SUPREME COURT OF FLORIDA
Case No.: SC05-1864

BRANDON REGIONAL HOSPITAL,

Petitioner

Vs.

MARIA MURRAY and DANIEL S. MURRAY, et al.

Respondents.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT
CASE NO. 2D05-937

RESPONDENTS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The Respondents, MARIA MURRAY and DANIEL S. MURRAY,[1] respectfully restates the statement of the case and facts as follows:

The Plaintiffs brought the present lawsuit against the Defendants arising from injuries received in October of 2000 when Maria Murray was a patient at University Community Hospital for the delivery of her baby. During the course of treatment of the Plaintiff by Dr. Brauner, he lacerated Maria's perineum (R.V.I, 32-35). The Plaintiffs allege that Dr. Brauner was negligent in a variety of ways, including his failure to appreciate the severity of the laceration, his failure to timely initiate appropriate medical treatment, and his failure to refer Maria to an appropriate physician to have the problem addressed (R. V.I, 32-35).

The Plaintiffs also allege that Maria became a patient of Dr. Blocker in February of 2001. Dr. Blocker operated on her at BRH on February 26, 2001, to repair a rectovaginal fistula. It was alleged that at that time, he likewise performed additional surgical procedures (R. V.I, 35-36). The Plaintiffs complaint stated that Dr. Blocker was negligent by his failure to obtain informed consent, by performing surgical procedures for which he did not have hospital privileges, by performing

[1] For ease of reference herein, the Plaintiffs/Respondents will be referred to as either Plaintiffs or Respondents. The Petitioner herein will be referred to as Petitioner or BRH. Dr. Blocker and Dr. Brauner will be referred to by name. All references to the record will be indicated by (R) followed by volume and page number of the record.

surgical procedures on Maria for which he was not qualified, and by his failure to properly initiate treatment thereafter.

BRH was also named in the suit. It was alleged that the Hospital had negligently granted Dr. Blocker privileges to admit and treat patients in the Hospital (R. V.I, 37-39). The complaint stated that BRH and its employees had a duty to confirm that Dr. Blocker had privileges to perform the surgical procedure scheduled to be performed on Maria on February 26, 2001, and that BRH and its employees had failed to confirm that Dr. Blocker had such surgical privileges to perform the procedures he had scheduled to perform upon Maria that day (R.V.I, 37-39). It was further alleged that the Hospital's conduct constituted corporate negligence in providing its facilities for Dr. Blocker's use under all the circumstances. The Hospital, likewise, was sued in a separate count for its vicarious responsibility based upon the negligent credentialing, selection, and/or retention of Dr. Blocker, or its failure to enforce the surgical privileges which it had granted to him (R. V.I, 39).

During the course of discovery, Dr. Blocker was asked about Exhibit 11 to his deposition which was titled "Brandon Regional Hospital Credentials Privilege List" (R. V.I, 162). BRH's counsel objected to any reference to the form asserting a privilege on behalf of BRH (R. V.I. 162-163). Dr. Blocker was asked whether the form gave him privileges to perform a sphincteroplasty (R. V.I, 164-165).

Both counsel for Dr. Blocker and BRH objected and Dr. Blocker was instructed not to answer the question (R. V.I, 164-165).

The form identified during the course of the deposition as Exhibit 11 listed a series of procedures. Next to each procedure are three boxes. The boxes bear the designation "R" which was meant that it was requested; "A" which meant that it was approved; and "NA" which meant that it was not approved. There were various checkmarks next to the procedures. There are no notes in the margins, nor is there any procedure for which Dr. Blocker had requested privileges in which those privileges were not granted to him (R. V.I, 166). The form had five signature blocks: one for Dr. Blocker, one for the department chair; one for the credentialing committee chairperson; another for the executive committee chairperson; and last, a signature block for the secretary of the Board of Trustees of the Hospital. In the upper-right portion of the document, after the words "Department of OB/GYN," there was a hyphen in the word "gynecology" (R. V.I, 166) (the gynecology privilege list).

