test are: the communications must originate in a confidence that they will not be disclosed; this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; the relation must be one which in the opinion of the community ought to be sedulously fostered; and the injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (this fourth factor is the equivalent of the balancing test used in several jurisdictions). 8 Wigmore at 527.

An application of these four criteria to a physician's application for staff privileges dictates that a privilege should exist. First, it is understood that when the doctor applies for his staff privileges, the information on the application will be confidential. The information is for the committee's eyes only.

Second, confidentiality is essential to the relationship between the physician and the committee. The physician is the best source of information. If the physician's application were open to public disclosure, or disclosure in a malpractice suit, the applicant may not be as candid. Third, the community would no doubt encourage this relationship so that the committees may conduct a more efficient review.

As to the fourth prong, the balancing of interests, the argument in the plaintiff's favor is that of liberal discovery. On the other hand, the courts also wish to encourage improvement in the delivery of health services. Chandra, 678 S.W.2d at 811 (Welliver, J., Dissent).

The improvement in the delivery of health services was uppermost in the minds of Florida's legislature and that of other states when it enacted the Medical Malpractice Reforms. However, this policy is not limited to state action. In 1986, the United States Congress passed the Health Care Quality Improvement Act. 42 U.S.C. §§ 11101-11152 (1986). The purpose of the Act is to encourage health care practitioners to identify and discipline those who engage in unprofessional behavior, and to restrict the ability of incompetent physicians to move from state to state without disclosure or discovery of the practitioners' previous damaging or incompetent performance. U.S. Dept. of Health and Human Services, National Practitioner Databank Guidebook, 1 (1990).

The Act also established the National Practitioner Data Bank, which collects and releases certain information related to the

health care practitioner's competence. The Databank is intended to aid the review process, and is to be considered together with other information in evaluating the physician's credentials. The information includes: medical malpractice payments; adverse licensure actions; adverse actions on clinical privileges; adverse actions on professional society memberships. Hospitals may request information from the Databank when screening applicants for hospital privileges. Id. at 1-4.

Thus it would appear that a plaintiff's interest in liberal discovery of a medical committee's records is overwhelmed by the state and national legislature's interest in improving public health care, and aiding the peer review process. In the case of an application for staff privileges, the plaintiff's argument is even weaker. Much of the information is available from other sources. Supra p. 10. On the other hand:

> Confidentiality is essential to effective 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 qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations.

Bredice, 50 F.R.D. at 250.

Furthermore:

> Denying the litigant access to the information sought in this case does not hinder the litigant's ability to determine all the facts in issue. The litigant may obtain medical records, depose witnesses and have his or her own experts evaluate and comment upon the disclosed facts and circumstances. Thus, the malpractice victim suffers only minimally from the nondisclosure, while the

medical profession suffers greatly from disclosure. Chandra, 678 S.W. 2d at 811 (Welliver, J., Dissent). Contra, Sweasy v. King's Daughter Memorial Hospital, 771 S.W.2d 812, 815 (Ky. 1989) (no real showing that peer review committees' functions would be substantially impaired by denial of privilege).

Indeed, the disclosure of information on an application for staff privileges and delineation of those privileges would indeed cause the medical profession to suffer greatly. The delineation of the staff privileges is the product of the medical review process. The committee is solely responsible for the granting of staff privileges. If such information were discoverable, the committee would, in essence, be testifying every time it makes any decisions. This was surely not the legislature's intent when it made the creation of the medical review committees mandatory.

Submitting an application for staff privileges to discovery would also be the equivalent of testifying for the plaintiff. In his application a physician must reveal extremely sensitive information, including, but not limited to: prior problems with any licensing agency, such as suspension, revocation and restrictions; prior judgments or settlements against the physician; problems with a liability insurance carrier; criminal records; actions against the physician regarding staff membership and privileges; any other disciplinary actions against the physician; narcotics and alcohol abuse; and psychological treatment. The physician must also provide details regarding any such negative incident.

The damage to the medical profession, should the application

be discoverable, would be twofold. First, knowledge that such information would be exposed in a malpractice action would curtail the doctor's willingness to be candid. Losing the physician's candor would violate the spirit of the legislature's medical malpractice reform. The review committee may have access to much of the information through other sources, including the National Practitioner Databank. However, the physician's application is the starting point for the committee's investigation. The physician's application would also provide details regarding certain incidents that may not be recorded elsewhere. The application is essential to the peer review process.

Second, the medical review committee is itself also exposed during any possible malpractice actions. This exposure places a chilling effect on the committee's ability to grant privileges to an otherwise fine physician who may have had problems with a patient or licensing board in the past. The physician's application is a starting point for the review process. However, prior investigations, settlements, or even a revocation of privileges do not paint the whole picture. A committee's further investigation may reveal other information or circumstances which would lead it to find that the applying physician is a perfect candidate for placement at its hospital. Nonetheless, the committee would feel restrained from granting privileges to a doctor knowing that its thought process would be exposed during discovery.

The overwhelming public policy considerations require that the

court recognize a privilege for the application, even if the statutory privilege did not apply. In this litigation, the plaintiff has access to more than adequate information to pursue the claim. The denial of discovery of the application for privileges would not be a burden. The plaintiff has no exceptional necessity.

However, the damage would be great to the peer review process. The chilling effect of disclosure of confidential information would stop the flow of information from its best source. Laws, supra p. 11. This would violate the legislature's intention of achieving complete investigation and review of medical care. In light of the overwhelming public interest in candid professional peer review, this court should find the application to be a privileged communication, and affirm the Fourth District's opinion in this case.

CONCLUSION

A physician's application for privileges and the delineation of those privileges are confidential committee records protected by Section 395.011(2) and Section 766.101, Florida Statutes. To hold otherwise would violate the legislature's intent to improve the quality of health care provided by hospitals in Florida. Both the medical profession as well as the public would suffer greatly from the disclosure of this privileged and sensitive information, and therefore, the Fourth District's decision should be affirmed.

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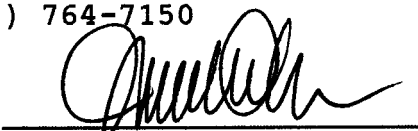
By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Richard Roselli, Esquire, Attorney for Petitioner, KRUPNICK, CAMPBELL, MALONE AND ROSELLI, P.A., 700 Southeast Third Avenue, Courthouse Law Plaza, Suite 100, Fort Lauderdale, Florida 33316; Susan L. Dolin, Esquire, Conrad, Scherer & James, Post Office Box 14723, Fort Lauderdale, Florida 33302; Jeffrey L. Cohen, Esquire, Florida Medical Association, Inc., Post Office Box 2411, Jacksonville, Florida 32203; and William Bell, Esquire, Florida Hospital Association, Inc., Post Office Drawer 469, Tallahassee, Florida 32302; and Roy D. Wasson, Esquire, Academy of Florida Trial Lawyers, Suite 402, Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 this 12th day of August, 1991.

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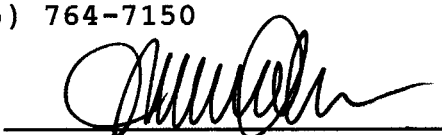
By: 

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