

IN THE SUPREME COURT OF FLORIDA

---

---

CASE NO.  
L.T. CASE NO: 4D15-4408

ANIL DESAI, M.D.,  
Petitioner,

v.

LAWNWOOD MEDICAL CENTER, INC.,  
Respondents.

---

---

ON PETITION FOR REVIEW OF A DECISION OF THE DISTRICT  
COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

---

---

PETITIONER'S INITIAL BRIEF

---

---

Thomas P. Crapps  
Fla. Bar No: 878928  
Meenan P.A.  
300 S. Duval Street, Suite 410  
Tallahassee, FL 32301  
Phone: 850-425-4000  
[tom@meenanlawfirm.com](mailto:tom@meenanlawfirm.com)  
*Attorney for Anil Desai, M.D.*

Richard H. Levenstein  
Fla Bar No: 235296  
Abby M. Spears  
Fla Bar No: 44662  
Kramer, Sopko & Levenstein P.A.  
2300 S.E. Monterey Road, Ste. 100  
Stuart, FL 34996  
Phone: 772-288-0048  
Fax: 772-288-0049  
[rlevenstein@kslattorneys.com](mailto:rlevenstein@kslattorneys.com)  
[aspears@kslattorneys.com](mailto:aspears@kslattorneys.com)  
*Attorneys for Anil Desai, M.D.*

RECEIVED, 03/21/2018 04:23:32 PM, Clerk, Supreme Court

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CITATIONS .....	ii
STATEMENT OF THE CASE AND FACTS .....	1
STANDARD OF REVIEW .....	5
SUMMARY OF THE ARGUMENT .....	5
ARGUMENT .....	6
I.    Dr. Desai is not required to exhaust the Board of Trustee’s unilaterally-created administrative procedure before filing his cause of action challenging the Hospital’s decision not to reappoint him based on the Hospital’s intentionally fraudulent and fabricated evidence.....	6
1. The Board’s administrative procedure contravenes, sections 395.0191 and 395.0193, Florida Statutes, which require the cooperative governance of a hospital between a hospital governing body and its medical staff. ....	7
2. The Board’s administrative procedure impermissibly impairs the contractual rights set out in the Medical Staff Bylaws. ....	13
3. The Board’s administrative procedure is not binding on Dr. Desai because the organized medical staff did not consent to be bound by the procedure.....	15
CONCLUSION.....	20
CERTIFICATE OF SERVICE .....	21
CERTIFICATE OF COMPLIANCE.....	21

## TABLE OF CITATIONS

### CASES

<i>City of Gainesville v. State, Dept. of Transp.,</i> 778 So.2d 519 (Fla. 1st DCA 2001).....	2
<i>Desai v. Lawnwood Med. Ctr.,</i> 219 So. 3d 869 (Fla. 4th DCA 2017) .....	1
<i>Florida High School Athletic Association v. Melbourne Cent. Catholic High School,</i> 867 So. 2d 1281 (Fla. 5th DCA 2004) .....	16
<i>Lawnwood Med. Ctr. Inc. v. Seeger,</i> 959 So.2d 1222 (Fla. 1st DCA 2007), <i>affirmed</i> , 990 So. 2d 503 (Fla. 2008).....	7, 18, 20
<i>Lawnwood Medical Center, Inc. v. Seeger,</i> 990 So. 2d 503 (Fla. 2008) .....	18
<i>Naples Cmty. Hosp. v. Hussey,</i> 918 So. 2d 323 (Fla. 2nd DCA 2005).....	7
<i>National Collegiate Athletic Association v. Brinkworth,</i> 680 So. 2d 1081 (Fla. 3d DCA 1996).....	16
<i>Norman v. Ambler,</i> 46 So. 3d 178 (Fla. 1st DCA 2010).....	16
<i>S. Riverwalk Invs., LLC v. City of Fort Lauderdale,</i> 934 So. 2d 620 (Fla. 4th DCA 2006) .....	5

*Universal Underwriters Ins. Co. v. Body Parts of America*,  
228 So. 3d 175 (Fla. 1st DCA 2017).....2

