

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No.: SC17-1493
L.T. Case No.: 4D15-4408

ANIL DESAI, M.D.,

Petitioner,

vs.

LAWNWOOD MEDICAL CENTER, INC.,

Respondent.

RESPONDENT'S ANSWER BRIEF

On Review from the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

A. Nature Of The Case.

Petitioner Anil Desai, M.D. seeks review of a Fourth District decision affirming the dismissal of Dr. Desai's Third Amended Complaint for failure to exhaust his available administrative remedies before filing suit. Dr. Desai sued Respondent Lawnwood Medical Center, Inc. (the "Hospital") after the Hospital denied his application for reappointment to the medical staff. The Hospital denied his application because of quality of patient care concerns, medical competence issues, and disruptive behavior. The Hospital notified Dr. Desai of its decision and his rights to administrative review under the Hospital Board's Fair Hearing and Appellate Review Procedures, but Dr. Desai refused to participate and pursue his available administrative remedies.

Dr. Desai's position is that he never agreed to be bound by the Board's Fair Hearing and Appellate Review Procedures, and that the Board's administrative procedures conflict with and impair the Medical Staff Bylaws, which is a contract between the medical staff and the Hospital Board. Finally, Dr. Desai asserts that this Court has conflict jurisdiction because the decision below conflicts with this Court's decision in *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503 (Fla. 2008).

It is the Hospital's position that Dr. Desai ***did agree*** to be bound by the Hospital Board's policies and procedures, which include the Fair Hearing and Appellate Review Procedures, as evidenced by Dr. Desai's application for reappointment to the medical staff and his Undertaking and Affirmation. Moreover, both state and federal law require the Hospital (indeed, all hospitals) to provide an administrative remedy and an appeal for decisions by the Hospital Board that adversely affect a physician's medical staff privileges. Dr. Desai was required to exhaust these legally required and ***available*** administrative remedies before filing suit. There is no impairment or unilateral amendment to the Medical Staff Bylaws because the Board's policies and administrative procedures provide for a situation not covered by the Medical Staff Bylaws (that is, when a decision of the ***Hospital Board*** denies or adversely affects medical staff privileges).

Finally, there is no conflict with *Seeger*. This case involves implementation of a legally required Hospital Board procedure for administrative review and appeal of its adverse decisions. *Seeger* involved an unconstitutional special law that granted a special privilege to a private corporation, and it has no application here.

The Hospital sets forth the following Statement of the Facts and Proceedings because Dr. Desai's Statement omits certain "facts" and portions of the procedural history that are necessary to understand the issues and their context. Dr. Desai

argues that because his case was dismissed on a motion to dismiss, the only “facts” that matter are the allegations of the Third Amended Complaint, which must be accepted as true. This view of the “facts” and procedural history is too limited. There was a full evidentiary hearing on Dr. Desai’s Motion for a temporary injunction, as well as two appeals to the Fourth District which established certain facts of this case. Furthermore, Dr. Desai’s Complaint was dismissed for failure to exhaust administrative remedies, not for failure to state a cause of action.

B. Statement Of The Facts And Proceedings.

In accordance with the Medical Staff Bylaws, physicians on the medical staff must apply for reappointment to the medical staff every two years. The Medical Staff Bylaws incorporate the Hospital’s bylaws, rules, and regulations.

In particular, Article VI-Part B, section 2(d) of the Medical Staff Bylaws requires that each applicant for appointment to the medical staff: (i) acknowledge that they have received and read a copy of the “*hospital and* medical staff bylaws, rules and regulations” in effect at the time of the application; and (ii) “agree[] to be bound by the terms thereof in all matters relating to consideration of his application[.]” (R.287 (emphasis added)).¹

¹ Citations to the Confidential Record on Appeal will be in the form of R.[Page Number]. Citations to the Non-Confidential Record on Appeal will be in the form of NR.[Page Number].

Two years before Dr. Desai submitted his application for reappointment to the medical staff, the Hospital Board adopted its Fair Hearing and Appellate Review Procedures. (R.1861). As required by Florida and federal law, those procedures provide an administrative review and appeal process if the Board denies reappointment after a favorable recommendation by the Medical Executive Committee (“MEC”).

In September of 2009, Dr. Desai submitted an application to the Hospital requesting reappointment to the medical staff. (R.1184). In support of his application, Dr. Desai signed a document titled “Applicant’s Undertaking and Affirmation.” (NR.4031). By signing the “Affirmation,” Dr. Desai specifically acknowledged and agreed to the following:

I acknowledge that (1) medical staff appointment and clinical privileges at this facility are not a right, (2) my request will be evaluated in accordance with prescribed procedures defined in the ***facility and medical staff bylaws and rules and regulations***, (3) all medical staff recommendations relative to my application are subject to the ultimate action of the facility’s Board whose decision shall be final, Appointment/Reappointment and clinical privileges shall be granted only on formal application according to ***facility and medical staff bylaws and rules and regulations*** and upon formal approval of the facility Board.

