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

PETITIONER'S INITIAL BRIEF ON THE MERITS

WM. JERE TOLTON, III
Fla. Bar No. 0887943
RANDY J. OGDEN, ESQUIRE
Florida Bar No.: 0351830
J. RUSSELL SMITH, ESQUIRE
Florida Bar No.: 0844896
OGDEN & SULLIVAN, P.A.
113 S. Armenia Avenue
Tampa, FL 33609
(813) 223-5111
(813) 229-2336 facsimile
Attorneys for Petitioner

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STATEMENT OF THE CASE AND FACTS

A. Preliminary Statement

This is a medical malpractice action in which Brandon Regional Hospital (Brandon) seeks review of an opinion of the Second District Court of Appeal, affirming a pretrial discovery order allowing the plaintiffs to discover and use Brandon's peer review committee's delineations of clinical privileges granted to Dr. Wayne S. Blocker, a staff physician in Brandon's obstetrics-gynecology department. Pursuant to Florida's peer review statutes, specifically Florida Statutes Sections 395.0191(8) and 766.101(5), the opinion of the Second District should be quashed and the cause remanded with instructions that Brandon's written report of clinical privileges approved for Dr. Blocker are to be protected from discovery and use at trial.

B. Statement of Facts

The Respondents, Daniel and Maria Murray, instituted this medical malpractice lawsuit against various healthcare providers, including Brandon, under Chapter 766, Florida Statutes (2001).[1] R. 32-39. The Murrays allege

[1] The other co-defendants were Wayne S. Blocker, M.D.; Wayne S. Blocker, M.D., P.A.; Robert E. Brauner, M.D.; and Robert E. Brauner, M.D., P.A. Dr. Blocker and his professional association are no longer parties to the action, having settled with the plaintiffs and being dismissed from the action on or about May 11, 2005.

that Brandon negligently credentialed Dr. Blocker, an OB/GYN physician on staff in Brandon's obstetrics and gynecology department. R. 37-39. Specifically, the Murrays allege that Dr. Blocker was not properly credentialed to perform certain surgical procedures that Ms. Murray underwent at Brandon on February 26, 2001. R. 35-39. Ms. Murray claims to have been injured by these procedures, and seeks to hold the hospital liable for her injuries. R. 37-39.

The Murrays squarely invoke the peer review credentials process in their Complaint:

> 27. At all relevant times, Brandon Regional Hospital, through its governing body and medical staff, was under a duty to exercise reasonable care in granting physicians the privilege to admit and treat patients in the hospital based upon the practitioner's competence, training, character, experience, and judgment.
>
> 28. At all relevant times, the medical staff of Brandon Regional Hospital had a duty to examine the credentials of candidates for medical staff appointment, to make recommendations to the governing body of the hospital on the appointment of candidates, and to select and retain professionally competent staff physicians.
>
> 29. At all relevant times, Brandon Regional Hospital, through its governing board and medical staff, failed to use reasonable care in granting Dr. Blocker privileges to admit and treat patients in the hospital for all of the surgical procedures which Dr. Blocker performed on Maria Murray on February 26, 2001.
>
> * * *
>
> 36. Based upon the negligent credentialing, selection, and/or retention of Dr. Blocker or its failure to enforce the

> surgical privileges granted to Dr. Blocker, Brandon Regional Hospital is liable for the negligent acts and omissions of Dr. Blocker.

R. 37-39. Brandon answered the Complaint and asserted several affirmative defenses.

During discovery, the Murrays moved to compel Dr. Blocker to produce the delineations of obstetrics privileges that Brandon's peer review credentials committee granted to him. R. 40-53. These delineations identify the privileges in obstetrics that were requested by Dr. Blocker and approved by recommendation of Brandon's peer review committee.[2] They are signed by and thus reveal the identities of physician-members of Brandon's peer review credentialing committee. Brandon and Dr. Blocker objected to production of these delineations, with Brandon seeking a protective order based in the immunity privilege attaching to peer review records under subsections 395.0191(8) and 766.101(5), Florida Statutes (2001). R. 62-65. The trial court denied the motion for protective order and ordered production of Dr. Blocker's "Obstetrical Privilege Lists" on January 24, 2005. R. 130-31. The trial court expressly found that a clinical privileges delineation constitutes a "final report" of a peer review committee under *Bayfront*

[2] The recorded delineations of obstetrics privileges in dispute are similar in form to the recorded delineations of gynecology privileges that appear in the record attached to Plaintiff's Motion to Compel Production of Dr. Blocker's Credentials Privilege Lists for Obstetric Privileges and Motion for Sanctions. R. 45-53.