Following that early deposition of Dr. Blocker, BRH filed a Motion for Protective Order citing to the privilege referred to in §766.101(5), Florida Statutes, and the peer review privileges set forth in §395.0191(8), Florida Statutes, and §395.0913(7), Florida Statutes (R. V.I, 167-169). The relief requested by the Hospital was for the court to seal Exhibit 11 to the deposition of Dr. Blocker and

order that it not be produced to any party or used for any purposes (R. V.I, 167-169).

At that hearing, counsel for the Murrays explained to the court that the exhibit was not part of the decision-making process of the credentialing committee (R. V.I, 177). The document actually reflected a decision which had already been made concerning Dr. Blocker and the document was merely created to articulate the privileges which BRH had awarded to him (R. V.I, 177). As such, it was argued that the document was not part of the decision-making process and did not fall within the statutory privileges. Second, it was argued that, even if the document were part of the peer review committee proceedings, it reflected no more than a determination by the committee and, as such, the report was not privileged (R. V.I, 179-180). The trial court denied BRH's Motion for Protective Order and authorized Plaintiffs' counsel to use Exhibit 11 or any other privilege list provided by Dr. Blocker during discovery (R. V.I, 152-153).

BRH then timely petitioned the Second District Court of Appeal for a Writ of Certiorari quashing the initial Order. That Petition was denied on October 15, 2004 (R. V.II, 206-207). Dr. Blocker's deposition was reconvened on December 2, 2004 (R. V.II, 208-251). During the deposition, Dr. Blocker was asked questions concerning the credentialing list that he had provided to Plaintiffs' counsel (R. V.II, 213-216). When asked whether there was another list the

Plaintiffs' counsel did not have for the time period in question, the witness answered: "Yes." (R. V.II, 216). Dr. Blocker explained that the document which had been produced was not complete in terms of the privileges which had been provided to him for that period of time. He then disclosed for the first time that there was an obstetrical privilege list which also came from the OB/GYN Department of the Hospital (R. V.II, 216-217). Dr. Blocker also had a copy of that privilege list; it simply was not in his possession at the time of the deposition. Dr. Blocker and his counsel assumed that the obstetrical list had been provided to Plaintiffs in pre-suit discovery (R. V.II, 217-218).[2] Dr. Blocker explained that there were separate documents from the OB/GYN Department providing him different privileges at the relevant time frames (R. V.II, 220-222).

As it had previously done with the document that bore the label "Gynecology," the Hospital filed a Motion for Protective Order concerning the production of the list of Dr. Blocker's credentials for obstetrical privileges (R. V.I, 62-65). The Motion raised the identical legal basis for the objection to the previous list. At the hearing on the Motion for Protective Order, the Hospital raised the same arguments it had previously raised with respect to the list of gynecology privileges and Plaintiffs' counsel, in turn, raised the same arguments in

[2] Counsel for the Plaintiffs disputed receiving it during the pre-suit discovery process and, instead, maintained that it was received during formal discovery. Exactly when the document was received was not raised as an issue below.

response (R. V.I, 68-90). The trial court denied BRH's Motion for Protective Order on January 24, 2005 (R. V.I, 66-67). On January 28, 2005, Dr. Blocker, in response to a Request for Production, produced the obstetrical credentials privilege list from BRH dated August 2000 (R. V.II, 252-254). The obstetrical list, in terms of its format and signatures, is identical to the gynecology form. The significant difference in the forms involved the types of procedures for which credentials were provided (R. V.II, 253-254). The Hospital timely petitioned the Second District for a Writ of Certiorari pertaining to the second list. As they had done with the first list, the Second District denied the Petition (R. V.II, 279-281). The Hospital then timely moved to invoke this Court's discretionary jurisdiction.