Id. (emphases added). Thus, both with his acceptance of the Medical Staff Bylaws and with his Affirmation, Dr. Desai expressly agreed to be bound by the Hospital rules and regulations, which include the Fair Hearing and Appellate Review Procedures.

In accordance with the Medical Staff Bylaws, Dr. Desai's application for reappointment was referred to the Recredentials Committee and the MEC for a review and recommendation based on all available information regarding Dr. Desai's professional and clinical competence and behavior for the preceding two years. (R.2375-2376, 2391-2394). During this process, the Hospital's Chief Executive Officer, Rodney Smith, asked the Recredentials Committee and the MEC to investigate serious quality of care and conduct issues concerning Dr. Desai. (R.2508-2509, 2511-2514, 2635-2639).

In letters dated November 16, 2009, Mr. Smith specifically detailed several major events involving Dr. Desai, which raised serious issues regarding quality of patient care, medical competence, and disruptive behavior. (R.2511-2514, 2635-2639). These events included:

- Use of contaminated specimens and misdiagnosis of cancer (March 25, 2009) (R.2512);
- Insertion of erroneous or false information in a pathology report, regarding a Leukemia diagnosis, and preparation of a report not supported by the clinical record (June 25, 2009) (R.2513);
- Dictation of erroneous or false information in a pathology report (June 25, 2009) (R.2513);
- Refusal to communicate or cooperate with referring physicians (April 22, 2009) (R.2512-2513);
- Disruptive physician conduct and false statements regarding dictation and transcription of lab reports (May 28, 2009) (R.2512);

- Failure to follow established procedures as required by the College of American Pathology accreditation standards (November 13, 2009) (R.2508, 2514);
- Disruptive behavior at an MEC meeting and refusal to comply with a corrective action plan to resolve issues pertaining to Dr. Desai's quality of care and medical competence issues (August 21, 2009) (R.2513);
- Allowing an unauthorized person, not approved for medical staff privileges, access to hospital facilities and confidential patient records (including Dr. Desai's secure password) to cover for Dr. Desai while he was away (June 2, 2009) (R.2513).

In his November 13th letter to the MEC, Mr. Smith expressed concern that Dr. Desai's refusal to follow the College of American Pathology standards was a threat to the "life or well-being of patients," as well as the Hospital's accreditation. (R.2508-2509).

Copies of these letters, with detailed document enclosures, were delivered to Dr. Desai, as well as every MEC and Recredentials Committee member. (R.2508-2509, 2511-2514, 2522, 2616, 2635-2639). Dr. Desai also attended each meeting of the MEC and the Recredentials Committee that involved review of his application for reappointment and the quality of care, medical competence, and behavior issues that had been raised. (R.681-682, 692, 2258-2259, 2491, 2516-2518).

The MEC met on November 23, 2009, to consider the Board's concerns regarding Dr. Desai and his application for reappointment. (R.2258, 2260, 2266).

The MEC dismissed or disregarded the detailed events concerning Dr. Desai as being outside the review period, inconsequential, or resolved. (R.2503-2504, 2505-2506); *see also Lawnwood Med. Ctr., Inc. v. Desai*, 54 So. 3d 1027, 1028 (Fla. 4th DCA 2011). This decision was contrary to the dates and specific information provided to the MEC. (R.2508-2509, 2511-2514, 2635-2639). At its December 8, 2009 meeting, the MEC voted to recommend that Dr. Desai be reappointed to the medical staff for two years with no qualifications or conditions, despite the issues and concerns raised by the Hospital. (R.2262, 2442-2443).

By letter of December 3, 2009, the Hospital Board notified Dr. Desai that it would consider his application for reappointment at a meeting scheduled for December 9th. (R.2262, 2444-2445). The Board invited Dr. Desai to attend the meeting, with counsel, and Dr. Desai accepted the invitation by letter of December 4, 2009. (R.2453, 2523). Dr. Desai did not request additional information, documents, or to postpone the meeting. *Id.*

Both Dr. Desai and his attorney appeared at the Board meeting on December 9th. (R.2447). Attorneys for the Hospital gave a power point presentation to the Board regarding Dr. Desai's application for reappointment. (R.2263); *see also Desai*, 54 So. 3d at 1028-29. The presentation included information about the quality of care, medical competence, and disruptive behavior issues, which had previously been made available to the Recredentials Committee and the MEC.

(R.2519-2633). Dr. Desai was told that he would be allowed to speak, and he addressed the Board. (R.2555, 2562-2566, 2568). However, Dr. Desai apparently became upset at the presentation and left the meeting before it concluded. (R.2448, 2576-2577). The Board ultimately voted to deny Dr. Desai's application for reappointment. (R.2286, 2451-2453).

