

IN THE SUPREME COURT OF FLORIDA

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

Petitioner,

CASE NO.

vs.

4TH DCA CASE NO. 90-2077

DOUGLAS J. LOVE, M.D.,

Respondent.

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PETITIONER'S BRIEF ON JURISDICTION

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**PREFACE**

This is a brief by Plaintiff/Petitioner on conflict jurisdiction directed to an opinion of the Fourth District Court of Appeals originally issued October 31, 1990 and also denied for rehearing on December 17, 1990. 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, the order of the trial court, the opinion of the Fourth District Court of Appeals, and copies of other relevant opinions upon which conflict is based.

### STATEMENT OF THE CASE AND FACTS

The underlying action is one for medical malpractice brought by Elois Posey Cruger, as parent and guardian of the minor, Ashanti Posey, against Douglas J. Love, M.D. As part of that litigation, Plaintiff filed certain notices of production from non-party reflecting Plaintiff's intent to have issued subpoenas duces tecum without deposition to three area hospitals, Plantation General Hospital, University Community Hospital, and Humana Hospital Bennett. These subpoenas duces tecum requested production of Defendant Dr. Love's application for privileges and his delineation of privileges. Defendant Dr. Love opposed production of these documents claiming they were privileged under Florida Statute §766.101(5) and §395.011(9). The trial court denied the Defendant Dr. Love's objection and ordered that the records be produced with certain caveats not of relevance here.

Defendant 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 overruling Defendant's objection to production. The Court of Appeals, citing Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (Fla. 2d DCA 1990), found that an application for privileges and a delineation of privileges are protected by the confidentiality provisions of Florida Statute §766.101 and §395.011.

## SUMMARY OF THE ARGUMENT

The opinion of the Fourth District Court of Appeals is in conflict with the decision of the First District Court of Appeals in Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990) on the issue of whether a doctor's application for privileges is protected from discovery by the confidentiality provisions of Florida Statutes §766.101 and §395.011.

## ARGUMENT

WHETHER THE DECISION OF THE FOURTH DISTRICT IS IN CONFLICT WITH THE DECISION BY THE FIRST DISTRICT.

The Fourth District Court of Appeals' opinion in the case herein essentially found that a doctor's application for privileges is protected by the provisions of Florida Statutes §766.101 and §395.011 which in pertinent part provide 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. (emphasis added)

In reaching this decision, the Fourth District came in direct conflict with the First District's opinion in Jacksonville Medical Center, Inc. v. Akers, 560 So.2d 1313 (Fla. 1st DCA 1990). In Akers, the court was also considering whether a doctor's application for privileges was protected from discovery pursuant to Florida Statutes §766.101 and §395.011. In finding that they were not privileged, the First District 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 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 exceptions 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 being considered by the hospital group. (underlining added)


Not only is the Fourth District in conflict with the First District in Jacksonville Medical Center, Inc. v. Akers, but the Second District is in conflict as well. In the case of Tarpon

Springs General Hospital v. Hudak, 556 So.2d 831 (Fla. 2d DCA 1990), the Second District also found that a doctor's application for privileges are protected by the confidentiality provisions of Florida Statutes §766.101 and §395.011.

As one can see, the First District has recognized the distinction between documents generated by a physician himself and presented to a review committee and those documents generated by a review committee itself. The Fourth District and the Second District have failed to recognize this distinction. Therefore, in the First District, parties will be able to obtain a physician's application for privileges, while in the Second and Fourth Districts, they will not be able to do so. This will cause an inconsistency in discovery results as well as create an uncertainty in the Third and Fifth Districts where there have as yet been no opinions in this area.

#### CONCLUSION


A conflict exists between the decisions of the First District and those of the Second and Fourth Districts such that the appropriate administration of justice requires that this Court take jurisdiction and review the case on the merits.

  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 25th day of January, 1991, to: JAMES C. SAWRAN, ESQ. 888 Southeast Third Avenue, Suite 100, Fort Lauderdale, Florida 33316.

  
Richard J. Roselli

1/24/91: (KBG) LG  
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