SUPREME COURT OF FLORIDA

CASE NO. 77,293

4TH DCA NO. 90-2077

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

Petitioner,

vs.

DOUGLAS J. LOVE, M.D.,

Respondent

INITIAL BRIEF OF PETITIONER

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PREFACE

Petitioner, Elois Posey Cruger, on behalf of her son, Ashanti Posey, plaintiffs at the trial court level, will be referred to as Petitioners. Respondent, Douglas J. Love, M.D., defendant at the trial court level, shall be referred to as Respondent. The present brief is accompanied by an appendix containing the notices of production from non-party accompanied by the subpoenas duces tecum without deposition which are at issue, and the order of the trial court.

STATEMENT OF THE CASE AND OF THE FACTS

The instant appeal arises out of a medical malpractice action brought by Elois Posey Cruger on behalf of her son, Ashanti Posey, against Douglas J. Love, M.D. The complaint alleges that the Respondent Douglas J. Love, M.D. negligently treated Ashanti Posey's fractured thumb on August 3, 1987.

In the course of litigation, Petitioner Posey filed Notices of Production From Non-Party, pursuant to Florida Rule of Civil Procedure 1.351, reflecting Petitioner's intent to have issued Subpoenas Duces Tecum Without Deposition to three area hospitals: Plantation General Hospital, University Community Hospital, and Humana Hospital Bennett. (A 1-7) The Subpoenas Duces Tecum requested the following documents be produced:

> A copy of the application for privileges and a copy of the delineation of privileges for Douglas J. Love, M.D.

Respondent Dr. Love opposed the production of these documents, claiming they were privileged under §766.101(5), Florida Statutes (1989) and §395.011(9), Florida Statutes (1989). The trial court denied Respondent Love's objection to notice of production from non-party and ordered that the records be produced subject to certain provisions.[1] (A 8)

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[1]The provisions protected from discovery any confidential notations which were made in the original documents by allowing Dr. Love to move for an in-camera hearing if there were such notations.

Dr. Love filed a Petition for Writ of Certiorari with the Fourth District Court of Appeal. The Fourth District Court of Appeal granted the Petition and quashed the trial court's order. (A 9) Petitioner filed a Notice to Invoke Discretionary Jurisdiction and a Jurisdictional Brief in support thereof. This Court accepted jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

A physician's application for privileges is not a document protected from discovery by the confidentiality provisions of §766.101, Florida Statutes (1989) or §395.011, Florida Statutes (1989). As recognized by this Court in Holly v. Auld, 450 So.2d 217, 220 (Fla. 1984), the statutory predecessor to these provisions were enacted to "encourage a degree of self-regulation by the medical profession through peer review and evaluation. The legislature also recognized that meaningful peer review would not be possible without a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues." (emphasis added)

Protecting a physician's application for privileges would in no way affect "the degree of confidentiality necessary for the full, frank medical peer evaluation which the legislature sought to encourage". Id. at 220. The application for privileges is submitted by the physician him/herself. Protecting it from discovery does not further the legislative purpose of encouraging

physicians to provide information and opinions regarding the competence of their colleagues.

ARGUMENT

Petitioner's notice of production from a non-party sought production of Dr. Love's application for privileges at three different hospitals. Dr. Love objected to said notice of production on the grounds that the documents requested were not subject to production pursuant to §766.101, Florida Statutes (1989) and §395.011, Florida Statutes (1989). Section 766.101 pertains to peer review by a hospital's medical review committee. Section 395.011 pertains to the granting of hospital staff privileges. Each of the sections contain confidentiality provisions. Subsection (5) of §766.101 provides as follows:

> 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 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 or 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 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 such committee hearings.

Section 395.011(9) is substantially identical except the term "board" is used rather than the term "committee".

In previous cases before this Court interpreting the predecessor to these statutes, the Court considered the intent and purpose of the legislation in reaching its determinations as to the scope of the privilege created by the statute. Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988); Holly v. Auld, 450 So.2d 217 (Fla. 1984). Similarly in this case, the Court must consider the intent and purpose of §§395.011(9) and 766.101(5) in determining whether a physician's application for privileges is protected from discovery.