**CONSTITUTIONAL AUTHORITY**

Article V, Section (3)(b)(3), Florida Constitution .....2

**STATUTORY AUTHORITIES**

§395.0193, Florida Statutes. ....7, 12  
§395.0191, Florida Statutes .....7, 12  
§120.68, Florida Statutes .....16

**RULES AND REGULATIONS**

Florida Administrative Code R. 59A-3.272.....11

## STATEMENT OF THE CASE AND FACTS<sup>1</sup>

Appellant, Anil Desai, M.D., (“Dr. Desai”) filed the underlying action to challenge Lawnwood Medical Center’s (“Hospital”) decision not to reappoint him for medical staff privileges, despite a favorable recommendation from the Hospital’s Medical Executive Committee. Dr. Desai’s amended complaint alleged three counts against the Hospital seeking specific performance of the Medical Staff Bylaws, damages for a breach of contract claim and a claim of fraud.<sup>2</sup> The circuit court dismissed Dr. Desai’s amended complaint with prejudice for failure to exhaust administrative remedies. R. 3015-3019.

The Fourth District Court of Appeal affirmed the circuit court’s dismissal, and held Dr. Desai was required to exhaust the Hospital Board of Trustees’ (“Board”) administrative procedure concerning adverse Board decisions. *Desai v. Lawnwood Med. Ctr.*, 219 So. 3d 869, 872 (Fla. 4th DCA 2017). The district court of appeal found that the Board’s administrative procedure was required by Florida law, citing Florida Administrative Code Rule 59A-3.272(4). *Desai*, 219 So. 3d at 872. The district court reasoned that the Board’s procedure “did not impermissibly amend the medical staff bylaws[,]” but rather “cover[ed] a situation that is not provided for by

---

<sup>1</sup>Citations to the Record on Appeal will be in the form of R. followed by the page citation. A description of the specific portion of the document may follow the Record cite.

<sup>2</sup> Dr. Desai’s Third Amended Complaint is found in the record at R. 2217-2267, with attached Exhibits.

the medical staff bylaws.” *Id.* Finally, the district court of appeal concluded “that the fact that the Hospital is a private entity [did] not render its administrative remedies unenforceable.” *Id.* This Court granted discretionary jurisdiction to review the decision below pursuant to Article V, Section (3)(b)(3) of the Florida Constitution.

The facts in this case are based on Dr. Desai’s Third Amended Complaint and Exhibits, which must be accepted as true for the purpose of this appeal.<sup>3</sup>

Dr. Desai is a board certified pathologist in the specialties of Anatomic Pathology and Clinical Pathology, and is licensed to practice medicine in Florida. R. 2218, ¶ 4. For 15 years, Dr. Desai was a member of the Hospital’s medical staff in good standing, and had served as a member of the Medical Executive Committee. R. 2221, ¶ 19. During his tenure, Dr. Desai “had never received any allegations against him related to his competency until the [Hospital] began its intentionally fraudulent scheme to remove Desai from the Hospital’s Medical Staff.” R. 2221, ¶ 19.

---

<sup>3</sup> The case comes before the Court on the trial court’s dismissal of Dr. Desai’s amended complaint with prejudice for Dr. Desai’s failure to exhaust administrative remedies. The primary purpose of a motion to dismiss is for the trial court to determine whether or not the complaint properly states a cause of action upon which relief can be granted. *See Universal Underwriters Ins. Co. v. Body Parts of America*, 228 So. 3d 175 (Fla. 1st DCA 2017). In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. *Id.*, citing *City of Gainesville v. State, Dept. of Transp.*, 778 So.2d 519 (Fla. 1st DCA 2001).

The Hospital's fraudulent scheme extended far beyond the recredentialing process to even include retaliation. As part of its fraudulent scheme, the Hospital's "agents and representatives engaged in a scheme to fabricate allegations against [Desai] and a scheme to circumvent the standards and procedures in place for the recredentialing of physicians, and to use the peer review process and the Board's rejection of the [Medical Executive Committee's] favorable recommendation to solely remove Desai from the [Hospital's] medical staff." R. 2221, ¶ 21.