Dr. Desai was offered the opportunity for a formal hearing and an appeal under the Board's Fair Hearing and Appellate Review Procedures, which would have automatically continued his medical staff privileges until the Board's decision became final. (R.1861-1869, 2451-2453). The Board offered to furnish Dr. Desai with copies of the Board meeting packet, power point presentation with supporting documents, and a transcript of the meeting. (R.2454-2455). The only condition was for Dr. Desai to sign a confidentiality agreement. *Id.*

Instead of pursuing his available administrative remedies under the Board's Fair Hearing and Appellate Review Procedures, Dr. Desai filed suit against the Hospital. (R.19-215).

Had Dr. Desai elected to pursue his rights to administrative review, his rights under the Fair Hearing and Appellate Review Procedures would have included:

- Notice of the proposed action;
- A hearing before a mutually-acceptable arbitrator, hearing officer, or panel of three individuals not in competition with Dr. Desai;

- Notice of hearing and a list of witnesses;
- The right to appear, right to be represented by an attorney, the right to call, examine and cross-examine witnesses, to present relevant evidence, and submit a written closing statement;
- The right to review that records to be relied upon at the hearing;
- The right to review the recommendation of the arbitrator or hearing officer or panel and the written decision of the Board; and
- The right to an appeal of the Board's written decision within 30 days of the date of the request for an appeal before a review panel.

(R.1861-1869).

If Dr. Desai had elected to pursue his rights under the Board's Fair Hearing and Appellate Review Procedures, the Board's decision to deny his application for reappointment ***would have been stayed and he would have remained on the medical staff*** pending a final decision. (R.1862-1863, 1867-1868).

After filing suit, Dr. Desai moved for an evidentiary hearing and obtained a temporary injunction from the trial court, ordering the Hospital to place Dr. Desai back on staff. The Hospital appealed. On appeal, the Hospital argued that it was immune from a suit under section 395.0191, Florida Statutes, for its credentialing decision to grant or deny reappointment to the medical staff, absent evidence of intentional fraud. The Fourth District agreed that Dr. Desai failed to allege evidence of extrinsic fraud, with particularity, in order to overcome the Hospital's

immunity. Thus, the Fourth District reversed the trial court's temporary injunction and remanded for dismissal of the complaint. *Lawnwood Med. Ctr., Inc. v. Desai*, 54 So. 3d 1027 (Fla. 4th DCA 2011).

The trial court then gave Dr. Desai several more chances to amend his cause of action, and this case continued in the trial court for several years. After the dismissal of Dr. Desai's first three complaints, Dr. Desai filed a Third Amended Complaint. (R.2249-2300, 2302-2449, 2451-2665). The Hospital moved to dismiss based on, among other grounds, Dr. Desai's failure to exhaust his available administrative remedies. (R.2667-2679).

The Hospital argued that Dr. Desai was required to pursue the Fair Hearing and Appellate Review Procedures and exhaust his available administrative remedies before filing suit. (R.2674-2676). Based on Dr. Desai's failure to avail himself of these remedies, the Hospital argued that the trial court should dismiss the action. (R.2678).

The trial court agreed, ruling that Dr. Desai was required to avail himself of the Hospital's "extensive administrative procedures for evaluating and acting upon applications for initial appointment and reappointment to the medical staff, and for fair hearing and appellate review if an application is denied." (R.3052-3056, 3191-3195).

Dr. Desai appealed, arguing that the Fair Hearing and Appellate Review Procedures infringed on his constitutional right of access to courts, that the review procedures constituted an impermissible amendment to the Medical Staff Bylaws, and that the exhaustion doctrine does not apply to private entities. *Desai v. Lawnwood Med. Ctr., Inc.*, 219 So. 3d 869, 870-71 (Fla. 4th DCA 2017). As the Fourth District acknowledged in its opinion, this Court has held that the Hospital's board of trustees has the final decision-making authority in credentialing decisions. *Id.* (citing *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 506 (Fla. 2008)).

In addressing Dr. Desai's argument that the review procedures constitute an impermissible amendment to the Medical Staff Bylaws, the Fourth District explained: "The fair hearing procedures were enacted more than two years before the Doctor's application for reappointment was submitted and, regardless, the medical staff bylaws do not provide a review procedure for the board's rejection of a recommendation that a doctor be reappointed. Thus, the board's fair hearing procedures do not impermissibly amend the medical staff bylaws. Rather, they cover a situation that is not provided for by the medical staff bylaws." *Id.* at 872.

There was no unilateral amendment to the medical staff bylaws because (a) the fair hearing procedures were already in place long before Dr. Desai put in his application for reappointment, and (b) in any event, the fair hearing procedures

are mandated by Florida law and address a situation that is not covered by the Medical Staff Bylaws. *Id.*

The Fourth District also rejected Dr. Desai's argument that the exhaustion doctrine does not apply to private entities, citing "*Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High School*, 867 So. 2d 1281, 1288 (Fla. 5th DCA 2004) ('As a general rule, when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court.');" *Nat'l Collegiate Athletic Ass'n v. Brinkworth*, 680 So. 2d 1081, 1084 (Fla. 3d DCA 1996) ('Under Florida law . . . a court may intervene in the internal affairs of a private association only in exceptional circumstances.')." *Desai*, 219 So. 3d at 872.

