

DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

ANIL DESAI, M.D.,)	
)	
Appellant/Plaintiff)	Case No. 4D15-4408
)	
v.)	Lower Tribunal Case
)	No. 09-CA-010027
LAWNWOOD MEDICAL CENTER, INC.,)	Hon. Dwight L. Geiger
)	
Appellee/Defendant)	
)	

AMICUS CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION
IN SUPPORT OF APPELLANT/PLAINTIFF AND FAVORING REVERSAL

Jon N. Ekdahl
Leonard A. Nelson
AMERICAN MEDICAL ASSOCIATION
330 N. Wabash Avenue
Chicago, IL 60611
(312) 464-5532
Of Counsel

Mary Thomas
1430 Piedmont Drive East
Tallahassee, FL 32308
(850) 224-6496
Fla. Bar No. 113148

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	ii
Interest Statement of <i>Amicus Curiae</i>	1
Summary of Argument	2
Argument	4
I. The Hospital Violated Dr. Desai's Contractual Rights.....	4
As Well as Florida Statutes by Refusing to Renew His Staff Privileges without Following the Peer Review Procedures Specified in the Medical Staff Bylaws.	
A. The Hospital Unreasonably Rejected the	5
Investigation and Determination of the Properly Constituted Medical Staff Peer Review Panel <i>Before</i> It Decided Whether To Deny Dr. Desai's Renewal Privileges.	
B. The Hospital Based its Decision on Personal Animus.....	7
Against Dr. Desai, Rather Than on Patient Welfare.	
II. The Hospital Could not Compel Dr. Desai to Accept.....	8
Its "Fair Hearing and Appellate Review Procedures" Because He Had not Agreed to Those Procedures and Because Those Procedures Violated Florida Law.	
Conclusion	11
Certificate of Service	13
Certificate of Type Size and Style	14

TABLE OF CITATIONS

Cases

South Riverwalk Invs., LLC v. City of Fort Lauderdale 2
934 So.2d 620 (Fla. 4th DCA 2006)

Lawnwood Medical Center, Inc. v. Seeger, 959 So.2d 1222 5
(Fla. 1st DCA 2007),
affirmed, 990 So.2d 503 (Fla. 2008)

Harper v. Hoecherl, 14 So.2d 179 (Fla. 1943).....9

Florida High School Athletic Ass’n. v. Melbourne Central9
Catholic High School, 867 So.2d 1281
(Fla. 5th DCA 2004)

Statutes

Federal

42 U.S.C. § 11101 1

42 U.S.C. § 11111 6

Florida

Section 395.0191, Fla. Stat. 1,6

Section 395.0193, Fla. Stat. 6,7,9,10

Section 766.101, Fla. Stat. 6,8

Florida Administrative Regulation

Fla. Admin. Code R. 59A-3.272 10

Interest Statement of *Amicus Curiae*

The American Medical Association (AMA), an Illinois non-profit corporation, is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in all areas of specialization and in all 50 states, including the State of Florida.

This case concerns the right of Anil Desai, MD, a physician whose medical competence has been questioned, to be reviewed by his peers, according to the procedures specified in the medical staff bylaws of Lawnwood Medical Center (the Hospital). The United States Congress has endorsed medical staff peer review as a mechanism for the prevention of medical error, 42 U.S.C. § 11101(5) (finding "an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review"), as has the Florida Legislature, § 395.0191(1), Fla. Stat. (medical peer review encouraged "to secure the provision of quality medical services to the

public"). Those laws were crafted in large part through the lobbying efforts of *amicus*. *Amicus* have numerous policies supporting the enforcement of medical staff bylaws and supporting good faith peer review. *Amicus* therefore have an interest in making sure that, in this case, Florida law is upheld as the Florida Legislature intended and the Florida courts have heretofore recognized.

Summary of Argument

At its heart, this is a claim for specific enforcement of Dr. Desai's right to renewal of his medical staff privileges, subject to the peer review procedures set forth in the Hospital's medical staff bylaws. [R.13:2217-2268,¶1][App. G]¹ Because the trial court entered judgment on a motion to dismiss, the allegations in Dr. Desai's Third Amended Complaint must be taken as true. *South Riverwalk Invs., LLC v. City of Fort Lauderdale*, 934 So.2d 620, 622 (Fla. 4th DCA 2006).