Medical Center, Inc. v. State, Agency for Healthcare Administration, 741 So.2d 1226 (Fla. 2d DCA 1999), and, as such, was not entitled to the protections of the peer review statutes. *Id*. This order was challenged by a petition for certiorari review filed on February 23, 2005.[3] R. 1-30.

C. District Court Decision

On August 17, 2005, the Second District Court of Appeal issued *Brandon Regional Hospital v. Murray*, 910 So.2d 880 (Fla. 2d DCA 2005) R. 279-81 (Appendix A). The appeals court agreed with the trial court that Brandon's obstetrics privileges delineations for Dr. Blocker are not protected by the peer review statutes under the authority of *Bayfront Medical Center, Inc. v. State Agency for Healthcare Administration*, 741 So.2d 1226 (Fla. 2d DCA 1999), and so the petition for certiorari was denied. *Murray*, at 881. In so holding, the court recognized contrary authority in every other Florida district court that has addressed this issue. *Id.*

[3] This issue arose previously in the litigation when the Murrays tried to use Dr. Blocker's gynecological delineations, already in their possession, during Dr. Blocker's discovery deposition. Then, as now, Brandon objected and moved for protective order. R. 56-58. The trial court overruled the objection and refused to protect the use of the gynecological privileges delineations in discovery. R. 54-55. Brandon challenged this order in the Second District, which denied Brandon's petition without a written opinion on October 15, 2004. Unlike the gynecological delineations at issue then, the Murrays were <u>not</u> already in possession of Dr. Blocker's obstetrics delineations at issue now, until the trial court ordered their production.

Brandon asked the Second District to certify conflict or, alternatively, to certify the question as one of great public importance. R. 282-87. The motion was denied. R. 288. Brandon then timely invoked the discretionary review jurisdiction of this Court, and now seeks resolution of the conflict between *Murray* and the several decisions of other district courts in Florida on the question whether the immunity privilege provided in subsections 395.0191(8) and 766.101(5), Florida Statutes, applies to the recorded delineations of clinical privileges approved by a hospital's internal peer review committee. This Court's jurisdiction arises in Article V, section 3(b)(3) of the Florida Constitution.

SUMMARY OF ARGUMENT

A Florida hospital's written delineations of staff membership and clinical privileges granted or denied to a staff physician applying for appointment or reappointment is a privileged communication protected from discovery by subsections 766.101(5) and 395.0191(8). A hospital credentials committee prepares the delineations principally for its benefit, as a function of its self-policing risk management and quality assurance responsibilities under Florida law. As the author of the delineations, the hospital review committee is unquestionably the "original source" of this record. In this lawsuit, not satisfied with simply asking Dr. Blocker to

identify which staff privileges he holds at Brandon, or whether he was approved to perform a particular surgical procedure, the Murrays wish to obtain and use Brandon's internal peer review records concerning obstetrics privileges approved for Dr. Blocker upon his evaluation for reappointment to hospital staff.

The Florida Legislature drafted the peer review statutes with an eye toward improving the provision of health care in our state. Medical review committees and the records they generate are deliberately afforded broad immunity protection so that Florida hospitals can obtain and evaluate confidential and often sensitive information to render decisions informed by candid, objective appraisals uninhibited by notional concerns about how a decision could be exploited in litigation. The peer review privilege makes no judgment about the truth or falsity of the findings and recommendations contained in the peer review report; it simply shields this record from disclosure in judicial proceedings.

The peer review statutes further the Legislature's policy goals of retaining qualified physicians who are willing to perform high-risk medical procedures so that Florida can continue to deliver the full array of healthcare services to the public. Keeping peer review records confidential encourages frankness, candor, and voluntary participation in the peer review process.

The delineations of staff membership and clinical privileges are invariably a crucial part of that process, and thus should be afforded the very protections intended by the Florida Legislature in enacting the peer review statutes.