Specifically, Dr. Desai alleged that:

the Board of Trustees, the Chief Executive Officer of the Hospital and Michael Joseph, the officer of the corporation which owns Defendant responsible for the operation of the Defendant Hospital, fabricated complaints against Desai, presented them to the Recredentials Committee and the MEC outside the appropriate procedures and then intentionally and unreasonably and fraudulently ignored the determinations reached by the Recredentials Committee and the MEC when voting to deny Desai's privileges based on what Defendant knew were false and fabricated complaints that were being used as a fraudulent pretext to get Desai off the Medical Staff at the Hospital, and to retaliate against him for his vocal assertion of what Defendant needed to do to provide quality medical care at Lawnwood Regional Medical Center.

R. 2222, ¶ 22. The medical staff, through a peer review panel, addressed and discussed allegations raised by the Hospital's chief executive officer challenging Dr. Desai's competency and professionalism, and dismissed the allegations. R. 2230, ¶ 54. The Medical Executive Committee "voted on December 8, 2009, to

unanimously approve Desai's reappointment acting pursuant to and authorized by the Medical Staff Bylaws." R. 2230, ¶ 55.

Despite the Medical Executive Committee's unanimous recommendation, the Board on December 9, 2009, voted to terminate and revoke Dr. Desai's privileges at the Hospital. R. 2249, ¶ 49. The Board's action was based on "false and fabricated complaints" that "had been disproven, clarified or deemed inconsequential by skilled physicians taking a detailed review of the circumstances through the proper, specific course as defined by the rules governing the parties." R. 2254, ¶ 166-167.

On December 14, 2009, the Board sent Dr. Desai a letter rejecting his request to extend his privileges, and provided him with a copy the Board's administrative procedure, the Fair Hearing and Appellate Review Procedure. R. 2254, ¶ 168, Exhibit H. The Board's administrative hearing procedure is found at R. 1831-1839, Exhibit H of the Second Amended Complaint, and at R. 2417-2631, Exhibit H to the Third Amended Complaint. Dr. Desai acknowledged the existence of the Board's administrative procedure, but contended that it did not apply to him because the procedure was outside the Medical Staff Bylaws. Consequently, Dr. Desai alleged that the Board's vote to deny his reappointment application is a final action, and that he "complied with and exhausted all administrative remedies legally available to him." R. 2258, ¶ 184-186.

## STANDARD OF REVIEW

The standard of review for an order dismissing a complaint with prejudice is *de novo*. *S. Riverwalk Invs., LLC v. City of Fort Lauderdale*, 934 So. 2d 620, 622 (Fla. 4th DCA 2006).

## SUMMARY OF THE ARGUMENT

Dr. Desai's action is not barred by the judicial doctrine of exhaustion of administrative remedies for three reasons:

- first, the Board's unilaterally-created administrative procedure violates Florida law, which recognizes a cooperative governance of a hospital with the medical staff's role in decisions concerning medical staffing, credentialing, and peer review;
- second, the Board's unilaterally-created administrative procedure impairs the Medical Staff Bylaws, a written, binding contract between the organized medical staff and Hospital, by creating unfair hurdles and creating a presumption in favor of the Board; and
- third, the Board's unilaterally-created administrative procedure violates the rule of law that parties must agree to be bound by an administrative process, and that one party may not *unilaterally* bind another to an administrative procedure without consent.

## ARGUMENT

### **I. Desai is not required to exhaust the Board of Trustee's unilaterally-created administrative procedure before filing his cause of action challenging the Hospital's decision not to reappoint him based on the Hospital's intentionally fraudulent and fabricated evidence.**

The narrow legal question here is whether the Board has authority to unilaterally create an administrative procedure addressing its final decision to deny Dr. Desai's reappointment to the medical staff, and bind Dr. Desai to that administrative procedure without his agreement.

The law does not give the Board authority to unilaterally create an administrative procedure that binds Dr. Desai, without his or the Medical Staff's consent, in order to challenge the Board's final action denying his reappointment. The Board's action, in creating its administrative procedure here, is not enforceable because it violates the cooperative hospital governance model envisioned by Florida law; impairs the Medical Staff Bylaws contract that sets out the agreed-upon procedures and standards used in medical staff reappointment; and violates the fundamental rules of law governing exhaustion of administrative remedies.