Dr. Desai then sought review with this Court, based on an alleged express and direct conflict with this Court's decision in *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 506 (Fla. 2008), and *Florida High School Athletic Association* and *National Collegiate Athletic Association*. It is the Hospital's position that no conflict exists with those decisions and that jurisdiction for review was improvidently granted.

SUMMARY OF THE ARGUMENT

Each of Dr. Desai's arguments is premised on the idea that the Fair Hearing and Appellate Review Procedures were forced upon him without his knowledge or consent. To the contrary, the Fair Hearing and Appellate Review Procedures were in place for two years prior to Dr. Desai's submission of his application for reappointment to the medical staff. And, on two occasions during that process, Dr. Desai agreed to the Hospital's rules and regulations, which include the Fair Hearing and Appellate Review Procedures. For that reason alone, Dr. Desai's arguments fail and the Fourth District's decision should be affirmed.

Even if this were not dispositive, the issues raised by Dr. Desai lack merit. Dr. Desai first argues that Florida law does not actually require Florida hospitals to provide a review procedure when the Board denies a doctor's application for reappointment after a favorable recommendation by the MEC. Section 395.0191(4) and its implementing administrative rule expressly provide that "[t]he governing body shall . . . provide a procedure for hearings and appeals on ***all actions*** concerning appointment, reappointment or dismissal." Fla. Admin. Code R. 59A-3.272(4) (emphasis added). The Hospital has done no more and no less than what is required by Florida (and federal) law.

Florida law requires the exhaustion of available administrative remedies before filing suit. This is especially pertinent in light of Florida's public policy in

favor of keeping peer review and credentialing decisions out of court unless strict requirements are satisfied. State and federal law require **all** hospitals to provide an administrative review and appeal process for all adverse credentialing decisions by hospital boards. Here, the Hospital provided the statutorily mandated administrative review and appeal process, and Dr. Desai was required to exhaust his available administrative remedy before going to court.

Dr. Desai next argues that the Fair Hearing and Appellate Review Procedures “impair” his rights under the Medical Staff Bylaws. To the contrary, those procedures do not negatively impact the rights of the medical staff at all. If a member of the medical staff follows the Fair Hearing and Appellate Review Procedures, the Board’s decision to deny reappointment does not become final until after the process is complete, and staff privileges remain in place pending the appeal process. Had Dr. Desai availed himself of those procedures (as he had agreed to do), his right to challenge the Board’s decision in court once it became final would not have been abridged in any way.

Dr. Desai’s final argument is that he could not be required to comply with the Fair Hearing and Appellate Review Procedures because he did not consent to them. As explained above, however, Dr. Desai **did** agree to be bound by the Hospital rules and regulations (twice), which include the Fair Hearing and Appellate Review Procedures.

Moreover, the Fourth District’s decision does not conflict with *Florida High School Athletic Association* and *National Collegiate Athletic Association*. The Fourth District relied on those cases for the unremarkable proposition that “the fact that the Hospital is a private entity does not render its administrative remedies unenforceable.” *Desai*, 219 So. 3d at 872. The Fourth District went no further than that statement in its holding.

Nor is there an express and direct conflict with *Seeger*. Unlike the special law at issue there—which “dramatically alters many of the rights and obligations specified in the contract between the appellant’s medical staff and board of trustees”—the Fair Hearing and Appellate Review Procedures here do no more than implement the requirements of Chapter 395. In direct contrast to the special law at issue in *Seeger*, the Hospital receives no special “privilege” as a result of the Fair Hearing and Appellate Review Procedures. And, in the end, those procedures do not impair the rights of the medical staff in any way.

The Fourth District’s decision should be affirmed or, given the lack of any express and direct conflict, this appeal should be dismissed.

ARGUMENT

Before addressing the issues as framed by Dr. Desai, the Hospital must reiterate that those issues are premised on facts that are demonstrably false and arguments that are directly contrary to Florida law. Most apparent, each of the issues raised by Dr. Desai relies on his assertion that the Fair Hearing and Appellate Review Procedures were thrust upon him without his knowledge or consent. To the contrary, Dr. Desai expressly agreed to those procedures not once, but twice.

The Fair Hearing and Appellate Review Procedures were in place for over two years before Dr. Desai applied for reappointment to the medical staff. Article VI-Part B, section 2(d) of the Medical Staff Bylaws requires that each applicant for appointment to the medical staff: (i) acknowledge that they have received and read a copy of the “**hospital and** medical staff bylaws, rules, and regulations” in effect at the time of the application; and (ii) “agree[] to be bound by the terms thereof in all matters relating to consideration of his application[.]” (R.287 (emphasis added)).

As a result, when Dr. Desai submitted an application to the Hospital requesting reappointment to the medical staff in September of 2009, Dr. Desai agreed to be bound by the Fair Hearing and Appellate Review Procedures.