ARGUMENT

A. The Question on Review

The narrow issue before this Court concerns the scope of the statutory peer review privilege provided in sections 766.101(5) and 395.0191(8), Florida Statutes (2001). The specific question presented is whether delineations of clinical privileges that are approved by a licensed hospital's medical review committee[4] in the exercise of its self-regulating responsibility for peer review and quality assurance are within the scope of immunity provided by the peer review statutes. The Second District Court of Appeal has determined, in the case giving rise to this Court's conflict jurisdiction, that such delineations do not fall within the field of protection. However, every other appellate court that has considered this question has decided that such delineations are peer review protected and thus immune from discovery and use at trial. *E.g.*, *Columbia Park Medical Center, Inc. v. Gibbs*, 723 So.2d 294 (Fla. 5th DCA 1998), *citing Hillsborough Co. Hospital Authority v. Lopez*, 678 So.2d 408 (Fla. 2d DCA 1996), *rev. denied*, 689

[4] A "medical review committee" is defined as "[a] committee of a hospital or ambulatory surgical center licensed under chapter 395." § 766.101(1)(a), Fla. Stat. (2001).

So.2d 1070 (Fla. 1997); *Columbia Park Medical Center, Inc. v. Gibbs*, 728 So.2d 373 (Fla. 5th DCA 1999); *Paracelsus Santa Rosa Medical Center v. Smith*, 732 So.2d 49 (Fla. 5th DCA 1999); *Boca Raton Community Hosp. v. Jones*, 584 So.2d 222 (Fla. 4th DCA 1991); *Love v. Cruger*, 570 So.2d 362 (Fla. 4th DCA 1990), *approved*, 599 So.2d 111 (Fla. 1992). Most recently, in a case squarely on point, the Fourth District held that documents from a hospital's credentialing file, which "contain detailed information about [a staff physician's] hospital privileges, his status and performance, and the investigations and records of the hospital's review committee[,]" were protected by the peer review statutes. *Columbia/JFK Med. Ctr. v. Sanguonchitte*, 31 Fla. L. Weekly D417 (Fla. 4th DCA Feb. 8, 2006). The probable explanation for the historical consistency among the district courts is the clarity of expression in the peer review statutes. Contrary to the view of the *Murray* court, the Legislature plainly intended to extend immunity protection to a peer review committee's report of its staff membership and clinical privileges decision in civil lawsuits such as this one. *Murray* departs from the legislative intent.

B. The Peer Review Statutes

Though the hospital's governing board retains the ultimate responsibility for the quality of medical care provided, that responsibility is

normally delegated to hospital staff, and discharged in practice by medical staff review committees. Concern that the candor necessary to the effective functioning of medical review committees would be severely undermined if their proceedings were discoverable has led to the adoption of statutes in several jurisdictions, including Florida, conferring a privilege from discovery upon the proceedings of such committees. *See Hall, Hospital Committee Proceedings and Reports: Their Legal Status*, 1 Am J L & Med 245 (1975). Public access to peer review investigations and reports created by staff committees may stifle candor and inhibit objectivity. Thus peer review statues generally represent a legislative choice between competing concerns, embracing the goal of medical staff candor, even at the cost of impairing plaintiffs' access to evidence.

> 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.

Holly v. Auld, 450 So.2d 217, 220 (Fla. 1984). It has thus long been settled that the public benefits of self-policing by the medical community clearly outweigh the potential cost to private litigants. *See also, Cruger v. Love,* 599 So.2d 111 (Fla. 1992) (observing that the Legislature enacted the peer

review statutes in an effort to curb escalating costs of healthcare by encouraging self-regulation through peer review).

In 1973, the Florida Legislature enacted section 768.131.[5] As *Cruger* recognized, the impetus for the enactment was the Legislature's concern about escalating healthcare costs and the sharp rise in medical malpractice insurance rates. Ch. 73-50 Laws of Florida, 1973, vol. 1, at 97. At the time, professional medical societies and associations were reviewing standards of medical care voluntarily. The Legislature wished to encourage this voluntary review process and recognized that some form of immunity was advisable to promote internal peer review investigations into adverse medical procedures to improve standards of care. *Id.*

Thereafter, as part of a broad initiative for further medical malpractice reform in 1985, the Florida Legislature enacted section 766.101(2), requiring hospitals to establish medical review committees to screen, evaluate, and review "the professional and medical competence of applicants to, and members of, medical staff." Physicians became required to cooperate with and participate in the process of peer review of professional competence as a condition of medical licensure. Ch. 85-175, § 8 Laws of Florida (1985).