**1. The Board’s administrative procedure contravenes Sections 395.0191 and 395.0193, Florida Statutes, that envision and require the cooperative governance of a hospital.**

Florida law sets out a statutory framework that requires a cooperative hospital governance model between a hospital’s medical staff and the hospital’s governing board. *See* §§395.0191, 395.0193, Fla. Stat. This cooperative framework acknowledges the medical staff’s role in advising a hospital’s governing board concerning peer review, quality of care issues, as well as medical staffing issues. See §395.0191(4)(medical staff review of applicants for staff membership), and §395.0191(5)(hospital governing board setting standards and procedures to be applied in medical staffing issues); see also §395.0193(2)-(3)(concerning peer review and quality of care issues). As part of the hospital governance model, Florida law requires the hospital, as a condition of licensure, to develop “written, binding procedures by which peer review shall be conducted.” §395.0193(2), Fla. Stat.

These “written, binding procedures” addressing peer review, quality of care issues, and the procedure for determining a physician’s reappointment or re-credentialing to the medical staff are the Medical Staff Bylaws. R. 2282-2408. Florida law clearly recognizes that the Medical Staff Bylaws are a binding contract between the Medical Staff and the Hospital’s Board.<sup>4</sup> R. 2282-2392. Consistent

---

<sup>4</sup> *Lawnwood Med. Ctr. Inc. v. Seeger*, 959 So.2d 1222, 1224 (Fla. 1st DCA 2007), *citing* *Naples Cmty. Hosp. v. Hussey*, 918 So. 2d 323, 325 (Fla. 2nd DCA 2005)(“Florida has adopted the majority view that hospital bylaws become a binding

with Florida law, the Medical Staff Bylaws, in this case, set out the standards and procedures that are applied to decisions regarding candidates for appointment and credentialing. R. 2342-2352, Art. VI, Med. Staff Bylaws; R. 2359, Art. VII, Part A, §3, Med. Staff Bylaws. Further, the Medical Staff Bylaws set out in detail the procedure for recredentialing a physician for staff privileges, including the extensive peer review process, and recommendation to the Medical Executive Committee. R. 2342-2352, Art. VI, Med. Staff Bylaws; R. 2359, Art. VII, Part A, §3, Med. Staff Bylaws. The Medical Executive Committee independently reviews the Recredentials Committee's recommendation, and makes its own *independent* evaluation and recommendation to the Hospital's Board for final action. R. 2360, Art. VII, Part A, s. 4, Med. Staff Bylaws. Finally, the Medical Staff Bylaws contain a detailed procedure for a fair hearing and appeal of an adverse determination by the Medical Executive Committee against a candidate for either appointment or reappointment to the medical staff. R. 2375- 2389; Art. VIII, Med. Staff Bylaws. This fair hearing and appeal of the Medical Executive Committee's adverse recommendation occurs *before* the final recommendation is given to the Board. R. 2375, Art. VIII, Part A.

---

and enforceable contract between a hospital and its medical staff when adopted by the hospital's governing board.”).

However, if the Medical Executive Committee recommends the individual for reappointment to the medical staff, then the recommendation is forwarded to the Board for a final action. *Id.* Under the Medical Staff Bylaws, “[r]atification of the medical staff decision or medical staff matters shall not unreasonably be withheld.” R. 2390; Art. XI, §3, Med. Staff Bylaws; see also R. 2352, Art. VI, Part D, §5(c), Med. Staff Bylaws (“Board of Trustees shall not unreasonably withhold approval of the recommendation made by the Medical Executive Committee.”). Consequently, the Board *may not unreasonably withhold approval of the recommendation made by the Medical Staff*. The Medical Staff Bylaws here reflect the cooperative governance framework between the Medical Staff and Hospital’s Board envisioned by Florida law.