Equally dispositive, in support of his application, Dr. Desai signed an “Applicant’s Undertaking and Affirmation,” wherein Dr. Desai specifically acknowledged and agreed as follows:

I acknowledge that (1) medical staff appointment and clinical privileges at this facility are not a right, (2) my request will be evaluated in accordance with prescribed procedures defined in the **facility and medical staff bylaws and rules and regulations**, (3) all medical staff recommendations relative to my application are subject to the ultimate action of the facility’s Board whose decision shall be final, Appointment/Reappointment and clinical privileges shall be granted only on formal application according to **facility and medical staff bylaws and rules and regulations** and upon formal approval of the facility Board.

(NR.4031) (emphases added).

Having agreed to abide by the Fair Hearing and Appellate Review Procedures, Florida law is clear that Dr. Desai was required to exhaust those administrative remedies before filing suit. *Baptist Health Sys. of S. Fla., Inc. v. Rae*, 753 So. 2d 752, 752 (Fla. 3d DCA 2000); *Zakharia v. Cedars Healthcare Group*, Case No. 07-09432, 2007 WL 4565133, ¶¶ 1, 2, 26 (Fla. 11th Cir. Ct. July 17, 2007) (denying injunctive relief regarding suspension of staff privileges, because plaintiff failed to exhaust his administrative remedies).

Indeed, decisions from around the country likewise hold that the exhaustion requirement applies to physicians in the context of hospital staff privilege matters. *E.g., Nemazee v. Mt. Sinai Med. Ctr.*, 564 N.E.2d 477, 482 (Ohio 1990); *Eidelson v. Archer*, 645 P.2d 171, 173 (Alaska 1982); *Bartschi v. Chico Community*

Memorial Hospital, 137 Cal.App.3d 502, 504, 508 (Cal. 1982); *Garrow v. Elizabeth Gen. Hosp. & Dispensary*, 401 A.2d 533, 538 (N.J. 1979); *Brooks v. Arlington Hosp. Assn.*, 850 F.2d 191 (4th Cir. 1988); *Qasem v. Kozarek*, 716 F.2d 1172 (7th Cir. 1983); *Shulman v. Washington Hosp. Ctr.*, 348 F.2d 70 (D.C. Cir. 1965).

Given that the record reflects that Dr. Desai agreed to be bound by the administrative remedies at issue here, it is beyond dispute that Dr. Desai was required to exhaust those remedies before filing suit. His failure to do so required the dismissal of the underlying action. *Odham v. Foremost Dairies, Inc.*, 128 So. 2d 586, 593 (Fla. 1961) (“where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act”); *Dist. Bd. of Trs. of Broward Cmty. Coll. v. Caldwell*, 959 So. 2d 767, 770-71 (Fla. 4th DCA 2007); *Florida Dep’t of Agric. & Consumer Servs. v. City of Pompano Beach*, 792 So. 2d 539, 545 (Fla. 4th DCA 2001).

This result is dispositive, both of the issues raised by Dr. Desai and the purported conflict jurisdiction upon which this Court’s review is premised. The Court, therefore, should either affirm the Fourth District’s decision or dismiss this appeal for lack of jurisdiction.

I. The Fair Hearing and Appellate Review Procedures Were Implemented In Accordance With And As Required By Florida And Federal Law.

Given the dispositive outcome resulting from Dr. Desai's agreement to follow the Hospital's administrative procedures, further analysis should be unnecessary. Nonetheless, the Hospital will briefly address the additional failures in the arguments raised by Dr. Desai.

Dr. Desai asserts that section 395.0191 does not actually require Florida hospitals to provide a review procedure where the Board denies a doctor's application for reappointment after a favorable recommendation by the MEC. Dr. Desai's reading of Florida law is incorrect.

Section 395.0191(5), Florida Statutes, provides that "[t]he governing board of each licensed facility shall set standards and procedures to be applied by the licensed facility and its medical staff in considering and acting upon applications for staff membership or clinical privileges." The implementing administrative rule provides that "[t]he governing body shall . . . provide a procedure for hearings and appeals on **all actions** concerning appointment, reappointment or dismissal." Fla. Admin. Code R. 59A-3.272(4) (emphasis added). The rule then provides a specific mandate in directing that "[t]he governing body shall establish a procedure for an applicant for privileges to appeal an adverse decision, and shall establish a time-limited period for rendering a final decision after the appeal." Fla. Admin. Code R. 59A-3.272(4)(g).

Federal law also requires that the Hospital Board provide procedures for administrative review and appeal of its decisions that are adverse to a physician. *See* Federal Healthcare Quality Improvement Act, 42 U.S.C. § 11101, *et seq.* (“HCQIA”). HCQIA requires that the hospital provide adequate notice and a hearing to physicians involved in a peer review proceeding. 42 U.S.C. § 11112(a), (b). Section 11112(b)(3)(A) requires that the hearing be conducted before an officer appointed by the entity, who is not in direct economic competition with the physician, a mutually acceptable arbitrator, or before a panel of non-competitor individuals. In the hearing, the physician has the right to representation by an attorney; to have a record made of the proceedings; to call, examine, and cross-examine witnesses; to present evidence determined to be relevant by the hearing officer; and, to submit a written statement at the close of the hearing. 42 U.S.C. § 11112(b)(3)(C).