[5] Section 768.131 was renumbered in 1976 to section 768.40, and subsequently renumbered again to the current version found in section 766.101.

To facilitate candor and encourage physician participation in the investigative process, the Legislature, as part of this comprehensive peer review initiative, expanded the immunity granted to medical review committees to prevent discovery and use at trial of the committee's records in any civil or administrative action against a healthcare provider arising out of the matters that were the subject of evaluation and review. Ch. 85-175, § 8 Laws of Florida (1985). Subsection 766.101(5) casts the net of immunity widely across the "investigations, proceedings, and records" of the committee, stating:

> 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 or administrative 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 use 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 or her knowledge, but the said witness cannot be asked about his or her testimony before such a committee or opinions formed by him or her as a result of said committee hearings.

Florida Statute Section 395.0191(8), governing staff membership and clinical privileges, provides virtually identical language. Under section 395.0191(8), records of the medical review committee engaged in the credentialing process are similarly immune from discovery or use at trial, unless the records are "otherwise available" from original sources.[6] The statute confers the medical staff of a hospital with complete authority to approve or disapprove applications for appointment or reappointment to all categories of staff and to make recommendations to the governing board about each applicant, "including the delineation of privileges to be granted

[6] Section 395.0191(8), Florida Statutes, provides:

> The investigations, proceedings, and records of the board, or agent thereof with whom there is a specific written contract for the purposes of this section, as described in this section, shall not be subject to discovery or introduction into evidence in any civil action against a provider of professional health services arising out of matters which are the subject of evaluation and review by such board, and no person who was in attendance at a meeting of such board or its agent 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 board or its agent or as to any findings, recommendations, evaluations, opinions, or other actions of such board or its agent or any members thereof. However, information, documents, or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such board; nor should any person who testifies before such board or who is a member of such board be prevented from testifying as to matters within his or her knowledge, but such witness cannot be asked about his or her testimony before such a board or opinions formed by him or her as a result of such board hearings.

in each case." § 395.0191(4), Fla. Stat. (2001). Consideration of an applicant for staff membership or clinical privileges includes, among other factors, the applicant's demonstrated competency, adherence to professional ethics, medical reputation, and ability to work with others. *Id.* The governing board is required to establish and publish standards and protocols for acting upon physician applications for staff membership and clinical privileges. § 395.0191(5), Fla. Stat. (2001). The board's investigation, proceedings, and records are to remain confidential, however.

C. Purpose and Intent of Statutory Peer Review Privilege

The legislative policy underlying the peer review statutes is critical to determine the scope of the discovery privilege. *Cruger*, at 113. Legislative intent and the policy underlying the statutes is plainly stated in the preamble to the 1985 legislative amendments, which *expanded* the field of immunity protection accorded to medical review committee. *Holly*, at 219. The preamble states:

> WHEREAS, high-risk physicians in this state sometimes pay disproportionate amounts of their income for malpractice insurance, and
>
> WHEREAS, professional liability insurance premiums for Florida physicians have continued to rise and, according to the best available projections, will continue to rise at a dramatic rate, and
>
> WHEREAS, the maximum rates for essential medical specialists such as obstetricians, cardio-vascular surgeons,

> neurosurgeons, orthopedic surgeons, and anesthesiologists have become a matter of great public concern, and
>
> WHEREAS, these premium costs are passed on to the consuming public through higher costs for health care services in addition to the heavy and costly burden of "defensive medicine" as physicians are forced to practice with an overabundance of caution to avoid potential litigation, and
>
> WHEREAS, this situation threatens the quality of health care services in Florida as physicians become increasingly wary of high-risk procedures and are forced to downgrade their specialties to obtain relief from oppressive insurance rates, and
>
> WHEREAS, this situation also poses a dire threat to the continuing availability of health care in our state as new young physicians decide to practice elsewhere because they cannot afford high insurance premiums and as older physicians choose premature retirement in lieu of a continuing diminution of their assets by spiraling insurance rates, and
>
> WHEREAS, our present tort law/liability insurance system for medical malpractice will eventually break down and costs will continue to rise above acceptable levels, unless fundamental reforms of said tort law/liability insurance system are undertaken, and
>
> WHEREAS, the magnitude of this compelling social problem demands immediate and dramatic legislative action, and
>
> WHEREAS, medical injuries can often be prevented through comprehensive risk management programs and monitoring of physician quality, and
>
> WHEREAS, it is in the public interest to encourage health care providers to practice in Florida, NOW, THEREFORE.