In contrast, the Board’s unilaterally created administrative procedure here creates a separate *de novo* procedure *without any* input from the Medical Staff on the medical staffing, credentialing, or peer review questions. The Board has destroyed the cooperative hospital governance model envisioned by the Florida statutes, and replaced the legal model with a highly flawed procedure that ignores the recommendations of the Medical Staff, and places the burden on the applicant physician to show that the Board acted unreasonably in denying his or her medical staff privileges. Neither section 395.0191 nor section 395.0193, Florida Statutes, gives a hospital governing board the power to create a procedure where it is free to

ignore the medical staff's recommendations, and create a presumption in favor of the Board's decision that is adverse to a physician applicant. Consequently, the Board's unilaterally-created administrative procedure violates the threshold requirement of Florida law that medical staffing and peer review are a mutual undertaking between the medical staff and the hospital's governing board.

The Board argued below that rule 59A-3.272(4), Florida Administrative Code, mandated that it create the Fair Hearing and Appellate Review Procedure in order to "provide a procedure for hearings and appeals on all actions concerning appointment, reappointment or dismissal." This argument improperly reads rule 59A-3.272, by combining subsections (2) and (4) of the Rule to give the Board unbridled, plenary power to bind the medical staff without any agreement.

Rule 59A-3-272 specifically addresses the powers of a hospital's governing board. Rule 59A-3.272(2) requires that the "governing board" be "organized under written bylaws, rules and regulations . . . , " and directs the governing board to include certain items in the governing board's bylaws, such as an organizational chart and designation of officers and their duties. R. 59A-3.272(2)(a)-(e), F.A.C. Notably absent from subsection (2) of Rule 59A-3.272 is any reference directing the hospital governing board to create a procedure or appeal concerning medical staffing issues within the context of the Board's own bylaws. In order to cobble together

support for its argument, the Board attempts to manipulate subsection (4) of the rule to allow it to create its administrative procedure outside of the Medical Staff Bylaws.

Subsection (4) of rule 59A-3.272, specifically addresses the governing board's relationship with the organized medical staff. Subsection (4) requires the governing board to approve the medical staff's by-laws, rules and regulations, and to:

provide for the appointment, reappointment, or dismissal of members of the organized medical staff, and provide a procedure for hearings and appeals on all actions concerning appointment, reappointment or dismissal. No action on appointment, reappointment, or dismissal of a member of the organized medical staff shall be taken without prior referral to the organized medical staff for their recommendation, except in emergency cases.

Subsection (4) directs the governing board to set the standards and procedures used by the organized medical staff in considering and acting on applications for staff membership. R. 59A-3.272(4)(b), F.A.C. Importantly, rule 59A-3.272(4)(f) and (g), require the governing board to “establish a procedure, within a time-limited period, for approving, approving in part, or denying an applicant’s request for privileges[,]” and “establish a procedure for an applicant for privileges to appeal an adverse decision, and shall establish a time-limited period for rendering a final decision after the appeal.” All of the requirements found in subsection (4) of rule 59A-3.272, specifically address the governing board’s enactment of a procedure within the context of the ratification of the medical staff bylaws and the procedures

contained within the medical staff bylaws. Subsection (4) does not give a hospital governing board the authority to unilaterally create an administrative procedure and bind the organized medical staff to its procedure, outside of the medical staff bylaws. Moreover, the Board's interpretation of rule 59A-3-272, as giving it plenary power to unilaterally create an administrative procedure is contrary to the balance that the Florida legislature struck when it drafted Sections 395.0191 and 395.0193, Florida Statutes.

Florida law creates a framework of cooperative governance between the medical staff and hospital governing board concerning the issues of medical staff credentialing and peer review. The medical staff makes a recommendation concerning peer review and medical staffing based on standards agreed upon and set by the hospital's governing board. The hospital governing board then makes the final decision. A proper implementation and reading of rule 59A-3.272(4), which is consistent with the framework of cooperative governance, is seen in the Medical Staff Bylaws here where the parties agreed upon the credentialing and appointment process; the appeal rights of an applicant that receives an unfavorable Medical Executive Committee recommendation; and the governing board's final decision. The Board's wrong interpretation of rule 59A-3.272 allows it to reject any Medical Staff's recommendation on issues like medical staffing for any reason, and then proceed to have the Board's decision reviewed based on terms and conditions

unilaterally set by the Board. This reading of rule 59A-3.272 is not only unreasonable, but contrary to Florida law.