ISSUE ON APPEAL

The Respondents most respectfully restates the issue as follows:

> WHETHER A DOCUMENT THAT MERELY LISTS THE CREDENTIALS CONFERRED UPON A PHYSICIAN FOLLOWING THE PEER REVIEW INVESTIGATIVE PROCESS, IS A DOCUMENT THAT FALLS WITHIN THE PRIVILEGES ARTICLUATED IN §766.101(5) AND §395.0191(8), FLORIDA STATUTES?

SUMMARY OF THE ARGUMENT

The decision of the Second District below simply determined that a Hospital's privilege list was not a document that was privileged from use or discovery pursuant to the terms of §766.101(5) or §395.0191(8), Florida Statutes. That decision was correct and should be approved by this Court.

The polestar decision concerning the statutory privileges at issue here is this Court's decision in Cruger v. Love, 599 So.2d 1111 (Fla. 1992). There, the plaintiff, during discovery, sought Dr. Love's applications for privileges to three local hospitals, as well as a delineation of those privileges. The plaintiff then withdrew the request for the delineation of privileges and sought only the production of the applications. The trial court ordered that the documents be produced and the Fourth District quashed that decision, finding that they were privileged from discovery by virtue of the statutory privilege.

When analyzing the purpose of the statutes, this Court stated that the Legislature enacted the peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and evaluation. The court held that the privileges provided under the statutes under review protected any document considered by the committee or board as part of its decision-making process. The court did not say the privilege continued once the decision-making process had been completed for

documents created thereafter. The decision of the Second District in the present case merely recognized that the peer review process ends at some point and that documents created thereafter do not enjoy the same confidential protection as those that are considered during the deliberative decision-making process.

Although the Hospital has been able to cite to a variety of cases which have quashed discovery orders requiring production of privilege lists, not a single one of them provides any meaningful analysis in light of this Court's decision in Cruger, as to why a document created after the deliberative peer review process has ended should likewise enjoy the privilege of confidentiality, the same as a document reviewed by a committee during the deliberative process. Extending the privilege after the deliberative process has been completed is not in conformity with the legislative purpose of the statute as expressed by the Cruger court. Nor does production of such a document invade that deliberative process or disrupt it in any fashion.

To the extent that this Court were to find that a credential list would otherwise fall within the parameters of the statutory privileges, the issue would appear to be moot in light of the passage of Amendment 7 which has been codified in Article X, Section 25, of the Florida Constitution. In Notami Hospital of Florida, Inc., d/b/a Lake City Medical Center v. Bowen, et al., ____ So.2d ____; 2006 Fla. App. LEXIS 5760 (Fla. 1st DCA, April 21, 2006), the First District

determined that similar claims of privilege pertaining to peer review and the like were abrogated by the new constitutional amendment. That court also ruled that the amendment was self-executing and intended to be retrospective as to existing records. If this Court agrees that Notami Hospital is correct, the privileges here asserted would no longer exist. The will of the State's citizens expressed directly in their constitutional amendment will abrogate the confidentiality privilege created by the Legislature. This Court should approve the decision of the Second District.

ARGUMENT

A DOCUMENT THAT MERELY LISTS THE CREDENTIALS CONFERRED UPON A PHYSICIAN FOLLOWING THE PEER REVIEW INVESTIGATIVE PROCESS IS NOT A DOCUMENT THAT FALLS WITHIN THE PRIVILEGES ARTICLUATED IN §766.101(5) AND §395.0191(8), FLORIDA STATUTES.

The Second District below determined that the Hospital's privilege list, which it had voluntarily provided to Dr. Blocker and who, in turn, had voluntarily produced during discovery, was not a document that was privileged from use for purposes of discovery. Neither the trial court nor the Second District issued any ruling pertaining to the admissibility of such document or its use at trial. The decision of the Second District was correct and this Court should approve it.