Coupling legislative concerns for maintaining the integrity of Florida's healthcare system with the plain language of the peer review statutes, it is clear that peer review delineations were contemplated by the statutory peer review privilege.

1. *Delineations of clinical privileges are "records" of a peer review committee within the plain and ordinary meaning of the statutes:*

Neither section 395.0191 nor 766.101 defines what constitutes "records of the committee." *Cruger*, at 113. Still, a plain reading of the statute logically leads to the conclusion that clinical privileges delineations, which reflect the product of a peer review committee's deliberative process, are most sensibly "records of the committee." As this Court instructed in *Holly*, in construing section 768.40, predecessor to section 766.101, the courts shall defer to the plain and ordinary meaning of the peer review statutes. *Holly*, at 219.

When looking for the plain and ordinary meaning of a word used in a statute, the courts may resort to the dictionary. *Allstate Ins. Co. v. Rudnick*, 761 So.2d 289 (Fla. 2000). Dictionaries attribute to the word "record" a sense of a thing being "written down and preserved as evidence"; an "account of events"; or "an official written report" of a proceeding. Webster's New World College Dictionary 1198 (4th ed. 2000). Similarly, *Black's Law Dictionary* defines "record" to mean "a documentary account of past events, usually designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." A written

delineation of clinical privileges is plainly a "record" designed to document the recommendations, findings, and actions of the medical review committee responsible for evaluating a physician's application for appointment or reappointment to medical staff. Just as the application for staff privileges is a "record" of the committee subject to peer review protection, *see Cruger*, so too should the delineations of clinical privileges stemming from the application.

2. *Established canons of statutory construction favor interpreting "records" of a peer review committee to include clinical delineations:*

The sweeping phrase "investigations, proceedings and records" in subsections 766.101(5) and 395.0191(8) strongly conveys the Legislature's desire to provide expansive protection, not only for committee deliberations, but also for its written decisions and reports. In addition to "investigations, proceedings and records," the peer review statutes shield committee members and attendees at peer review proceedings from having to testify about "any findings, recommendations, evaluations, opinions, or other actions of such committee or any members thereof." § 395.0191(8) and 766.101(5), Fla. Stat. (2001). Protecting peer review participants from having to testify in medical malpractice actions concerning the committee's "findings, recommendations, evaluations, opinions, [and] other actions," yet

allowing discovery and use at trial of the committee's delineations, which reflect its findings, recommendations and actions, would allow the rule to be virtually swallowed. *State v. Goode*, 830 So.2d 817 (Fla. 2002) (the Legislature does not intend to enact useless provisions, and courts should avoid readings that render part of statute meaningless). This could not have been the Legislature's intention, nor is it the preferred construction for the courts. *See* 48A *Fla. Jur.* 2d Statutes § 181; *Royal World Metropolitan, Inc. v. City of Miami* Beach, 863 So.2d 320 (Fla. 3d DCA 2003) (If a statute is fairly susceptible of two constructions, one of which gives effect to it, and the other of which defeats it, the former construction is preferred).

A reading of section 395.0191 as a whole reveals that staff membership decisions and delineations of clinical privileges are meant to be protected. Section 395.0191(4), for example, encourages voluntary physician participation in the peer review process by authorizing medical staff to make recommendations to the governing board about a physician's application for staff appointment or reappointment, "including the delineation of privileges to be granted in each case." §395.0191(4), Fla. Stat. (2001). This subsection continues: "In making such recommendations and in the delineation of privileges, each applicant shall be considered individually" pursuant to specific statutory criteria and other appropriate

factors as determined by the governing board. *Id.* Clearly, then, delineations of clinical privileges are an integral component of the peer review process. Their very existence is owed to the peer review investigation.

Delineations of staff privileges are, in essence, the memorialized collective opinion of the members of the governing committee. The gynecological delineations approved for Dr. Blocker, for example, reveal members must certify that they "Agree [ ] with above recommendations by department chair." R. 45-47, 52-53. To conclude that the Legislature intended to allow discovery of a review committee's clinical privileges delineations while protecting its members from compelled testimony concerning committee recommendations, actions and findings is to create an anomaly in the statute, one that would endorse a reading that fails to credit the statute as a whole. *See Hechtman v. Nations Title Ins. of New York*, 840 So.2d 993 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

Moreover, the closely related peer review statutes regulating dentistry reveal that delineations of clinical privileges are meant to be protected.

