

IN THE SUPREME COURT OF FLORIDA  
Case No.: SC11-722  
District Court Case No. 4D10-49

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ANIL DESAI, M.D.,

Petitioner,

vs.

LAWNWOOD MEDICAL CENTER, INC.,

Respondent.

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On Review from the Fourth District Court of Appeal

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**RESPONDENT'S OPPOSITION BRIEF ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

The following facts are taken from the face of the Fourth District's decision that Petitioner seeks to have reviewed. *See Reaves v. State*, 485 So. 2d 829, 830 n.3 (Fla. 1986) ("The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict.").

As required by the hospital's medical staff bylaws, Petitioner Anil Desai, M.D., applied for reappointment to the medical staff. A1 at 1028. During the review process, serious conduct and quality of care issues were raised concerning Desai. *Id.* In particular, there were seven major events over the preceding two years, which raised quality of patient care, medical competence, or disruptive behavior issues. *Id.*

In reviewing Desai's application, the Medical Executive Committee either dismissed or disregarded the events as being outside the review period, inconsequential, or resolved. *Id.* It then voted to recommend Desai for reappointment. *Id.* After convening a meeting where Desai and his attorney attended and participated, the governing board of Respondent Lawnwood Medical Center, Inc. (the "Hospital") reviewed Desai's application for reappointment and voted to deny it. *Id.* at 1028-29.

Rather than utilize the administrative appellate process available to him, Desai filed an action for injunctive relief and moved for a temporary injunction. *Id.* at 1029. The trial court held an evidentiary hearing where, among other things, a member of the Hospital's board testified that the board's vote was based on concerns for the quality of care at the Hospital, and was not related to any extrinsic issue concerning Desai's opposition to hospital administration. *Id.* Nonetheless, the trial court granted Desai's motion for temporary injunction, and the Hospital appealed. *Id.*

The Fourth District agreed with the Hospital's argument that section 395.0191, Florida Statutes (2009), provides the Hospital with immunity from suit when the claim arises out of the appointment or reappointment process absent intentional fraud. *Id.* Desai failed to allege intentional fraud with particularity and, as a result, he failed to overcome the immunity afforded by the statute. *Id.* Because the Fourth District determined the Hospital is immune from suit, it reversed the temporary injunction and remanded for dismissal of the complaint. *Id.* at 1031.

### SUMMARY OF THE ARGUMENT

Section 395.0191(7), Florida Statutes, expressly provides that "no cause of action for injunctive relief or damages shall arise against, any licensed facility . . . for any action arising out of or related to carrying out the provisions

of this section [governing the appointment and reappointment of medical staff], **absent intentional fraud.**” (emphasis added).

In accordance with this clear statutory directive, the Fourth District held that Desai’s cause of action arose out of his application for reappointment to the medical staff, governed by Section 395.0191(7), and that he must properly allege intentional fraud to avoid statutory immunity. None of the decisions cited by Desai conflict with this holding.

Moreover, the Fourth District’s direction to the trial court to dismiss the complaint was nothing more than a necessary consequence of the court’s legal determination that Desai failed as a matter of law to plead a claim sufficient to overcome the statutory immunity granted by section 395.0191.

This Court should decline review.

### **ARGUMENT**

#### **I. There Is No Express And Direct Conflict; To The Contrary, The Fourth District’s Decision Is In Accord With Existing Precedent.**

Desai’s claim indisputably arises out of the reapplication process and is, therefore, governed by section 395.0191, Florida Statutes. As held by the Fourth District in applying the statute’s unambiguous statutory mandate, because Desai failed to plead fraud with specificity and particularity, the Hospital is immune from suit. None of the cases cited by Desai conflict with the Fourth District’s decision.

Desai first asserts that the First District’s decision in *Lawnwood Medical Center, Inc. v. Seeger*, 959 So. 2d 1222 (Fla. 1st DCA 2007), creates an express and direct conflict. Neither the First District’s *Seeger* decision nor this Court’s subsequent decision in *Lawnwood Medical Center, Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008), had any occasion to address statutory immunity in the context of medical staff appointments or reappointments pursuant to section 395.0191.