Even though the Medical Executive Committee, the elected peer group from the medical staff, had reviewed and re-reviewed Dr. Desai's medical records and had repeatedly certified his competence [R.13:2217-2268,¶¶38,44,49,54-55,71,147][App. G], the Hospital contended, based on evidence which it knew to be

¹ Citations to the record on appeal are in the form R. [volume number]:[page number(s)], and citations to the appendix are in the form App. [tab letter]. See Appellant's Initial Brief, nn. 1-2.

falsified [R.13:2217-2268, ¶¶58-59][App. G], that Dr. Desai had rendered incompetent medical care. [R.13:2217-2268, ¶5][App. G] Rather than follow the procedures established under the medical staff bylaws [R.14:2282-2408][App. G], which required the Hospital to accept the medical staff re-credentialing position absent a reason to do otherwise, Article XI, §3, the Hospital summarily discharged Dr. Desai. This was notwithstanding that every disinterested physician who had reviewed Dr. Desai's medical records, including the physician members of the Hospital's own Board of Trustees, had found Dr. Desai to be without fault. [R.13:2217-2268, ¶¶60,152,162][App. G] The Hospital failed to provide Dr. Desai with adequate notice of the Board's intentions [R.13:2217-2268, ¶¶52,158][App. G], and it blocked any meaningful opportunity he might have had to defend himself. [R.13:2217-2268, ¶¶153,155,166][App. G]

The Hospital's motivation derived from personal animus against Dr. Desai, unrelated to his professional competence and unrelated to the care of patients within the Hospital. [R.13:2217-2268, ¶¶29,156][App. G] It wished to punish Dr. Desai for his criticisms of the Hospital [R.13:2217-2268, ¶102][App. G] and for actions in an unrelated lawsuit. [R.13:2217-2268, ¶¶22,23,157][App. G] It wanted to make an example of him [R.13:2217-2268, ¶180][App. G], to demonstrate that physicians on the medical staff who might wish to challenge Hospital

procedures could not rely on the medical staff bylaws (which one of its executives called "trash") for protection. The same executive said, "the Bylaws would not last long, nor would those who made them." [R.13:2217-2268, ¶194(j)][App. G]

The lower court found that Dr. Desai forfeited his hearing rights, because he failed to accept the procedures specified in the Hospital's "Fair Hearing and Appellate Review Procedures" (FHARP). [R.19:3153-3157][App. I] This finding violated the principle of enforceability of medical staff bylaws, a principle repeatedly recognized by the Florida courts. It also violated Florida statutory and administrative law, which provide, *inter alia*, that medical staff peer review must be conducted (a) before (not after) disciplinary action is taken against a physician, (b) by a physician's peers, *viz.*, other physicians on the medical staff, rather than by laymen, and (c) under a fundamentally fair procedure.

The lower court erred in its interpretation of Florida law and should be reversed.

Argument

I. The Hospital Violated Dr. Desai's Contractual Rights as Well as Florida Statutes by Refusing to Renew His Staff Privileges without Following the Peer Review Procedures Specified in the Medical Staff Bylaws.

Medical staff bylaws are a binding contract between the members of the medical staff (largely composed of physicians)

and the hospital which cares for the physician's patients. *Lawnwood Medical Center, Inc. v. Seeger*, 959 So.2d 1222 (Fla. 1st DCA 2007), *affirmed*, 990 So.2d 503 (Fla. 2008). See also the cases cited at n. 4 of Appellant's Initial Brief.

For 15 years, Dr. Desai had served on the Hospital medical staff, operating under the medical staff bylaws. [R.13:2217-2268, ¶19][App. G] During that time, the Hospital and the patients within the Hospital benefited from his services. He was thus entitled to rely on the protections set forth in those bylaws. Nevertheless, the Hospital repeatedly breached its obligations to Dr. Desai under the medical staff bylaws.

When the hospital breached Dr. Desai's contractual rights, it also breached its obligations under the Florida statutes.

A. The Hospital Unreasonably Rejected the Investigation and Determination of the Properly Constituted Medical Staff Peer Review Panel Before It Decided Whether to Deny Dr. Desai's Renewal Privileges.

The medical staff bylaws [R.14:2282-2408][App. G] specify that, when a physician's medical competence has been questioned, the physician is first entitled to have the issue determined by a medical staff review body - his peers. Following such determination, the Hospital Board of Trustees "shall not

unreasonably [withhold]" ratification of that determination.
(Article XI, § 3).

To the same effect is § 395.0193(3), Fla. Stat. which
provides:

If reasonable belief exists that conduct by a ... physician who delivers health care services at [a licensed hospital] may constitute ... grounds for discipline ..., a peer review panel shall investigate and determine whether grounds for discipline exist with respect to such staff member or physician. The governing board of any licensed facility, after considering the recommendations of its peer review panel, shall [take appropriate action against] any such ... physician after a final determination has been made ...