**2. The Board's unilaterally created administrative procedure impermissibly impairs the Medical Staff in the Medical Staff Bylaws.**

Next, a review of the Board's unilaterally-created administrative procedure, in light of the Medical Staff Bylaws, shows the Board's procedure is not only unfair, but fatally flawed because it clearly impairs the "written, binding procedures," required by Florida law. The Board's administrative procedure impairs the agreed upon process for reappointment to a medical staff by placing additional and unfair hurdles for an applicant. The Board's unilaterally-created administrative procedure does not provide for an independent judge to review the facts or appeal<sup>5</sup>; does not provide for discovery in the administrative hearing<sup>6</sup>; and impermissibly creates a

---

<sup>5</sup>Section 8, Conduct of Hearing, Board of Trustees Fair Hearing and Appellate Review Procedure shows that the Board's fair hearing shall be held as determined by the Trustee either: before an arbitrator mutually acceptable to the individual and Trustees; or by a hearing officer who is appointed by the Trustees, and who is not in direct economic competition with the individual; or before a panel of individuals who are appointed by the Trustees, and who are not in direct economic competition. In section 9.1, of the Board's administrative procedure, the Hospital's chief executive officer determines if a hearing officer is required to preside at the hearing. At the end of the day, the Board unilaterally chooses its own judge for the fair hearing." This selection of "judge" contrasts sharply with the panel that reviews an adverse recommendation by the Medical Executive Committee where the Medical Executive Committee and the affected applicant each select an equal number of medical staff peers for the independent review, and the compromised panel, itself, selects an additional member. R. 2377, Art. VIII, Part B, §5, Med. Staff Bylaws.

<sup>6</sup>§11.1, Bd. of Trustees Fair Hearing and Appellate Review Procedure. Not only is there no discovery, neither the individual nor his or her attorney may contact the

presumption in favor of the Board's proposed action denying the applicant's reappointment.<sup>7</sup> The Board's additional hurdles to review, its unfair hearing process, and its shifting of the burden to the applicant, like Dr. Desai who received an unanimous vote for reappointment by the Hospital's Recredentialing Committee and the Medical Executive Committee, is a fundamental and impermissible impairment of the Medical Staff Bylaws contract. The Medical Staff Bylaws provide that if the Medical Executive Committee makes a favorable recommendation to appoint or reappoint the applicant, then the Board shall "not unreasonably withhold" its consent. R. 2390; Art. XI, §3, Med. Staff Bylaws ([r]atification of the medical staff decision or medical staff matters shall not unreasonably be withheld."); see also R. 2352, Art. IV, Part D, §5(c), Med. Staff Bylaws ("Board of Trustees shall not unreasonably withhold approval of the recommendation made by the Medical Executive Committee."). In contrast, the Board's administrative procedure expressly states there is a presumption "in favor of the Trustees unless [the hearing officer] finds that the Individual who requested the hearing has proved that the

---

Hospital's employees or listed witnesses without it being agreed upon by the Hospital's counsel. §11.4, Bd. of Trustees Fair Hearing and Appellate Review Procedure.

<sup>7</sup>§14.2, Bd. of Trustees Fair Hearing and Appellate Review Procedure provides: "The arbitrator, hearing officer, or hearing panel shall recommend in favor of the Trustee unless it finds that the individual who requested the hearing has proved that the proposed action that prompted the hearing was unreasonable or without good cause, or is not supported by substantial evidence."

proposed action that prompted the hearing was unreasonable or without good cause, or is not supported by substantial evidence.”<sup>8</sup> This presumption shifts the burden set out in the Medical Staff Bylaws. Under the Board’s unfair administrative procedure, the applicant has the burden of showing that the Board acted unreasonably. Rather than the Board articulating a reason for its decision, the applicant must prove, without the benefit of discovery, that the Board acted unreasonably. This is an impermissible impairment of the written, binding contract between the Hospital and its Medical Staff.