The analysis of the issue in this case must commence with this Court's decision in Cruger v. Love, 599 So.2d 1111 (Fla. 1992). There, the plaintiff sued Dr. Love on behalf of her son for the doctor's alleged negligent treatment of her son's fractured thumb. During discovery, the plaintiff sought, from three local hospitals, copies of Dr. Love's applications for privileges and a delineation of those privileges. Ms. Cruger then withdrew the request for delineation of privileges and sought only the production of the applications for the privileges. Dr. Love objected, claiming that those documents were privileged. The trial court ordered that the documents be produced and the Fourth District held that the

documents were privileged from discovery by virtue of §766.10l and §395.011, Florida Statutes.

Analyzing the purpose of the statutes, this Court stated that the Legislature enacted the peer review statutes in an effort to control the escalating cost of health care by encouraging self-regulation by the medical profession through peer review and evaluation. Citing, Holly v. Auld, 457 So.2d 217, 219-220 (Fla. 1984). Finding that the applications fell within the privilege delineated within the respective statutes, the Cruger court stated:

> We hold that the privilege provided by §766.101(5) and §395.011(9), Florida Statutes, protects any document considered by the committee or board as part of its decision-making process. The policy of encouraging full candor in peer review proceedings is advanced only if all documents considered by the committee or board during the peer review or credentialing process are protected. Committee members and those providing information to the committee must be able to operate without fear of reprisal. Similarly, it is essential that doctors seeking hospital privileges disclosure all pertinent information to the committee. Physicians who fear that information provided in an application might some day be used against them by a third party will be reluctant to fully detail matters that the committee should consider. Accordingly, we find that a physician's application for staff privileges is a record of the committee or board for purposes of the statutory privilege. [Emphasis supplied] Id. at 114.

If the purpose of the privilege is as this Court stated in Cruger, then the Hospital's argument must fail. BRH urges that any document to which it affixes

the label "peer review committee" is privileged, regardless of whether the document itself was one that was actually considered during a peer review investigation or one that is merely a report that details the conclusions after the committee has considered the information in reaching its determination. These distinctions, which the Hospital overlooks, are essential because not every document that bears the name of some committee member, nor every document that is even considered by such committee, is absolutely privileged. For instance, applications for privileges, which the Court found to be privileged in Cruger, may still be obtained from the original source, the physician, without violating either the letter or the spirit of the privilege articulated in the statutes at issue. See, Humana Medicals Plan, Inc. v. Erdely, 785 So.2d 714 (Fla. 4th DCA 2001).

Keeping in mind the purpose of the privileges and the fact that not all documents that are, somehow, arguably, within the purview of the "peer review" process are privileged, the question becomes whether the document at issue is one to which the privilege applies. Most respectfully, we believe that the Second District and the trial court correctly concluded that the "obstetrical list" was not privileged.

In Bayfront Medical Center, Inc. v. Agency for Health Care Administration, 741 So.2d 1226 (Fla. 2nd DCA 1999), the case that the Second District relied upon in the present case, Bayfront challenged a summary judgment that enforced an

administrative subpoena duces tecum issued by AHCA. The subpoena required Bayfront to produce certain of its "peer review" records for inspection as art of AHCA's responsibilities of "risk management" review. Finding, in part, the documents sought by the subpoena were protected from discovery, the Second District reversed in part.

That court began its analysis with the privileges articulated in §395.0193(7) and §766.101(5), Florida Statutes. After having addressed the distinction between "peer review" of physicians and internal risk management programs which were primarily directed to non-physician personnel, the court addressed the argument raised by AHCA. Specifically, AHCA maintained that §395.0197(11), Florida Statutes, overrode the privilege established by §395.0193(7), Florida Statutes, so as to give it the right of access to the records of the deliberations and opinions contained within the investigations conducted by the peer review committees. The Second District disagreed. The Bayfront court stated that the access to information provided by §395.0197(11), Florida Statutes, was limited to that pertaining to the risk management program as distinguished from peer review, which was a separate process. That court concluded by stating:

> We conclude that the records of the investigative portion of the peer review panel are privileged from disclosure by §395.0193(7) and §766.105(5), Florida Statutes.

