

SUPREME COURT OF FLORIDA

CASE NO. 77,293

4TH DCA NO. 90-2077

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

Petitioner,

vs.

DOUGLAS J. LOVE, M.D.,

Respondent

REPLY BRIEF OF PETITIONER

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PREFACE

Petitioner, Elois Posey Cruger, on behalf of her son, Ashanti Posey, plaintiffs at the trial court level, will be referred to as Petitioners. Respondent, Douglas J. Love, M.D., defendant at the trial court level, shall be referred to as Respondent. Amicus Curiae, Humana of Florida, Inc., shall be referred to as Amicus.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Elois Posey Cruger as parent and guardian of the minor, Ashanti Posey, adopts and incorporates by reference the Statement of the Case and of the Facts as contained in the Initial Brief of Petitioner.

SUMMARY OF ARGUMENT

Neither the language of Florida Statutes §766.101(5) nor §395.011(9) supports a privilege for a physician's application for privileges at a hospital. Such applications are otherwise available and are not a product of the internal workings of the review committee. Moreover, the public policy of encouraging a physician's candor and frankness is, in fact, enhanced by making applications available for discovery as opposed to protecting the applications from discovery. A physician who knows that his application may potentially be made public in the future would almost certainly be more apt to be honest in his application than if he thought the application would never be seen outside the confines of the review committee.

ARGUMENT

A PHYSICIAN'S APPLICATION FOR PRIVILEGES IS NOT PROTECTED FROM DISCOVERY BY §766.101(5), FLORIDA STATUTES (1989) AND §395.011(9), FLORIDA STATUTES (1989), EITHER UNDER THE LANGUAGE OF THE STATUTES OR FOR PUBLIC POLICY REASONS.

The assumption which might be drawn from Respondent's Brief is that, given a chance, physicians will be less than honest in order to be granted privileges to practice at a hospital. Certainly physicians have a financial incentive in obtaining privileges to practice at hospitals. In order to obtain these privileges, they must present an application detailing their educational and professional history. Obviously, physicians would prefer to present a flattering picture of their history and abilities. On the other hand, hospitals obviously want to get a candid picture of the physician's abilities so they can properly assess the advisability of granting the physician privileges. At least the public hopes this is what the hospitals wish to do. A patient's only concern is that a hospital only grant privileges to those physicians who are qualified and safe. This is the same concern expressed by the legislature and which is reflected in its enactment of Florida Statutes §766.101(5) and 395.011(9).

The question then becomes how to insure the hospital's and the public's ability to know the truth about a physician despite a doctor's desire to paint a rosy picture to a review committee. Respondent argues that the way to insure truthfulness is to prevent the doctor's application from ever reaching the light of day.

Logically, this argument is unpersuasive. Only if a physician knows that someone other than a hospital review committee might see his application does he have an incentive to tell the truth. As far as a physician is concerned, the worst that can happen if a review committee discovers he has been less than honest is for the review committee to deny him privileges. Of course, this is all the review committee could have done in the first place.

On the other hand, if the physician knows the application will be open to public scrutiny, he knows he has to be honest for at least two reasons. First, he knows that others in the professional community, as well as members of the general public, might have more knowledge of his background and history than does the limited membership of a peer review committee. In other words, a person is more apt to be honest when he has thousands of people looking over his shoulder than a mere handful.

Secondly, if a physician knows his application will be subject to review in potential future medical malpractice actions, he is certainly more apt to be honest. He must realize that a physician who has lied on his application will have difficulty convincing a jury that he is being honest with them. Therefore, a physician who knows that his application will be available for review by potential litigants has an incentive to be honest and above board.

Neither Respondent nor Amicus Humana of Florida, Inc. analyze how protecting the application will affect a physician's honesty in preparing that application. Nor do any of the cases

relied upon the Respondent or by Amicus explain how a physician's application itself involves a peer review committee's members deliberative process. They simply jump to the conclusion that since a peer review committee reviews the application, then the application itself must reflect the committee's deliberative process. However, the application does not in any way reflect the committee's deliberative process. In fact, it precedes any deliberative process on the part of the review committee. The only thing the application reflects is the applicant's own description of his educational and professional history.

For example, in Tarpon Springs General Hospital v. Hudak, 556 So.2d 831 (Fla. 2d DCA 1990), the court simply stated that the application "certainly falls within the policy considerations reflected in the statutes". Id., at 832. In Parker v. St. Claire's Hospital, 159 A.D.2d 1919, 553 N.Y.S.2d 533 (App. Div. 1990), the court merely states that the hospital submitted the affidavit of its director of quality of assurance that the application of the physician in question was "engendered and used" for medical review proceedings. In Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (Ct. App. 1987), the actual question addressed by the court was whether the plaintiff was entitled to discover "the review of medical staff privilege applications by credentials committees". Id., at 1388. Obviously, the issue presented in our case is not whether plaintiff can discover the review of an application for privileges, but the

application itself. Therefore, the opinion in Humana Hospital and its analysis are not persuasive herein.

Finally, under the broad heading of "public policy", Respondent argues that a physician's applications should be protected in order to further the goal of self policing by the medical profession. In doing so, Respondent speaks of the desire for candor on the part of physicians. However, as discussed above, candor on the part of applying physicians is enhanced not by the protection of the application, but by the disclosure of the application. Petitioner agrees that candor on the part of a physician's peers when reviewing that physician's ability to practice medicine is essential to the review process. Fear of defamation suits or a general reluctance to criticize a fellow physician in public are problems. The legislature has enacted §§766.101(5) and 395.011(9) to help diminish these problems. These problems are not affected by whether a physician's own application is available during the discovery process. Therefore, extending the protection of these statutes to a physician's application for privileges in no way furthers the state's interest in encouraging the medical profession to engage in effective self policing of its members.

CONCLUSION

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

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