In other words, the governing board is to act "after a final determination has been made" by the peer review panel.

This timing requirement juxtaposes with federal and state statutory immunities afforded to participants in peer review proceedings. 42 U.S.C. § 11111 (with certain exceptions, prohibiting monetary damage awards in connection with peer review actions that meet specified standards for fairness); §§ 395.0191(7) & 766.101(3)(a), Fla. Stat. (generally prohibiting monetary damage awards in connection with peer review actions, absent "intentional fraud"). While recourse for wrongful denial of medical staff privileges is limited, the countervailing factor is that disciplinary action may be taken against a physician only after the peer review panel has rendered its decision.

However, that is not what happened here. In this case, the Hospital denied Dr. Desai's privileges and then offered him a hearing (as will be explained later - *not* a peer review hearing and not a fair hearing, but a hearing of some sort). As the Hospital would have it, Dr. Desai should have suffered the loss of his privileges while the hearing process wended its course. All the while, Dr. Desai would endure substantial and irreversible professional and financial injury. [R. 10:1648] [App. D] Again, Dr. Desai was to suffer this injury notwithstanding that every disinterested physician who had reviewed his files had found no cause against him. This is not what the medical staff bylaws provide, and it is not what the Florida statutes mandate.

B. The Hospital Based its Decision on Personal Animus Against Dr. Desai, Rather Than on Patient Welfare.

Florida law requires that those who investigate and discipline physicians must do so "in good faith." Section 395.0193(1) Fla. Stat. The purpose of the disciplinary process is explained in § 395.0193(1) ("to secure the provision of quality medical services to the public") and in § 395.0193(2)(g) ("to reduce morbidity and mortality and to improve patient care"). Yet, that was not the Hospital's motive here. It acted with personal animus against Dr. Desai [R.13:2217-2268, ¶¶ 22-23, 29,102,156-157] [App. G] and with a desire to undermine the

protections of the medical staff bylaws [R.13:2217-2268, ¶194(j)][App. G] - protections specifically recognized by Florida case law.

By the same token, although the medical staff bylaws in this case vest the Hospital with certain discretionary powers in making credentialing decisions (*viz.* Medical Staff Bylaws, Article VIII, Part D, §4) these powers must be exercised in good faith and in a spirit of cooperation with the organized medical staff peer review committees. See Medical Staff Bylaws, Article XI, § 3 ("Ratification of the medical staff decision or medical staff matters shall not be unreasonably withheld"); *cf.*, § 766.101(2), Fla. Stats. (hospitals "shall cooperate with a review of professional competence performed by a medical review committee"). Acting in good faith and in a spirit of cooperation means acting in the interest of patient care, not acting to further a vendetta or erode statutory purposes. Whatever discretion the Hospital might have otherwise enjoyed regarding the composition of its medical staff, it abused that discretion here.

II. The Hospital Could not Compel Dr. Desai to Accept the "Fair Hearing and Appellate Review Procedures" Because He Had not Agreed to Those Procedures and Because Those Procedures Fell Short of the Requirements of Florida Law.

The court below found that Dr. Desai relinquished his reappointment rights by failing to seek the hearing offered him

under FHARP. As Dr. Desai explained in his brief, those procedures were not the procedures of the medical staff bylaws, and he never agreed to them. Since the Hospital was bound under the medical staff bylaws, it could not force this requirement on him. See Appellant's Initial Brief at 11-20.

Moreover, even if Dr. Desai had somehow agreed to the FHARP rules, those rules should have been unenforceable against him. Private mechanisms to resolve disputes, such as FHARP, are unenforceable if those mechanisms violate legal requirements, are unreasonable or oppressive, or would result in a pre-ordained and meaningless outcome. *Harper v. Hoecherl*, 14 So.2d 179 (Fla. 1943); *Florida High School Athletic Ass'n. v. Melbourne Central Catholic High School*, 867 So.2d 1281,1288 (Fla. 5th DCA 2004). FHARP failed all of these measures.

FHARP fell short of Florida statutory requirements. Section 395.0193(2), Fla Stat. mandates that, as a condition of licensure, a hospital "shall provide for peer review of physicians who deliver health care services at the [hospital]." Similarly, § 395.0193(3), Fla. Stat. requires "a peer review panel [to] investigate and determine whether grounds for discipline exist."

