

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1493
Lower Tribunal CASE NO: 4D15-4408

ANIL DESAI, M.D.,
Petitioner,
v.
LAWNWOOD MEDICAL CENTER, INC.,
Respondent.

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

AMICUS CURIAE BRIEF OF THE AMERICAN MEDICAL ASSOCIATION
IN SUPPORT OF PETITIONER AND FAVORING REVERSAL

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Interest Statement of *Amici 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"). The federal law, known as The Healthcare Quality Improvement Act of 1986, was crafted in large part through the lobbying efforts of the AMA; the Florida Medical Association, an AMA constituent organization, lobbied for the comparable Florida law. The AMA House of Delegates has passed numerous policies supporting the enforcement of medical staff bylaws and supporting good faith peer review. The AMA therefore has 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. 2217-2269,¶1].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

¹ Citations to the Record on Appeal are in the form R. followed by the page number(s). See Petitioner's Initial Brief, n.1.

competence [R. 2217-2268, ¶¶38, 44, 49, 54-55, 71, 147], the Hospital contended, based on evidence which it knew to be falsified [R. 2217-2268, ¶¶58-59], that Dr. Desai had rendered incompetent medical care. [R. 2217-2268, ¶5]. Rather than follow the procedures established under the medical staff bylaws [R. 2282-2408], which required the Hospital to accept the medical staff's 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. 2217-2268, ¶¶60, 152, 162]. The Hospital failed to provide Dr. Desai with adequate notice of the Board's intentions [R. 2217-2268, ¶¶52, 158], and it blocked any meaningful opportunity he might have had to defend himself. [R. 2217-2268, ¶¶153, 155, 166].

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. 2217-2268, ¶¶29, 156]. It wished to punish Dr. Desai for his criticisms of the Hospital [R. 2217-2268, ¶102] and for actions in an unrelated lawsuit. [R. 2217-2268, ¶¶22, 23, 157]. It wanted to make an example of him [R. 2217-2268, ¶180], 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. 2217-2268, ¶194(j)].

Dr. Desai was not required to accept the procedures specified in the Hospital's "Fair Hearing and Appellate Review Procedures" (FHARP). [R. 3153-3157]. For one thing, such a requirement would violate the principle of enforceability of medical staff bylaws, a principle repeatedly recognized by the Florida courts. For another, such a requirement would violate the Florida statutes and regulations that mandate 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.

Because the trial court and the District Court of Appeal found otherwise, they were in error 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). As with all contracts, medical staff bylaws require that the parties act so that both sides have a reasonable opportunity to obtain their contract objectives. Particularly, discretionary powers must be exercised reasonably and in good faith, without oppressing either party. *Burger King Corp. v. E-Z Eating 8th Corp.*, 2008 WL 11330709 (S.D. Fla. 2008).

For 15 years, Dr. Desai had served on the Hospital medical staff, operating under the medical staff bylaws. [R. 2217-2268, ¶19]. 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 breached its contractual obligations to Dr. Desai. When the Hospital breached those contractual rights, it also breached its obligations under the Florida statutes. This breach had two principal elements: (1) the Hospital caused Dr. Desai to suffer the loss of his medical staff privileges *before* he had an opportunity to defend himself in an adversarial peer review proceeding, and (2) the Hospital rejected the findings of the medical staff credentialing committee based on personal animus, rather than on his professional competence or on patient welfare.

A. The Hospital Denied Dr. Desai's Privileges Before it Allowed him a Peer Review Hearing.

The medical staff bylaws [R. 2282-2408] 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.

Here, the Hospital unilaterally 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]. 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 his Medical Competence or on Patient Welfare.

As the second aspect of its breach, the Hospital acted oppressively and in contravention of the spirit of the medical staff bylaws and of Florida law. It based its decision on personal animus, rather than on Dr. Desai's medical competence or on patient welfare.

The 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 sought to punish Dr. Desai, because he had criticized the Hospital's methodology for the handling of pathology slides, which caused the slides to become contaminated. [R. 2217-2268, ¶¶ 22-23, 29, 88, 102, 156-157]. Moreover, the Hospital wanted to enhance its control over the

medical staff by undermining the protections of the medical staff bylaws. [R. 2217-2268, ¶194(j)].

While the medical staff bylaws vested the Hospital with certain discretionary powers in making credentialing decisions (*viz.* Medical Staff Bylaws, Article VIII, Part D, §4) these powers had to be exercised reasonably, 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 reasonably, 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 were Inherently Unfair.

Both the trial court and the District Court of Appeal found that Dr. Desai relinquished his reappointment rights by failing to seek the hearing offered him under FHARP. As Dr. Desai

explained in his Initial Brief, those procedures were not the procedures of the medical staff bylaws and neither he nor the medical staff as a whole had agreed to them. Since the Hospital was bound under the medical staff bylaws, it could not force this requirement on Dr. Desai. See Petitioner's Initial Brief at 9-10,14-15.

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. 1831-1839], 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. First, if Dr. Desai had invoked FHARP, then, under FHARP § 8.1, Dr. Desai would almost certainly *not* have been reviewed by his peers. *See Mileikowsky v. West Hills Hospital*, 203 P.3d 1113 (Cal. 2009) (holding that a decision by a hearing officer, even on a purely procedural matter, was not a decision by a physician's peers and thus violated a California statute that guaranteed the right of physician peer review).

Second, and perhaps more importantly, the hearing would *not* have been impartial, as the Trustees (*i.e.* the Hospital and not

Dr. Desai) could unilaterally choose to have the hearing under FHARP §§ 8.1.2 or 8.1.3, and under those options the Trustees (but, again, not Dr. Desai) could appoint the hearing officer or the hearing panel. FHARP was both unreasonable and oppressive.

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;" the outcome would have been pre-ordained.

In sum, the trial 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. The District Court of Appeal affirmed this decision without a reasonable consideration of the requirements of Florida law or the inherent unfairness of the FHARP process. If this Court should affirm, the Hospital will have succeeded in its goal of making "trash" of its medical staff bylaws and destroying "those who made them." [R. 2217-2268, ¶194(j)].

Conclusion

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

Mary Thomas, Attorney for
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March 27, 2018

Certificate of Service

I certify that the foregoing brief was submitted to the Clerk of the Florida Supreme Court and delivered by e-mail this 27th day of March, 2018 to:

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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).

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