Florida Statute Section 466.022(1), governing peer review of consumer complaints by professional associations of dentists, provides that information obtained from the "official records" of dental peer review committees is subject to the provisions of section 766.101 even though the information is made available to the Florida Department of Health. The statute goes on to explain what is meant by "official records" of the committee:

> For the purpose of this section, official records of peer review organizations or committees include correspondence between the dentist who is the subject of the complaint and the organization; correspondence between the complainant and the organization; diagnostic data, treatment plans, and radiographs used by investigators or otherwise relied upon by the organization or committee; results of patient examinations; interviews; evaluation worksheets; recommendation work-sheets; and peer review report forms.

§ 466.022(3), Fla. Stat. (2005). In the context of credentials peer review, a delineation of privileges is most certainly a "peer review report form." If a courtesy copy of the delineation report is sent to the staff physician, as occurred here, the delineation becomes "correspondence" between the physician and the committee. *See, e.g., Boca Raton Community Hosp. v. Jones*, 584 So.2d 220 (Fla. 4th DCA 1991) (correspondence from hospital to physician indicating staff privileges were granted is subject to peer review protections).

It thus defies a reasonable reading of the peer review statutes to suggest that the very document expressing the peer review committee's decision on a staff membership application is somehow not a "record" of the committee. Nothing in the statutory language admits to an interpretation that would limit delineations from the discovery privilege. As this Court wrote in *Holly*, "courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or *limit* its express terms or its *reasonable and obvious implications.*" *Id.* (emphasis in original). If the Legislature wished to make available to private litigants the delineations arising from peer review proceedings for use in medical malpractice lawsuits, it has had 33 years to amend the statutes to express that intention. The Legislature well knows how to limit or refine its statutory grant of immunity. *See, e.g.*, *Cruger*, 599 So.2d at 114 (stating that "[i]f the legislature intended the privilege to extend only to documents *created by* the board or committee, then surely that is what it would have said."). The Legislature has expanded, not restricted, the immunity shield of the statute over time, and in circumscribing the statute's reach in favor of discovery, the *Murray* decision has abrogated legislative concern.

This Court, in *Cruger*, recognized the need for an expansive rather than restrictive interpretation of the peer review statutes, when quoting from

Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099, 1102 (Fla. 1989), it reiterated that "a court's obligation is to honor the obvious legislative intent and policy behind an enactment, even where that intent requires an interpretation that exceeds the literal language of the statute." *Id.* at 114. Regardless whether the document comes at the beginning of the proceeding (*e.g.*, the application) or the end (*e.g.*, the delineations), delineations are certainly part of the proceedings.

3. *There is no "final report" or "end result" exception to immunity protection by the statutory peer review privilege:*

Cases addressing "end result" or "final report" type documents have found them to be shielded from discovery. *See, e.g., Variety Children's Hosp. v. Mishler*, 670 So.2d 184 (Fla. 3d DCA 1996) (final surveys of the Joint Commission on Accreditation of Hospitals to assess the hospital's compliance with standards set by the Commission, as well as the hospital's responses to accreditation surveys, are protected by the peer review statutes); *Palm Beach Gardens Comm. Hosp., Inc. v. O'Brien*, 651 So.2d 783 (Fla. 4th DCA 1995) (list of prior incident reports at hospital concerning patient treatment by staff physicians was peer review privileged); *All Children's Hosp., Inc. v. Davis*, 590 So.2d 546 (Fla. 2d DCA 1991) (names and addresses of members of peer review committee are protected by peer

review statutes); *Bay Medical Center v. Sapp*, 535 So.2d 308 (Fla. 1st DCA 1988) (incident reports concerning internal investigations of physician were peer review protected); *Parkway General Hosp., Inc. v. Allinson*, 453 So.2d 123 (Fla. 3d DCA 1984) (minutes of medical staff review committee meetings were protected from disclosure). There is thus long standing precedent in Florida for protecting the "end result" of peer review proceedings.