In *Seeger*, this Court struck down provisions of a special law that gave a private corporation, the Hospital, the right to override or unilaterally amend the medical staff bylaws and to unilaterally override medical staff recommendations regarding “hospital-based contractual services” (such as exclusive physician provider contracts, establishing new departments, terminating exclusive contracts, and the like), quality assurance, peer review, etc. While affirming the Board’s final authority to make these decisions, the Court held that the special law violated article III, section 11(a)(12), of the Florida Constitution, which prohibits a grant of “privilege” to a private corporation (and thus “prohibits special laws granting rights, benefits, and advantages to a corporation”). *Seeger*, 990 So. 2d at 514 (emphasis added).

*Seeger* clearly did not involve an action “arising out of or related to carrying out the provisions of [section 395.0191]” and thus had no occasion to address or consider the interpretation and application of section 395.0191



immunity to a hospital board's medical credentialing decision based on quality of patient care or medical competence issues. There is no conflict.

Next, Desai relies on another case where statutory immunity under section 395.0191 was not an issue: *Naples Community Hosp., Inc. v. Hussey*, 918 So. 2d 323 (Fla. 2d DCA 2005). In *Hussey*, the Second District reversed an injunction in favor of the doctor, holding that the hearing process described in the bylaws did not apply when a staff member was denied reappointment because of a business decision to enter into an exclusive contract with another provider. *Id.* at 326-27. Since statutory immunity under section 395.0191 was not presented to or addressed by the court in *Hussey*, no express and direct conflict can exist with the decision of the Fourth District below.

Likewise, *University Community Hosp., Inc. v. Wilson* involved the termination of an exclusive provider contract based on a business decision (as opposed to quality of care issues). 1 So. 3d 206 (Fla. 2d DCA 2008). The issue of statutory immunity under Chapter 395 was not raised or discussed. *Id.*

Desai next asserts that the Fifth District's decision in *Lawler v. Eugene Wuesthoff Memorial Hosp. Ass'n*, 497 So. 2d 1261 (Fla. 5th DCA 1986), is in direct conflict with the Fourth District's decision. In *Lawler*, the doctor alleged that the hospital acted maliciously and that he was removed from the medical staff "without adequate notice . . . , without an opportunity to defend and without

a fair hearing before an impartial body.” *Id.* at 1263-64. The court in *Lawler* determined that those allegations were sufficient to establish that the hospital did not act with “good faith and without malice,” as was necessary for qualified immunity under the (now obsolete) statute. *Id.* (quoting § 395.065, Fla. Stat. (1981)).

The *Lawler* court recognized and applied the statutory immunity provisions applicable at the time, and determined that the doctor there satisfied those requirements. The Fourth District employed the same analysis here, only with a different result: unlike in *Lawler*, the doctor here failed to present allegations sufficient to overcome qualified statutory immunity. *Lawler*, therefore, is in accord with the Fourth District’s treatment of the current statutory immunity provision, which bars suit absent intentional fraud.

Desai’s discussion of *Lawler* fails altogether to acknowledge there has long been—and still is in the form of section 395.0191—a statutory pleading requirement to avoid qualified immunity from suit based on actions taken by a hospital governing board in the appointment or reappointment process. There is no express and direct conflict.

Desai’s reliance on *Palm Springs General Hosp., Inc. v. Valdes*, 784 So. 2d 1151 (Fla. 3d DCA 2001), is likewise misplaced. In *Valdes*, there was no mention of statutory immunity. Implicit in the *Valdes* opinion, however, is a

recognition that the plaintiff had sufficiently pled and proved facts that avoided the immunity otherwise provided under the statute at issue. *Id.* at 1153 (noting that the hospital did not dispute the doctor was not accorded notice, hearing and due process in the suspension of his privileges). Again, the decision fails to present any conflict, let alone an express and direct conflict.

Finally, Desai cites to the Fourth District's decision in *Lawnwood Medical Center, Inc. v. Sadow*, 43 So. 3d 710 (Fla. 4th DCA 2010). Not only did the Fourth District explain in its decision below that *Sadow* had no application here because that suit did not arise out of the appointment statute, A1 at 1030-31, but *Sadow* cannot be a basis for this Court's review as it too came out of the Fourth District. *State v. Walker*, 593 So. 2d 1049, 1050 (Fla. 1992).