* * *

> However, the report of the results of such "peer review" investigations, as contrasted to the actual records of the investigative procedures of the "peer review" panel, is not clothed with the same privilege. [Emphasis supplied]

The court then stated that the portion of the AHCA subpoena directed toward the recommendations and corrective action taken were not privileged from discovery.

Predictably, the Hospital has cited to a litany of cases it maintains are directly on point which held that a document which simply outlines the privileges held by a physician is privileged. However, the broad legal holdings cited in those cases seem to go far beyond the facts of those cases. For instance, in Iglesias v. It's A Living, Inc., 782 So.2d 983 (Fla. 3d DCA 2001), the court's decision states only that during discovery, the defendant serve subpoenas duces tecum on every hospital where Iglesias then had, or had in the past, staff privileges. The decision itself does not identify exactly what documents were requested, nor does it clarify whether such documents were of the type considered by the committee or board as part of its decision-making process. Similarly, in Boca Raton Community Hospital v. Jones, 584 So.2d 220 (Fla. 4th DCA 1991), the Fourth District identified a variety of documents to which it concluded that a blanket privilege applied. Many of those documents, at least apparent on their face, seem to be of the type that would be considered by a peer review committee when making its determination. The Fourth District did not discuss the other documentation referred to which indicated that the doctor had been given staff privileges. One assumption is that

the court there determined that such documents contained evidence which was part of the decision-making process of the hospital.

In Columbia Park Medical Center, Inc. v. Gibbs, 723 So.2d 294 (Fla. 5th DCA 1998), the issue addressed by the court there was waiver. The plaintiff requested a copy of any documents provided to Doctors Arnold Eihorn and Lewis Kantounis outlining privileges then currently held at the hospital. The hospital objected, raising the peer review privilege, and the trial court overruled the objection on the ground that the materials requested were no longer privileged when they were given to doctors who were not on the committee. The plaintiff there further contended that the documents lost their privilege status because they were intended to be made public and were made available to the individuals who were not members of the peer review committee. Citing to the Second District's decision in Hillsborough County Hospital Authority v. Lopez, 678 So.2d 408 (Fla. 2nd DCA 1996), rev. den., 689 So.2d 1070 (Fla. 1997), the court determined that the hospital's disclosure of medical review committee documents to physicians not on the committee did not waive the limited immunity of that record from discovery or introduction into evidence in a civil case. The Fifth District simply determined that there had been no waiver. In the second Gibbs decision, Columbia Park Medical Center, Inc. v. Gibbs, 728 So.2d 373 (Fla. 5th DCA 1999), the documents requested were essentially the same as the court had considered in Gibbs I. The

court stated that, for that reason, if not for any other, the trial court had erred in ordering the production of those documents.

Most recently, the Fourth District issued its decision in Columbia/JFK Medical Center v. Sanjuonchitte, 31 Fla. L. Weekly D417 (Fla. 4th DCA, February 8, 2006). There, the plaintiff served the hospital with a request to produce Dr. Farkasis' credentialing file. The hospital objected, stating that the credentialing file was not subject to discovery because of the statutory privileges at issue here. The Fourth District stated that it agreed with the hospital that the documents sought in the case which were part of Dr. Farkasis' credentialing file, were protected by the statutory peer review privilege. The court explained that the documents were part of the credentialing and peer review process and directly related to the hospital's staff membership privileges which were used to determine what surgeries Dr. Farkasis could perform and whether his performance warranted continued privileges. The court stated that the documents contained detailed information about the doctor's privileges, his status and performance in the investigations and records of the hospital's review committee.