In following *Bayfront Medical Center, Inc. v. State Agency for Healthcare Administration*, 741 So.2d 1226 (Fla. 2d DCA 1999), the *Murray* court seems to have equated a peer review committee's staff privileges delineations with the final administrative report that a licensed hospital is *statutorily required* to furnish to the Florida Agency for Healthcare Administration ("ACHA") for purposes of demonstrating its compliance with a comprehensive risk management program under chapter 395.[7]

The dispute in *Bayfront Medical* arose when ACHA issued an administrative subpoena to Bayfront Medical Center, Inc. In exercising its

[7] Pursuant to section 395.0197(3), formerly numbered subsection (5), as part of its compliance obligations under its internal risk management program, every licensed hospital "shall annually report to the [Agency for Healthcare Administration] and the Department of Health the name and judgments entered against each healthcare practitioner for which it assumes liability." There is no corresponding reporting requirement imposed on a hospital's staff membership or clinical privileges committee, however.

government oversight of healthcare providers for compliance with internal risk management programs, ACHA asked Bayfront to produce certain peer review files. Specifically, ACHA requested:

> The minutes of the department of surgery meeting in which the care of [Ms. Jane Doe] on March 25, 1997, was discussed along with any recommendations and corrective action which resulted from such discussions.

Id., at 1229. Because the minutes arose from Bayfront's internal peer review investigation of an incident involving "Jane Doe," the Second District reversed a lower court ruling allowing ACHA access to those minutes. The court held: "We conclude that the records of the investigative portion of the peer review panel are privileged from disclosure by sections 395.0193(7) and 766.101(5)." In doing so, the court recognized the tradition under Florida law for "constru[ing] the privilege and confidentiality of peer review records in the broadest manner to protect the integrity of the peer review process." *Id.* (internal quotation marks omitted).

By contrast, *Bayfront Medical* allowed ACHA to obtain the final recommendations of the peer review panel and the corrective action taken by the panel. It did so because when a hospital takes disciplinary action against one of its staff physicians, Florida law requires the hospital to send a written report to ACHA describing any "final disciplinary actions taken." § 395.0193(4), Fla. Stat. (1997); *see also*, § 395.0197(5), Fla. Stat. (1997)

(requiring licensed healthcare facilities to report to ACHA annually with summaries of all incident reports filed with the facility in the preceding year). *Bayfront Medical* allowed ACHA access to these records not because they fell within some imaginary "final report" category of exclusion in the peer review statutes, but rather because, under subsection 395.0193(4), the Legislature *expressly gives* ACHA access to final disciplinary reports prepared by a medical review committee so that ACHA can determine whether independent disciplinary action is appropriate. *Id.* at 1227.

Bayfront Medical was careful to stress the distinction between statutorily required reports to ACHA and the hospital's confidential internal peer review evaluation:

> The disciplinary "peer review" investigation and the procedures and interpretations resulting therefrom are not a part of the "risk management program" required by section 395.0197. "Peer review" is a separate and distinct procedure required instead by section 395.0193.

Id., at 1228. Hence, nothing in *Bayfront Medical* sustains the conclusion followed in *Murray* that peer review delineations are a "final report" external to the records of the peer review committee. Unlike ACHA, the Murrays have no statutory right to access the final recommendations or decisions of a hospital's medical review board. The Second District in

Murray misreads *Bayfront Medical* to support discovery of such records in medical malpractice suits.

As correctly noted in *Bayfront Medical*, the statutory peer review privilege is *not* casually embraced in Florida. *Id*. at 1229. Since *Love v. Cruger*, 570 So.2d 362, 363 (Fla. 4th DCA 1990), *approved*, 599 So.2d 111 (Fla. 1992), courts have uniformly held that the broad reach of the statutory privilege extends to staff privileges delineations "[i]n light of the policy that lies behind the confidentiality of records and deliberations of medical review committees." Nor can a party avoid the privilege simply by obtaining the delineations from the physician who receives a courtesy copy. *See, e.g., Hillsborough County Hosp. Authority v. Lopez*, 678 So.2d 408, 409 (Fla. 2d DCA 1996).

Similarly, in *Columbia Park Medical Center, Inc. v. Gibbs*, 723 So.2d 294, 295 (Fla. 5th DCA 1998), Judge Sharp cited the Fourth District's holdings in *Boca Raton Community Hospital v. Jones* and *Love v. Cruger* to hold that hospital committee records, "including documentation that a physician was given staff privileges and delineating the privileges extended," were privileged from discovery and use. Again, the privilege continues even though the hospital provided courtesy copies to non-

committee doctors. *Id.; Paracelsus Santa Rosa Medical Center v. Smith*, 732 So.2d 49 (Fla. 5th DCA 1999).