Not only do the decisions relied on by Desai fail to create an express and direct conflict with the Fourth District's decision, but several other District Court decisions recognize the application of statutory immunity in similar circumstances. For example, In *Noble v. Martin Mem'l Hosp. Ass'n, Inc.*, 710 So. 2d 567, 567-68 (Fla. 4th DCA 1997), a physician subject to disciplinary proceedings brought various claims against a hospital and individuals, based on conspiracy and an alleged breach of the hospital bylaws.

The Fourth District affirmed a summary judgment for defendants and held that plaintiffs are required to plead intentional fraud with particularity in order to

overcome the defendants' immunity under section 395.0193. *Noble*, 710 So. 2d at 568-69; *see also Brumer v. HCA Health Servs. of Fla., Inc.*, 662 So. 2d 1385, 1386 (Fla. 4th DCA 1995) (plaintiff physician seeking to sue hospital for breach of contract relating to staff privileges must plead fraud with particularity to avoid immunity from suit under predecessor to section 395.0193, Florida Statutes).

The Third District reached a similar result in *Cedars Healthcare Group, Ltd. v. Mehta*, 16 So. 3d 914 (Fla. 3d DCA 2009). In *Mehta*, the plaintiff/physician's hospital staff privileges were suspended and then reinstated, with conditions. *Id.* at 916. After exhausting his administrative remedies, the plaintiff sued for breach of the medical staff bylaws, tortious interference, and infliction of emotional distress. *Id.* The trial court denied a motion to dismiss the claims and failed to apply the immunity provisions of section 395.0193. *Id.*

The Third District granted certiorari and quashed the trial court's order, holding that section 395.0193(5) offers immunity for "any action taken without intentional fraud in carrying out the provisions of this section [395.0193]." To fall outside of the immunity provided by subsection 395.0193(5), plaintiffs were required to plead intentional fraud with particularity." *Mehta*, 16 So. 3d at 917 (quoting § 395.0193(5), Fla. Stat.; footnote omitted). The Fourth District's decision is in accord with this precedent.

Desai has presented no express and direct conflict, and this Court should

decline review.

**II. The Fourth District's Instruction To Dismiss The Complaint Was A Necessary Consequence Of Desai's Failure To Overcome The Statutory Bar Against Suit.**

Desai asserts that the Fourth District erred in remanding the case to the trial court with instructions that the complaint be dismissed. According to Desai, the court should not have gone beyond reversing the temporary injunction. Desai fails to recognize that the Fourth District held, as the basis for reversing the injunction, Desai's complaint failed to allege fraud with specificity and particularity as is required to overcome statutory immunity from suit. Dismissal of the complaint was nothing more than a necessary consequence of the Fourth District's holding.

None of the decisions cited by Desai expressly and directly conflict with the Fourth District's instruction here. Desai's reliance on *Hitt v. Homes & Land Brokers, Inc.*, 993 So. 2d 1162, 1165 (Fla. 2d DCA 2008), is misplaced. The Second District in *Hitt* merely held that an order addressing subject matter jurisdiction is not immediately appealable pursuant to rule 9.130. That holding has nothing to do with the situation here, and certainly does not expressly and directly conflict with the Fourth District's decision.

Desai next asserts that the Fourth District erred in holding that the complaint failed to allege a fraud with specificity and particularity and, in so

holding, improperly relied on *Feldman v. Glucroft*, 580 So. 2d 866 (Fla. 3d DCA 1991). The decision below merely cited *Feldman* as an example of where conclusory allegations, such as those in Desai's complaint, are insufficient to overcome statutory immunity. A1 at 1030. More to the point, rather than attempting to present an express and direct conflict, Desai is improperly attempting to address the merits of the Fourth District's decision.

There is no express and direct conflict here. The Court should decline review.

### **CONCLUSION**

Based on the foregoing, the Hospital respectfully requests that the Court decline review.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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