The Fourth District's decision in Columbia/JFK Medical Center, supra, would seem to be appropriate as it pertains to those documents which were considered by the peer review committee which concerned the doctor's performance and investigations by the hospital into his performance. That

decision, however, does not address, and appears to be completely inconsistent with, the purpose of the statutory privilege as expressed by this Court in Cruger, supra, to the extent that it can be read that a simple list of privileges that have been granted is confidential and non-discoverable. There is nothing at all contained in a mere record of what privileges were granted that in any way invades the deliberative self-policing process used in the decision-making of the peer review committees. In short, that process is completed when a credentialing list is prepared. The list merely documents decisions that have already been made through the use of that deliberative process.

The hospital here goes to great lengths to suggest that the statutes at issue are clear and unambiguous and, therefore, the list of hospital privileges must be confidential. It goes to great lengths to argue an imaginary parade of horribles as to what would happen if the list of credentials is determined to be non-privileged. With all, due respect, this argument is completely without merit. First, the hospital concedes that the Legislature did not define the term "records." That is, it specifically did not include credentials lists, which are created after the deliberative process for which the privilege was created is completed, as a record. Had the Legislature intended these documents to be privileged, it easily could have done so. Second, the decision of the Second District in Bayfront Medical Center, supra, has been in existence since 1999. Since the time of that decision, the Legislature

has not chosen to legislatively overrule the Bayfront decision, or to clarify the pertinent language in the statute. As a basic rule of statutory construction, the Legislature is presumed to know the meaning of the words it employs in a statute. King v. Ellison, 648 So.2d 666, 668 (Fla. 1994). The Legislature is also presumed to know the status of the law at the time that it passes a statute. See, e.g., Crescent Miami Center, LLC v. Dept. of Revenue, 903 So.2d 913 (Fla. 2005). Simply stated, had the Legislature disagreed with the holding of Bayfront, it could have and would have clarified its intent in any of the several subsequent amendments to these statutory schemes. It has not done so, presumably by choice.

Even if the Second District misinterpreted the breadth of the statutes at issue here, the issue would appear to be moot. Recently, in Notami Hospital of Florida, Inc., d/b/a Lake City Medical Center v. Bowen, et al., _____ So.2d ____; 2006 Fla. App. LEXIS 5760 (Fla. 1st DCA, April 21, 2006), the First District determined that similar claims of privilege pertaining to peer review, risk management, and credentialing documents were abrogated by Amendment 7, codified as Article X, Section 25, of the Florida Constitution. The court also ruled that the constitutional amendment was self-executing and was intended to be retrospective as to existing records.[3]

[3] The Fifth District has also interpreted application of the Amendment in Florida Hospital Waterman, Inc. v. Buster, 31 Fla. L. Weekly D763 (Fla. 5th DCA, March 10, 2006). The Fifth District there, likewise, determined that Amendment 7

Although the court's ruling in this case was not based upon Amendment 7, and, in fact, during the hearing, the parties specifically chose not to address it, this Court can decide the case based upon the law at the time that the appeal is heard. If this Court agrees with the First District, that Amendment 7 applies to credentialing records and is retroactive in its application, the issue in this appeal is simply moot.

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preempts certain statutory privileges previously afforded to health care providers, that the Amendment was self-executing, but, in contrast to the First District, determined that it did not apply retroactively to existing records.

CONCLUSION

The decision of the Second District in this case should be approved. The decision fully implements the purpose of the statutory "peer review" privilege as articulated by this Court in Cruger, supra. The credentialing list is not a document considered by the committee when determining the merits of any physician's abilities to obtain the privilege in the first instance. It is merely a record that a decision has been made. The record itself does not infringe upon the free exchange of information within the deliberative process, which was the bedrock of legislative intent when it created the statutory privilege in the first instance. This Court should approve the decision of the Second District.

Respectfully submitted,

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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 **Wm. Jere Tolton, III, Esq**., 113 S. Armenia Ave., Tampa, FL 33609; **Louis LaCava, Esq**., 101 E. Kennedy Blvd., #2500, Tampa, FL 33602; and **Christopher Schulte, Esq**., 100 S. Ashley Dr., #600, Tampa, FL 33602, on _____.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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