Far from conflicting with section 395.0191, the Hospital’s Fair Hearing and Appellate Review Procedures are ***required*** by that very statute and its implementing rule (as well as federal law). Dr. Desai attempts to avoid the plain language of the governing Florida law by arguing that the fair hearing and appeal procedure is actually nothing more than a kangaroo court. Thus, Dr. Desai concludes, the procedure conflicts with the intent of Chapter 395. Dr. Desai’s

position is not supported by the provisions of the Fair Hearing and Appellate Review Procedures.

Under the Board's Fair Hearing and Appellate Review Procedures, Dr. Desai had the right to a full evidentiary hearing before a mutually acceptable arbitrator, hearing officer, or a panel of three individuals, who may be physicians on the medical staff. Dr. Desai had the right to written notice of the proposed adverse action and its reasons, as well as a notice of hearing and a list of witnesses expected to testify. Dr. Desai also had the following additional rights: (i) the right to appear and testify; (ii) the right to be represented by an attorney; (iii) the right to call, examine and cross-examine witnesses, to present relevant evidence; (iv) the right to review any records the Hospital would rely upon at the hearing; and (v) the right to submit a written closing statement. (R.1861-1870).

The arbitrator, hearing officer, or a panel of three individuals would have been required to provide Dr. Desai written findings and recommendations, and he had the right to review the findings and recommendations before the Board took final action. (R.1863-1865). After the Board issued its final written decision, Dr. Desai had a right to an appeal by a review panel. (R.1867-1868).

Finally, had Dr. Desai availed himself of the Board's Fair Hearing and Appellate Review Procedures, the Board's decision to deny reappointment would have been ***automatically stayed and he would have maintained his medical staff***

privileges pending the review and appeal process. (R.1862-1863, 1867-1868).

Nothing about that process suggests that the Board has unilaterally implemented a procedure to undermine the authority of the medical staff, in violation of Chapter 395. Ultimately, Dr. Desai's issue appears to be with the Legislative directive that Florida hospitals provide an internal appeal procedure for adverse credentialing decisions by the hospital board as a condition for licensure. This, however, is not a basis to avoid either the statutory mandate, or the administrative procedures to which Dr. Desai expressly agreed to be bound.

The Legislature has made it clear that the Board has the final authority in credentialing and re-credentialing decisions. § 395.0191(4), Fla. Stat.; *Desai*, 54 So. 3d at 1028. The Legislature has likewise made it clear that hospitals are required to implement an internal review and appeal process to review the Board's preliminary decision. § 395.0191(4), Fla. Stat.; Fla. Admin. Code R. 59A-3.272(4). The Hospital here has followed that legislative intent by providing the Fair Hearing and Appellate Review Procedures. Dr. Desai failed to abide by those procedures, and his lawsuit was properly dismissed as a result.

II. The Fair Hearing and Appellate Review Procedures Do Not Impair The Medical Staff Bylaws.

Here, Dr. Desai argues that the Fair Hearing and Appellate Review Procedures “impair” the Medical Staff Bylaws. The Fair Hearing and Appellate Review Procedures, however, were in place long before Dr. Desai agreed to them, and they deal with circumstances that the Medical Staff Bylaws do not address. Moreover, the Hospital is required by Florida and federal law to provide appeal procedures. There is no room for reasonable dispute on these points. For these reasons alone, Dr. Desai’s argument fails.

A review of the Fair Hearing and Appellate Review Procedures themselves confirm that there is no impairment of any provision of the Medical Staff Bylaws. All of the provisions of the Fair Hearing and Appellate Review Procedures are aimed at permitting the Hospital to find and address issues internally before the court system becomes involved. *See supra* at 19-22.

Florida’s public policy requiring the exhaustion of those internal review and appeal procedures ***before*** filing suit in court dovetails with the substantial public policy considerations underlying and supporting the discovery privilege and grant of immunity to governing bodies. *See Feldman v. Glucroft*, 522 So. 2d 798, 801 (Fla. 1988); *Holly v Auld*, 450 So. 2d 217, 219-20 (Fla. 1984). As this Court explained:

In an effort to control the escalating cost of health care in the state, the

legislature deemed it wise to encourage a degree of self-regulation by the medical profession through peer review and evaluation. . . .

. . .

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.

Feldman, 522 So. 2d at 800-01 (quoting *Holly*, 450 So. 2d at 219-20).

This rationale applies equally here, where Dr. Desai complains about having to comply with the legislatively mandated internal review process before going to court.