**3. Dr. Desai is not required to exhaust the Board’s unilaterally-created administrative procedure because the organized medical staff did not consent to be bound by the administrative procedure.**

The Board’s unilaterally-created administrative procedure is not supported by the rules of law governing when parties agree to be bound by an administrative process. There is no dispute that exhaustion of administrative remedies may apply to private entities. However, the law is clear that in order to apply the exhaustion of administrative remedies doctrine between two private parties, the parties must have agreed to be bound by the administrative process, and the obligation to exhaust that process before filing suit. One private party cannot unilaterally impose an administrative process on another private party without an express agreement.<sup>9</sup> In

---

<sup>8</sup>§14.2, Board’s Fair Hearing and Appellate Review Procedure.

<sup>9</sup> This is distinguishable from an instance where the judicial doctrine of exhaustion of administrative remedies is applied between a state agency and an individual. The

fact, the case law cited by the district court below, *Florida High School Athletic Association v. Melbourne Cent. Catholic High School*, 867 So. 2d 1281 (Fla. 5th DCA 2004), and *National Collegiate Athletic Association v. Brinkworth*, 680 So.2d 1081 (Fla. 3d DCA 1996), supports this basic proposition.

Both *Florida High School Athletic Association* and *National Collegiate Athletic Association* address the issue of whether a member of a voluntary, private organization was required to exhaust the organization's administrative remedies, determining the eligibility of an athlete, before seeking judicial relief. See, *Florida High School Athletic Ass'n.*, 867 So.2d at 1284; *Nat'l Collegiate Athletic Ass'n.*, 680 So.2d at 1081. Importantly, in each case, the appellate court recognized that the members of the private organization adopted the rules concerning the eligibility of athletes, and review of the private organization's decision. See, *Florida High Sch. Athletic Ass'n.*, 867 So.2d at 1284 ("FHSAA, acting through its member schools, adopts rules regarding eligibility and similar matters related to interscholastic athletic competition."); *Nat'l Collegiate Athletic Ass'n.*, 680 So.2d at 1084 ("Basic policies of the NCAA are determined by the members at annual conventions."). The

---

Legislature enacted Chapter 120, Florida Statutes, and set out the administrative process for challenging an agency action. The law is clear that a party must exhaust this administrative remedy before seeking judicial review. See §120.68, Fla. Stat; and *Norman v. Ambler*, 46 So. 3d 178 (Fla. 1st DCA 2010). The state agency and the party challenging the agency's proposed action are bound by the procedures set out by the Legislature.

holdings in *Florida High School Athletic Association* and *National Collegiate Athletic Association* recognize that when private parties *agree* to an administrative process on how to settle a dispute within a private organization, then the courts require the parties to exhaust the *agreed upon* administrative remedies before seeking any judicial intervention. This outcome, in its essence, is a reflection of the judiciary recognizing parties' freedom to enter into bargained for contracts that set out mechanisms for how to resolve an internal conflict, subject only to constitutional limitations.

The foundation in *Florida High School Athletic Association* and *National Collegiate Athletic Association* contrasts sharply with the district court's opinion below. Here, the district court of appeal granted the Board plenary power to unilaterally enact an administrative process without the Medical Staff's prior knowledge, consent or participation. Further, the decision below then imposed this "non-existent contractual obligation" on Dr. Desai by affirming the dismissal of his complaint for failure to exhaust the unilaterally enacted administrative remedies. An administrative remedy that neither he nor the Medical Staff have bargained for or agreed to follow.

The Board's argument that it created its administrative procedure based on Florida's recognition that the operation of hospitals is a public health and safety issue, and section 395.0191(5), Florida Statutes, is without merit. As shown earlier,

Florida law envisions a cooperative governance model between a hospital's governing board and its medical staff. The medical staff plays a key role in peer review and credentialing decisions with its role defined by Sections 395.0191(4) and 395.0193(2), Florida Statutes. The hospital's governing board sets the standards and procedures, consistent with the law. The Board is not free to unilaterally-create an administrative process regarding the reappointment of medical staff that gives it plenary power without input from the Medical Staff.