In Holly v. Auld, supra, this Court addressed at length the predecessor to §766.101(5) [§768.40(5)]. After considering the preamble and the language of the enactment itself, the Court found as follows:

> In an effort to control the escalating costs of health care in this state, the legislature deemed it wise to encourage a degree of self-regulation by the medical profession through peer review and evaluation. The Legislature also recognized that meaningful peer review would not be possible without a limited guarantee of confidentiality for the information and opinions elicited from physicians regarding the competence of their colleagues.
>
> 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.

See also, Feldman v. Glucroft, 522 So.2d at 800.

It is hard to see how such statutory intent and purpose is furthered by protecting a physician's application for privileges. Such an application is generated by the physician himself. A typical application for privileges merely requires a physician to provide certain biographical information regarding himself and identify the privileges which he seeks to acquire. The application calls upon no other physician to comment upon or make statements about another physician's fitness for staff privileges. The application itself involves no medical peer evaluation.

Respondent's reliance upon the term "records" in both statutes as support for application of the confidentiality provisions to an application for privileges ignores the purpose and intent of the statute. In Holly v. Auld, this Court acknowledged that the discovery privilege provided by the statutes impinges upon the rights of civil litigants to discover information which might be helpful or even essential to their causes. Nevertheless, the Court upheld the discovery privileges because there was a corresponding trade-off in the form of health care cost containment and effective self-policing by the medical community.

In contrast, an impingement upon a civil litigant's right to discovery of an application for privileges would not have a corresponding benefit to the general public. The policy judgment made by the legislature to encourage full and frank medical peer review is not furthered by extending the discovery privilege to an application for privileges at a hospital.

The court below and the court in Tarpon Springs General Hospital v. Hudak, 557 So.2d 831 (Fla. 2d DCA 1990), failed to undergo this analysis. In Tarpon Springs, the court simply found that a physician's application for staff membership privileges was protected because an application for privileges was "necessarily part of the records" of the medical review committee and as such was protected by §§766.101(5) and 395.011(9). Although the court also stated that the application "certainly falls within the policy considerations reflected in the statutes", the court fails to offer an explanation of how those policy considerations are enhanced by protecting a physician's application for privileges from discovery.

The court below relied upon the opinion in Tarpon Springs in reversing the trial court's order compelling production of Dr. Love's applications for privileges. It also relied upon the case of Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979). As in Holly v. Auld and Feldman v. Glucroft, the Third District Court of Appeal in Hlis relied upon the need for confidentiality in a review committee's proceedings in order to improve the quality of the medical community's self-regulation. As noted above, protection of a physician's application for

privileges in no way enhances the quality of peer review by the medical community.

The First District Court of Appeal in the case of Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990), more astutely recognized the distinction between a physician's application for privileges and the proceedings of a medical peer review committee. In finding that a physician's application for privileges was discoverable, the court stated as follows:

> The statutory immunity provisions were enacted to insure an environment of candor and confidentiality in medical peer review proceedings. However, '[t]he 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.'
>
> In the case at bar, Dr. Brown's applications are not *exclusively* the records of the hospital's licensing board of peer review committee; they were generated by Dr. Brown and submitted by him to the hospital for its consideration. The statutory exception within §§395.011(9) and 766.101(5) explicitly underscores the distinction between records created by the *internal* hospital entity, and those produced by *outside* entities considered by the hospital group.

The First District Court of Appeal cited the Illinois case of Willing v. St. Joseph's Hospital, 176 Ill.App.3d 737, 531 N.E.2d 824 (App.Ct. 1988), appeal denied, 125 Ill.2d 575, 130 Ill.Dec. 490, 537 N.E.2d 819 (1989), as support for its opinion that an application for privileges is not protected from discovery. In

Illinois, the Medical Studies Act, Ill. Rev. Statute 1983, Ch. 110, par. 8-2101, et seq., protects from discovery the information, records, reports, statements, notes of credentials committees of hospitals. In addressing the issue of whether a physician's application for privileges was protected by the statute, the court in Willing, as well as the court in Ekstrom v. Temple, 197 Ill.App.3d 120, 553 N.E.2d 424 (App.Ct. 1990), first identified the purpose behind the statute. In Ekstrom, which relied upon Willing, the court found, as did the court in Willing, that the purpose of the Medical Studies Act was "to insure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care. The Act is premised on the belief, that absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues." Ekstrom, 197 Ill.App.3d at 129, 553 N.E.2d at 430. As further stated by the court in Ekstrom:

> The candor sought to be promoted is on the part of the reviewing physicians, not the applicant for privileges, and we do not believe that allowing discovery of applications would impede the review process. Ekstrom, 197 Ill.App.3d at 129, 553 N.E.2d at 430.