The Legislature recognized that an effective credentialing process depends on statutory protections and qualified immunity for those involved in the review and approval process. *See Feldman*, 522 So. 2d at 801; *Holly*, 450 So. 2d at 219-20. The statutorily mandated internal review procedure further promotes a full and complete credentialing process before a final decision is made. Both the Fair Hearing and Appellate Review Procedures and the Medical Staff Bylaws work together towards that goal.

On an even more basic level, the Fair Hearing and Appellate Review Procedures do not negatively impact the rights of the medical staff—including Dr. Desai—in any way. If a member of the medical staff follows the Fair Hearing

and Appellate Review Procedures, the Board's decision to deny reappointment does not become final until after the process is complete, and staff privileges remain in place pending this process. (R.1862-1863, 1867-1868). As applied here, Dr. Desai's right to challenge the decision in court once it became final would not have been abridged in any way if he had exhausted his administrative remedies, as he had previously agreed to do.

Nonetheless, Dr. Desai asserts that the Fair Hearing and Appellate Review Procedures impair the Medical Staff Bylaws because: (1) there is no "independent judge," (2) there is no discovery, and (3) there is a presumption in favor of the Board's preliminary decision. Initial Br. at 13-14. At the outset, it is unclear how those circumstances would impair any particular provision of the Medical Staff Bylaws.

Moreover, Dr. Desai fails to recognize that the Fair Hearing and Appellate Review Procedures are not the beginning of the credentialing process. Before the Board makes its initial decision, an extensive process takes place where evidence is presented, vetted, considered, and reviewed—a process where Dr. Desai was fully permitted to participate. The Fair Hearing and Appellate Review Procedures build on this existing process in order to provide the hospital system, including the Hospital **and** Dr. Desai, an opportunity to review the evidence and determine whether the Board's preliminary decision should become final.

Contrary to Dr. Desai's argument here, although the rights under the Fair Hearing and Appellate Review Procedures are substantial, they are not meant to provide a second *de novo* process. The appeal procedures complement the process leading up to the Board's preliminary decision, in accordance with section 395.0191's mandate. Providing additional discovery and *de novo* proceedings at that point would be antithetical to the statutory system created by the Florida legislature.

It should also be noted that Dr. Desai's suggestion that the person overseeing the appeal procedures is not "independent" is belied by plain language of the Fair Hearing and Appellate Review Procedures. The process is to take place before a mutually acceptable arbitrator, a hearing officer, or a panel of individuals not in competition with Dr. Desai. On its face, this simply is not an "unfair hearing process," as Dr. Desai suggests. Initial Br. at 14. Dr. Desai clearly disagrees with the Board's preliminary decision, but that is no excuse for ignoring the statutorily-mandated Fair Hearing and Appellate Review Procedures. We will never know what the result of that process would have been, as Dr. Desai refused to participate.

In sum, Dr. Desai has not identified any provision of the Medical Staff Bylaws that have been "impaired" by the Fair Hearing and Appellate Review Procedures. Nor could he, as those procedures do not abridge the right to challenge a negative credentialing decision in court.

III. Dr. Desai Agreed He Was Bound To Follow The Fair Hearing and Appellate Review Procedures.

In his final point, Dr. Desai argues that, because he did not agree to the Fair Hearing and Appellate Review Procedures, the Fourth District's decision conflicts with (i) *Florida High School Athletic Association*, (ii) *National Collegiate Athletic Association*, and (iii) *Seeger*. Of note, those three decisions form the purported express and direct conflict that provide this Court with jurisdiction.

As explained throughout this brief, Dr. Desai ***did*** agree to be bound by the Hospital rules and regulations (twice), which include the Fair Hearing and Appellate Review Procedures. As a result, Dr. Desai's entire argument fails. Equally important, for the same reason, the basis for this Court's jurisdiction likewise ceases to exist.

Nonetheless, it bears reiterating that, contrary to Dr. Desai's argument here, the Fourth District simply did not hold that a private entity can unilaterally impose administrative remedies without the consent of its staff. The Fourth District actually held that "the fact that the Hospital is a private entity does not render its administrative remedies unenforceable. *Fla. High Sch. Athletic Ass'n v. Melbourne Cent. Catholic High School*, 867 So. 2d 1281, 1288 (Fla. 5th DCA 2004) ('As a general rule, when a private organization has procedures for internal review of its decisions, those procedures must be exhausted before seeking redress from a court.');

Nat'l Collegiate Athletic Ass'n v. Brinkworth, 680 So. 2d 1081,

1084 (Fla. 3d DCA 1996) (‘Under Florida law . . . a court may intervene in the internal affairs of a private association only in exceptional circumstances.’).” *Desai*, 219 So. 3d at 872.

The limited argument advanced by Dr. Desai to the Fourth District was that administrative remedies by private entities are unenforceable. That argument is plainly wrong in light of *Florida High School Athletic Association* and *National Collegiate Athletic Association*, and the Fourth District held as much. Far from an express and direct conflict, the Fourth District’s decision entirely accords with those decisions.