The Murrays are entitled to ask Dr. Blocker about what clinical privileges he held at Brandon. They are entitled to offer expert opinion about Dr. Blocker's qualifications and competency to perform the procedure in question. However, they are *not* entitled to discover and use Brandon's internal clinical privileges delineations to prove their case. Medical review committees have relied on this discovery privilege for quite some time and in a variety of contexts. *See Palms of Pasadena Hosp. v. Rutigliano*, 908 So.2d 594 (Fla. 5th DCA 2005) (identities of the members of hospital's credentials committee were privileged and immune from discovery in action against the hospital alleging that hospital negligently granted hospital privileges to physician who negligently treated patient); *Tenet Healthsystem Hospitals, Inc. v. Taitel*, 855 So.2d 1257, 1258 (Fla. 4th DCA 2003) (plaintiffs were not entitled to blank forms used by hospital to test competency of its nurses, despite plaintiff's contention that these forms were relevant to the prosecution of their claim against the hospital).

The potential chilling effect on peer review is not merely notional. If a peer review committee evaluating credentials for staff appointment knows that its delineations may be used against the hospital in malpractice

litigation, doctors may be reluctant to participate in credentials evaluation or serve on the credentials committee for fear of reprisal. The committee may refuse to approve a set of privileges for an otherwise qualified skilled physician out of fear that if one type of privilege is denied, plaintiffs may use that decision to argue the denied privilege is procedurally similar to privileges granted, and thus the hospital should be held liable for approving other "similar" clinical privileges. Allowing discovery and use of delineations would inevitably invite speculation about the reasons for denying one set of privileges, or the reasons why another set of privileges was not requested, thus encouraging efforts to pierce the peer review investigation. Such use would not only frustrate the confidentiality intended for the peer review process, but might also open the door to incremental encroachment into peer review proceedings. The peer review privilege precludes discovery of records created in the peer review proceeding. The Legislature established this price as necessary to maximize recourse to and participation in self-policing by the healthcare profession. *Murray's* judicial encroachment on the peer review privilege should be quashed.

CONCLUSION

Based on the Legislature's decision to entrust final decisions regarding the competency of staff physicians to hospital review boards

charged with assigning credentials, it is incongruous that staff membership and clinical privileges delineations created by the board would not be protected by the statutory peer review privilege simply because they represent the final product of the peer review process. Delineations of privileges are an integral part of the medical review committee's proceedings, as is any other record generated by the committee. Indeed, delineations are more crucial to protect since these documents reflect the internal findings of the board's confidential deliberations. In the commitment to uphold the legislative policy and intent underlying enactment of the peer review statutes, this Court should quash the decision in *Murray*, return consistency to the law, and remand the matter to the lower court for

further proceedings consistent with the principles expressed in *Gibbs*, *Smith*, *Jones*, and *Love*.

WM. JERE TOLTON, III, ESQUIRE
Florida Bar No.: 0887943
RANDY J. OGDEN, ESQUIRE
Florida Bar No.: 0351830
J. RUSSELL SMITH, ESQUIRE
Florida Bar No.: 0844896
OGDEN & SULLIVAN, P.A.
113 South Armenia Avenue
Tampa, Florida 33609
(813) 223-5111; (813) 229-2336 - Fax
Attorneys for Petitioner/Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States mail this _____ day of March, 2006, to:

Edwin P. Krieger, Esquire
Catania & Catania, P.A.
101 E. Kennedy Blvd., Suite 2400
Tampa, FL 33602

George A. Vaka, Esquire
Vaka, Larson & Johnson, P.L.
777 S. Harbour Island Blvd., Ste. 300
Tampa, FL 33602

Louis LaCava, Esquire
Stephens Lynn Klein, et al.
101 E. Kennedy Blvd., Suite 2500
Tampa, FL 33602

Christopher Schulte, Esquire
Burton, Schulte, Weekley, Hoeler
& Beytin, P.A.
100 S. Ashley Drive, Suite 600
Tampa, FL 33602

_____
WM. JERE TOLTON, III, ESQUIRE
Florida Bar No.: 0887943

CERTIFICATE OF COMPLIANCE

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

_____
WM. JERE TOLTON, III, ESQUIRE
Fla. Bar No. 0887943