Article VIII, Part B, § 5 of the medical staff bylaws is consistent with these statutory requirements, in that it

requires the hearing panel to be "composed of active Medical Staff members." These are Dr. Desai's peers.

The FHARP provisions [R.11:1831-1839][App. D], though, are sharply different. FHARP § 8.1 states as follows:

8.1. If a hearing is requested on a timely basis, the hearing shall be held as determined by the Trustees, either

8.1.1. before an arbitrator mutually acceptable to the individual and the Trustee;

8.1.2 before a hearing officer who is appointed by the Trustees and who is not in direct economic competition with the Individual involved; or

8.1.3 before a panel of individuals who are appointed by the Trustees and are not in direct economic competition with the Individual involved. These panel members may be physicians who are members of the medical staff, lay persons, physicians who are not members of the medical members of the medical staff, or any combination thereof. When a hearing panel of individuals is utilized, one member shall be appointed by the Trustees to serve as the chairperson."

Two conclusions are evident. If Dr. Desai had invoked FHARP, then, (1) under FHARP § 8.1, Dr. Desai would almost certainly not have been reviewed by his peers, and (2) the deck would have been heavily stacked against him.

FHARP also violates § 395.0193(2)(c), Fla. Stat., which mandates "[f]air review of the case with the physician involved," and Fla. Admin. Code R. 59A-3.272(4)(b), which requires that "standards and procedures to be applied by the hospital ... shall not operate to deny staff privileges or

clinical privileges in an ... unreasonable ... manner."

However, FHARP § 14.2 specifies:

The arbitrator, hearing officer, or hearing panel shall recommend in favor of the Trustees 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 sense, or is not supported by substantial evidence.

In other words, Dr. Desai, had he opted to accept the FHARP process, would not only have had to prove his innocence, but in doing so he would have had to overcome a deferential presumption in favor of the Hospital. This would hardly have been a "fair review."

In sum, the lower court found that Dr. Desai forfeited his rights because he failed to accept an inherently unfair procedure which would have (a) been far less even-handed than the procedure to which he was entitled under the medical staff bylaws, (b) infringed the rights guaranteed him under Florida statutes and administrative regulations, and (c) endorsed a preordained outcome. If this ruling is affirmed, the Hospital will succeed in its goal of making "trash" of its medical staff bylaws and of destroying "those who made them." [R.13:2217-2268, ¶194(j)] [App. G]

Conclusion

As the courts of Florida have repeatedly held and as the Florida Legislature has mandated, medical staff bylaws are not

trash and accused physicians have a right to be reviewed by their peers, under fair procedures. For the reasons set forth herein and for the reasons set forth in Dr. Desai's brief, the judgment against Dr. Desai should be reversed and this cause should be remanded for further proceedings.

/S/ Mary Thomas
Attorney for *Amicus*

May 19, 2016

Mary Thomas
1430 Piedmont Drive East
Tallahassee, FL 32308
(850) 224-6496
Fla. Bar No. 113148

Certificate of Service

I certify that the foregoing brief was submitted to the Fourth District Court of Appeals Clerk of court and delivered by e-mail this 19th day of May, 2016 to:

Attorneys for Appellant, Anil Desai, MD

Richard H. Levenstein

rlevenstein@kslattorneys.com

Abby M Spears

aspears@kslattorneys.com

Kramer, Sopko & Levenstein, P.A.

2300 SE Monterey Road, Suite 100

Stuart, FL 34996

And to

Attorneys for Appellee, Lawnwood Medical Center, Inc.

Thomas E. Warner

twarner@cfjblaw.com

Dean A. Morande

dmorande@cfjblaw.com

Michael D. Sloan

msloan@cfjblaw.com

Carlton Fields Jordan Burt, P.A.

City Place Tower, Suite 1200

525 Okeechobee Boulevard

West Palm Beach, FL 33401-6350

/S/ Mary Thomas

Attorney for Amicus

Certificate of Type Size and Style

I certify that the foregoing brief has been prepared in Courier New 12-point font in compliance with FL Rule of App. Proc. 9.210(a)(2).

/S/ Mary Thomas
Attorney for *Amicus*

May 19, 2016

Jon N. Ekdahl
Leonard A. Nelson
AMERICAN MEDICAL ASSOCIATION
330 N. Wabash Avenue
Chicago, IL 60611
(312) 464-5532
Of Counsel

Mary Thomas
1430 Piedmont Drive East
Tallahassee, FL 32308
(850) 224-6496
Fla. Bar No. 113148

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