The California courts have reached a similar result. In Hinson v. Clairemont Community Hospital, 218 Cal.App.3d 1110, 267 Cal.Rptr. 503 (Ct.App. 1990), the court was called upon to determine the applicability of Evidence Code section 1157 to a

physician's application for privileges. The section provided in pertinent part:

> Neither the proceedings nor the records of organized committees of medical . . . staff in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery.

In Hinson as in this case, the physician sought to argue that his application for privileges was protected from discovery under the statute. The court of appeals disagreed:

> Robbins explains an application for privileges is reviewed by medical staff and the denial, suspension or termination of staff privileges derives from the investigation and report of such a committee. In other words, Robbins argues Evidence Code section 1157 protects everything which touches upon a medical staff committee. Neither the legislative purpose of Evidence Code section 1157 nor its interpretation by the courts supports such a broad construction.
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> The purpose behind Evidence Code section 1157 was explained by the court in Matchett v. Superior Court, 40 Cal.App.3d 623, 629, 115 Cal.Rptr. 317 (1974), as follows:
>
> > Evidence Code section 1157 expresses a legislative judgment that the public interest in medical staff candor extends beyond damage immunity and requires a degree of confidentiality. . . . Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

The privilege contained in Evidence Code section 1157 'applies only to records of and proceedings before medical investigative committees'. (citation omitted) As the court explained in Santa Rosa Memorial Hospital v. Superior Court, supra, 174 Cal.App.3d 711, 724, 726-727, 220 Cal.Rptr. 236:

> Information developed or obtained by hospital administrators or others which does not derive from an investigation into the quality of care or the evaluation thereof by a medical staff committee, and which does not disclose the investigative and evaluative activities of such a committee, is not rendered immune from discovery under section 1157 merely because it is later placed in the possession of a medical staff committee or made known to the committee members; and this may be so even if the information in question may be relevant in a general way to the investigative and evaluative functions of the committee. . . .

We conclude neither an application for staff privileges not the fact a physician's privileges have been denied, suspended or terminated prima facie fall within the scope of Evidence Code section 1157. An application for staff privileges is not included within Evidence Code section 1157 since the application is neither necessarily 'a proceeding in' nor 'record' of a committee; it is a document prepared and completed by an individual physician. As the Santa Rosa case explains, the mere fact information is placed in a medical staff committee's files does not render information immune from discovery.[2] Hinson, 218 Cal.App.3d at 1127-1128, 267 Cal.Rptr. at 513-514.

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[2]The Hinson court did not reverse the lower court's order only because Hinson requested not only the application for privileges but also other information clearly within the scope of the statute. Hinson, 218 Cal.App.3d at 1129, 267 Cal.Rptr. at 514.

The California and Illinois court opinions are persuasive because in both cases the courts found their respective confidentiality provisions to have the same purpose and intent this Court has found behind Florida's confidentiality provision. Those opinions recognize that the purpose and intent of the confidentiality provisions are not furthered by protecting a physician's application for privileges from discovery. An application for privileges is not generated by the medical review committee nor it is the result of medical colleagues commenting upon the applicant's competence. Protecting an application from discovery, therefore, does not enhance candor on the part of reviewing physicians or the committees and boards upon which they sit.

In conclusion, the purpose and intent of §§766.101 and 395.011 do not support extending the protection of those sections to a physician's application for privileges. The legislature's purpose and intent, that is, enhancing quality peer review in order to reduce medical costs and increase the quality of medical care, will in no way be impaired by allowing discovery of a physician's application for privileges. It would be improper to limit a party's right to discovery of such documents where no policy reason exists to support such a limitation. Accordingly, this Court should uphold the trial court and allow the issuance of the subpoenas duces tecum for Respondent's applications for privileges with the limitations as set by the trial court.

CONCLUSION

Petitioner requests this Court to reverse the Fourth District Court of Appeal's decision below and affirm the trial court's order compelling production of Respondent's applications for privileges.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Intial Brief of Petitioner was mailed on this 21st day of June, 1991, to:

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APPENDIX