In *Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008), this Court recognized that “[u]nder these [medical staff] bylaws, even though the Board would have final authority on decisions relating to hospital-based contractual services, the role of the medical staff is a critical element in the decision-making process and the Board must have good cause to reject the recommendations of the medical staff in this area.” 990 So. 2d at 516. Justice Pariente, writing for the Court, observed that:

In sum, the previously existing Medical Staff Bylaws established a framework for cooperative governing in which the medical staff plays an important role in the recommendation of candidates for appointment and credentialing, peer review, and decisions on contract-based services. The framework for governing, and the medical staff's important role in it pursuant to the bylaws, is altered by the HGL in a manner favorable to the Board by the many rights conferred on the corporation, in which the HGL essentially gives the Board plenary power to take independent action in these areas. At a minimum, these multiple facets of the HGL grant Lawnwood a “right” and place it in an

advantageous position, one that it did not possess before the law was enacted. *Seeger*, 990 So. 2d at 517.

In *Seeger*, this Court held that the *same* Medical Staff Bylaws, at issue here, could not be unilaterally amended by the Board through the enactment of the Hospital Governance Law. 990 So. 2d at 518. This Court struck down the Hospital Governance Law as unconstitutional because the law provided a special privilege to a private corporation, and impaired the Medical Staff Bylaws contract for the benefit of the Hospital's private corporate owners. *Id.* As this Court described in *Seeger*, section 6 of the Hospital Governance Law required that the "Board's independent action on a medical staff recommendation is subject to 'a fair hearing process.'" *Seeger*, 990 So. 2d at 514-515. Further, section 6 of the Hospital Governance Law provided the "Board with the right to override the recommendation of the peer review panel or the medical staff's recommendations for staff membership, clinical privileges, or quality assurance without any uniformly applied reasonableness or good cause requirement, as was previously required by the Medical Staff Bylaws." 990 So. 2d at 516.

The Board's unilaterally-created administrative procedure here is substantially similar to section 6 of the unconstitutional Hospital Governance Law. Both are impermissible attempts to re-write the Medical Staff Bylaws which provide a cooperative governance of the hospital, and to remove the Medical Staff from credentialing, staffing, and peer review decisions. Finally, it is no coincidence that

the Board enacted its unilaterally-created administrative procedure here on July 11, 2007 less than one month *after* the Florida First District Court of Appeal affirmed the trial court's striking the Hospital Governance Law as unconstitutional. *Lawnwood v. Seeger*, 959 So. 2d 1222 (Fla. 1st DCA 2007). Clearly, the Board's unilaterally-created administrative procedure is an impermissible end-run-around against this Court's and district court of appeal's decisions in *Seeger*.

In closing, *Seeger* clearly shows that a private hospital corporation cannot unilaterally amend medical staff bylaws, which are an enforceable contract bargained for between the parties. The district court of appeal's decision below conflicts with this Court's decision in *Seeger*, in that the lower court permits the Board to unilaterally impose on the Medical Staff an administrative hearing related to credentialing and medical staff privileges that is not contained in the Medical Staff Bylaws.

## **CONCLUSION**

This Court should reverse the lower court's ruling dismissing Dr. Desai's action against the Hospital based on failure to exhaust administrative remedies, and allow Dr. Desai an opportunity to proceed with his lawsuit challenging the Hospital's action in denying him reappointment to the medical staff based on the intentionally fraudulent actions of the Hospital's officials.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy was served electronically to the following  
on March 21, 2018.

Thomas E. Warner, Esquire  
Dean A. Morande, Esquire  
Michael D. Sloan, Esquire  
Carlton Fields Jordan Burt, P.A.  
City Place Tower, Suite 1200  
525 Okeechobee Boulevard  
West Palm Beach, FL 33401-6350  
[twarner@carltonfields.com](mailto:twarner@carltonfields.com)  
[dmorande@carltonfields.com](mailto:dmorande@carltonfields.com)  
[kcasazza@carltonfields.com](mailto:kcasazza@carltonfields.com)  
[wpbecf@carltonfields.com](mailto:wpbecf@carltonfields.com)

/s/ Thomas P. Crapps  
Thomas P. Crapps

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this brief complies with the requirements of Rule  
9.210(a)(2), Florida Rules of Appellate Procedure, as it has been prepared using  
Time New Roman 14-point font.

/s/ Thomas P. Crapps  
Thomas P. Crapps