In short, the Fourth District did not hold as Dr. Desai suggests. At no point did the Fourth District hold that a private entity can unilaterally impose administrative procedures on its staff without consent. Nor would it have made such a holding, ***as those are not the facts of this case.***

Dr. Desai’s reliance on *Seeger* for an express and direct conflict is likewise misplaced. There is no analogy to be drawn between the special law at issue in *Seeger* and the Fair Hearing and Appellate Review Procedures here.

In quoting the lower court, this Court explained that the special law at issue in *Seeger* “‘dramatically alters many of the rights and obligations specified in the contract between the appellant’s medical staff and board of trustees,’ constituting an impermissible privilege and an impermissible impairment of contract.” *Seeger*,

990 So. 2d at 508 (quoting *Lawnwood Med. Ctr., Inc. v. Seeger*, 959 So. 2d 1222, 1224 (Fla. 1st DCA 2007)). Moreover, the special law “was not required to protect the public health, ensure the quality of care at Lawnwood, or accomplish some other legitimate public purpose.” *Id.*

Directly contrary to the special law at issue in *Seeger*, there is no special “privilege” to the Hospital as a result of the Fair Hearing and Appellate Review Procedures. To the contrary, those procedures are required by Chapter 395 as a condition for the Hospital to maintain its license to operate. The Florida Legislature deemed such procedures necessary as part of the process to ensure quality healthcare for the residents of the state of Florida.

Ultimately, Dr. Desai’s position here is that the medical staff should be permitted to hold a hospital’s license hostage by refusing to agree to administrative procedures required by section 395.0191. The Hospital here has done no more and no less than what it is required to do by Chapter 395, Florida’s Administrative Code, and federal law. The Fourth District’s decision reflects this outcome. The decision below should be affirmed or, more appropriately, because there is no “express and direct conflict,” the Court should dismiss this appeal for lack of jurisdiction.

IV. The Arguments Advanced By The Amici Are Off Point And Do Not Alter The Result Here.

The briefs offered by the American Medical Association and the Association of American Physicians & Surgeons have not presented any issues that warrant an extended discussion. The Hospital will therefore only briefly address the issues raised in those briefs.

As a general matter, the AMA brief starts with the premise that Dr. Desai was wrongfully denied privileges by the Board, and then summarily concludes that, as a result, there should not have been a need for administrative review. In essence, the AMA argues that, because the Hospital allegedly treated Dr. Desai so badly, the Hospital's administrative procedures are *per se* improper and need not be followed. As explained above, neither the facts nor the law bear out this conclusion.

The AMA also asserts that Dr. Desai was required to "suffer[] the loss of his privileges while the hearing process wended its course." AMA Br. at 6. This is incorrect, as had Dr. Desai had elected to pursue his rights under the Board's Fair Hearing and Appellate Review Procedures, the Board's decision to deny his application for reappointment would have been stayed and he would have remained on the medical staff pending a final decision. (R.1862-1863, 1867-1868). Dr. Desai's ability to seek review in court would have not been impaired in any way had he followed the statutorily mandated administrative procedures.

The AAPS brief takes this incorrect premise further in arguing that public policy weighs in favor of doctors having “unfettered access” to the courts, without regard to administrative remedies. AAPS Br. at 13. This is directly contrary to Florida law, which expressly favors self-governance as a means of providing quality healthcare to Florida residents. *Feldman*, 522 So. 2d at 800-01 (“In an effort to control the escalating cost of health care in the state, the legislature deemed it wise to encourage a degree of self-regulation by the medical profession through peer review and evaluation.”; “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.” (quoting *Holly*, 450 So. 2d at 219-20)).

The final point of note from the AAPS brief is its suggestion that this Court should create a distinction between for-profit and not-for-profit entities when it comes to the exhaustion doctrine. At the outset, the AAPS has cited no law to support this novel proposition. It also runs counter to the very statutes that require the Hospital (and all Florida hospitals) to provide fair hearing and appellate review procedures. The Florida legislature certainly did not mandate all hospitals to provide these statutorily mandated procedures, just for those procedures to be unenforceable at “for-profit” hospitals.

In sum, neither the AMA brief nor the AAPS brief provide meaningful

support for Dr. Desai's position.

CONCLUSION

The Hospital respectfully requests that the Court affirm the Fourth District's decision, or dismiss this appeal for lack of jurisdiction.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished via electronic mail this 21st day of June, 2018, to: Richard H. Levenstein, rlevenstein@kslattorneys.com, ptreadway@kslattorneys.com, sbartlett@kslattorneys.com and Abby M. Spears, aspears@kslattorneys.com, ptreadway@kslattorneys.com, skenerson@kslattorneys.com, Kramer, Sopko & Levenstein, P.A., 2300 SE Monterey Road, Suite 100, Stuart, FL 34996; Thomas Crapps, tom@meenanolawfirm.com, Meenan P.A., 300 S. Duval Street, Suite 410, Tallahassee, FL 32301, *counsel for Petitioner*.

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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.

/s/ Thomas E. Warner

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